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THE SOUTHWESTERN REPORTER VOLUME 182

PANHANDLE & S. F. RY. CO. v. JONES.
(No. 866.)

(Court of Civil Appeals of Texas. Amarillo.
Dec. 11, 1915. Rehearing Denied
Jan. 26, 1916.)

1. CARRIERS ⇐207 — CARRIAGE OF LIVE STOCK—ACTIONS—RIGHT TO RECOVER.

As under the law existing before the Carmack Amendment (Act Cong. June 29, 1906, c. 3591, § 7, para. 11, 12, 84 Stat. 595 [U. S. Comp. St. 1913, § 8592]) a shipper of live stock might recover under a verbal contract, he may thereafter recover under a verbal contract where no valid written contract was made; the amendment declaring that nothing should deprive the holder of any receipt or bill of lading of any remedy or right of action which he had under existing laws.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. ⇐207.]

2. CARRIERS ⇐102—CARRIAGE OF LIVE STOCK—CONTRACT.

At common law a shipper of live stock might rely either on an oral contract or recover for negligent delay where there was no contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 434; Dec. Dig. ⇐102.]

3. CARRIERS ⇐207—CARRIAGE OF LIVE STOCK—ACTIONS—CONTRACTS.

Where the contract for an interstate shipment of cattle was oral, but just before the train started the shipper was required to sign a written bill of lading which he did not have time to read and could not have understood, the oral contract was not supplanted; the contract contained in the bill of lading not being mutual.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. ⇐207.]

4. CARRIERS ⇐228—CARRIAGE OF LIVE STOCK—ACTIONS—CONTRACTS.

In an action for injuries to an interstate shipment of cattle, where the carrier relied on a contract made under authority of the Carmack Amendment, claiming limitations of liability were in consideration of a reduced rate, the carrier has the burden of proving that the limitations were reasonable and supported by consideration, and were not a subterfuge to escape liability for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 967-969; Dec. Dig. ⇐228.]

5. APPEAL AND ERROR ⇐1170 — INSTRUCTIONS—DEFECTS.

Where the charge as a whole fairly presented the case, judgment will not be reversed on account of technical defects.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4068, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. ⇐1170.]

Appeal from Lubbock County Court; E. B. Haynes, Judge.

Action by J. O. Jones against the Panhandle & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Madden, Trulove, Ryburn & Pipkin, of Amarillo, Roscoe Wilson, of Lubbock, and Terry, Cavin & Mills, of Galveston, for appellant. Bean & Klett, of Lubbock, for appellee.

HALL, J. Appellee sued appellant railway company to recover \$850 damages alleged to have been sustained as the result of delay in the transportation of five cars of cattle shipped from Abernathy, Tex., to Kansas City, Mo. A trial resulted in a verdict and judgment in appellee's favor in the sum of \$517.17.

Plaintiff alleged that about 2:30 o'clock p. m., October 23, 1914, he delivered to defendant 189 head of cattle, which were accepted for safe and speedy transportation as a through shipment from Abernathy, Tex., to Kansas City, and that thereby defendant became bound to transport said shipment with reasonable speed and safety; that the cattle did not reach Kansas City until 11:30 p. m. October 26th; that the time consumed in transportation was unreasonably long, by about 24 hours; that said delays specified in the pleading occurred en route, each alleged to have been unreasonable; that the cattle were placed in muddy pens and detained there for an unreasonable time; that as the result of such delays and detention there was a decline in the market value of the cattle to plaintiff's damage in the sum of \$800.

Defendant answered by general and special demurrers, special denial of each of the material allegations of plaintiff's petition, and by special pleas set up, among other things, the following:

"(a) That such cattle were by it received, and by it and its connecting carriers transported from Abernathy, Tex., to Kansas City, Mo., interstate, as common carriers of freight, by rail, and in accordance with the provisions of a written contract theretofore made and entered into between plaintiff and defendants. (b) That such contracts were made for the transportation

of said cattle at the lower of two rates the carriers had caused to be filed with the Interstate Commerce Commission and duly published at which they could by law transport such cattle, which lower rate the plaintiff had accepted as the rate for the transportation of his cattle, the choice of the two rates being open to plaintiff, the higher being for transportation without limitation of liability, and the lower for transportation with the limitations specified in the contract. (c) That by such contract it was agreed, among other things, in substance: (1) That the stock were not to be transported within any specified time nor delivered at destination at any particular hour nor in season for any particular market; (2) that the company would stop for watering and feeding only at such stations as it had adequate facilities for feeding and watering, and that plaintiff should not confine his stock in the cars for a longer period than 28 hours without unloading for rest, feeding, and watering; (3) that in case of loss or damage from any cause for which the defendant might be liable payments should be made therefor only on the basis of the actual cash value at the time and place of shipment, in no case to exceed the valuation therein specified, which was for an ox, steer, or bull \$50, for a cow \$30, and for a calf \$10 per head; (4) that in order that any loss or damage claims by plaintiff might be fully and fairly investigated, and the facts and nature of such claims and loss preserved beyond dispute and by the best evidence, and as a condition precedent to the right to recover any damages for any loss or injury to his stock during the transportation thereof, or at any time or place where the same might be loaded or unloaded for any purpose, or previous to the loading thereof for shipment, the plaintiff or his agent in charge should give notice of their claims therefor to some officer of the company or to the nearest station agent, if delivered to the consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock should be removed from the place of destination or from the place of delivery, and before such stock should have been slaughtered or intermingled with other stock, and that plaintiff would not remove such stock from such station or stockyards until the expiration of three hours after the giving of such notice, and that a failure to comply with the terms of this clause in said contract in any respect should be a complete bar to any recovery of any and all such damages; (5) that such recitals and limitations upon the liability of the carriers were made in consideration of the lower of the two rates, which the shipper acknowledged that he had chosen, having had full opportunity to choose the rate at the carrier's risk, or limited liability at the rate chosen and stipulated in the contracts. (d) That, though the defendant and its connecting carrier had on their respective lines at each and all places where all said cattle were stopped or delayed in transit station agents and other officers and agents to whom such notice could and reasonably should have been given, and though the delivering carrier, the Atchison, Topeka & Santa Fé Railway Company, had such officers and agents at Kansas City to whom plaintiff could and reasonably should have given such notice, plaintiff wholly failed to give notice in writing of his claim for damages before such stock were removed from the place of destination or from the place of delivery, and before such stock was slaughtered or intermingled with other stock within the time and manner and form as required by such shipping contracts, the provisions of which are reasonable and just, so that plaintiff could and reasonably should have given such notice as he had contracted and agreed to do."

In addition to the demurrers and denials, plaintiff, by supplemental petition, replied to

defendant's answer, among other matters alleging:

"That as a special answer herein plaintiff says that said cattle were received and transported by the defendant under a verbal contract of shipment made and entered into by and between plaintiff and defendant three or four days before said cattle were delivered to the defendant for shipment, and that by the terms of said agreement the defendant agreed for a valuable consideration to transport said cattle with reasonable speed and safety to the point of destination, as alleged in plaintiff's original petition."

"That, if it be true, as alleged by the defendant, that a written contract was issued by the defendant and entered into by the plaintiff, that the same was not binding, and was without consideration, and attained by fraud and under duress, as more particularly alleged herein; that after said cattle were delivered to and received by defendant company for shipment to Kansas City as previously agreed upon by verbal contract, as herein alleged, and after said cattle had been loaded on the train, and the same was steamed up and ready to leave the stock pens, and the plaintiff was ready to climb into the caboose and take his seat therein, for the purpose of accompanying said shipment, as he had the right to do, the agent of the company at Abernathy required and requested the plaintiff, before permitting said train to leave or the plaintiff to accompany the same, to sign an instrument at the office, which was located some several hundred yards from the stock pens, without explaining said instrument to plaintiff and without giving the plaintiff an opportunity to read the same, or to learn the contents thereof; that plaintiff was in ignorance of the contents of said instrument and of the nature thereof; that the plaintiff did not know, and did not have opportunity to know, that said instrument was a limitation of the company's liability, or that said instrument required the plaintiff to give notice of any kind, as alleged, by the defendant, or that said instrument varied from the verbal contract of shipment, and, in fact, did not understand and was not notified that said instrument was a contract of shipment, but supposed that the same constituted the plaintiff's 'pass' to ride on said train with his cattle; that plaintiff further says that he had never read any such instrument before, and did not know or understand the nature or purpose of such instrument; that he was deceived thereby and acted in ignorance of the nature or purpose of said instrument; that the agent at said place merely told the plaintiff that he must 'sign up' before the train left, in order to get his 'pass'; that, had the plaintiff known that said instrument was at variance with said verbal contract of shipment, he would not have entered into said written instrument, and would not have bound himself by the terms thereof; that the plaintiff further says that he was only allowed a minute in which to sign said instrument, and that the whole of said instrument was prepared and signed in only three or four minutes of time, and that, in fact, said instrument was very lengthy in form, consisting of a multitude of paragraphs in exceedingly small type, very difficult for the ordinary eye to read without considerable strain, all of which paragraphs impose on the shipper a variety of restrictions, limitations, and responsibilities, and concurrently exempt the company from many of the duties and liabilities of a common carrier for hire; that said instrument could not have been read by the plaintiff in less than one hour, and that the plaintiff could not have interpreted the contract thereof after reading, as the provisions of said instrument are couched in such language that only the skilled lawyer would be able to comprehend, and plaintiff further says that the first time that the plaintiff had an opportunity to see said contract, and that the first time same was offered to him, was after said train

was ready to go, when the agent of said company required plaintiff to sign, and that under such circumstances it was a physical impossibility for the plaintiff to become familiar with said instrument or to know the contents thereof, or the exceptions that the defendant now claims as an excuse for its negligent delay and damage to said cattle during the three or four minutes only allowed by the defendant."

By supplemental answer the defendant replied that at the time the shipment moved there were two freight rates in effect from Abernathy to Kansas City upon cattle, one of which was based on a valuation of \$30 per head for each cow and \$10 for each calf, and the execution of a release liability contract of shipment, as executed, by plaintiff, and alleged by defendant, and that the other was a higher rate upon shipments not so released, and the higher nonreleased was 20 per cent. per hundredweight higher than the released valuation rate, which two rates were evidenced by tariffs duly filed with the Interstate Commerce Commission and published according to law; that the plaintiff executed the written contracts pleaded by the defendant voluntarily and without misrepresentations or deceit, duress, fraud, or concealment on the part of the defendant or its agents, and paid the rate based upon such released liability contract and valuation; that the defendant, in consideration of the limited liability, terms, conditions, and stipulations contained in such contract, accepted the lower rate recited therein, etc.

The demurrers were all overruled and exceptions reserved.

[1-4] Under the first assignment of error the appellant contends that there can be no valid, verbal contract for an interstate shipment of live stock since the enactment of the Carmack Amendment, and that, where the carrier has duly filed tariffs and has caused the same to be published, providing for two rates applicable under different specified conditions to a shipment, and the shipper accepts from the carrier a bill of lading, specifying the lower of the two rates and the conditions of shipment so applicable thereto according to the published tariffs, such shipping contract and the tariff sheets become, by operation of law, the contract governing the shipment. The Carmack Amendment provides:

"That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws." U. S. Comp. St. 1913, § 8592, par. 11.

Under existing law appellee could sue and recover upon the verbal agreement, provided his proof warranted such recovery. *Gulf, Colorado & Santa Fé v. Vashinder*, 172 S. W. 763; *Barnes on Interstate Transportation*, § 307. And he is entitled to recover even without an express contract. *Hannibal Ry. Co. v. Swift*, 12 Wall. 262, 20 L. Ed. 423. It is stated in the contract that the rate given under this contract is lower than the rate made by the railway company and connec-

tions for the transportation of stock at carrier's risk, and without limitation of liability. Appellee testified that he did not read the contract and did not know what was in it; and we held in the case of *Pecos & Northern Texas Ry. Co. v. Stinson*, 181 S. W. 526, that such a contract, signed under such circumstances, was not binding and mutual. It has been held in the case of *Hovey v. Tankersley*, 177 S. W. 153, that the burden of proof, under the Carmack Amendment, was upon the carrier to show that a provision in its bill of lading is reasonable and supported by a consideration. *I. & G. N. Ry. v. Rathblath*, 167 S. W. 751. See, also, *C. & R. I. & G. v. Whaley*, 177 S. W. 543; *C. & R. I. & G. v. Dalton*, 177 S. W. 558. No consideration is shown by the appellant for the stipulations exempting it from such liability. *Cau v. Texas, etc., Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *York v. Illinois Central R. Co.*, 3 Wall. 107, 18 L. Ed. 170; *Arthur v. Texas, etc., Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590; *Charnock v. Texas, etc., Ry. Co.*, 194 U. S. 432, 24 Sup. Ct. 671, 48 L. Ed. 1057. The Interstate Commerce Commission, in construing section 20 of the Carmack Amendment (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended [U. S. Comp. St. 1913, § 8592]), uses this language:

"If a rate is conditioned upon the shipper's assuming the entire risk of loss, the condition is void as against loss due to the carrier's negligence or other misconduct.

"If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value, (b) the stipulation is valid, even when the loss is due to the carrier's negligence and, if the shipper has himself declared the value expressly or by implication, the carrier accepting the same in good faith as the real value and the rate being fixed in accordance therewith.

"(c) The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount does not purport to be an agreed valuation, but has been fixed arbitrarily by the carrier without reference to the real value.

"(d) The stipulation is void as against loss due to the carrier's negligence or other misconduct, if the amount specified while purporting to be a valuation is, in fact, purely fictitious, and represents an attempt to limit the carrier's liability to an arbitrary amount.

"The carrier must not make use of its released rate as a means of escaping liability for the consequences of its negligence, either wholly or in part." *Barnes on Interstate Transp.* § 310.

According to appellee's testimony, he did not fix the value, but it was fixed by the agent, and at his request written into the contract by the appellee.

The rulings above quoted seem to us to be a fair and just construction of the statute in question, and, when applied to this case, under the facts, we think the appellee was entitled to recover. Especially is this true since the evidence does not show that the cattle were actually shipped upon the lower rate fixed by the commission. The burden was upon the railway company to show, not only the acceptance of the bill of lading in lieu

of the oral contract by Jones, but his assent to its terms, and such assent and acceptance cannot be presumed from its use as means of transportation by him. 4 R. C. L. "Carriers," § 240. Appellant alleged that the shipment was made under the lower rate, but, aside from the recital of that fact in the contract, which the uncontradicted evidence shows appellee did not read, there is no testimony to sustain the allegation. The written contract is neither mutual, nor is it sustained by a consideration.

The several stipulations pleaded by appellant cannot therefore be set up as a defense, since they were no part of the verbal contract under which the cattle were accepted and loaded. What is here said disposes of appellant's principal assignments.

[8] There may be some technical errors in the charge of the court, but, taken as a whole, we think it is a fair presentation of the case, and these assignments will be overruled.

Upon consideration of the whole case, we are of the opinion that a proper judgment has been rendered, and the errors insisted upon by appellant, if errors in fact, are harmless, and the judgment is affirmed.

STRATTON v. WESTCHESTER FIRE INS. CO. OF NEW YORK et al.
(No. 6997.)

(Court of Civil Appeals of Texas. Galveston. Nov. 9, 1915. Rehearing Denied Dec. 9, 1915.)

1. VENDOR AND PURCHASER ⇨54—PASSING OF TITLE—RETENTION OF LIEN.

Where land is conveyed by deed retaining an express lien to secure part of the purchase money, legal title to the land remains in the vendor until the purchase money is paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. ⇨54.]

2. HOMESTEAD ⇨96—PURCHASER'S RIGHT.

Such a vendee cannot hold the land as a homestead against such vendor holding vendor's lien notes for part of the purchase money.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 147-153; Dec. Dig. ⇨96.]

3. EXEMPTIONS ⇨84—PROCEEDS OF INSURANCE.

Money paid upon an insurance policy upon a house not the insured's homestead is not exempt from garnishment for the payment of the insured's debts.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 36, 37, 74; Dec. Dig. ⇨34.]

4. HOMESTEAD ⇨88—EQUITABLE ESTATES OR TITLES.

An equitable title founded upon a conveyance in which an express lien is retained to secure unpaid purchase money may be the subject of a homestead, and exempt from the payment of ordinary debts.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 126; Dec. Dig. ⇨88.]

5. HOMESTEAD ⇨79 — EXTENT OF EXEMPTION—INSURANCE MONEY.

Where land was conveyed with express reservation of a vendor's lien to secure the unpaid portion of the price, there being no agreement that the purchaser, who occupied the place as

a homestead when he insured it, should do so for the benefit of the vendor, upon burning of the house the purchaser was entitled to the insurance money, and not the vendor, to satisfy the unpaid balance on his foreclosure judgment, since insurance money on a homestead, in the absence of an agreement that the policy was for the benefit of the vendor holding the superior title and note for unpaid purchase money, is not subject to the payment of the indebtedness.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 111; Dec. Dig. ⇨79.]

6. VENDOR AND PURCHASER ⇨295—VENDOR'S LIEN—ELECTION TO FORECLOSE—EFFECT.

Where the vendor of realty by deed reserving a vendor's lien foreclosed, he could not thereafter claim that he continued to hold the superior title for the purpose of making out his right to the insurance money payable for burning of the house, since a vendor has only the election to abandon the contract and recover the land, or to affirm and have judgment for his debt with foreclosure of his lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 831; Dec. Dig. ⇨295.]

7. APPEAL AND ERROR ⇨877—PARTY ENTITLED TO ALLEGE ERROR.

The vendor of realty, who had no interest in the insurance money payable the purchaser for burning of the house, could not complain of the amount of recovery allowed the purchaser against the insurance company in the vendor's garnishment proceeding against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. ⇨877.]

8. GARNISHMENT ⇨191 — COSTS — RECOVERY BY GARNISHEE.

In a vendor's garnishment proceeding against the insurer of the realty, where the answer of the garnishee was not denied, and it was discharged from the garnishment upon its answer, although judgment went against it for the purchaser, such garnishee was entitled to recover of the vendor its costs, including a reasonable attorney's fee, under Rev. St. 1911, art. 307, providing that, where the garnishee is discharged upon his answer, costs, including reasonable compensation to the garnishee, shall be taxed against plaintiff.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 372-379; Dec. Dig. ⇨191.]

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Action by John Stratton against John Magee, in which the Westchester Fire Insurance Company of New York was made garnishee, and the latter impleaded John Magee. From a judgment for Magee, and for the garnishee for its costs, plaintiff appeals. Affirmed.

Patton & Schwartz, of Hallettsville, for appellant. John S. Patterson, of Austin, for appellee Westchester Fire Ins. Co.

LANE, J. On the 6th day of February, 1914, suit was brought by John Stratton against John Magee upon 23 vendor's lien notes, each for the sum of \$32, and foreclosure of vendor's lien upon the tract of land upon which was the house destroyed by fire, and insured for the benefit of Magee by a policy issued by the Westchester Fire Insurance Company of New York, "as his interest may appear." The fire occurred on the 6th

of March, 1914. A judgment of foreclosure of Stratton's vendor's lien was entered on the 17th of March, 1914. On the 7th day of July, 1914, the property was sold under Stratton's foreclosure proceedings, and was bought at the sale by the said Stratton for the sum of \$200, which was credited on the judgment against Magee, leaving a balance due thereon of \$1,121.09. The property was conveyed by Stratton to Magee by deed dated October 1, 1912; vendor's lien being expressly reserved in the deed of conveyance to secure the deferred payments. Writ of garnishment was issued out of the trial court against the insurance company by Stratton on the 23d day of March, 1914, and served on the same day of issuance. At the time of the purchase of the premises in question Magee paid Stratton \$100, and prior to the destruction of the house by fire made further payments amounting to \$209.65; the total amount paid before the fire being \$309.65.

The garnishee, insurance company, answered, truthfully stating its obligation and indebtedness to Magee, and had him made a party defendant so as to protect it against double payment of its obligation under its policy of insurance.

The defendant in the foreclosure proceeding, Magee, having been made a party to the garnishment suit, answered, setting up the contract of insurance, the adjustment of the loss, and prayed judgment against the insurance company therefor, and pleaded the exemption of the debt from garnishment because the property insured was his household furniture and his homestead. In the adjustment of the loss between Magee and the insurance company it was agreed that the loss was \$187 for the destruction of his household furniture, and \$831.45 for the destruction of the house. At the time of the destruction of the house and furniture by fire Magee occupied the house with his family as a home and it was his homestead, and he had a homestead interest in the house and that was insured "as his interest may appear."

The case was tried before the court without a jury on the 22d day of October, 1914, and judgment was rendered that Stratton take nothing by his suit, and that the defendant, John Magee, recover of the Westchester Fire Insurance Company the sum of \$496.65, viz., the sum of \$187, value of his household furniture destroyed by fire, and the sum of \$309.65, the sum that he had paid upon the premises upon which the house destroyed by fire was situated, and that the garnishee, insurance company, recover of plaintiff, Stratton, the sum of \$100 attorney's fees and all costs of court. From such judgment, John Stratton has appealed.

Appellant's first assignment submits:

"That the trial court erred in holding that the money due on a fire insurance policy for the burning of a house on premises occupied by the beneficiary as a homestead is not liable for his indebtedness for the purchase money of said

premises secured by an express lien retained by the vendor in the deed of conveyance under which he holds."

Appellant submits under this assignment only four propositions:

[1] First. That, where one conveys land by deed to another and retains in such deed an express lien to secure a part of the purchase money, the legal title to the land conveyed does not pass to the vendee, but remains in the vendor until the purchase money is paid.

[2] Second. That such vendee cannot hold the land conveyed as a homestead as against his vendor who holds vendor's lien notes for a part of the purchase money.

[3] Third. That money paid upon an insurance policy upon a house not the homestead is not exempt from garnishment for the payment of the insured's debts.

[4] Fourth. That an equitable title founded upon a conveyance in which an express lien is retained to secure unpaid purchase money may be the subject of a homestead, and exempt from the payment of ordinary debts.

We think none of the propositions submitted can be successfully controverted, but none of them are germane to the assignment under which they are made, and therefore do not call for any consideration from this court, but, as the assignment is a proposition within itself, and may be submitted as such, we will consider the same.

The agreed facts show that appellant, Stratton, conveyed to Magee the land on which was situated the house which was insured and which was destroyed by fire; that in the deed of conveyance Stratton retained an express vendor's lien upon the land to secure a part of the purchase money; that Magee with his family was occupying said house as his homestead at the time it was insured, and at the time it was destroyed by fire; that he procured a policy of fire insurance upon said house, which, among other things, provided for the payment of loss to him "in so far as his interest may appear"; that before the house was destroyed he had paid of the purchase money on the premises purchased by him from Stratton the sum of \$309.65; that the contract of insurance was between Magee and the insurance company, and was intended to be for the benefit of Magee, and not in the interest or benefit of Stratton; that there was no agreement by Magee to insure the property for Stratton; that the house was destroyed by fire on the 6th day of March, 1914, and that thereafter the loss had been adjusted between the insurance company and Magee as being \$831.45; that Stratton sued Magee upon certain vendor's lien notes given for part of the purchase price of the land conveyed by Stratton to Magee, and took judgment thereon for the sum of \$1,321, and a foreclosure of his vendor's lien on the 17th day of March, 1914; that on the 23d day of March, 1914, Stratton

caused a writ of garnishment to issue upon his said judgment against the insurance company, and thereby sought to subject the insurance money due to Magee to his said judgment.

The trial court held that Stratton had no lien nor any other right in or to the insurance money; that it was not subject to the writ of garnishment issued upon Stratton's judgment, because it was money due upon a policy of insurance upon the homestead of Magee.

[5] Appellant insists that he held the superior title to the premises sold to Magee upon which the house destroyed was situated, and held a vendor's lien thereon, and that the house, if in existence, could have been subjected to sale to pay his judgment for the purchase money, and therefore the insurance money for its destruction is likewise subject to the payment of such judgment. We do not think the court erred in the holding complained of. Insurance money upon a homestead, in the absence of an agreement that the policy was for the benefit of the vendor holding the superior title and note for unpaid purchase money, is not subject to the payment of such indebtedness unless agreed to by the debtor. *Ward v. Goggan*, 4 Tex. Civ. App. 274, 23 S. W. 479; *Cameron v. Fay*, 55 Tex. 58; *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1051, 53 Am. St. Rep. 742; *Pennsylvania Fire Ins. Co. v. Wagley*, 36 S. W. at page 998.

[6] We also conclude that Stratton cannot, since he took judgment on his debt against Magee and foreclosed his lien, successfully claim that he continued to hold the superior title to the property sold to Magee. "When the right of rescission exists, the vendor has his choice of remedies. He may abandon the contract and recover the land, or he may affirm the contract and have judgment for his debt, with a foreclosure of the vendor's lien." *Curan v. Land & Mortgage Co.*, 24 Tex. Civ. App. 499, 60 S. W. 466; *Douglass v. Blount*, 67 S. W. at page 489, 58 L. R. A. 699; *Gardener v. Griffith*, 93 Tex. 355, 55 S. W. 314. But he must choose one or the other of such remedies; he cannot exercise both. Stratton sued and recovered judgment upon his contract of sale and foreclosed his vendor's lien on March 17, 1914, and thereby divested

himself of the superior title to the property. Having so parted with his superior title, he cannot be heard to say that he should be entitled to the insurance money in question because he was, in fact, the owner of the house at the time it was destroyed by fire. See authorities above cited. We do not think that appellant Stratton had any interest, either legal or equitable, in the insurance money which he seeks to recover by his garnishment.

[7] Appellant's second assignment insists that the court erred in not rendering judgment against the Westchester Fire Insurance Company for \$831.45 in favor of Magee; that being the agreed loss for the destruction of Magee's house.

We have already held in our conclusion's under the first assignment that appellant has no interest in the insurance money in question, and therefore the amount of the recovery in this case is not a matter about which he is concerned. Magee, the only party who has the right to complain of the inadequacy of the judgment, is not complaining. We therefore overrule the second assignment.

[8] Appellant's third assignment insists that the court erred in rendering judgment against him in favor of the insurance company for \$100 attorney's fees, because he says the garnishee was not discharged on its answer, but was held thereon in a judgment in favor of Magee, the beneficiary under the policy of insurance. The contention here made is not tenable. The answer of the garnishee was not controverted, and the garnishee was discharged from the garnishment upon its answer, and, under article 307, Revised Statutes 1911, is entitled to recover his costs, including a reasonable attorney's fee, and, as no complaint is made that the fee allowed in this case is unreasonable, we are not called upon to question its being a reasonable fee in this case. The rendition of the judgment in favor of Magee against the garnishee upon his policy of insurance in no way affected his discharge on his answer to appellant's garnishment.

This disposes of all of appellant's assignments, and, as we find no such error committed by the trial court as should cause reversal, the judgment of the trial court is affirmed.

Affirmed.

GALVESTON, H. & H. R. CO. v. HODNETT.
(No. 6972.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 9, 1915. Rehearing Denied
Dec. 16, 1915.)

**1. APPEAL AND ERROR ⇐1060—TRIAL ⇐
120—ARGUMENT OF COUNSEL—PREJUDICIAL
EFFECT—DUTY OF COURT.**

For plaintiff's counsel in argument to the jury to say, relative to cross-examination by M., another counsel for plaintiff, of L., seeking an admission that L. had made a statement to M. contrary to his testimony, that there is a prejudice against lawyers going on the stand in their own cases about matters to which witnesses have testified, to dispute them, and that M. would as soon jump out of the window as to have been guilty of putting questions to a witness to deceive any one into believing that the witness had admitted to him what agreed with his theory of the case, was, in effect, an assertion, without evidence to justify it, that the witness had testified to facts directly variant from his former statements, constituting improper conduct, likely prejudicial, so that the court, on objection, should have arrested the argument and directed the jury to disregard it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. ⇐1060; Trial, Cent. Dig. §§ 285-287; Dec. Dig. ⇐120.]

2. TRIAL ⇐118—ARGUMENT OF COUNSEL.

So far as argument of counsel, in a case submitted to the jury on special issues, explains to the jury the legal effect of their answers, it is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 290-293; Dec. Dig. ⇐118.]

Appeal from District Court, Harris County; Norman G. Kittrell, Special Judge.

Action by W. J. Hodnett against the Galveston, Houston & Henderson Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also (Sup.) 163 S. W. 13.

Baker, Botts, Parker & Garwood, C. L. Carter, and Walter H. Walne, all of Houston, for appellant. John Lovejoy and Presley K. Ewing, both of Houston, for appellee.

McMEANS, J. This suit was brought by W. J. Hodnett against the Galveston, Houston & Henderson Railroad Company, for damages on account of personal injuries alleged to have been received on the 19th day of August, 1910. At the time of the accident appellee was a section foreman in appellant's employ, and, with a gang of Mexicans under his direction, was engaged at the time in unloading steel rails from a flat car. The accident happened early in the morning, shortly after the plaintiff began work. To do this work, an engine was coupled onto either two or three cars, one of which was a flat car loaded with steel. The appellee and those working under him were standing on the flat car. The flat car was moved, in each instance, a distance of a rail's length, approximately 30 feet, two rails were thrown off, after which the engine and cars were then moved the proper distance, where two more rails were unloaded. After a number

of stops had been made, the plaintiff was standing on the end of the flat car furthest from the engine, and when the car came to a stop he fell to the ground. The gravamen of the plaintiff's complaint was that, being in the employment as section foreman of the defendant, a corporation operating a railroad in this state, and in the ordinary discharge of his duties, he was jerked from the car and injured, and that such fall and injury was due to the negligence of the defendant: (a) In handling the train and car so that the car came to an unnecessarily sudden and abrupt stop, and consequent bump and jerk back; and (b) in failing to maintain the drawhead of one of the cars in a reasonably safe condition, so that it was defective, and admitted of undue slack. Appellant defended on the theory that there was no slack in the cars and no rough handling, but that the plaintiff became overbalanced and fell from the car, without any negligence on appellant's part. A trial before a jury resulted in a verdict and judgment in plaintiff's favor for \$8,850, from which the defendant has appealed.

[1] Appellant's fifth assignment of error is as follows:

"The court erred in failing to charge the jury to disregard, and in failing to reprimand counsel for the use of, the following language used by plaintiff's attorney in his opening argument to the jury: 'Now, I say, but do not say because I am associated with Maj. Lovejoy—for any man in Houston or elsewhere in the state, knowing Maj. Lovejoy, knows of his high and honorable character—that Maj. Lovejoy would as soon have jumped out of that window as to have been guilty of putting questions here to a witness to deceive or mislead anybody into believing the witness had admitted to him what agreed with his (the major's) version of the case.' Because the language used with reference to Maj. Lovejoy was not warranted by any facts in evidence, was an effort on the part of plaintiff's attorney to impeach the witness Lancaster by the acts and conduct of Maj. Lovejoy during the trial of the case, contrary to any of the known rules for impeaching the witness of an adversary, and was an effort to substitute the virtues attributed to Maj. Lovejoy for legal evidence."

On the trial, while the defendant's witness, Lancaster, was on the stand and testifying on cross-examination, the examination being conducted by Maj. Lovejoy, one of plaintiff's attorneys, the following questions were asked by counsel and answers made by the witness:

"Q. Didn't you say to Hodnett that you got a hard fall, and it is a wonder they didn't kill every man on that car? A. No, sir. Q. Didn't you call afterwards at St. Joseph's Hospital to see Hodnett? A. No, sir. Q. Up here in this city? A. No, sir. Q. He called to see you, didn't he; you were up there sick? A. I was hurt. Q. Up in St. Joseph's hospital? A. Yes, sir. Q. And didn't you and Hodnett again talk over the way in which he was thrown off of that car? A. No, sir. Q. And didn't you say up there that 'it is a wonder it didn't kill every man on that car'? A. No, sir. Q. Mr. Lancaster, didn't you tell Mr. Hodnett that he could call on you at any time in undertaking to maintain his rights for the injuries he said

he had sustained, and that you would testify to that in court? A. Not as I remember of. Q. Didn't you express your sympathy with him, and tell him that there was no necessity of that man handling that engine in that way, and that he ought to recover? A. I might have expressed my sympathy with him for being hurt. Q. You went to see Mr. Hodnett when he was in his room there? A. No, sir. Q. Did you ever talk with anybody else about how Mr. Hodnett was thrown off of that car? A. No, sir. Q. You are certain of that? A. Yes, sir. Q. Did anybody connected with Mr. Hodnett's case ever ask you to tell them how he was hurt? Stop a minute and refresh your memory. A. I had a little talk with Mr. Hodnett about a year afterwards. I met him on Main street here, and asked him how he was getting along, and he said very well, considering. Q. And did you go with him to any lawyer's office? A. No, sir. Q. Did you ever tell any of his lawyers how he was hurt; how he was jerked off that train? A. Not as I know of. Q. Are you certain of that? A. Yes, sir. Q. Didn't you tell me that you would come here at any time I would notify you if I would pay your expenses and your time, and that you would come here and testify for Mr. Hodnett? A. I don't remember that. Q. Didn't you come to my office and volunteer that statement? A. No. Q. When you got hurt, I represented you, didn't I? A. Yes, sir. Q. Didn't we talk over how Mr. Hodnett got hurt, and something about his case? A. Yes; I believe so. Q. All I want to do is refresh your memory. Didn't you, on more than one occasion, offer to make a written statement for me in this case, to the effect that Mr. Hodnett was jerked off of that train down there, and hurt because of the way in which that engine was handled? Now stop one minute and think. A. Put the question to me again. Q. Did you offer to make a statement in writing that you would testify to it that Mr. Hodnett was thrown off of that car down there and hurt because of the violent way in which that engine was handled? A. No, sir. Q. You talked about it, didn't you? A. I talked to you regarding the case. Q. Didn't you offer to come here and testify in the case for Mr. Hodnett that he was thrown off of that car down there and hurt by the violent way in which the engine was handled, at any time that we would pay your expenses and pay you for your time? A. No, sir. Q. Are you certain of that? A. Certain. Q. You told him that you would testify in his case, didn't you? A. I told him I would testify in his case, yes. Q. What did you offer to testify in his case for if you didn't know that your testimony would be in his interest? Didn't you tell Mr. Hodnett that you would come here and testify in his case any time he would let you know? A. No, sir. Q. You said awhile ago that you told him that you would come here and testify; you said that awhile ago? A. No, sir. Q. Didn't you tell me you would testify in his case? A. No, sir; not as I remember. Q. What were you talking to me about it for, then? A. You were asking me some questions in regard to it. Q. Mr. Lancaster, didn't you say—didn't I tell you what Mr. Hodnett had said; that you had said to him—didn't I repeat this to you at that time? That Mr. Hodnett told me that you had told him, when you picked him up and asked him if he was hurt, that it was a wonder that they hadn't killed every man on that car? A. Not as I remember of. Q. And didn't you say that you did say that to him, and that it was a wonder they didn't kill them? A. No, sir. Q. And you did talk to me about it, and you did agree to come here and testify if I would pay your expenses? A. No, sir. Q. Didn't you agree to let me know where your address was? A. No, sir. Q. Did you give any reason to me why, or what I must do in addition to that in order to get you to testify? A. No, sir. Q. Mr. Hodnett, didn't you, down at

the hospital here, St. Joseph's Hospital—No, I will ask you this: Do you know whether—one of the box cars there—one, anyhow, was an M., K. & T. car, wasn't it? A. I don't remember the initial. Q. Do you know where they picked it up? A. I don't remember where we got it. Q. Didn't you tell Mr. Hodnett down in the hospital, when he went down to see you, that when you did testify in this case, you would show that both drawheads on that car were in bad order, and that you would tell where they got it from? A. No, sir. Q. Was anything said of the car, that you recollect of? A. No, sir. Q. You don't recollect anything that was said about it? A. There was nothing said about it as I remember."

In the opening argument to the jury Mr. Presley K. Ewing, also counsel for plaintiff, made use of the following language:

"Take Lancaster. He didn't testify on the former trial, but he did testify on this trial. You heard the major's (reference to Maj. Lovejoy, one of the plaintiff's attorneys) questions to him. You know, of course, and you are entitled to know, of the prejudice against lawyers going on the stand in their own cases about matters to which witnesses have testified to dispute them. It is simply regarded as not professional to do it. I do not mean to say but that at times we may, and some of us do, testify to important matters, but not generally. Now, I say, but do not say because I am associated with Maj. Lovejoy for any man in Houston or elsewhere in the state, knowing Maj. Lovejoy, knows his high and honorable character—that John Lovejoy would as soon have jumped out of that window as to have been guilty of putting questions here to a witness to deceive or mislead anybody into believing the witness had admitted to him what agreed with his (the major's) version of the case."

Whereupon the defendant's attorney, without interrupting counsel for the plaintiff, called the attention of the court to the remarks of counsel with reference to Maj. Lovejoy and his questions to the witness and excepted thereto, but the court took no action with reference to the argument made or the exception thereto. The witness Lancaster, on direct examination, had testified:

"I was present down there at the time when Mr. Hodnett had a fall from a flat car. * * * The train consisted of a box car and a flat car and the engine. Mr. Hodnett was on the end of the flat car; the train was headed east; the flat car was in front going east, then came the box car. * * * There were two cars in that string, a flat car and a box car. I saw Mr. Hodnett as he was falling. * * * At the time he fell the engine and cars had come to a stop—just about the same kind of a stop we had been making for 15 or 20 stops before. I did not notice any sudden stop with a jerk. I did not notice any more slack in the drawheads of those cars than is usual. * * * The speed at which that train was moving at the time the accident happened was so slight that it would be hard to estimate it. * * * After we finished unloading the steel, Smith did not give us any instructions to put a bad-order box car on the repair track out of this train. There were no bad-order cars on this train, not as I know of; we had no bad-order cars in it."

The argument complained of was not only improper, but in our opinion extremely prejudicial to defendant. To make the truth of this statement apparent, it is only necessary to say that Hodnett, the plaintiff, alone testified to the rough handling of the train and the unusual slack due to the defective

ness of the drawheads in one of the cars, to each of which he attributed his fall and consequent injury, while five or six witnesses, all of whom were then employes of the defendant, and some of whom were in its employment at the time of the trial, testified that there was no rough handling and no unusual slack. Thus the fact issues were sharply drawn, and the testimony, in point of number of witnesses, greatly preponderates against the plaintiff's theory of the cause of his injury. We do not mean to be understood as holding that the verdict was so manifestly against the great weight and preponderance of the testimony as to authorize the court to set it aside; for that question we do not decide, and in view of the disposition we shall make of this appeal, it would be improper to now decide it. But it is our opinion that in the circumstances stated the effect of the argument was calculated to convince the jury that Lancaster had made statements to Maj. Lovejoy wholly at variance with his testimony and corroborative of plaintiff's theory of the case, and that the only reason that Maj. Lovejoy did not take the stand and by his testimony impeach the witness was because of the—

"prejudice against lawyers going on the stand in their own cases about matters to which witnesses have testified to dispute them."

To say in direct connection with the language used as above quoted that Maj. Lovejoy "would as soon have jumped out of that window as to have been guilty of putting questions here to a witness to deceive or mislead anybody into believing the witness had admitted to him what agreed with his (the major's), version of the case" was in effect an assertion, without evidence to justify it, that the witness had testified to facts directly variant from his former statements; and the probable, if not the necessary, effect of this was to induce the belief in the minds of the jury that he had sworn falsely, and this was calculated to cast suspicion upon the testimony of all of defendant's witnesses with which the testimony of Lancaster agreed. We readily accept as true the statement of counsel that he made the argument merely to relieve his associate from a possible wrong impression of his act by the jury, and not with any thought of having the jury think that the plaintiff could get benefit from the statements of the witness inquired about when unproved. The lofty character of the distinguished and able counsel acquits him in the mind of this court of any intention to mislead or deceive the jury, and it is probable that the fact of his prominence gave greater weight to his statements with the jury; but we cannot look to the intention of the counsel in making the argument, but only to the probable effect it had upon the jury in determining the weight of the evidence; and, believing, as we do, that the argument was extremely prejudicial to defendant, it is our opinion that the trial

judge erred in failing to arrest the argument when his attention was called to it and in not instructing the jury to disregard it, and that this error requires a reversal of the judgment.

[2] Appellant by its sixth assignment complains that:

"The court erred in failing to instruct the jury to disregard, and in failing to reprimand counsel for his closing statement to the jury as to how they should answer the special issues submitted to them by the court if they wanted plaintiff to recover."

Under this assignment the following proposition is advanced:

"Where a case is submitted to a jury on special issues, it is reversible error for the court to permit counsel, without rebuke, to advise the jury in his argument what the legal effect of their answer will be."

The case was submitted to the jury on special issues in the form of interrogatories. During the argument plaintiff's counsel used the following language:

"We claim that every question submitted here to you should be answered, 'Yes,' down to the question for damages, and we submit to you that the question for damages should be answered in the amount that you find, and we submit that all of the questions after the questions for damages there should be answered, 'No,' if you want the plaintiff to recover and believe he ought to recover; that is the way we want you to answer it."

Without interrupting the attorney in his argument the defendant's attorney called the court's attention to the argument, and excepted to it on the ground that it was an effort of counsel to explain to the jury the legal effect of their answers to the special issues submitted; but the court did not instruct the jury in reference thereto. It seems to us that the argument went far toward explaining to the jury the legal effect of their answers, and to the extent it went in this direction the argument was improper. In *Fain v. Nelms*, 156 S. W. 281, this court had occasion to pass upon a similar question and there held that the argument, under the circumstances of that case, was improper, and that the court should have stopped it when attention was called to it. In writing the opinion of the court our late Associate Justice Reese uses the following language:

"The jury, as triers of fact solely, had nothing to do with the legal effect of their findings. This was a matter which could not properly concern them. They were only to find the facts. The argument came very near a direct invitation to the jury to consider, in finding this fact, what the legal effect would be. The argument should not have been made, nor should the court have allowed it to be made, and to give tacit approval of it by disregarding appellant's objection."

We adhere to the ruling in the *Fain* Case, and will continue to do so until convinced of its erroneousness by reasoning more cogent than that offered by appellee's attorneys. Nor can we agree with appellee's attorneys that in that case we indulged in reasoning to be "deplored."

However, as the judgment must be reversed

for the error hereinbefore discussed, and as the error here complained of will not likely arise upon another trial, we do not think it necessary to commit ourselves upon the question as to whether the error, under the facts of this case, requires a reversal.

We have examined all the other assignments of error presented by appellant in its brief, and are of the opinion that none of them points out reversible error. For the error first indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

FEEGLES et al. v. SLAUGHTER et al.
(No. 7427.)

(Court of Civil Appeals of Texas. Dallas. Dec. 18, 1915. Rehearing Denied Jan. 22, 1916.)

1. WILLS § 600—CONSTRUCTION—ESTATE CONVEYED.

Where a will, in the first clause, gave testator's property to his wife without limitation, but declared in another that whatever property the wife might own at her death should be equally divided between her relatives and testator's, but that she should have full power of control and disposition during her life, such will did not limit the wife's rights in the property to a life estate, since it is a primary canon of construction that the intention of the testator should be discovered and effectuated whenever possible, and in case of repugnancy that construction is favored which admits of immediate vesting of the entire estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.]

2. WILLS § 487—ACTION TO CONSTRUE—AMBIGUITY—ADMITTING PAROL EVIDENCE.

Where testator's will gave his property absolutely to his wife, and provided that whatever might be left at her death should be equally divided among their relatives, also giving her full power to control and dispose of the property during her life, the latter clause was not such a legal limitation upon the estate granted the wife at first as to make the will ambiguous and permit evidence of the maker's intention different from the legal import of the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.]

3. WILLS § 693—POWER OF DISPOSITION—EXERCISE—EFFECT.

Where testator's will gave his wife a life estate, with remainder to their relatives, and full power to control and dispose of the property, the wife's acts of disposition during her life cut off the remaindermen's contingent right.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.]

4. WILLS § 600—POWER OF DISPOSITION—FOLLOWING PROCEEDS.

Where testator's will gave his property to his wife with power of control and disposition, whatever should be left on her death to go to their relatives, such relatives could not pursue the proceeds of the property sold by the wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.]

5. WILLS § 693—POWER OF DISPOSITION—GIFT.

Where testator's will gave his wife absolute power to control and dispose of the property left her, whatever might be left on her death to go to their relatives, a disposition by the

wife by gift was effectual to bar the relatives' right.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655, 1661; Dec. Dig. § 693.]

6. DEEDS § 17—CONSIDERATION.

Where the grantee of realty paid the grantor \$10 cash, provided an annuity of \$600 for her, and agreed to render her personal services in caring for her as a daughter would her mother, which she did until the grantor's death, there was consideration for the conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26-37; Dec. Dig. § 17.]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by Mrs. S. A. Feebles and others against C. C. Slaughter and others for the construction of a will and the recovery of property. From a judgment for defendants, plaintiffs appeal. Affirmed.

Henry P. Edwards and Cockrell, Gray & McBride, all of Dallas, for appellants. Thompson, Knight, Baker & Harris, Towne Young, and Carden, Starling, Carden, Hemphill & Wallace, all of Dallas, for appellees.

RAINEY, C. J. Appellants, relations of J. B. D. Young, deceased, brought this suit against the appellees to construe the last will and testament of the said Young, and to recover the property devised therein, which property was willed by the said Young to his wife, Mrs. L. V. Young, and by her willed to Mrs. Ann A. Knight, and to recover the property or proceeds alleged to have been devised by the will to plaintiffs. The general issue was joined, and upon hearing the evidence the court instructed the jury to return a verdict for the appellees, which was done, and judgment was so rendered, from which this appeal is prosecuted.

J. B. D. Young and L. V. Young for years lived together as husband and wife. He was over 65 years old and she was over 60 years old when he died. They had only one child, which died in early infancy. They, as husband and wife, accumulated the property which is the subject of this suit. J. B. D. Young came to Texas in an early day, leaving his relatives in one of the older states, and thereafter had no contact with them. Mrs. Young had some relatives, whose names and addresses are not known, except a sister, Mrs. Feebles, one of the appellants, whose personal relations with Mrs. Young were not congenial. None of the appellants were dependent on Mr. and Mrs. Young.

On May 1, 1901, J. B. D. Young executed his last will and testament, and thereafter on June 3, 1901, died, owning the property in suit. His will was duly probated, and Mrs. Young qualified as sole executrix. Said will is as follows:

"The State of Texas, County of Dallas.

"Know all men by these presents: That I, J. B. D. Young, of the above named county and state, being of sound mind and disposing memory, do make this my last will and testament.

"I. It is my will and desire, and I do hereby

bequeath all my property, both real and personal, to my beloved and faithful wife, Mrs. L. V. Young.

"II. I do hereby constitute and appoint my wife my sole executrix, and direct that no bond shall be required of her.

"III. I desire and direct that no proceedings shall be had in court in reference to my estate, other than probate of my will, and the filing of an inventory and appraisal.

"IV. I direct that all my just debts shall be seasonably paid.

"V. I further desire and hereby will and direct that upon the death of my wife the property which she then owns shall be equally divided between her relatives and my relatives, it being intended that she shall have full power to control and dispose of the property during her life.

"Witness my hand this May the 14th, 1901.

"J. B. D. Young.

"Witnesses:

"N. W. Finley.

"V. E. Armstrong."

Soon after the probate of this will Mrs. Young took charge of said property and sold to Guy Sumpter one tract for \$15,200 cash, which was used by her in building a home and for other things. In 1902 she sold to R. E. L. Knight for a valuable consideration a tract, the consideration being \$3,000 cash, and in 1905 she sold to said Knight a tract for a consideration of \$300 cash. Knight was J. B. D. Young's attorney during his lifetime, and after his death continued to be Mrs. Young's attorney.

On September 23, 1902, Mrs. Young executed her last will and testament, by the terms of which she devised all her property to Mrs. Ann A. Knight, wife of R. E. L. Knight. On April 23, 1913, Mrs. Young died, making no other will, which will was probated in July, 1913.

In 1902 Mrs. Young deeded to Mrs. Knight the Slaughter tract, the consideration recited in the deed being "\$10 and other valuable considerations." The deed retained a life estate in Mrs. Young. Said tract was renting at the time for \$150 per month. Mrs. Young received the rents on said property until December 24, 1906, when she and Mr. and Mrs. Knight executed a deed to C. C. Slaughter for said tract for \$35,000 cash paid; \$10,000 of the money Mrs. Young transferred to Mrs. Knight, upon Mr. and Mrs. Knight's agreement to pay her thereafter \$600 a year for her life. The remaining \$25,000 of the consideration they invested in the purchase of the Bosbyshell tract on Elm street, near Lamar, taking a deed from Bosbyshell to Mrs. Young, and she in turn, within a few days thereafter, executed a deed to Mrs. Knight, wherein she undertook to reserve the life estate in the tract and convey the remainder to Mrs. Knight; the deed being exactly similar in form to the one that she had formerly executed to Mrs. Knight to the Slaughter tract. Mrs. Young continued thereafter to receive the rents, amounting to about \$175 a month, on the Bosbyshell tract, and to use them, until August 30, 1912, when Mrs. Young and Mr. and Mrs. Knight, for a consideration of \$40,000, deeded said

Bosbyshell tract to one Hart, \$9,000 of the consideration being a lot on Ross avenue (Ross avenue tract), and the remaining \$31,000 being Hart's notes. Mrs. Young and Mr. and Mrs. Knight then made an agreement, and carried it into execution, by which Mr. and Mrs. Knight agreed to pay Mrs. Young \$150 a month for her life and relieve her of taxes, in consideration whereof Mrs. Young made over to Mrs. Knight the \$31,000 Hart notes, and the Ross avenue tract was deeded to R. E. L. Knight for Mrs. Knight's benefit.

Mrs. Knight's testimony is quite lengthy, but is practically uncontradicted, and from which excerpts are taken to the effect as follows:

"I remember the occasion in January, 1902, when Mrs. Young made deed to me to the Slaughter tract of land. The deed recites the consideration of \$10 and other valuable considerations. The first conversation that Mrs. Young and I had concerning her intention to deed me that property was on my way home from town. I had been down in Dallas shopping with her, and going home she made that proposition, and we discussed it going home, all the way out from Sangers. She just simply said she wanted to make a trade with me. She had a proposition to submit. She said she was alone, and that she missed Mr. Young very much, and she felt her dependence, and she thought this matter over and had decided to buy my services. She had to buy somebody's, and she wanted to have me promise that I would take care of her and do these things I have said for her, and in fulfillment of that she would deed me this property. She said I should take care of her and look after her. I don't mean financial support; she was able to take care of herself financially. In addition to the \$10 that I was to pay for the deed to this property, I was to give her love and affection, and my attention, and administer to her during her lifetime. I was to respond to any call at any time that she should make on me. I was to look after her while she was sick, and do all that a daughter should have done, and I was to look after her during her sickness, and see that she was properly buried, look after her grave after she was gone, also that of Mr. Young. I don't remember what was said exactly when she handed me the deed; she just merely asked me for the \$10, and responding to that I paid her the \$10. We talked it over and I explained to her that I felt that I would be willing. We had always been friends of long standing, and I was sure I was generous and kind enough at heart to look after her without, and I didn't like to sell my services to a friend, but she would have it that way, because, she said, she might live to be a very old woman, and become a very great tax and a care on me, and she would not be satisfied or comfortable until she was sure she had bought me and I would accept it on that condition; that is, that I would permit her to buy me, and the obligation did not end with her death. It is going on now. I told her I would not consider it at all until I discussed it with my own family, my mother and brothers. I thought it was too great a task, too great a responsibility, and I was not sure of my own character. I did not know whether or not I had the dignity of character to keep a trade like that, and I was not willing to go into it unless I had advised with my family. I did not accept the proposition at once, but certainly within two days I accepted her proposition. I cannot tell you all the services I performed for Mrs. Young after she made me that deed. I called her up over telephone frequently to know how she was doing, and if she needed anything, or wanted anything, and I

helped her to rent the house when it was vacant. I put advertisements in the newspapers and looked up people to go out and live with her. I shopped with her, helped her buy her clothes, hats, furniture, helped her buy a horse and buggy, and there was nothing that you could detail that could be done for anybody that I didn't do for her, or help to do, and frequently did it all. She went away awhile in the summer, and she came to my house and visited in the home of my family. Yes; in my pleadings I have alleged that I was to give Mrs. Young all the nurture, assistance, aid, and every attention that might be required in sickness or health during her lifetime, and I would render unto her just everything that she ever demanded or ever wanted. I gave her exactly what I gave to my mother. I responded to her requests, to any requests that she might make at any time, regardless of what my condition was. She never phoned me to come down there that I didn't go, unless I wasn't well. I was never phoned to or called for that I didn't respond immediately at any time. The agreement was that I was to give her my time, give her all the nurture, assistance, aid, that she needed, and my position, my duty, toward Mrs. Young was that of daughter. She demanded of me exactly what my mother would have, and I used to look after her when she was sick, took care of her, and protected her in every way. I looked after her in any way just as I would have done my own mother. I was present at the death of Mrs. Young. When she died she lacked 2 days of being 77 years of age. I would like to say this: I felt doubly responsible for her welfare, not only because she had paid me to take care of her and look after her, but Mr. Young had asked me to do it the Sunday I went out there. He turned her over to me. He was dying, and he asked me to take care of her, because he knew her condition of loneliness. I was very fond of Mrs. Young or I could not have done what I did for all the money she had. I felt as a daughter toward her. I am quite sure I would have done this without a dollar. I am quite sure I would have. I did not exact of her any agreement to give me her property before I agreed to it. It was her own proposition. I remember the sale of the tract of land to Col. Slaughter, for which he paid \$35,000. There was \$25,000 of it paid for the Bosbyshell property. I kept the other \$10,000. It was mine. I bought Mrs. Young's life estate in the \$10,000 by paying her \$600 a year for life. I kept the \$10,000 and paid her \$600 a year as long as she lived, two payments a year, \$300 at each time. The other \$25,000 was used in the purchase of this tract on Elm street, known as the Bosbyshell tract of land. Immediately after purchasing the Bosbyshell tract, which was deeded to Mrs. Young, she in turn deeded it to me, and reserved a life estate in it. It was understood between her and me before Bosbyshell made the deed that that should be done. In 1912, about a year before she died, she and I sold the Bosbyshell tract to Mr. Hart for \$40,000. The consideration was in part a lot on Ross avenue, and the balance in notes. The notes aggregated \$31,000. I have those two small notes yet. The \$20,000 note has been disposed of. I paid a debt off with it. It is a fact that when we sold the Bosbyshell tract of land to Mr. Hart Mrs. Young turned the notes over to me. Mr. Knight was Mrs. Young's attorney at the time she made that proposition in the buggy, and he continued so at all times thereafter up to the time of her death, but he had nothing to do with this deed. I know that Mrs. Young had the supremest confidence in Mr. Knight, and Mr. Young did too. I suggested to Mrs. Young that she go to Mr. Coke. Nobody suggested it to me. Mr. Knight did not suggest it to me. I made the suggestion myself. I wanted Mr. Coke to do it. I didn't want it to be a family

matter. I wanted Mrs. Young to get a lawyer who could advise her, and with whom I felt perfectly free to discuss this matter, and I wanted it fixed in the best way possible to protect Mrs. Young during her lifetime. I wanted it to be a valid transaction. I had already discussed it with Mr. Knight in Mrs. Young's presence. I do not know that Mrs. Young knew that she could not will away the property. She never said anything to me about not being able to will it away. I never knew anything about Mr. Young's will. I suppose I knew that he had left one, but there was never any discussion of it. I suppose that fall when I returned from Kentucky after the will was probated was when I first knew of it, if at all. I did not read it. I never saw it. I don't know what he said about his relatives. Nobody ever told me he had made a will in which he mentioned his relatives and her relatives. The first time I ever saw a copy of the will was in these pleadings. There was no discussion between us about Mr. Young's will, no discussion between Mrs. Young and myself. I suppose she knew all about his will, and she certainly thought she had the right to do as she pleased. The Mr. Coke who attended to the matters for Mrs. Young was Mr. Alex Coke. When Mrs. Young turned the notes over to me that were given for the Bosbyshell tract, I bought her life interest in those notes, and the proceeds of the Bosbyshell tract, by paying her \$150 a month during her lifetime, which was a little more net than she had realized monthly from the building, and I agreed, with Mr. Knight's approval, and in his presence, to do that. I also agreed to pay the taxes on the home place, which was perhaps all the taxes she had. I did not have possession of the place, but thereafter I was to pay the taxes on the home place. The Bosbyshell tract of land was sold in August, and we were to pay all of her taxes after that year. That was in 1912. My understanding was that I was to pay all the taxes beginning with the year 1913. The notes were turned over to me in August, and we paid her in August, September, October, November, December, January, and straight on up to the time of her death in monthly installments of \$150 each. Mrs. Young was talking to me, and she says: 'Whatever happens to me, Miss Ann—if I die, or whatever comes to me and my lot, do not call those people. I don't want those people notified, because they turned the back of their hand to me when I needed them, and now I don't want any of them, and I don't want any of them apprised of my condition or of my death.' That interview must have been two weeks before Mrs. Young died. Mrs. Feebles did not come over until after Mrs. Young was dead. I have already related the facts about Mrs. Young going away with us on a vacation trip to Chicago. She went every summer from 1902 to 1912 with us. We went one summer to Hot Springs for a month. One summer we went to Kentucky, and Mrs. Young went with me and visited my friends. One summer we went to Quebec and Toronto, and down there on Lake Champlain, Lake George and down to Boston and New York. One summer we went to the Jamestown Exposition. One summer to Michigan, and then we went three years in succession, I think, to New York City. I don't know whether that covers the period of years or not, but it is as nearly correct as I can be just now. She always went with us as a friend and equal. The members of my family always treated her as the most respected one of the family, and she was looked upon by strangers and people in the hotels as the children's grandmother, and it pleased her very much. They were so considerate of her that it pleased her to have people think that she was the grandmother of those children. Her mental vigor was just wonderful. She was as strong-minded as I ever knew a woman to be. She had extraordinary

intelligence. She had taken advantage of every opportunity that came her way, and she regretted very much not having had the experience of traveling and the advantages of traveling until it came to her in later years. She enjoyed it very much. She was younger and entered into the spirit of it even more than the younger members of the family. Her attitude toward every one was just youthful, interested in everything, theaters, and after that the café, and that feature of life. We stopped at the very best of hotels. The attitude of the children toward her, and the attitude of her toward my children, was the attitude of a grandmother. She was just as fond of them as she could be, and made a great deal more over them than either of their own grandmothers. Mrs. Young's reading in her later years was this way: She could read the paper. It took her some little time to read over the fine print, but she could read the transfers of property. She was always interested in the business affairs of Dallas, and she could read about the permits being issued for new buildings. She kept up with all the growing conditions of Dallas by reading the paper. I do not think she read books to a very great extent. She read the Bible. I do not know of her reading generally except the paper and the Bible. I do not know that she read anything else much. She was a member of the Methodist Church. There never was a time after we made the trade when I felt that I could overlook a single want of Mrs. Young's. She did not want to accept the services she wanted me to render, unless she felt that she was paying for it that way. Said she did not feel at liberty to call upon me at any time for anything, and that is why she wanted it to be a business contract strictly. I could not tell you all the things I did for her. I asked her to go to Mr. Coke at the time she made this deed. I wanted her to be protected. I did not make any suggestions, except that I wanted her to be absolutely protected against everything, and I would not touch it or consider it under any circumstances until she had gone to Mr. Coke and discussed it with him so she would be thoroughly protected. I have been looking after her grave; am still doing it. That was part of my promise, part of my contract, and I am taking care of Mr. Young's grave as well. Mrs. Young had Dr. Embree with her. He was a neighbor, and he treated her for any little troubles that she had, but in her last illness I called in Dr. Embree and asked him to let me call my own family physician. I felt that I would be better satisfied to have his opinion, his diagnosis of the case, so I called my family physician. Dr. Embree visited Mrs. Young frequently. The physician I called was Dr. Baird. Dr. Embree called him at my request, and I called him too. Dr. Baird and Dr. Embree are doctors of standing. She used my automobile, and the nurse, myself, and frequently some neighbors would go with her, and whenever she wanted it she would telephone me that she wanted it, say she wanted to go driving, and telephone me just like it was hers. She would telephone me that she wanted to go driving at 2 o'clock, or 4 o'clock, just as she wanted to. She did not have a car. She used my car, and it would be sent for her when she telephoned, just as if it were her very own. She had no expenses, no upkeep of the car, no driver to pay. Mrs. Young knew that she had a standing invitation, and I always fixed a place for her at the table. She knew she was welcome, and that she was expected. She would come in without an invitation; she dropped in just like my own family did. It was as definitely understood as if I were her daughter and she my mother. She would do that without formal invitation. She always felt at liberty to ask anybody that was in her home, and in that way entertained many of her friends. After Mr. Young's death the rela-

tions that existed between Mrs. Young and myself were just as close, just as binding, just as affectionate as you could imagine. Mrs. Young's personal appearance was very aristocratic, very highborn, very elegant looking. She dressed very elegantly, in keeping with her birth and her money and her position. She was cheerful, wholesome, truthful, and honest, and splendid and noble, in every sense of the word. There wasn't a little, malicious, disagreeable thing in her. I am sure of that because I had ample opportunity to know in the most intimate fashion that it was possible for a human being to know. At the time Mrs. Young made the deed to me I was not dictating to her. She was doing the things she wanted to do. She and Mr. Coke settled that. I made no dictation whatever to her. I never attempted to alienate Mrs. Young from Mrs. Feegles, or any of her relatives. I would not stoop that low. I could not do a thing like that. I have no disposition to be a home breaker, or disturber of families in any way. On the other hand, I urged and begged Mrs. Young to look over the shortcomings and all the hurts that she might have received, because I thought life too short to harbor a grudge against anybody for any reason whatever. I do not harbor them myself, and I certainly would not urge Mrs. Young to do a thing like that. I don't know anything about the law in regard to the making of wills."

Mrs. Feegles testified that:

"Mrs. Young seemed to think the world and all of Mrs. Knight. There was no one came in between them. That was what disgusted me, because I thought I ought to come in before anybody else. It was in 1902, in July or August, when she deeded me that property. She said the reason she gave me that property was because she wanted to do something for me. I was living with her at the time. After that Mrs. Young wanted me to deed the property back to her, and she came to my house and asked me to do it. She said she would give me a good price for it, and I says 'I don't think you ought to have it back.' Mrs. Young asked me not to take any steps after her death to recover back her property. The consideration in the deed which Mrs. Young made to me after Mr. Young's death was \$1. She said it had to be \$1. She made the same trade about that piece that she made about all the rest of her property; she got all the rents from it while she lived. She told me she was going to give it to me, but that she was to get the rent out of it while she lived. I was living with her at that time. She was feeding me at that time, and that was all. I left after she told me she had made me a deed, because she didn't treat me right. I won't be positive when she told me she had deeded me the property, but I had made up my mind about two weeks before she told me about the property, to go. She told me she was going to deed it to me when I first came to live with her. I came down town and went to the courthouse to see if it was there, because I doubted it. I doubted it because they had treated me so funny and cool that I had come to the conclusion that I couldn't believe what she told me about the property, but they showed me the deed at the courthouse. I sold the place last year some time. I am to get \$5,000 for the place, and I have already got \$2,000 of it. I believe they paid me \$1,500 in cash and the balance in notes. I do not know whether my contention in this case is that my sister ought not to have sold anything but her life estate or not. I do not know anything about it. I claim in this case that the relatives of Mr. and Mrs. Young ought to be allowed to participate in the distribution of this estate, on the ground that Mrs. Young did not have the right to make any deeds to that property. I did not go back to her after I left her the last time. I couldn't have been of much service to her. We are com-

manded to return good for evil, but it don't seem like we do it, and I did not do it. I did not have anything to do with her funeral arrangements. I did not have anything to do with looking after her grave. I have been to her grave since she has been dead once, about a year ago. Mrs. Young was kind of like myself, high-tempered. I am not so high-tempered as I was once. I try to keep my temper under control now more than I used to. She was just in some things and in some she wasn't. When she got mad at anybody she was terribly mad, and I am kind of like her. There were some good traits in my sister's character, some things when she took a notion, when she took a notion to Mrs. Knight there was nothing would be too hard for her to do for her. She would have done anything on earth for those people. Besides, the deed to the lot, my sister gave me a little money sometimes. Directly after she sold the Sumpter property she gave me \$500. After that a few dollars now and then, amounting to about \$700 or \$900 altogether. She gave me the \$500 before I came down there, because Mr. Young had requested her when she sold some property to pay me \$500. I suppose he wanted to try to pay for that place I deeded back to him, that \$200 difference that he owed me. He said when she sold some of it to give me \$500. I never considered the \$900 much of a gift because I had worked for her years and years before, and I thought I had earned it."

The testimony of Mrs. Knight and Mrs. Feegles is quite voluminous, and we have copied only excerpts therefrom, deeming that the part so copied is all that is necessary for a proper decision of the case.

For a proper determination of the propositions in controversy herein it becomes necessary to construe the last will and testament of J. B. D. Young. It is provided by the first clause of the will as follows:

"It is my will and desire and I do hereby bequeath all my property, both real and personal, to my beloved and faithful wife, Mrs. L. V. Young."

This clause standing alone vested absolutely the fee-simple title in all the property then owned by J. B. D. Young in Mrs. Young. This does not seem to be controverted, but it is contended by appellant that clause 5 of said will limits and prevents clause 1 from having the effect its language imports. Clause 5 reads:

"I further desire and hereby will and direct that upon the death of my wife the property which she then owns shall be equally divided between her relatives and my relatives, it being intended that she shall have full power to control and dispose of the property during her life."

[1, 2] Appellant's contention, as we understand it in effect, is that clause 5 of said will limited Mrs. Young's rights in said property to a life estate, that the disposition of said property during her lifetime in the manner it was done by her was unauthorized and fraudulent and done for the purpose of circumventing and defeating the terms of said will, and that said will made Mrs. Young a trustee for the benefit of his and her relatives at the end of her life. We do not concur in the contention of the appellant.

"It is a primary canon of construction of wills that the intention of the testator shall be discovered and effectuated whenever that can be done within legal limitations, but in case of re-

pugnancy that construction is favored which admits of immediate vesting of the entire estate."

The will of J. B. D. Young, in our opinion, clearly shows on its face that he intended to invest in Mrs. Young an absolute fee to the property therein bequeathed, and it was to be in no way affected by clause 5, which gave her "full power to control and dispose of the property during her life." This clause is not such a legal limitation upon the estate granted to Mrs. Young in the first clause of the will as to make it ambiguous and permit evidence of the maker's intention different from the legal import of the language of the will itself. We see nothing in the evidence which, in our opinion, tends to show that Young had any other intention than to place the fee to the property in his wife. All the property had been accumulated during their married lives, and was therefore community property, except the homestead tract, which was the separate property of Mrs. Young, it having been so made by conveyance from her husband. They were very devoted to each other and had lived together for over 30 years, and at the time of his death there was existing on the part of neither any special attachment for any of their relatives, who were the plaintiffs. From the circumstances surrounding him at the time of making his will Young's solicitude was for his wife's welfare, and that clause 5 was placed in the will merely to provide for a contingency; that is, if any of the property remained on hand at her death, it was to be equally divided among their relatives; in other words, we construe clause 5 in connection with clause 1, to mean that Mrs. Young should have the absolute right to dispose of the property during her life, and thereby vest a title in fee to it to the exclusion of his or her relatives. The use of the term, during her life, was not intended to limit the title to the property in Mrs. Young to a life estate, but to designate the time when the relatives should take in the event she had not disposed of it, and there was any remaining in her hands at the time of her death. There was no property remaining in Mrs. Young's hands at her death, except her separate property, and J. B. D. Young's will did not deal with that, and Mrs. Young had the right to do as she pleased with it.

In support of our view that Mrs. Young was vested under the will with an absolute fee-simple title in all the property and empowered to dispose of it, we cite the following authorities: Article 1106, R. S. 1911; *Hanna v. Ladewig*, 73 Tex. 37, 11 S. W. 183; *Spea v. Ligon*, 59 Tex. 233; *Livingston v. Koenig*, 20 Tex. Civ. App. 398, 50 S. W. 463; *Young v. Campbell*, 175 S. W. 1100; *Irvin v. Putnam* (Ky.) 89 S. W. 521; *Ide v. Ide*, 5 Mass. 503; *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228; *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950.

[3] If it should be conceded that the will

conferred a life estate in Mrs. Young, which we do not, it also gives to her full power to control and dispose of the property, which power is broad and unlimited.

In *Hanna v. Ladewig*, 73 Tex. 37, 11 S. W. 133, where like power was conferred upon a life tenant the tenant conveyed the property, and the remaindermen sought to set aside the conveyance. In construing the extent of the powers granted by the will, Mr. Justice Stayton, speaking for the court, said:

"The power conferred on Mrs. Hinkly by the will of her husband was as broad as could well be conceived, and no limitation was placed on its exercise other than such as her own wish and pleasure might dictate. The will declared that she should have power to 'absolutely dispose' of the property, not for some specific purpose pointed out by the testator, but 'according to her pleasure.' * * * Appellants do not stand as creditors or persons having fixed rights in the property, not to be divested unless by a conveyance made on valuable consideration Mrs. Hinkly felt compelled for her own support or any other consideration to sell it. Whether they should ever receive or become entitled to the property Walter Hinkly made dependent upon the volition, pleasure, and act of his wife, who was the mother of the persons who were to take if the wife did not execute the power conferred on her. Speculation as to why he conferred on her such a power would be unprofitable, but it is likely that he felt he could safely intrust to a mother a power in the nonexercise of which her own children were interested. She having exercised the power conferred upon her, through whatsoever motive, or upon whatsoever consideration, their contingent right was forever cut off when it was once exercised, and the fact that the property was reconveyed to her is a matter of no importance. * * * The plaintiffs showing no title in themselves, it is unnecessary to consider other questions presented in the record."

In *Livingston v. Koenig*, 20 Tex. Civ. App. 398, 50 S. W. 463, where a like power was given a life tenant, Mr. Justice Williams said:

"The pronoun 'same' evidently refers in each instance to the same antecedent, viz., the property, and the power is given over that and not merely over the life estate. A grant of power to dispose of the latter would be wholly useless and senseless. The power is 'discretionary and unrestricted,' not only to sell, but to dispose of, the property. This embraces the power to give it away unless it is limited by other parts of the will. The only other part which could be claimed to have that effect is the third clause, wherein the testator bequeaths to her children the remainder of her estate after the termination of the life estate. This does not impair the force of the language used in conferring the power, because it is only what is to remain of the property; that is, such as has not been taken out of her estate by the exercise of the power that is bequeathed to the children."

In both the above cases the property was community and conveyed without valuable consideration.

It is insisted by appellant that the will conferred a trust on Mrs. Young only in the property for the benefit of relatives, subject to use by her for her support, etc. That the sale and transfer of the Slaughter tract was without consideration, fraudulently conveyed, and that the purchaser had notice thereof.

On the proposition that Mrs. Young was a

trustee as claimed, the case of *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412, is cited in support of appellant's contention. In that case a will similar in some respects to the one here involved was being construed. A demurrer had been sustained to the petition, and in passing upon the case Mr. Justice Stayton, as was his custom, wrote an able opinion in which, among other things, he said:

"We are of the opinion that N. G. Bagley took, under the will, an estate in fee in the entire property, but that this was in trust for the beneficiaries named in the fourth paragraph of the will, except as their right was limited by the right given to him to use and dispose of the property during his lifetime, which was given by the express terms of the will."

He further says:

"If Mrs. Bagley had provided in express terms in her will that the part of her estate remaining at the time of her husband's death should go to the persons named in the fourth paragraph, then a legal estate therein would have vested in them under the will; but this she did not. * * * It is evident from an inspection of the will before us, that it was not the intention of the testatrix, by force of the will alone, to vest in Jessie McMurry and Flora Brown a legal estate in remainder to be enjoyed by them after the termination of the life estate in N. G. Bagley."

In the Young will there is no express provision that the remaining property at his death should go to his relatives, so no estate vested in them under the will. The *McMurry* Case clearly decides that where the will provides for the disposition of the property by the first taker as in this case, and there is a disposition, the title vests absolutely in the grantee. It is shown that all of the property had been disposed of before Mrs. Young's death, except the homestead tract, and this was her separate property. This she had the right to devise, as it was not affected by the will of Mr. Young.

[4] As to the right of appellant to pursue the proceeds of the property sold by Mrs. Young, we are of the opinion that this proposition is settled adversely to appellant by the opinion in the *McMurry* Case, supra, which holds that:

"There is nothing in the relationship of the parties or the purposes for which the power to use and dispose of the property was most positively given to the husband which would authorize a holding that the testatrix intended that her nieces should have the right to follow and have the proceeds of any part of her estate that might be disposed of by her husband."

[5, 6] Now as to the proposition of no consideration for the disposition of the Slaughter tract: As we hold the will gave to Mrs. Young an absolute right to dispose of the property, there being no limitations expressed as to the manner, mode, or purpose for its disposition, we think it immaterial how and for what purpose it was disposed of. We take it, however, that there was a valuable consideration for its transfer. The testimony of Mrs. Knight shows that there was paid to Mrs. Young \$10 in cash, which was nominal, and further that at Mrs. Young's

suggestion an annuity of \$600 was provided for her, and also that at Mrs. Young's solicitation Mrs. Knight was to render her personal services in caring for and looking after her as a daughter would her mother. This Mrs. Knight did faithfully until Mrs. Young's death. How Mrs. Knight performed her contract is detailed in her testimony above set out. This shows, we think, a consideration that cannot be measured by dollars and cents, and to a lone woman in Mrs. Young's condition of inestimable value. This testimony of Mrs. Knight is not controverted, and we see no reason why it should be ignored.

There is no evidence of deception practiced on Mrs. Young by Mrs. Knight or by her husband, R. E. L. Knight. In this transaction it seems Mrs. Young had another attorney representing her; at least, there is no proof that Mrs. Knight and her husband unfairly and fraudulently induced Mrs. Young to make the transactions, but that she acted in accordance with her own wishes.

The judgment is affirmed.

WYATT v. CHAMBERS. (No. 7029.)

(Court of Civil Appeals of Texas. Galveston. Dec. 23, 1915.)

1. DEEDS — 70—VALIDITY—FRAUD.

Where a grantee, to procure a deed to real estate, and for the purpose of defrauding and deceiving the grantor, promised to pay the grantor \$700 in cash, with the intention at the time of not making such payment, and the grantor relying thereon, executed and delivered the deed, and the payment was never made, the grantor was guilty of such fraud as authorized the cancellation of the deed, since, while a failure to keep a promise to perform an act in the future is not fraud in legal acceptance, though the promise is the consideration upon which a deed is executed, and the failure to keep it is wholly without excuse, this rule is subject to a well-recognized exception applicable where the representations and promises are made for the purpose of defrauding and deceiving, and with no intention at the time of performing them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. —70.]

2. APPEAL AND ERROR — 1067 — HARMLESS ERROR—INSTRUCTIONS.

In a suit to cancel a deed for fraud, plaintiff requested an instruction that if the grantee promised and represented that he would pay the grantor \$700, upon the execution of the deed, with the design of cheating and deceiving the grantor, and with the intention at the time of not paying such sum, and if the grantor relied thereon and executed the deed, and if the payment was never made, to find for plaintiff. The court charged that if it was agreed that the grantee was to pay the grantor \$700, and pay up all back taxes and support the grantor for life, and if the grantee had failed to make such cash payment and to pay such back taxes, and to furnish such support, and if such promises and agreements were fraudulently made for the purpose of deceiving the grantor, and without intention of carrying out and performing them, the verdict should be for plaintiff. *Held*, that the evidence being sufficient to raise the issue, the refusal of the requested instruction was prejudicial error, as the instruction

given did not authorize a verdict for plaintiff if the grantee complied with the promise to pay the taxes and support the grantor, though he failed to pay the cash consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. —1067; Trial, Cent. Dig. § 475.]

3. DEEDS — 70—VALIDITY—FRAUD.

If a grantee promised to pay \$700 for real estate and to pay up back taxes and support the grantor, and if he did not intend to make such cash payment, but made the promise fraudulently for the purpose of procuring the execution of the deed, and if he did not pay the cash consideration, the deed should be set aside, notwithstanding his faithful compliance with his other promises.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. —70.]

4. CANCELLATION OF INSTRUMENTS — 43 — PLEADING—ISSUES.

In a suit to set aside a deed conveying lots 4 and 5, the petition alleged that lot 4 was fraudulently inserted in the deed without plaintiff's knowledge or consent, that she could not read or write, and did not intend to convey lot 4, that defendant promised to pay \$700 for lot 5, and support plaintiff as long as she lived, and pay all back taxes, that defendant did not intend to pay anything for the property, but made the promise for the sole purpose of deceiving plaintiff into signing the deed, that plaintiff believed the promise, and with that belief executed the deed, and that no money was ever paid her. *Held*, that this raised an issue as to defendant's fraudulent promise to make the cash payment without intent of making it, with respect to lot 4, as well as lot 5, there being but one conveyance which included both lots.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 96-99; Dec. Dig. —43.]

5. TRIAL — 234—INSTRUCTIONS—BURDEN OF PROOF.

A party to a suit is only required to prove his case by a preponderance of the evidence, and an instruction requiring a party to establish the facts relied upon by him as grounds for a recovery by a clear preponderance of the evidence imposes too great a burden upon him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. —234.]

6. WITNESSES — 178—COMPETENCY—TRANSACTION WITH DECEASED PARTY—"CALLING" OF WITNESS.

In a suit by the administrator of W. against the administratrix of O., an heir of W., who was incompetent to testify against defendant as to statements made to her by deceased, "unless called to testify thereto by the opposite party," was not called by defendant within the statute, where plaintiff prepared and filed interrogatories to her stating that her deposition would be taken in answer thereto, and defendant thereupon propounded cross-interrogatories and procured the issuance of a commission under which the deposition was taken, and the deposition could not be introduced by plaintiff, as the filing of the direct interrogatories was the "calling" of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 722-725; Dec. Dig. —178.]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by P. B. Wyatt, administrator, against W. J. Chambers, who died pending action, which was then defended by his administratrix. From judgment for defendant, plaintiff appeals. Reversed and remanded.

A. C. Van Velzer and Fred R. Switzer, both of Houston, for appellant. W. H. Ward and Hortense Ward, both of Houston, for appellee.

McMEANS, J. Catherine Williams brought this suit against W. J. Chambers to set aside a deed executed by her to W. J. Chambers conveying lots 4 and 5 in block 49 in the Baker addition to the city of Houston. She died before a trial was had, and P. B. Wyatt was appointed administrator of her estate, and the suit is prosecuted by him in that capacity. It is alleged in plaintiff's petition that lot 4 was fraudulently inserted in said deed without her knowledge or consent, and that she could not read or write, and that she did not intend to convey lot 4; and that defendant promised to pay to Catherine Williams for lot 5 the sum of \$700 in cash, and to support her as long as she lived, by providing her with the necessaries of life, and also to pay all back taxes then due upon the property; that defendant did not intend to pay her anything therefor at the time he made the promise, but made the promise for the sole purpose of decoying her into signing the deed; that she believed the promise, and with that belief she executed and delivered the deed, and that no money was ever paid her for said conveyance.

Pending a trial Chambers died, and the suit was defended by his administratrix, who pleaded that the consideration for the execution of the deed was only that the said Chambers should pay the taxes owing upon the property, repair the house upon the property, in which Catherine Williams lived, and permit her to have a home there for the balance of her life; that he fully performed his agreement with her by paying the taxes, amounting to several hundred dollars, and by furnishing a home to her during her lifetime; specially denied that there ever was an agreement to pay her \$700, or any cash sum; specially denied that lot 4 was inserted in the deed without the knowledge and consent of Catherine Williams, but averred that, on the contrary, the same was included in the sale.

A trial before a jury resulted in a verdict and judgment for defendant, and the plaintiff has appealed.

Upon the trial the plaintiff introduced testimony which, if given credence by the jury, would have warranted a finding for plaintiff upon the issues presented by his pleadings. On the other hand, the defendant introduced testimony, which, being believed by the jury, warranted their finding on the issues raised by her pleadings. The verdict is not questioned upon this appeal by any assignment of error challenging the sufficiency of the evidence to sustain the same, but the assignments presented are predicated upon alleged prejudicial errors in the court's charge, the refusal to give a certain charge requested by

plaintiff, and upon the exclusion of certain testimony offered by the plaintiff upon the trial.

[1-3] The fifth assignment complains of the refusal of the court to give to the jury the following special charge requested by plaintiff:

"You are instructed that if W. J. Chambers at the time he secured said deed from Catherine Williams, dated October 3, 1907, promised and represented to her (if you find from the preponderance of the evidence that he made such promises and representations) that he would pay her the sum of \$700 cash upon her execution of the deed to him of the corner lot No. 5, and did so with the design of cheating and deceiving said Catherine Williams and had the intention at the time of not paying the said \$700 at that time or any other time in the future, but merely used such promises and representations, if any, as a false pretense, if any, to induce the said Catherine Williams to execute said deed, and if the said Catherine Williams relied upon such promises and representations at the time, if any, and executed the said deed, and would not have executed the said deed had such promises and representations, if any, not been made to her, and if she had not believed the same, if you find she did believe same, and if you find that the said \$700 was not paid, then you will find for the plaintiff for both of said lots."

Appellant, under his first assignment of error, advances the following proposition:

"Where a proposed grantee in order to procure a deed to real estate made promises and representations to the grantor that he would pay her \$700 in cash upon the delivery of the deed, and the grantor relying upon such promises and representations executed and delivered the deed to the grantee, when at the time of making said promises and representations said grantee made the same for the purpose of defrauding and deceiving the grantor, and had the intention at the time of not paying the promised cash payment, and never did pay the same, the grantee was guilty of such fraud as will authorize the cancellation of the deed."

The above proposition is an accurate statement of the law as we understand it. While a failure to keep a promise to perform some act in the future will not be regarded as fraud in legal acceptance, although the promise is the consideration upon which a deed is executed and the failure to keep it is wholly without excuse, there is a well-recognized exception to this rule where the representations and promises are made for the purpose of defrauding and deceiving, and without any intention at the time the same are made of performing the same. This exception is recognized in *Railway v. Titterton*, 84 Tex. 218, 10 S. W. 472, 31 Am. St. Rep. 39, *Railway v. Smith*, 98 Tex. 553, 86 S. W. 322, *May v. Cearley*, 138 S. W. 165, and *Insurance Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945, and was applied by the El Paso Court of Civil Appeals on the former appeal of this case. *Chambers v. Wyatt*, 151 S. W. 864.

The evidence being sufficient to raise the issue, and the court recognizing the exception to the general rule above stated, gave to the jury in its charge in chief the following instructions:

"Now you are charged that if you believe from a clear preponderance of the evidence in this case that on the date mentioned, to wit, the 3d day of October, 1907, that said Catherine Williams executed a deed conveying to the defendant, W. J. Chambers, lots 4 and 5 in block No. 49, Baker addition to the city of Houston, Tex., but if you further believe from the evidence that it was agreed by and between the said parties that the said Chambers was to pay the said Catherine Williams the sum of \$700 in cash, to pay up all back taxes due on the said property, and to support the said Catherine Williams during her life as the considerations for the execution and delivery of the said deed, and you further believe from the evidence in this case that the said W. J. Chambers has not paid the consideration mentioned and agreed upon, if you find such to be the case—that is to say, that he has failed to pay the \$700 in cash, has failed to pay up all back taxes due on said property, and failed to provide the said Catherine Williams with all the necessities of life—if you find such was the consideration for the execution of the said deed, and you further find that at the time said promises and agreements were made by said Chambers, that they were fraudulently made and made for the purpose of deceiving the said Catherine Williams, and without any intention on the part of the said W. J. Chambers of carrying out and performing same, then in such event you will let your verdict be in favor of the plaintiff as to lot No. 5 of said block No. 49, Baker addition."

It will be observed that under this charge the jury could not have found for the appellant, unless they believed from the evidence that all of the promises made by Chambers to Catherine Williams, as the consideration for the execution and delivery of the deed, had not been kept; that is to say, that unless Chambers had failed to perform his promise to pay the back taxes due upon the property and to provide her with the necessities of life, and to pay her \$700 upon the execution and delivery of the deed, the jury would not have been authorized by the charge to find for plaintiff, even though they may have believed from the evidence that he had complied with his promise to pay the taxes and furnish her a support, yet had not paid the cash consideration promised. In other words, the charge required the jury to find that Chambers had failed to comply with all the promises made by him before they could return a verdict for the plaintiff. We believe that if Chambers promised to pay Catherine Williams \$700 for the property and to perform certain other agreements made as the consideration for the sale, and that at the time he promised to pay the cash consideration he did not intend to pay it, but made the promise fraudulently for the purpose of procuring her to execute the deed, and that thereafter he did not pay the cash consideration, the deed could and should be set aside, notwithstanding he thereafter faithfully complied with his other promises.

The special charge contained an accurate instruction in this regard and should have been given, and the refusal of the court to give it was such prejudicial error against the appellants as to require a reversal.

[4] Appellee contends that the refusal to give the special charge was not error for the

reason that there were no pleadings to support it, in that plaintiff did not ask for cancellation of the deed to lot 4 for failure to pay the consideration of \$700, but asked for cancellation for such alleged failure as to lot 5.

We think the pleadings were sufficient to raise the issue as to both lots. There was but one conveyance and it included both lots; and plaintiff alleged that the deed was obtained by Chambers by making false and fraudulent promises to Catherine Williams that he would pay her \$700 in cash, and that he would pay the back taxes upon the property and support her as long as she lived. While it is alleged that Catherine Williams did not know that lot 4 was inserted in the deed, that it was so inserted by Chambers fraudulently, and that if she had so known she would not have signed the deed, nevertheless it is alleged that she was induced to sign the deed that was executed by reason of each of the promises and representations made to her by Chambers, which she believed and relied on, and was thereby decoyed into parting with the title to her property, and that Chambers made the promises with the sole purpose of deceiving her and defrauding her out of her property, and without any intention on his part of complying with the same at the time when made or any time thereafter.

[5] In submitting the issues presented by the plaintiff's pleadings and raised by the evidence, the court instructed the jury that if they believed from a clear preponderance of the evidence that certain facts alleged by plaintiff as grounds for recovery existed, to find for plaintiff. The appellant contends that the charge, requiring plaintiff to prove his case by a clear preponderance of the evidence, imposed a greater degree of proof upon him than required by law, and is erroneous.

The law only requires that a party to a suit shall prove his case by a preponderance of the evidence, and the charge requiring that he establish the facts relied upon by him as grounds for recovery by a clear preponderance of the evidence imposes a greater burden upon him than is imposed by law. *Green v. Keegans*, 54 Tex. Civ. App. 237, 118 S. W. 173; *Prather v. Wilkens*, 68 Tex. 187, 4 S. W. 252. The charge is erroneous; but in view of the fact that the judgment will be reversed for the error hereinbefore indicated, and as the error above stated is not likely to happen upon another trial, we will not pause now to determine whether such error should require a reversal.

[6] We think that the court did not commit error in refusing to permit Alma Whitby to testify in behalf of plaintiff. She was an heir of Catherine Williams, deceased, and was incompetent to testify against the defendant as to statements made to her by the deceased, "unless called to testify thereto by the opposite party." The facts that gave

rise to the questions are these: The plaintiff prepared interrogatories to Alma Whitty which were filed with the clerk, stating that her deposition would be taken in answer thereto and would be used by plaintiff as evidence upon the trial of the case, and notice of such filing was served upon the defendant. Thereupon the defendant propounded cross-interrogatories to her. Thereafter the defendant procured the issuance by the clerk of a commission to take the deposition of the witness and caused the same to be placed in the hands of a notary public for execution. Her deposition was taken accordingly and the fees of the notary for taking same were taxed as costs in the case. However, the amount of these costs were advanced and paid to the notary by the defendant. Under these facts the plaintiff makes the contention that when defendant procured the answers of the witness to be taken she was "called to testify thereto by the opposite party," and that this gave the plaintiff the right to introduce her testimony, although she would have been incompetent to testify as to the same matters had she been called by the plaintiff to testify.

We cannot agree to this contention. The filing of the direct interrogatories was the "calling" of the witness in this instance, and she was therefore called by the plaintiff and not by the defendant. *Ivy v. Ivy*, 51 Tex. Civ. App. 397, 112 S. W. 112. We think the court correctly sustained the objection to the introduction of her deposition, and the assignment raising the point is overruled.

For the error first hereinbefore indicated the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

THOMAS v. ABBOTT et al. (No. 6988.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 10, 1915. Rehearing Denied
Jan. 6, 1916.)

APPEAL AND ERROR §1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict on conflicting testimony, justifying a verdict either way, according to which witnesses are believed, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.]

Appeal from Brazoria County Court; J. W. Munson, Judge.

Action by W. C. Abbott and another against Norman F. Thomas. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wilson & Follett, of Angleton, for appellant. A. T. Carleton, of Houston, and Masterson & Rucks, of Angleton, for appellees.

McMEANS, J. W. C. Abbott and Milton Kennedy, cattle brokers, brought this suit against Norman F. Thomas to recover \$300

as commission for the sale of 300 cattle belonging to defendant, alleging in their petition that defendant had contracted to pay them \$1 per head for finding a purchaser for that number of cattle, and that they had found such a purchaser to whom the defendant had made sale.

The defendant denied making such contract, but claimed that he, having that number of steers for sale at the price of \$35 per head, agreed to pay Abbott \$1 per head, provided Abbott could find a purchaser who would pay \$36 per head.

The case was submitted by the court to a jury upon a charge against which no valid complaint is made, and resulted in a verdict for plaintiffs for the amount sued for, upon which a judgment in their favor for such an amount was accordingly entered.

The effect of all of the appellant's assignments is that the verdict and judgment are contrary to the facts proved or against the overwhelming weight and preponderance of the testimony.

We have examined the evidence closely, and find that the plaintiffs introduced testimony which, if believed by the jury, justified them in returning a verdict for the plaintiffs. On the other hand, the defendant introduced testimony which, if believed by the jury, would have justified them in finding that no such contract as alleged by plaintiffs had been made.

It was the peculiar province of the jury to settle such conflict in the evidence, and, having settled it in favor of plaintiffs, this court in such case has no power to substitute its judgment as to the weight of the testimony for that of the jury. In such circumstances it becomes the duty of this court to affirm the judgment of the court below, and it has accordingly so been affirmed.

Affirmed.

TEXAS CITY TERMINAL CO. v. PETITFILS. (No. 7006.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 11, 1915. Rehearing Denied
Jan. 6, 1916.)

1. PLEADING §290—ADMISSION BY FAILURE TO DENY UNDER OATH IN REPLY.

In an action against a railroad for injuries to a passenger on its car, where the defendant pleaded that plaintiff was guilty of contributory negligence in standing in the aisle, which plea was not denied under oath, the action of the court in refusing to instruct a verdict for defendant was proper; it being unnecessary for a plaintiff to traverse allegations in the answer which are the mere converse of those in the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. § 290.]

2. NEW TRIAL §96—GROUNDS—ABSENCE OF WITNESSES.

Where motion for new trial was made by defendant for its inability to obtain the testimony of witnesses summoned by plaintiff, but who were not called by him, and who, when informed by plaintiff, at the close of his evidence

at about 10 o'clock in the morning, without knowledge that their further attendance was desired by defendant, that they were excused, left the courtroom, with defendant's knowledge, which failed to ask process for their return, though the witnesses, were within one hour's drive by automobile, while defendant did not conclude its evidence until 3 o'clock in the afternoon, and asked no continuance, postponement, or delay of the trial in order to obtain the testimony, the motion was properly denied.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 172, 180-194; Dec. Dig. ¶ 98.]

3. TRIAL ¶ 133—ARGUMENT OF COUNSEL.

In a personal injury case against a railroad, where the improper, but not inflammatory, language of plaintiff's counsel in his address to the jury was immediately withdrawn by him upon objection while the court, on his request, instructed the jury to disregard it, in the absence of anything in the size of the verdict or the record to indicate that the remarks had any effect on the jury to influence them to find for plaintiff, or to award larger damages, there was no error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. ¶ 133.]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by A. F. Pettifils against the Texas City Terminal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Armstrong and Eugene A. Willson, both of Galveston, for appellant. Frank S. Anderson and Aubrey Fuller, both of Galveston, for appellee.

PLEASANTS, O. J. A. F. Pettifils brought this suit against the Texas City Terminal Company, which owns and operates a railroad between Texas City and Texas City Junction for the carriage of passengers for hire, to recover damages for personal injuries sustained by him while a passenger on defendant's passenger car, due to the alleged negligence of defendant in operating its car whereby the car upon which he was a passenger, while moving at a high rate of speed, ran off the main track through a switch onto a side track and came into collision with a car there standing. The negligence charged is that the switch connecting the side track with the main track was negligently left open so as to cause the passenger car to pass from the main track into the switch, thereby colliding with a car standing on the side track, and that the motorman driving the passenger car negligently failed to observe the open switch, as it was his duty to do, and as he might have done by the exercise of reasonable diligence. The plaintiff alleged that at the time he entered the passenger car, and at the time of the accident, he was compelled to, and did, stand in the aisle of the car, being unable to obtain a seat on account of the crowded condition thereof.

The defendant answered, pleading among other defenses that plaintiff was standing in the aisle of the car without any necessity therefor, and that in so doing he was guilty of negligence which contributed to his inju-

ries. This charge of contributory negligence was not specifically denied by any pleading thereafter filed by the plaintiff.

The case was tried before a jury, and resulted in a verdict and judgment for plaintiff for \$500, from which the defendant has appealed.

[1] By its first assignment of error appellant complains of the refusal of the court to sustain its motion for a new trial upon the ground that, appellant having pleaded that the appellee was guilty of contributory negligence in standing in the aisle of the car, and this plea not having been denied under oath, the court should have instructed a verdict in its favor, and erred in refusing to give its first special charge which contained such an instruction. This case was tried before the repeal by the last Legislature of the law requiring pleadings to be under oath, and providing, in substance, that any defensive plea duly sworn to, not denied under oath, should be taken as confessed. A similar question was presented in the case of *Railway v. Pennington*, 163 S. W. 467, and decided adversely to the contention here made; and, in overruling the assignment, we shall content ourselves by referring to the reasoning there made, which applies with peculiar force under the facts of this case. See, also, *Denison Cotton Mills v. McAmis*, 176 S. W. 621; *Railway v. Tomlinson*, 169 S. W. 217; *Tablet Bros. Co. v. Higginbotham*, 170 S. W. 118.

[2] The fourth assignment complains of the refusal of the court to grant appellant's motion for a new trial on account of its inability to obtain upon the trial the testimony of two witnesses, Capt. Heintzelman and Lieut. Blackford, both of whom were United States Army officers stationed at Texas City. These witnesses had been summoned by the appellee, but were not placed upon the stand by him, and when he concluded the introduction of his evidence he informed said witnesses that he would not need their testimony, and, being told by them that they had not been summoned by the appellant, he excused them from further attendance upon the trial, and they immediately left for their headquarters at Texas City. This was about 10 o'clock in the morning, and the appellant was apprised about that time that they had been excused and had left the courtroom. Appellant did not conclude the introduction of its evidence until 3 o'clock that afternoon. Texas City was only about one hour's drive by automobile from Galveston, and the round trip could have been made in about two hours, but, notwithstanding this the appellant asked for no process to secure the return of these witnesses, nor did it ask for a continuance, postponement, or delay of the trial in order to obtain their testimony. When appellee excused the witnesses from further attendance he did so without knowl-

edge that their further attendance was desired by appellant or that their testimony was material to the appellant's defense.

We think that under the foregoing facts the court properly refused to grant a new trial upon the ground urged in the assignment.

[3] The language used by appellee's counsel in his address to the jury, while improper, was not inflammatory, and was immediately withdrawn by him upon objection being made thereto by the appellant. In addition to this, the court instructed the jury to disregard the remarks objected to, which the counsel also requested the jury to do. There is nothing in the size of the verdict or anything in the record to indicate that the remarks had any effect upon the jury, either in their finding in his favor or in fixing the amount of their award. The second assignment, which raises the point, is overruled.

The remaining assignment complains that the verdict is excessive. We have carefully read the evidence, and find therefrom that the verdict was warranted thereby, or at least was not so excessive as to justify this court in substituting its judgment for the judgment of the jury as to the extent of plaintiff's injuries and as to the sum of money that would properly compensate him therefor. The assignment is overruled.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

GALVESTON, H. & S. A. RY. CO. v. WALLRAVEN. (No. 6837.)

(Court of Civil Appeals of Texas. Galveston. Nov. 2, 1915. Rehearing Denied Nov. 24, 1915.)

1. LIMITATION OF ACTIONS — 185 — PLEADING — DEFENSES — DENIAL.

Under Rev. St. 1911, art. 1829, providing that if any special defense is pleaded, the plaintiff shall be required to answer, and that any fact so pleaded which is not denied shall be taken as confessed, plaintiff, in an action against a carrier for damages to household goods, whose petition fixed the date of the accrual of her cause of action within two years next preceding the filing of her suit, was not required to repeat such allegation by a special denial of defendant's plea of the two-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 694; Dec. Dig. ¶ 185.]

2. CARRIERS — 136 — DELAY IN DELIVERY — QUESTION FOR JURY.

Evidence, in an action for damages to household goods and wearing apparel, held to make defendant's negligence in not delivering the goods to plaintiff after their arrival at destination a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 478, 596-598; Dec. Dig. ¶ 136.]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by Willie Wallraven against the Galveston, Harrisburg & San Antonio Rail-

way Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 160 S. W. 116.

Baker, Botts, Parker & Garwood, of Houston, and W. T. Armstrong and Barret Gibson, both of Galveston, for appellant. Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellee.

LANE, J. [1] During the preceding term of this court we sustained appellant's first assignment, and reversed the judgment of the lower court in favor of appellee, and rendered judgment for the appellant. The substance of said assignment is that, as appellant, defendant in the trial court, had pleaded in its answer, which was sworn to, that the cause of action declared upon by appellee had accrued more than two years prior to the institution of the suit, and was therefore barred by the two-year statute of limitation, and as appellee had not, as required by law, specifically denied such special defense, the court erred in not instructing a verdict in its favor. At the preceding term of this court appellee filed her motion for a rehearing. Upon further consideration of the case upon said motion we concluded we were in error in our holding, and granted said motion and set aside the judgment so rendered. Upon further consideration we find that appellee's petition clearly fixes the date of the accrual of her cause of action within two years next preceding the filing of her suit, and that, having so done, she was not required to repeat such allegation by special denial of appellant's plea of limitation, and we therefore overrule appellant's first assignment of error. Word v. Bank, 170 S. W. at page 846; Railway Co. v. Pennington, 166 S. W. 467; Memphis Cotton Oil Co. v. Tolbert, 171 S. W. at page 311.

[2] Appellant's second assignment is as follows:

"Because the plaintiff failed, by the evidence introduced by her and in her behalf, to sustain the allegations of paragraph 2 of her first amended original petition, alleging that plaintiff 'delivered, and caused to be delivered, to the defendant's station and freight agent at the said town of San Leon certain personal property, to be shipped by defendant railway company for this reason: That the plaintiff wholly failed to prove that such freight was delivered to any person bearing the relation of agent to the defendant for the purpose of receiving or shipping such freight, or in any wise binding the defendant by any act as an agent for such purpose.'"

There was no evidence showing that appellant railway company had a freight agent, or other agent authorized to receive appellee's household goods, or that she delivered the same to any such agent at San Leon, as alleged, but on the contrary, the undisputed evidence shows that appellant had no such agent at San Leon to whom appellee could or did deliver her property. Had the allegation mentioned been the only allegation which would have entitled appellee to recover for

her property placed in charge of appellant, no recovery could be had under the proof made. But we find that in the nineteenth section of appellee's petition it is alleged:

"After same [the household goods named] were delivered to defendant by plaintiff, defendant's further negligence and delay in failing to promptly deliver said goods to her within a reasonable time after said goods had reached Galveston was the proximate cause of said injuries, damages, and losses by plaintiff."

The undisputed evidence shows that appellant railway company did take possession of said goods, and did transport them to Galveston; and there was ample testimony that after the goods were transported to Galveston they were permitted by appellant to remain in its depot for six or more days before appellee was advised of their arrival, although she had repeatedly made inquiry for them, to support a finding that appellant was negligent in not delivering said goods to appellee after their arrival in Galveston. Whether this testimony was true or false was for the jury, and it found against appellant on that issue. We therefore overrule appellant's second assignment.

What we have said with reference to appellant's second assignment will also apply to its third assignment. We, therefore, for the same reasons given for overruling the second assignment, overrule the third assignment. What has been said disposes of all of appellant's assignments.

While in every judicial investigation the discovery of the truth and justice should be the aim and desire of the courts, and if this discovery can be had, the paramount effort of the court should be to see that justice is done to all parties to the suit, and while there may be errors committed in the trial of this case which, had they been presented for review, would have caused a reversal of the judgment rendered, we are not at liberty to consider them in the state of this record, and as no such error in the trial of this cause has been presented to us as should cause a reversal of the judgment rendered by the trial court, the same is affirmed.

Affirmed.

MAGILL et al. v. McCAMLEY.
(No. 7026.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 23, 1915. Rehearing Denied
Jan. 20, 1916.)

1. PLEADING — CONCLUSIONS.

The answer to a suit on a note that defendants were merely accommodation makers, and that the note was signed by them for the sole accommodation of the payee, was bad as merely stating the pleader's conclusions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.]

2. BILLS AND NOTES — ACCOMMODATION — INDOSEMENT — CONSIDERATION — ANSWER — SUFFICIENCY.

It is no defense to a suit on a note given by the principal maker in payment of an account due to plaintiff that defendants signed

without consideration at plaintiff payee's request upon his statement that he was hard pressed for money and that if they would sign the note he could sell it to P. and get money on it, since the extension of the time of payment of the due account by the execution of the note was sufficient consideration therefor, and no intention to excuse defendants from liability thereon is inferable from the facts pleaded.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.]

Appeal from District Court, Matagorda County; Saml. J. Styles, Judge.

Action by W. L. McCamley against G. M. Magill and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Gaines & Corbett, of Bay City, for appellants. Linn & Austin, of Bay City, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the Burton D. Hurd Land Company, Burton D. Hurd, F. H. Jones, and C. M. Magill, to recover the principal, interest, and attorney's fees due upon a note for \$2,894.25 executed by defendants and payable to appellee.

The defendants Magill and Jones, in their first amended original answer, pleaded specifically as follows:

"Now come the defendants, C. M. Magill and F. H. Jones, and, leave of the court first had and obtained for such purpose, file this their first amended original answer herein, and demurring generally to plaintiff's original petition filed herein, say that the same is insufficient to entitle the plaintiff to the relief prayed for, or to any relief whatsoever, and of this the judgment of the court is prayed.

"(1) And for answer herein, if any there need be, these defendants, in a purely formal way, deny each and every, all and singular, the allegations in said original petition contained, and will demand strict proof thereof.

"(2) Specially answering said petition, and particularly the first paragraph thereof, these defendants say that they admit that they signed the promissory note for \$2,894.25, but deny that they or either of them are in any manner liable thereon, because they say that, in so far as these defendants and each of them are concerned, they and each of them were merely accommodation makers of said note, and that said note was signed by them and each of them for the sole accommodation of the payee therein, who is still the legal holder thereof, as is shown by plaintiff's original petition filed herein.

"(3) Further specially answering paragraph 1 of said original petition, these defendants and each of them say that no beneficial consideration or thing of value moved to either of these defendants, or the Burton D. Hurd Land Company, or Burton D. Hurd individually, for the execution and delivery of said note, and long prior thereto the Burton D. Hurd Land Company, the principal maker of said note, was indebted to either W. L. McCamley, Wm. E. Austin & Co., or the Wm. E. Austin Abstract Company (these defendants being unable, because of the confusion in the contentions of the plaintiff herein, to determine to which of the three foregoing named persons or corporations said debt was due) for certain abstract work covering a long period of time, and all of which abstract work was done for the sole and exclusive use of the Burton D. Hurd Land Company; that the said McCamley, at the time of

the execution and delivery of said note sued upon, approached the defendant G. M. Magill and stated to the said G. M. Magill that if the said Magill, Jones, and Hurd would sign the note for the amount due by the said Burton D. Hurd Land Company, along with the said Burton D. Hurd Land Company, the plaintiff could and would negotiate and sell said note to A. B. Pierce, of Blessing, Tex., stating that he was hard pressed for money, and that if the said Magill, along with the others, would sign said note, he could sell the note to A. B. Pierce and get money therefor, and that such execution and delivery of said note by the said G. M. Magill, Jones, and Hurd, for such purpose, would be an accommodation to the plaintiff; that upon such state of facts, upon such request, and for such purpose, the said Magill signed, and likewise the said Jones and Hurd signed along with the said Burton D. Hurd Land Company for the purposes and under the state of facts just above set out.

"(4) That, as a matter of fact, the said plaintiff never did offer such note to the said A. B. Pierce for purchase, and never did seek to sell said note so signed to A. B. Pierce, which is the note sued upon in this cause.

"(5) That if the said McCamley had, as he had agreed to do, offered such note to A. B. Pierce, for purchase, these defendants charge, on information and belief, that A. B. Pierce would have purchased said note for money.

"(6) That if the said Pierce had acquired said note, as it was intended by the parties, plaintiff and defendants, that he should, these defendants say upon information and belief that the said A. B. Pierce would have collected said note out of equities, rights, or interest then in his hands belonging to the said Burton D. Hurd Land Company, or out of assets, equities, rights, and interest afterwards coming into his hands, and that said note would have been paid off, satisfied, and discharged."

The plaintiff filed a second supplemental petition and directed special exceptions to paragraphs 2, 3, 5, and 6 of defendants' amended answer, and the court sustained the exceptions to paragraphs 2 and 3 of defendants' amended answer.

The answer of the remaining defendants, who have not appealed from the judgment of the trial court, need not be noticed.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff against all of the defendants for the amount due upon the note.

Under appropriate assignments of error, the appellants assail the judgment on the ground that the trial court erred in sustaining plaintiff's special exceptions to paragraphs 2 and 3 of defendants' answer.

The special exceptions sustained by the court were as follows:

"And specially demurring to paragraph No. 2 of said answer, he says that the same is insufficient because it states merely a conclusion of the pleader and does not set out any facts that would create an accommodation maker of the note of the defendants.

"And specially demurring to paragraph No. 3 of said answer, he says same is wholly insufficient because it fails to show any defense or that these defendants were not beneficiaries of said note and the extension of the debt thereby granted, and because it fails to show or allege that the plaintiff was in any way obligated to pay off or discharge said note, or that he incurred any liability thereon whatever at any time."

[1] We do not think the court erred in sustaining these exceptions. Paragraph 2 of the answer states no facts upon which the conclusion that appellants were merely accommodation makers of the note, and not liable to plaintiff thereon, can be based, and it is elementary that an allegation or averment of a legal conclusion, when no facts are stated from which such conclusion can be drawn, is insufficient pleading.

[2] The facts averred in paragraph 3 of the answer show that the note sued on was executed for an amount then due by the land company. The note was payable 12 months after date, and its execution necessarily extended the time of payment of the then due account. This was a sufficient consideration for the note. The fact that the plaintiff stated to these appellants, before they executed the note, that he was hard pressed for money and that if they would sign the note with the other defendants he could sell it to Mr. Pierce and "get money thereon," and that it would be an accommodation to him if appellants would execute the note, and that appellants signed the note upon this state of facts, present no defense to plaintiff's suit. It cannot be inferred from these facts that either plaintiff or appellants understood or intended that appellants would not be held liable on the note. Certainly there was no agreement, expressed or implied, on plaintiff's part, to protect appellants against the liability incurred by them by signing a note for a debt due by their comakers, and they cannot upon the facts stated claim to be relieved of their contract undertaking to pay plaintiff the amount due upon the note.

In *Parker v. Lewis*, 39 Tex. 395, cited by appellants, there was an agreement by the payee of a bill of exchange with the drawee that, if the latter would accept the bill so as to enable the payee to raise the money thereon, he, the payee would protect the drawee against any liability thereon.

A similar state of facts existed in the case of *Bank & Trust Co. v. Ford*, 152 S. W. 704, also cited by appellants. The facts of these cases easily distinguish them from the instant case.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

HOUSTON & B. V. RY. CO. v. HUGHES.
(No. 7209.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 14, 1915. Rehearing Denied
Jan. 18, 1916.)

1. APPEAL AND ERROR 920—PRESUMPTION
FAVORING COURT BELOW.

Assignments of error that the appointment of a receiver for defendant corporation was erroneous because no grounds therefor were stated in plaintiff's petition, and that the petition

upon which the order appointing a receiver was granted stated no cause of action against defendant, were equivalent to a general demurrer, when urged in a trial court, and required the appellate court to indulge all reasonable inferences in favor of the sufficiency of the petition to sustain the appointment of the receiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.]

2. RAILROADS § 205—RECEIVER—PROPRIETY OF APPOINTMENT—STATUTE.

Where a bondholder of an insolvent railroad corporation sued it, alleging waste and mismanagement and asking the appointment of a receiver, the petition, by its express allegations, showing that a suit on the bonds and for foreclosure would be premature, as the road had committed no default in the performance of the conditions of the mortgage constituting the contract between the parties, the appointment of a receiver was improper, although Rev. St. 1911, art. 2128, provides that receivers may be appointed in cases where a corporation is insolvent, since insolvency alone does not justify the appointment of a receiver, which is an ancillary remedy, while the instant suit was primarily for such purpose.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 673-675; Dec. Dig. § 205.]

3. APPEAL AND ERROR § 781—DISMISSAL—MOOT QUESTION.

The appeal of a railroad, for which, at the instance of its bondholder, a receiver has been appointed, from the order of appointment, will not be dismissed as moot on the ground that the subject-matter of controversy has ceased to exist, because, subsequent to the appointment, a second receiver for the property is appointed by a United States court, and the road does not appeal from such second appointment, apparently acquiescing therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 8122; Dec. Dig. § 781.]

Appeal from District Court, Brazoria County; Samuel J. Styles, Judge.

Suit by Ed. S. Hughes against the Houston & Brazos Valley Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

A. E. Masterson, of Angleton, W. T. Andrews, of Stamford, and Andrews, Streetman, Burns & Logue, of Houston, for appellant. A. R. Rucks, of Angleton, S. P. Hardwicke, of Abilene, and Theodore Mack, of Ft. Worth, for appellee.

McMEANS, J. On October 27, 1915, Ed. S. Hughes brought this suit against the Houston & Brazos Valley Railway Company, praying for the immediate appointment of a receiver to take charge of all the properties, rights, and franchises of appellant, and his petition was presented to the honorable judge of the district court of Brazoria county in chambers and in vacation. On the same date, and upon ex parte hearing without notice to the defendant, the judge made an order in said cause appointing H. O. Wooten receiver of the defendant and all its properties, rights, and franchises of every kind, character, and description, directing that all persons in possession of any property of de-

fendant should forthwith deliver the same to the receiver, and restraining all persons from interfering with the possession and use thereof, or with the taking possession of said properties. From this order and judgment, the defendant has appealed.

The appellant in its brief has undertaken to set out the substance of the material allegations in the plaintiff's petition, as well as the exhibits attached to and made a part thereof, and, as this seems to have been correctly done, and as no objection thereto is urged by plaintiff, we adopt the same as our statement of the material allegations of the petition.

(1) The first paragraph merely alleges the residence of the parties. The second paragraph alleges that appellee is the owner of 205 of the first mortgage bonds of appellant of the denomination and par value of \$1,000 each, dated July 1, 1907, payable July 1, 1937, with interest at the rate of 5 per cent. per annum, interest payable semiannually on the 1st day of July and on the 1st day of January of each year, that said bonds are of the aggregate value of \$205,000, and that to secure and insure the payment thereof the defendant on July 1, 1907, made, executed, and delivered to Mercantile Trust Company of St. Louis, Mo., as trustee, its deed of trust mortgage upon all of the properties, rights, and franchises of the defendant railway company of every kind, character, and description whatsoever and wheresoever situated. The paragraph further describes said properties more in detail, and the petition refers to the said deed of trust mortgage and incorporates it in the petition. This exhibit is attached to the petition, and will be more particularly referred to in this statement.

(2) The third paragraph of plaintiff's petition alleges that the bonds are secured by first mortgage lien notes upon the properties of defendant, and that the payment of the bonds and the interest thereon is dependent upon the earnings and upon the successful operation and maintenance of the railroad and its properties.

(3) The fourth paragraph of the plaintiff's petition alleges that defendant is insolvent, that its present earnings are not sufficient to pay its operating expenses, and that for the past year or more the operating expenses have exceeded its earnings from \$800 to \$1,500 per month, and that plaintiff fears:

"That, if the operation is permitted to be continued by the defendant railway company under its present management, the expenses will continue to exceed the earnings."

(4) The same paragraph of plaintiff's petition further alleges that the alleged insolvent condition of defendant is due to the extravagance and mismanagement in the operation of the same, in that it has an excessive number of employes and pays excessive prices for its supplies and materials, and purchases inferior material and uses a great portion of its

earnings for the construction of additional facilities not justified by the traffic, in that said facilities are more than ample to take care of the traffic that may be reasonably expected for several years.

(5) The fifth paragraph of plaintiff's petition alleges that defendant has borrowed from time to time large sums of money to meet and pay obligations incurred by it by reason of its extravagance and mismanagement, and that it is indebted for moneys borrowed and advanced to it and material furnished to it, and is without funds with which to pay the same; that said indebtedness is increasing, and defendant cannot now secure further loans and advances to pay the current operating expenses; that the persons who have heretofore been making advances and loans to defendant have advised plaintiff that they will not continue to do so.

(6) The sixth paragraph of plaintiff's petition reads as follows:

"Plaintiff alleges that he fears, and has reason to believe, that if the properties of said railway company are permitted to remain in the control and operation of its present management that it will be so mismanaged and so extravagantly operated, and not having funds with which to meet same, as hereinbefore alleged, that large debts will accumulate against the properties of said railway company, including debts for wages and personal services, material furnished, and accounts of other railroads accumulate against it, all of which will create a prior lien upon the properties of said railway company, and will accumulate to such an amount as to materially injure, if not totally destroy, the value of plaintiff's bonds; that said railway company has not heretofore, and is not now, making any effort whatever, on account of the mismanagement and extravagance of the operation thereof, to pay, and has been unable to pay, the interest out of the earnings of said road on said bonds, and has not and is unable to create any sinking fund with which to eventually redeem said outstanding bonds when same mature, and, if they are permitted to continue to manage and operate same, that no provision will or can be made for the payment of said interest, or create a sinking fund for the ultimate redemption of said bonds at maturity, and that, therefore, by reason of the facts herein alleged, unless a receivership is granted herein and the properties of said railway company taken out of the hands of the present management, that plaintiff will suffer irreparable injury; that plaintiff has no adequate remedy at law."

(7) The seventh paragraph of plaintiff's petition reads as follows:

"And in this behalf plaintiff further shows to the court that it is necessary and imperative that your honor immediately appoint a receiver to take charge of and operate the properties of the defendant railway company, to prevent the present management from contracting for further additional and unnecessary materials, and thereby further increasing the indebtedness of said company, and impairing and injuring the properties of said company as security to plaintiff's bonds, and for the further reason that the persons owning the balance of the first mortgage bonds of said company, to wit, \$215,000, and upon which default has been made in the payment of the interest due thereon, are nonresidents of the state of Texas, and are threatening to immediately file a petition in another jurisdiction asking that the properties of the defendant company be placed in the hands of a receiver, and in this behalf plaintiff shows that

all of the properties of the defendant railway company are located in Brazoria county, Tex., that the greatest number of creditors of said company reside in Brazoria county, Tex., and that the management and operation of the defendant railway company can be best, most conveniently, and most economically managed and operated by and under the order of this court."

(8) The eighth paragraph of plaintiff's petition alleges that defendant railway company, by reason of the matter set forth in said petition, as above referred to, "became, and is now, indebted to and liable to plaintiff in the sum of \$205,000, together with interest thereon from and since the 1st day of July, 1915." The plaintiff does not in this or any other paragraph of the petition allege any default by defendant, or any demand by plaintiff and refusal by defendant, or that any sum of the principal or interest is past due.

(9) The prayer of plaintiff is that the court immediately appoint a receiver and authorize him to take charge of all of the properties of defendant and operate the same under the orders of the court, to the end that they may be preserved, saved from injury and loss, and operated in such manner as to earn sufficient moneys to pay the expense of said defendant, including interest on plaintiff's bonds, as it will mature, and to create a sinking fund to redeem the bonds at maturity; the order to be perpetuated to such end. This is the primary prayer of the petition.

(10) The plaintiff makes an alternative prayer that, in the event the properties of defendant do not earn sufficient funds to pay the operating expenses and to meet and pay the obligations of said defendant, on final hearing in the cause plaintiff have judgment for \$205,000, with interest thereon from July 1, 1915, at 5 per cent. per annum, together with foreclosure of his mortgage lien and order of sale and general and special relief.

(11) As above stated, the mortgage is incorporated in plaintiff's petition, and the parts thereof which are material in this proceeding are shown herewith. The mortgage contains a substantial copy of the form of bond, and it shows the following provisions:

"For a description of the mortgaged property, the nature and extent of the security, the rights of the holders of bonds, and the terms and conditions on which the bonds are issued and secured, reference may be had to said mortgage and deed of trust."

(12) After the description of the property conveyed in the granting clause, the trust of the conveyance is expressed as follows:

"But in trust, nevertheless, for the equal pro rata benefit and security of all the holders of the first mortgage bonds issued or to be issued under this indenture, without preference or priority of any bond over any other, or the coupons thereto belonging, by reason of priority in the time of issue and negotiation thereof, or otherwise, howsoever, and for enforcing the payment of the principal and interest thereof according to their tenor, with the power and au-

thority, and subject to the agreements, covenants, provisos, and conditions hereinafter expressed and declared."

(13) Of the succeeding covenants of the mortgage only the fourth, fifth, sixth, ninth, thirteenth, and fifteenth have any bearing upon the questions involved in this case. The fourth paragraph specifically provides that the railway company shall be entitled to retain possession of the premises until the events of default thereafter described shall occur, and reads as follows:

"Fourth. Until the happening of one or more of the events hereinafter specified and termed the events of default, the railway company, its successors and assigns, shall be entitled to retain possession of the mortgaged premises, and to operate and use the same and receive and enjoy the earnings, income, and profits thereof."

(14) The fifth paragraph contains the description of all of the events of default named in the mortgage, and we give them by quoting the paragraph as follows:

"Fifth. If one or more of the following events, hereinafter called the events of default, shall happen, that is to say: (a) Default shall be made in the payment of any installment of interest of the first mortgage bonds when and as the same shall become payable as therein and herein expressed, and such default shall continue for the space of 30 days, or default shall be made in the payment of the principal of any of said bonds, when the same shall become due and payable by their terms, or by declaration, or otherwise; (b) default shall be made by the railway company in the observance or performance of any other of the covenants, conditions, and agreements in the first mortgage bonds, or in this indenture expressed, and the railway company shall not remedy such default within three months after written notice stating such default, and requiring the railway company to comply with such covenant or condition, shall have been served upon the railway company by the trustee—then and in any of such events the trustee, personally or by its attorneys or agents, may, in its discretion, enter into and upon all and singular the mortgaged premises and each and every part thereof, and shall until the same be sold, or surrendered to the railway company, its successors or assigns, as hereinafter provided, possess, use, manage, and operate the same."

The covenants and agreements of the railway company are shown in paragraph 13 of the mortgage, and are described hereinafter.

(15) The following constitutes all of the material part of the sixth paragraph:

"Sixth. If one or more of the events of default shall happen, the trustee, upon requisition of the owners of a majority in amount of the first mortgage bonds then outstanding, shall declare the principal of all the first mortgage bonds, unless already due, to be forthwith due and payable, without notice to the railway company, anything in said bonds or herein contained to the contrary notwithstanding. Such requisition may be evidenced by an instrument in writing, duly signed and acknowledged by persons proved to the reasonable satisfaction of the trustee to be the owners of a majority in amount of the first mortgage bonds then outstanding, or by their representatives duly authorized in writing. Such proof may be made by affidavit."

(16) The thirteenth paragraph contains the specific covenants of the railway company, the first of which is to pay the in-

terest and principal upon the bonds; the second to pay taxes, assessments, and governmental charges, unless it shall in good faith contest the validity thereof; the third is a covenant that it will not create or suffer to be created any lien or charge upon the mortgaged premises prior to the lien of this indenture, "or do any act or thing whereby the lien or security hereof may be impaired"; the fourth is a covenant that the railway company will properly maintain the mortgaged premises, renewing and replacing the same as may be necessary, preserve the franchises, and keep the buildings adequately insured against loss by fire; the fifth covenant provides that the company will execute such further deeds and conveyances as may be required by the trustee; and the sixth covenant provides that it will indemnify and save harmless the trustee from loss occasioned by the execution of the trust, and not caused by the personal misconduct of the trustee.

(17) The fifteenth paragraph of the mortgage is as follows:

"Fifteenth. No holder of the first mortgage bonds or coupons shall have the right to institute any suit, action, or proceeding, at law or in equity, upon or in respect of this indenture, or for the execution of any power or trust hereof, or for the appointment of a receiver, or for any other remedy under or upon this indenture, unless such holder shall previously have given to the trustee written notice of some existing default and of the continuance thereof as hereinbefore provided; nor unless also the holders of a majority in amount of the first mortgage bonds then outstanding shall have made written request upon the trustee, and shall have afforded to the trustee reasonable opportunity to proceed itself to exercise the powers hereinbefore granted or to institute such action, suit, or proceedings in its own name after such right of action shall have accrued to the trustee, nor unless also such holder or holders shall have offered to the trustee adequate security and indemnity against the costs, expenses, and liabilities to be incurred in or by reason of such action, suit, or proceeding; and such notification, request, and offer of indemnity are hereby declared in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, and to any action or cause of action for foreclosure or for the appointment of a receiver, or for other remedy hereunder; it being intended that no one or more holders of the first mortgage bonds or of the coupons pertaining thereto shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all the holders of such outstanding bonds and coupons; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to affect any discretion or power by any provisions of this indenture given to the trustee to determine whether or not the trustee shall take action in respect of any default without such notice or request from bondholders, or to affect any other discretion or power given to the trustee. No delay or omission of the trustee or of any holder of the first mortgage bonds to exercise any right or power accruing upon any default shall impair any such

right or power or shall be construed to be a waiver of and such default or acquiescence therein, and every power and remedy given by this indenture to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient by the trustee or by the bondholders."

[1] The appellant's first assignment of error complains that the appointment of the receiver was erroneous for the reason that no legal or equitable grounds therefor are stated in the appellee's petition which would justify the appointment of a receiver; and the second assignment asserts that the petition upon which the order appointing a receiver was granted stated no cause of action against appellant. These assignments are equivalent to a general demurrer when urged in a trial court, and require us to indulge all reasonable intendments in favor of the sufficiency of the petition to sustain the action of the court in appointing the receiver, wresting the property of the appellant from the control of its owner and placing it in the possession of another. If, indulging such intendments, it can be held that the petition states a cause of action, then the assignments must be overruled; if not, then the order appointing a receiver must be reversed and vacated, and the receiver discharged.

[2] Looking to the allegations of the petition, and construing the same most favorably to the pleader, we are of the opinion that the pleading sufficiently charges that the Houston & Brazos Valley Railway Company was insolvent, or in imminent danger of insolvency, at the time the petition was exhibited. Article 2128, Revised Statutes 1911, provides that receivers may be appointed "in cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency. * * *" But does insolvency of a corporation alone justify the appointment of a receiver? This question has been answered negatively by the Ft. Worth Court of Civil Appeals in *Espuela Land, etc., Co. v. Bindle*, 5 Tex. Civ. App. 18, 23 S. W. 819, where a similar question was presented. In that case Justice Stephens, speaking for the court, said:

"While it is not very clear to us that the fact of insolvency was established, we are of opinion that we would not be warranted in disturbing the finding on that issue. The question then arises: Can a stockholder or lien creditor of an insolvent corporation which is still a going concern have a receiver appointed to take charge of the entire assets, and convert the same into money for general distribution, on the sole ground of insolvency? * * * The answer to this question involves a construction of article 1461 of our Revised Statutes (now article 2128), which provides, in substance, that any judge of a court of competent jurisdiction may appoint a receiver in case where a corporation is insolvent. This question has never been * * * adjudicated in this state, that we are aware of. Statutes of identical import with ours have been construed by the Supreme Courts of California and Indiana; but the decisions seem to be directly in conflict. *French Bank Case*, 53 Cal. 495; *Bank v. Tile Co.* [105 Ind. 227] 4 N. E. 351.

In the former case it is said: 'There is, of course, no such thing as an action brought distinctively for the appointment of a receiver; such an appointment, when made, is ancillary to or in aid of the action brought.' It was there held that the statute providing for the appointment of a receiver where a corporation becomes insolvent, in the absence of a more explicit legislation, did not 'confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it was insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver.' In the latter case the opposite conclusion seems to have been reached. * * * We see nothing in our statute to indicate that the Legislature intended thereby to so change the whole scope of receiverships as to convert a merely auxiliary proceeding into a primary object of litigation. * * * Unless the statute providing for the appointment of a receiver enabled appellees to sue where they would otherwise have had no cause of action, the appointment should have been denied. As already seen, we cannot give the statute such a construction. Until a plaintiff has a cause of action of some sort—until he can show himself entitled to recover something—he is not in an attitude to appropriate any of the merely ancillary remedies of the courts."

The same principle, viz., that insolvency alone is no ground for the appointment of a receiver of a corporation, is recognized in *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211, where it is said:

"Mere insolvency of a corporation in equity is no ground for the appointment of a receiver (5 Pom. Eq. § 116), though by our statute in general terms it seems to have been made so."

In the case last referred to a suit was filed by the plaintiff against the Jacksboro Stone Company, a corporation, and certain private individuals, to recover judgment upon a promissory note then due, and to foreclose a mortgage upon property of the corporation which had then matured. Afterwards certain of its creditors intervened and prayed for the appointment of a receiver. They set up no cause of action against the corporation in their intervention, and asked for no judgment against it, but sought, as a primary object, the appointment of a receiver; and it was upon their petition that the receiver was appointed. It was upon this state of facts that the language quoted was used.

We do not wish to be understood as holding that the insolvency of a corporation is not a ground for the appointment of a receiver, for such holding would be directly contrary to the provisions of the statute above quoted; but what we think that the cases referred to hold, and what we mean to hold, is that a receiver should not be appointed on the ground of insolvency unless the plaintiff shall by his suit seek the recovery of a judgment of some kind against the insolvent corporation and pray for the appointment of a receiver as a purely ancillary remedy. In no case ought a receiver to be appointed on the ground of insolvency of a going concern, as the primary and sole object sought to be effected by the suit.

It will be observed by referring to the material allegations of plaintiff's petition as above set out that plaintiff alleged no default in the payment of the mortgage indebtedness according to contract; it alleges no default in the performance of the conditions of the mortgage constituting the contract between the parties; it does not allege that there is any present impairment in the security given to secure the payment of the bonds held by plaintiff; it does not allege that there would be any impairment in the future by a continuation of the alleged mismanagement which had theretofore prevailed according to the allegations of the petition. The petition contains in full the contract of the mortgage to which plaintiff, as a holder of bonds, is subject, and this mortgage provides in paragraph 4 that the appellant shall be entitled to the enjoyment and possession of the mortgaged properties so long as it is not in default in the performance of the covenants of the mortgage. The events of default are set forth in said contract and in the petition, and there is no allegation in any part of the petition to the effect that any of said events of default have occurred, or that the covenants of appellant have not been performed. The petition charges appellant with no fraud, and does not charge the trustee with any fraud or neglect. It shows on its face that, before it can proceed with an action, it must first request the trustee to act, but the petition does not allege that any such request has been made on the trustee, or that the trustee has refused to act to the complete protection of the appellee. It shows further that all interest due upon appellee's bonds has been paid to him as it accrued, and that the bonds do not mature until 1937. It is true that appellee in the alternative prayed that, in the event the properties of defendant do not earn sufficient funds to pay the operating expenses and to meet and pay the obligations of appellant, on final hearing he have judgment for the amount of his bonds, with interest and foreclosure of his mortgage lien, etc.; but, whatever his ultimate rights may be, the petition by its express allegations shows that a present suit upon the bonds and for foreclosure is premature, and that he has no more standing in court on the face of the petition than if he had brought a simple suit to recover a judgment upon a promissory note which had not matured. Looking to the whole petition, it is manifest, we think, that the primary and sole purpose of the suit was for the appointment of a receiver, and that such appointment was not sought as "an ancillary right to a cause of action and a preliminary protective measure by which the property is impounded and held by the court until the cause of action alleged is judicially determined."

It is well settled by Texas decisions that the appointment of a receiver is an ancillary

remedy, and that before a receiver will be appointed the plaintiff's petition under which the appointment is sought must state a cause of action against the defendant. If it does not, the prayer for the appointment of a receiver should be denied. We have already held that the mere insolvency of a corporation, there being no cause of action stated in the petition, or other ground than insolvency alleged, is of itself no ground for the appointment of a receiver. The authorities are numerous, but we shall quote but few of them.

In *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509, it is said:

"The first proposition of appellants is, in substance, that the right to the appointment of a receiver of a corporation is not a cause of action, but only an ancillary right to a cause of action, and a preliminary protective measure by which property is impounded and held by the court until the cause of action alleged is judicially determined. If there is no cause of action alleged, then no right exists to have a receiver appointed. This proposition is correct, and is supported by the following authorities: *Land & Cattle Co. v. Bindle*, 5 Tex. Civ. App. 21, 23 S. W. 819; *Investment Co. v. Crawford*, 45 S. W. 738; *Iron Co. v. Blevens*, 12 Tex. Civ. App. 410 [34 S. W. 828]."

In *Hermann v. Thomas*, 143 S. W. 195, this court, speaking through Chief Justice Pleasants, says:

"The general proposition that the right to the appointment of a receiver is not a cause of action, or, in other words, does not exist, independent of some other right, or the infringement of some right of the plaintiff which would entitle him to maintain an action therefor, and when no cause of action is shown in the petition, and no relief sought, other than the appointment of a receiver, such relief will not be granted, is well settled."

In *Style v. Lantrip*, 171 S. W. 786, it is said:

"Except in case of lunatics and infants, the appointment of a receiver alone does not constitute a cause of action. The exercise of such appointing powers is purely auxiliary, depending upon the pendency of a suit seeking some other and ultimate relief which is within the jurisdiction of the court. * * * It is not only essential that the petition should state grounds calling for the appointment of a receiver to take charge of the property involved in the litigation, but it should also show upon its face an independent cause of action within the jurisdiction of the court."

In *Continental Trust Co. v. Brown*, 179 S. W. 939, the San Antonio Court of Civil Appeals ruled as follows:

"Hildebrand and Hopkins are not suing the Boston & Texas Corporation, except that they ask for a receiver. So, as to them, it is purely a suit for a receiver, and the courts of this state, as well as all other recognized authorities, have uniformly held that a bill which has for its sole object the appointment of a receiver will not be entertained. This court has only recently so held in an opinion written by the Chief Justice. *Toomey v. First Mortgage Trust Co.*, 177 S. W. 539. A receivership is ancillary to the main suit where a cause of action exists and is asserted independent of such receivership. * * *"

See, also, *Williams v. Watt*, 171 S. W. 268. It follows from what has been said that

It is the opinion of this court that the judge of the court below was without authority to appoint a receiver under the allegation of the petition exhibited to him. It is therefore ordered that the judgment be reversed and the order appointing a receiver vacated, and the receiver discharged. This obviates the necessity of a discussion of the other assignments of error presented by appellant in its brief.

[3] At the time of the submission of this case the appellee presented a motion to dismiss the appeal therein, the reason suggested therefor being that the question submitted to this court for adjudication is a moot question and purely academic, and that it does not involve any substantial issue or genuine controversy. This contention is based upon the fact that upon the same day in which the district judge of Brazoria county appointed H. O. Wooten receiver, but at a later hour of the day, a receiver for the property of the appellant corporation was appointed by the United States District Court for the Southern District of Texas, upon the application of the Freeport Texas Company, a Delaware corporation, without notice. Attached to the motion as exhibits are: (1) A certified copy of the petition of the Freeport Texas Company, which is in the nature of a creditors' bill, in which, as such creditor, it sought to subject the property of the corporation to the payment of its debt, bringing the suit for itself and for all creditors of the appellant similarly situated, and praying for the appointment of a receiver as an ancillary remedy; (2) a certified copy of the order of the judge of said court appointing a receiver; and (3) the oath; and (4) the bond of the receiver.

Appellee contends with much earnestness, in effect, that the fact of the appointment of a receiver in another forum, from which no appeal is taken, and which is apparently acquiesced in by the appellant, brings the case within that class of cases illustrated by the case of *Telegraph Co. v. Galveston*, 59 S. W. 589, in which it was held that, when the subject-matter of controversy between the parties to a suit has ceased to exist, the courts will not try the case to determine the question of what the rights of the parties are, or, as stated by Chief Justice Roberts in *Lacoste v. Duffy*, 49 Tex. 768, 30 Am. Rep. 122, it has not been customary in our courts to decide questions of importance after their decision has become useless.

We are unable to appreciate the force of appellee's contention in this regard or the applicability of the principle enunciated in the case relied upon by him. The subject-matter of the litigation has not been destroyed nor ceased to exist by reason of the action of the United States District Court, or otherwise. Our statutes authorize appeals from interlocutory orders appointing receivers, and in appealing in this case the appel-

lant was exercising a legal right, and has the right to have its appeal determined upon its merits. What some other court has done, or what it may do, in case the order appointing a receiver, when tried out on its merits, may be vacated, is a matter with which this court cannot concern itself.

We think the motion to dismiss the appeal should be overruled; and it has so been ordered.

Reversed and rendered.

WILLIAMS, County Treasurer, et al. v.
CARROLL. (No. 38.)

(Court of Civil Appeals of Texas. Beaumont.
Nov. 11, 1915. On Motion for Rehearing, Jan. 6, 1916.)

1. CONSTITUTIONAL LAW §13, 16 — CONSTRUCTION.

The fundamental rule in the interpretation and construction of the Constitution is to give effect to the intent of the people who adopted it, and the court, in case of ambiguity in the language, may consider the prior state of the law, the subject-matter and purpose sought to be accomplished, and the proceedings of the constitutional convention and attending circumstances.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9, 10, 12, 16; Dec. Dig. §13, 16.]

2. CONSTITUTIONAL LAW §14—CONSTRUCTION.

It is a general rule of interpretation that words are to be understood in their usual and best-known signification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. §14.]

3. CONSTITUTIONAL LAW §14—CONSTRUCTION.

The court should endeavor to so interpret it as to leave none of its language meaningless and without effect, trying to enforce and sustain every sentence and paragraph.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. §14.]

4. CONSTITUTIONAL LAW §16—CONSTRUCTION.

When necessary to resort to extrinsic sources to aid in construing the Constitution, the courts will resort to the history of the time and the condition of affairs leading to the enactment of the particular provision to ascertain its purpose, and thereafter such provision will be construed, so far as reasonably possible, to further such purpose.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. §16.]

5. CONSTITUTIONAL LAW §19—CONSTRUCTION.

Contemporaneous and practical construction of constitutional provisions by the Legislature in the enactment of laws has great weight, and will be followed by the courts, if possible, without doing violence to the fair meaning of the words used in the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. §19.]

6. COUNTIES §190—TAXATION — CONSTITUTIONAL LIMITS.

Under Const. art. 8, § 9, providing the maximum levy for each of the purposes named, though there is no express provision declaring

that money raised for a specific purpose shall be used for that purpose alone, any expenditure for any purpose in excess of the limitation fixed on that particular fund, whether it be done by direct or indirect means, as by transferring and shifting funds raised by levy for one purpose to a fund for another purpose, is unconstitutional.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ¶190.]

7. COUNTIES ¶190—TAXATION—CONSTITUTIONAL LIMITS—"STREET"—"ROAD."

Const. art. 8, § 9, provides for an annual levy for the erection of public buildings, streets, and other permanent improvements not to exceed 25 cents on the \$100 valuation, and for an annual levy of 30 cents per \$100 valuation for roads and bridges. *Held*, that the total levy for roads and bridges is not increased to 55 cents, since a "street" generally means a passageway within the bounds of a municipal corporation, while "road" means a county highway forming a communication between the city limits of one city or town and the city limits of another city or town, so that the levy for streets must be restricted to streets within a city or town, when such streets are continuations of public roads.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ¶190.]

For other definitions, see Words and Phrases, First and Second Series, Street; Road.]

8. COUNTIES ¶190—TAXATION—CONSTITUTIONAL LIMITS—"COUNTY PURPOSE."

Under Const. art. 8, § 9, providing the rate of taxation for city or county purposes, and also the rate for roads and bridges, the levy for county purposes cannot be used for roads and bridges of the county, for, although the maintenance of roads and bridges would ordinarily be considered a "county purpose," the specification of levies for special county purposes apart from that for general county purposes indicates that those specially provided for are not county purposes within the section.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ¶190.]

For other definitions, see Words and Phrases, First and Second Series, County Purpose.]

9. COUNTIES ¶190—TAXATION—TRANSFER OF FUNDS—STATUTE.

Const. art. 8, § 9, provides the maximum levy for the several purposes specified. *Vernon's Sayles' Ann. Civ. St. 1914, art. 1440*, provides that the commissioners' court shall have power to transfer money from one fund to another, if deemed necessary and proper. *Held*, that the statute should be construed to accord with the Constitution, and that it authorizes the transfer of funds only when such transfer will not make possible the expenditure from one fund of a sum greater than the constitutional limitation of levy for such purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ¶190.]

10. INJUNCTION ¶76—OFFICERS—TAXATION—TRANSFER OF FUNDS—DISCRETION OF COMMISSIONERS.

The court has no power to interfere with the commissioners' court in the exercise of a statutory judgment or discretion upon its part to transfer the excess of a fund raised for one county purpose to the fund of another, so long as the exercise of such discretion does not exceed constitutional limitations.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 145, 150, 157; Dec. Dig. ¶76.]

11. COUNTIES ¶196—TAXPAYER'S ACTION—PARTIES.

In a taxpayer's action to restrain the commissioners' court of a county from transferring \$40,000 realized from a tax for general county purposes to the road and bridge fund of the county, which would make possible an expendi-

ture from such fund in excess of the constitutional limitation, the holders of outstanding warrants against the road and bridge fund, issued before service of the temporary restraining order, were not necessary parties; the action not being an attack upon the validity of the warrants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ¶196.]

12. COUNTIES ¶196—TAXPAYER'S ACTION—BURDEN OF PROOF.

In a taxpayer's action to restrain the commissioners' court of a county from transferring to the road and bridge fund funds raised by a levy for county purposes, the burden of proof to show the transfer would result in road and bridge expenditure in excess of the constitutional 30 cents per \$100 valuation rate allowed for road and bridge purposes was upon plaintiff.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ¶196.]

13. COUNTIES ¶196—TAXPAYER'S ACTION—BURDEN OF PROOF.

Where plaintiff showed that for several years there were transferred into the road and bridge fund such excessive amounts, the burden of proof was on defendants to show that on account of authorized expenditures for streets in municipalities the total expenditure for roads and bridges was within the constitutional limit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ¶196.]

On Motion for Rehearing.

14. COUNTIES ¶190—TAXATION—TRANSFER OF FUNDS—STATUTE.

Const. art. 8, § 9, sets only the maximum amounts which can be expended through the specified funds, and the statute (article 1440), recognizing the impossibility of foretelling precisely the amounts required for expenditure from the various funds for any year, permits transfer from one fund to another, so long as the effect of such transfer is not to make possible an expenditure from the augmented fund greater than the Constitution permits.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ¶190.]

15. COUNTIES ¶196—TAXATION—TAXPAYER'S ACTION—RELIEF.

In a taxpayer's action against the commissioners' court of a county to prevent its expending from the road and bridge fund amounts in excess of the constitutional limit, plaintiff's bill must be limited to the relief sought, and unlawful amounts levied and expended for road and bridge purposes in previous years are beyond the reach of the injunction.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ¶196.]

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Action by W. M. Carroll against H. L. Williams, County Treasurer of Jefferson County, and others. From a judgment for plaintiff, defendants appeal. Judgment reformed and affirmed.

Geo. D. Anderson and Jas. A. Harrison, both of Beaumont, for appellants. Chenault O'Brien and George Chilton, both of Beaumont, for appellee.

CONLEY, C. J. This was an action by W. M. Carroll, as a taxpaying citizen of Jefferson county, in his own behalf, and in behalf of all other persons similarly situated, against H. L. Williams, county treasurer of Jefferson

county, Tex., and against R. W. Wilson, county judge, George W. Caswell, B. J. Johnson, J. B. Peek, and W. M. Carroll, as county commissioners of Jefferson county, Tex. The suit was for an injunction to restrain and prevent the transfer by the county treasurer, under an order of the commissioners' court previously made, of the sum of \$40,000 realized from a tax for general county purposes, under levy of 25 cents on the \$100 valuation for the year 1914, to the road and bridge fund of said county, or, if the transfer had already been made, then to enjoin the payment of said money on warrants drawn on that fund.

The petition in substance alleged: That the order for the transfer was made on May 15, 1915, and that under and by virtue of section 9, article 8, of the Texas Constitution, the commissioners' court could not levy to exceed a maximum tax of 30 cents on the \$100 valuation for road and bridge purposes. That such tax was not sufficient to meet the annual expenditures for road and bridge purposes, and had not been for several years prior thereto, and for the purpose of acquiring additional amounts for expenditures from that fund the commissioners' court for the past four years had been in the habit and it was their custom to levy a greater tax for other purposes than was required to meet the expenditures for such purposes, and then to transfer the excess of such funds to the road and bridge fund. That in this way they were expending more money on roads and bridges than was allowed by the Constitution. That for the year 1914 they levied the full sum of 25 cents on the \$100 valuation for county purposes, knowing that such amount was not required to meet the demands on the county purpose fund, but doing it for the purpose of creating an excess in that fund, so that they might transfer such excess to the road and bridge fund. That the \$40,000 transfer complained of was from the general fund to the road and bridge fund, and that by adding this sum to the amount which had already been taxed for such purpose would far exceed the 30 cents on the \$100 valuation allowed for road and bridge purposes.

Appellants, answering, claim that under the Constitution and laws of Texas Jefferson county had the power and right to levy a tax of 30 cents on the \$100 valuation for road and bridge purposes, and had the further right to levy 25 cents on the \$100 valuation for *streets*, sewers, waterworks, and other permanent improvements, making in all a total of 55 cents, which, they contended, could be levied for road and bridge purposes, and that for the year 1914 they had levied less than 30 cents on the \$100 valuation for such purposes, and that the transfer of the additional sum of \$40,000 from the general fund to the road and bridge fund did not swell it to an excess of the constitutional amount allowed for such purposes. They also denied the allegations as to purposely and knowing-

ly levying taxes for the other funds in excess of the amounts required therein, with the intent to transfer such excessive amounts in said funds, when collected, to the road and bridge fund.

Upon the presentation of the petition to Hon. W. H. Davidson, district judge of the Fifty-Eighth judicial district court, a temporary restraining order, as prayed for, was granted, and the cause set down for hearing at a later date. After the hearing, at which testimony was adduced, the trial court entered an order reciting that he found the allegations in plaintiff's petition substantially true, and granted a temporary injunction restraining the disbursement of the \$40,000, or what was left of it, in the payment of warrants drawn on the road and bridge fund; it having developed at the hearing that immediately after the order of the commissioners' court had been made, and before the service of the temporary restraining order, the sum of \$2,650 had been paid, out of the \$40,000 transferred, on warrants presented to the county treasurer on the road and bridge fund. From this order an appeal was perfected, and is now prosecuted in behalf of the appellants.

Appellants further contend that, if necessary so to do, they also have the right and authority to levy 25 cents on the \$100 valuation for "county purposes," and if the exigencies require it to transfer the excess of such general fund to the road and bridge fund and to expend the same for the latter purpose. They further insist that the use of the word "streets" in that provision of the Constitution which authorizes a levy of 25 cents "for the erection of public buildings, streets, sewers, waterworks and other permanent improvements," when used with reference to counties, means roads throughout the county, whether in a city or not; that this section plainly shows that it was intended to permit a certain tax levy in favor of counties and cities for general construction and maintenance of roads and streets, and a further tax of 25 cents to build new streets or roads, which are permanent in their nature; and that therefore they have not exceeded, by the transfer of funds or otherwise, the constitutional amount they were authorized to expend for road and bridge purposes. To substantiate these assertions, they rely upon article 8, section 9, of the Texas Constitution, and article 1440, Vernon's Sayles' Texas Civil Statutes.

Section 9, article 8, of the Constitution, reads as follows:

"No county, city or town shall levy more than 25 cents for city or county purposes, and not exceeding 15 cents for roads and bridges, and not exceeding 15 cents to pay jurors, on the one hundred dollars valuation. * * * And for the erection of public buildings, streets, sewers, waterworks, and other permanent improvements, not to exceed 25 cents on the one hundred dollars valuation, in any one year, and except as is in this Constitution otherwise provided; and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected

for the further maintenance of the public roads: Provided, that a majority of the qualified property tax paying voters of the county, voting at an election to be held for that purpose, shall vote such tax, not to exceed 15 cents on the one hundred dollars valuation of property subject to taxation in such county."

An analysis of the different provisions of this section authorizes the county to make the following levies: (1) Not more than 25 cents on the \$100 valuation for county purposes. (2) Not more than 15 cents for roads and bridges. (3) Not more than 15 cents to pay jurors. (4) Not exceeding 25 cents for the erection of public buildings, *streets*, sewers, waterworks, and other public improvements, except as in the Constitution otherwise provided. (5) Not to exceed 15 cents on the \$100 valuation for the *further* maintenance of public roads, when authorized by vote of the qualified tax paying voters of the county, voting at an election held for that purpose.

In the sense that all laws in conflict with these provisions are void, the above section and article is self-executing; but in so far as anything is required to be done to carry it into effect it is not so, because it prescribes no rules by which any act could be done in the enforcement of its requirements. *Mitchell County v. Bank*, 91 Tex. 371. The Legislature, however, has made appropriate provision for putting into effect the above section and article, in so far as counties are concerned, by the enactment of articles 2242, 7357, and — of Vernon's Sayles' Civil Statutes. In accordance with the provisions of the statute, an election was held in Jefferson county in the year 1904 to determine whether or not the additional 15 cents on the \$100 valuation should be levied, and, this election having carried, the commissioners' court has been levying the same ever since.

[1] The appellee urges that the maximum limit of the taxes authorized by the Constitution to be levied by the commissioners' court of the county for road and bridge purposes is fixed at 30 cents on the \$100 valuation, and that the method and manner of levying taxes for the different funds in excess of the amounts required therefor, and the subsequent transfer of the excess amounts in such funds to the road and bridge fund, as has been the alleged custom and practice of the commissioners' court, is a subterfuge, and accomplishes indirectly what is prohibited by the Constitution. Before undertaking to interpret this section of the Constitution, or solve the issues thus presented, it may be well to here state some of the general rules by which the court is to be guided in the matter of the interpretation and construction of constitutional provisions generally:

"The fundamental rule for the government of the courts in the interpretation or construction of the Constitution is to give effect to the intent of the people who adopted it. The meaning

of the Constitution is fixed when it is adopted; and it is not different at any subsequent time when a court has occasion to pass upon it. * * * Where its terms are plain and definite, that which the words declare is the meaning of the instrument. In such instances there is no room for construction; the words of the instrument lie before the court already molded to their use, and its province extends no further than the enforcement of the language as written. If the terms of a particular provision are ambiguous, and other parts of the instrument do not make them plain, under another well-established rule the court is at liberty to consider the prior state of the law, the subject-matter, and the purpose sought to be accomplished, as well as to consult the proceedings of the convention and the attending circumstances, for whatever extrinsic aid they may render the court in its effort to discover the true meaning of the provision." *Cox v. Robison* (Sup.) 150 S. W. 1151.

[2, 3] It is a general rule of interpretation that words are to be understood in their usual and best-known signification. The courts, in construing the Constitution, should endeavor to put a construction and interpretation thereon that will not leave any of its language meaningless and without effect, but should try to enforce and sustain every sentence and paragraph, for it should be assumed that they were put there for a purpose.

[4] When it becomes necessary to resort to extrinsic sources to aid in construction, the courts will resort to the history of the time, and the conditions of affairs which led to the enactment of the provision in question, with a view to ascertaining its object and purpose, and then such provision should be construed in a way, so far as reasonably possible, to further the known object and purposes for which it was adopted.

[5] Contemporaneous and practical construction of the constitutional provisions by the legislative department in the enactment of the laws necessarily has great weight with the judiciary, and such practical construction will be followed by the courts, if it can be done without doing violence to the fair meaning of the words used. Legislative construction of the constitutional provisions, adopted and acted on with the acquiescence of the people for many years, is entitled to great weight with the courts, and will not be disturbed, except for manifest error. 8 Cyc. 735 et seq.

[6] It can be said with no degree of uncertainty that the meaning of this section of the Constitution authorizing the levy of a tax of 25 cents on the \$100 valuation for permanent improvements in which *streets* are enumerated, a tax of 30 cents for roads and bridges, and a tax of 25 cents for "county purposes," when the construction of roads and bridges is a part of the business of the commissioners' court, and a "county purpose," is not plain, when we are asked to ascertain from the language itself the maximum tax which can be levied for roads and bridges, and for that reason we are permitted to seek whatever information we can to make the same certain and to arrive at its true meaning.

We may better understand this provision of the Constitution if we understand its history.

Taking up the history of section 9, article 8, of the Constitution, it would seem that this section as originally adopted in 1876, allowed a county to levy a tax of not more than one-half of the amount allowed to the state (the state being allowed 50 cents exclusive of the tax allowed to pay the public debt), and for the erection of public buildings tax not to exceed 50 cents on the \$100 valuation. Neither the Constitution of 1845, 1861, nor 1869 fixed a limit for the tax rate for state, county, or municipal purposes, but left it to the discretion of the Legislature; the provisions of each of said Constitutions, in this regard, being almost if not quite identical, and declaring in substance that taxation should be equal and uniform throughout the state, and that all property in this state should be taxed in proportion to its value, to be ascertained as directed by law. Harris, Texas Constitution, p. 584.

The original provision of the Constitution of 1876 fixed the total limit of tax levies by commissioners' courts, outside of levy to take care of payment of debts incurred prior to the adoption of the Constitution, at 75 cents on the \$100 valuation, to wit, 25 cents for general purposes, and 50 cents for the erection of public buildings. In 1883 this section was amended by allowing a levy of not to exceed 25 cents on the \$100 valuation for county purposes, 15 cents for road and bridge purposes, and 25 cents for the erection of public buildings, streets, sewers, and other permanent improvements, making a total maximum tax of 65 cents on the \$100 valuation. This did not include a tax to pay debts incurred previous to the adoption of the Constitution. In 1890 this section was again amended, allowing tax levies as follows: Not to exceed 25 cents for county purposes, 15 cents for roads and bridges, and 25 cents for permanent improvements, including the erection of public buildings, streets, sewers, and waterworks, and other permanent improvements, and 15 cents additional for the maintenance of public roads, provided the majority of the qualified tax-paying voters, at an election held in the county for that purpose, voted for the same, making a total maximum tax of 80 cents. In 1907 the amendment authorizing a levy of not more than 15 cents to pay jurors was adopted, and added to the Constitution, and the status of this article and section then assumed the shape it is now in, making a total maximum levy of 95 cents.

It will be seen from these facts that this section in the Constitutions of 1845, 1861, and 1866 provided for a general tax, which the Legislature and the commissioners' court could levy without limit, and apportion to whatever legitimate purposes they saw fit. In the adoption of this section in the Constitution of 1876, we see an effort for the first

time upon the part of the organic law to limit and apportion the tax which the Legislature and commissioners' court might assess. Under the amendment of 1883 we see a more pronounced effort to limit and apportion such taxes, and in the amendment of 1890 and 1907 a still further effort to regulate such matters. Now there must have been some cause or reason for this.

Turning to the Constitutional Journal of 1875, page 37, we find a resolution introduced in the early days of the convention to this effect:

"Whereas, in the nature of their government, the governments are the great principles necessary to restore confidence and elevate people to prosperity and happiness; and

"Whereas, in the nature of their government, the government has no right or power to impose burdens on them for any purpose whatever, except for revenues sufficient to administer the same:

"Therefore be it resolved by the convention of the people of Texas that there ought to be a clause placed in the organic law restraining the Legislature or taxing power of the state from levying taxes upon the people for any other purpose whatsoever except revenues sufficient to strictly and economically administer the government."

Again, on page 378, Id., in a report of the committee on revenues and taxations, we find this language used in the preamble of the report submitting the scheme of revenues and taxation for the proposed Constitution, to wit:

"This committee, to whom has been intrusted the consideration of the question of revenue and taxation, in the correct solution of which are involved the necessity of immediate relief to the overburdened taxpayers of the state, and at the same time the antagonistic requirements for increase of revenues and the avoidance of future sale of state responsibilities, have endeavored to define a system of taxation, based upon consideration of natural rights, and upon correct principles of political economy, *limiting the assessment and expenditure* strictly to legitimate objects of government and to so guard the *definements* as to prevent future variance and abuses. With these objects in view, they have directed me to report the accompanying article, and ask its consideration by the convention as part of the Constitution."

Then said report sets out a limitation on the taxing power for state purposes and for county purposes and the method and manner of its apportionment, etc. From this language it is evident that there was a well-grounded distrust in the general power and authority theretofore vested in the Legislature and commissioners' court, under the broad provisions of the other three Constitutions, in the matter of levying unlimited taxes, and in the indiscriminate amounts which could be expended for any particular state or county purposes. Such wide latitude probably resulted in extravagant expenditures and waste of money in conducting the different affairs of the state and county, and to remedy this evil the constitutional convention thought it proper to limit the assessment and expenditures strictly to the economical administration of the government, and to that end fixed the maximum limit of taxa-

tion for any one year, and in a way undertook to apportion the amounts which could be levied and expended for any particular purpose. The constitutional amendments following in the succeeding years are but manifestations of a like feeling upon the part of the people, and a further effort to define and limit the levying of taxes and expenditures of public moneys, and to fix and apportion what amounts should be allowed towards the upkeep, construction, and maintenance of certain projects, constituting the county and state business.

In the case of *Dean v. Lufkin*, 54 Tex. 271, Judge Gould, in the year 1881, speaking of this original section of the Constitution of 1876, said:

"We think, moreover, that the purpose of the Constitution was to limit county taxation for ordinary purposes, including the erection of public buildings, thereby seeking to guard against extravagant expenditures."

Appellant earnestly contends that there is no express provision in the Constitution that money raised for a specific purpose shall be used for that purpose alone, or that it cannot be applied to another county purpose, and that it does not necessarily follow that, because a limitation is placed on the amount counties can levy for taxes for certain enumerated purposes, the Legislature is prohibited from authorizing counties to apply money collected for one county purpose to the use of another county purpose, and that if the Constitution had any such intention it would have been expressed in unmistakable terms, and that, therefore, there being no such express provision in the state Constitution, the Legislature, having plenary powers and control over county funds, can authorize counties to apply funds obtained by taxation to a use or purpose different from that originally designated; in other words, that the limitation, as expressed in the Constitution, applies only to the rate of taxation, and not to the amount that can be expended for any particular purpose.

We believe it was the object and purpose of the Constitution in this section and article to put a definite limitation upon the *levy and expenditures* of the funds for the purposes in the several apportionments mentioned therein, and an examination of the decisions dealing with this provision but emphasizes that conclusion. In the case of *Dean v. Lufkin*, 54 Tex. 265, the commissioners' court of Galveston county in 1879 levied a county tax of 7 cents to create a sinking fund to pay registered county warrants issued for indebtedness subsequent to 1876, and for an indebtedness incurred before that date, and also to create a sinking fund to pay warrants issued to April, 1876. The commissioners' court at the time had already exhausted the limit allowed to pay ordinary debts—that is, 25 cents on a \$100 valuation—and the 7 cents, so far as it was made to pay ordinary debts, was in excess of that rate. In an applica-

tion to enjoin the collection of the tax the court said:

"The tax of 7 cents on the \$100 valuation of property was avowedly levied to pay certain registered warrants, one class of the warrants being for indebtedness subsequent to April, 1876. Having already levied, for ordinary purposes, taxes to the extreme limit allowed, this levy, in so far as it was made to pay ordinary debts, was unauthorized, and the illegality of that purpose infected the entire levy of 7 cents."

In the case of *City of Ft. Worth v. Davis*, 57 Tex. 225, the city of Ft. Worth undertook to levy a tax for school purposes which was not authorized by the Constitution, and an injunction was applied for to restrain the collection of the tax. In speaking of the constitutional provisions affecting taxation, the court said:

"But in our opinion the Constitution, pervaded throughout as it is by a manifest purpose of limiting the taxing power of the Legislature and of all the municipal or political subdivisions of the state, has clearly expressed that purpose in reference to taxation for public schools, leaving no room for any such implied authority as is claimed. * * * So the ninth section of the article on taxation carefully prescribes the limit to state, county, and city taxation, except for the payment of debts then already incurred. * * * These repeated and guarded constitutional limitations of the taxing power are a prominent feature of that instrument, and are inconsistent with the existence of a legislative power to authorize additional taxation by school districts, unless some affirmative grant of that power be found in the Constitution itself. That power has been expressly granted in the Constitution of 1869. * * * Taxation by school districts was familiar to the framers of the present Constitution. It was the system generally prevailing in other states, by which the deficiencies of a general or state school fund were supplemented. The omission of a provision authorizing that system was plainly intentional, for in addition to what has been said, the journals of the convention show that all propositions embracing that system were voted down. Our conclusion is that the city of Ft. Worth, in its capacity as a school district, had no other power to levy taxes for the support of public schools than can be found expressly authorized in the Constitution."

In *Citizens' Bank v. City of Terrell*, 78 Tex. 457, 14 S. W. 1005, the city of Terrell undertook to issue bonds for waterworks purposes in excess of the constitutional limitation, and the court, in determining their invalidity, says:

"The * * * provision limiting the amount of debt that cities can charge themselves with had its foundation in a wise public policy. These constitutional restrictions were made for observance, not evasion. A disregard of them by the attempted creation of unlawful debts, whether on account of the purpose or the amount, may lead to serious complications in the administration of the affairs of municipal government, growing out of questions that they may give rise to as to whether the property of delinquent taxpayers can be sold so as to confer any right upon the purchaser when the void debt enters to any extent into the tax for which the sale is made. When the debt is void in its inception for want of authority to create it, no subsequent ratification of it by the collection of taxes or otherwise can give to it any validity, nor can there then be such a thing as a bona fide holder of the obligations, with a right to collect them notwithstanding the want of power * * * to create the debt."

While it may be conceded that there is no express provision in the Constitution declaring that money raised for a specific purpose shall be used for that purpose alone, and cannot be applied to any other purpose, yet, in view of the history of section 9, article 8, throwing light upon the object and purpose sought to be accomplished and the evil to be remedied by its adoption, and in further view of the expressions of the courts in treating the limitations therein as imperative, we have had no hesitancy in reaching the conclusion that the levy of any tax, or the creation of any expenditure in any fund, whether it be done by direct means or by indirect methods, as by the transfer and shifting of funds under authority of Rev. St. § 1440, when the effect thereof is to create a fund in excess of the constitutional limitation fixed on that particular fund, is in violation of the Constitution, and will not be permitted.

[7] Now, what is the maximum tax which can be levied, collected, and expended under the Constitution for roads and bridges? It is conceded by all parties to this suit that the commissioners' court can levy 30 cents for that purpose; but appellants claim they have the power under that provision of the Constitution, as hereinbefore stated, which authorizes a tax of 25 cents on the \$100 valuation for permanent improvements, in which is mentioned and included streets, to levy such additional amount for the construction of roads, and that it was the intention of the Constitution to permit a certain tax levy in favor of counties and cities for general construction and maintenance of roads, to wit, 30 cents on the \$100 valuation, and a further tax levy of 25 cents to build new streets or roads which are permanent in their nature, and that the word "streets" as used in the Constitution is synonymous with the word "roads."

It is a general rule of interpretation that words are to be used in their usual and best-known signification. The word "street" is defined by Webster as "a city road." It is a general term including all *urban* ways which can be or are generally used for the ordinary purpose of travel. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288-290. In common parlance, the word "streets" is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not to roads and highways outside of municipal corporations. In *re Woolsey*, 95 N. Y. 135. Streets and alleys ordinarily relate exclusively to the ways or thoroughfares of towns or cities. They are laid out and dedicated to public use, and especially for the use and convenience of property holders of the towns and cities, by the proprietor thereof, or laid out or established for the same purpose by the corporate authorities. While every street is a highway, every highway is not a street. *Debolt v. Carter*, 31 Ind. 355-367. "Highway" or "road" is an open way or a public

passage; it is ground appropriated for forming a communication between one city or town and another. *Hutson v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 289-312; *Telephone Co. v. City of Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 176. In common usage, the term "road" denotes a township or county highway. The road act, giving an action to any person damaged by means of insufficiency or want of repairs of any public roads of any of the townships of the state, has no application to an accident occurring in consequence of municipal streets in an incorporated municipality being out of order. *Carter v. City of Rahway*, 55 N. J. Law, 177, 26 Atl. 96.

From these authorities it may be fairly deducible that a "street," as that term is used, generally means a passageway within the bounds of a municipal corporation, and that the word "road" means a county highway forming a communication between the city limits of one city or town and the city limits of another city or town. That this is the meaning of the word "streets," as the same appears in the Constitution, is evident from the fact that the legislative body of Texas, in dealing with a division of jurisdiction over the public highways of the state, in article 854, *Vernon's Sayles' Texas Civil Statutes*, gives such incorporated cities or towns the exclusive control and power over their streets, alleys, grounds, and highways, and to that end grants them power to open, alter, widen, extend, establish, regulate, grade, clean, and otherwise improve the streets. And articles 923 and 924, *Id.*, further authorizes the levy of taxes to accomplish those purposes. Article 1049, *Id.*, provides that with the consent of the board of aldermen, where *streets* are continuations of public roads, the commissioners' court shall have power to construct bridges and other improvements thereon, which facilitates the practicability of travel on such *streets*, thus again using the term in the sense of highways within the limits of the corporation. Under article 29 of the charter of the city of Beaumont, exclusive control and regulation of all *streets*, *alleys*, public grounds, and highways within the corporate limits is vested in the city council. To that end they may construct, regulate, establish, and change or grade all streets, sidewalks, etc.; and in section 45 et seq. of the charter of the city of Beaumont ample authority is given to the municipal corporation to levy taxes to accomplish those purposes. Article 2241, *Vernon's Sayles' Civil Statutes*, further enumerating the powers of the commissioners' court, grants general power and authority to said court to lay out and establish, change, and discontinue public roads and highways, and to exercise general control and superintendence over all roads, highways, ferries, and bridges in the county.

Considering these premises, we are of the opinion that the words "streets" and "roads,"

as used in the Constitution, are not synonymous, and therefore that the tax of 25 cents on the \$100 valuation as provided for in the Constitution "for the erection of public buildings, streets, sewers, waterworks and other permanent improvements" *must be restricted to the erection of permanent streets within the corporate limits of a city or town, when such street or streets are the continuations of public roads*, and when the consent of the board of aldermen or the city council has been first obtained, to authorize the county commissioners' court to make such improvements. In our opinion, it was not the intention of this provision to authorize a levy of 25 cents on the \$100 valuation, to raise revenues with which to build or construct or maintain public roads or bridges outside of the city limits of a municipal corporation, whether they were permanent in their nature or otherwise, and in determining the maximum rate which can be levied for the road and bridge fund this rate cannot be considered.

[8] It is also urged in substance by appellants that the provision of the Constitution authorizing a levy of 25 cents on the \$100 valuation for "county purposes" would permit the use of such funds for roads and bridges of the county, for that would be a "county purpose"; in other words, that at least the rate allowed for county purposes might be added to the 30-cent rate to bring it up to the 55-cent total which appellants contend for, providing all of the levy of said 25 cents could be spared for that purpose. It may be conceded as an abstract proposition that the construction, repair, and maintenance of roads and bridges would ordinarily be considered a "county purpose," and where the law allowed the levy of a tax for general "county purposes," without providing for taxes for special "county purposes," such as roads and bridges and other special county purposes, as provided in said section 9, article 8, of the Constitution, that this tax could be used for roads and bridges. However, on the other hand, where the Constitution specifies certain taxes for certain special county purposes, and then also provides for a tax for general county purposes, the words "county purposes" will ordinarily be construed and understood as comprehending purposes not already specially provided for. The Supreme Court, in the case of *Lufkin v. Galveston*, 63 Tex. 437, speaking on this subject, says:

"As a natural result of this principle, it follows that where in one section a general rule is prescribed, which without qualification would embrace an entire class of subjects, and in another section a different rule is prescribed for individual subjects of the same class, the latter must be construed as exceptions to the general rule, and be governed by the section which is applicable to them alone. This gives effect to both sections, and prevents the otherwise necessary result that the special section would entirely fail to have any force whatever. * * * This rule of interpretation should certainly be adopted when the Constitution or statute un-

der construction contains language which shows that the general section must yield to the other as to the special subjects prescribed for in the latter."

In the case of *Louisville v. Button*, 118 Ky. 732, 82 S. W. 293, the city ordinance authorizing a levy of taxes provided the city council should subdivide the levy by showing the amount of taxes levied for each purpose, and also the amount of taxes levied for "general purposes." The different purposes which the ordinance permitted the taxes to be assessed for were schools, sinking funds, police purposes, fire departments, street cleaning, street sprinkling, etc., and for "general purposes." The city council levied the taxes and specified different amounts for different purposes, but failed to mention street sprinkling, and was about to appropriate some of the tax money realized under the levy for general purposes to street sprinkling, when citizens and taxpayers sought an injunction against such misappropriation, which was granted, and in deciding the case the court said:

"The question then narrows itself down in this case to the one whether 'street sprinkling' is embraced in the term 'general purposes.' Without undertaking to define here what may be included in the latter term, we are clear that its being enumerated with some dozen other divisions, each of which is required to be provided for expressly, if at all, negatives the proposition that one embraces the other; for, if that were true, it would be within the power of the council to levy the whole tax under the head of 'general purposes,' defeating entirely the motive of the legislation requiring a particularization of subjects for which taxes are to be levied. The attempted defection of the 'general purpose' fund complained of was illegal, and was therefore properly enjoined."

From the above authorities, we are of the opinion that the rate of 25 cents on the \$100 valuation for "county purposes" cannot be considered as a part of the rate allowed for roads and bridges, and we have reached the final determination that the Constitution fixes the maximum rate for road and bridge purposes at 30 cents on the \$100 valuation.

[9, 10] We now come to consider the other question in the case, and that is the interpretation of article 1440, which reads as follows:

"The commissioners' court shall have power, by an order to that effect, to transfer the money in hand from one fund to another, as in its judgment is deemed necessary and proper, except that the funds which belong to class first shall never be diverted from the payment of the claims to which the same are appropriated by article 1438, unless there is an excess of such funds."

The courts of this state have had before them several cases in which they were called upon to review the action of tax-levying bodies, in which attempts were made to evade the constitutional inhibitions set forth in section 9, article 8, by means of transferring money from one fund to another, and they have not hesitated to prevent or nullify any act which resulted in the violation, either directly or indirectly, of the rights of the property owners to protection against unlawful

and unconstitutional tax burdens. In the case of *Jefferson County Iron Co. v. Hart*, Tax Collector, 18 Tex. Civ. App. 525, 45 S. W. 321, it appears that the commissioners' court of Marion county had levied 25 cents on the \$100 valuation for county purposes (the maximum constitutional tax rate for that purpose), but that no actual money was collected for that fund, on account of such taxes having been paid by county scrip. In addition to this tax, the commissioners' court also levied 12½ cents on the \$100 valuation for stationery; 12½ cents for jury special, and 20 cents for courthouse repairs, and then, when such taxes were collected, they were transferred to the county purpose fund. The evidence showed that no repairs were contracted for on the courthouse or jail, nor had there been any repairs of much consequence made on either in ten years, although a tax for that purpose had been regularly levied during all that time, and that at the time of the present levy it was further shown that there was something over \$2,000 on hand in this fund, which had not been transferred. An injunction was asked restraining the collection of such taxes, and in considering the subject the court said:

"The petition alleges, in effect, that there is no necessity for this tax; that it is levied for the purpose of, and with the intention of, using the fund arising therefrom for the payment of the current expenses of said county, and not for the purpose of repairing the courthouse and jail. These allegations are sustained by the findings of the trial court. Under these facts, if the tax for the 'courthouse repairs' is sustained, it in effect renders nugatory the limitation in the Constitution prohibiting a county from levying a tax in excess of 25 cents on each \$100 valuation * * * for county purposes. This provision of the Constitution cannot be defeated in this indirect manner. If this were a case in which the commissioners' court was exercising its discretion as a court in the levy of a tax, we would not feel authorized in interfering with its discretion. The record presents a case in which the commissioners' court, after having levied a tax for county purposes to the full limit authorized by the Constitution, has made an additional levy for the purported purpose of courthouse repairs, when the real purpose and intention is to raise a fund for general county purposes. This seems a means adopted to defeat the limitation on taxation for county purposes imposed by the Constitution. It is the duty of the courts in such a case, when their power is properly invoked, to interfere and prevent the threatened wrong."

In the case of *Ault v. Hill County*, 111 S. W. 425, it appeared that the tax of 25 cents on the \$100 valuation for county purposes was, and for years had been, insufficient to meet the expenditures of the county from that fund, and to remedy the situation the commissioners' court were in the habit of levying and collecting a special tax, which they called the "improvement fund," when in fact no improvements were in contemplation, and in transferring the money so raised to the general county fund purpose. In affirming the judgment of the trial court in holding such levy illegal and void, the Court of Civil Appeals said:

"* * * In addition, it seems * * * very conclusively established that the current revenues, realized from the 25 cents allowed by law to be levied and collected for general county purposes, were entirely inadequate to meet the annual current expenses. So pronounced has been the deficiency of this fund for the purposes stated that the commissioners' court of the county has, in evasion of the limit of 25 cents permitted on each \$100 valuation of property, for the past several years, levied and collected a tax of about 12 or 13 cents of the 25 cents allowed on each \$100 valuation of property for public buildings, etc., and transferred the amount derived therefrom to the general fund of the county. At the time of the levy of this tax, allowed for public buildings and other permanent improvements, no contract had been entered into for the erection or repair of any such building or other permanent improvement, and no such contract was in contemplation. The last of such levies, prior to the execution of the contract with appellant, was made in the early part of the year 1906, and was not made in contemplation of such contract or the changes and improvements therein specified to be made in the courthouse of Hill county, but for the general purposes of said county, as had been the custom of the court to do for some years prior thereto. The levy and collection of this tax, under the circumstances, however deficient the tax allowed for county purposes may have been to defray the absolutely necessary expenses of the county, were unauthorized and illegal, and furnish no basis for the making of the contract with appellant. * * * The levy of the tax in the early part of the year, upon the pretense and under the guise that it was for improvement purposes, being illegal, cannot be successfully relied upon. * * * The tax, authorized for permanent improvements above referred to, cannot be legally levied or collected, except in contemplation of and for the purpose of constructing such improvements, and to recognize and uphold, for any purpose, a levy and collection of this tax, made as they were, would be to encourage the doing of that which might result in the nullification of the limitation of the Constitution prohibiting a county from levying a tax in excess of 25 cents on the \$100 valuation of property for county purposes, and give the stamp of approval to an unauthorized and illegal act. This, of course, the courts will not do. Without the fund derived from the illegal levy and collection of the taxes to which we have adverted, there can be no pretense whatever but that the current expenses of the county very largely exceeded its current revenues; and from our understanding of the evidence it seems clear that even with it the same condition existed. We therefore hold, under the facts before us, that the fund derived from the unauthorized tax levy * * * could not be looked to as a means of paying the debt contracted with appellant."

A writ of error was granted by the Supreme Court in this case, and in reversing the decision of the Court of Civil Appeals (102 Tex. 335, 116 S. W. 359) that court said:

"We agree with the Court of Civil Appeals in the opinion that the course thus taken was a mere attempt to swell the fund allowed for general county purposes, by sums collected under the guise of another power when there were no circumstances justifying its exercise and no real purpose to exercise it. Section 9 of article 8 of the Constitution fixes the maximum rates of taxation that may be levied for the several purposes therein specified, one of which is 'county purposes,' and another is 'the erection of public buildings,' etc. It seems too plain to require argument that the power to tax for the latter purpose cannot lawfully be used as a means of exceeding the limits set to the power to tax for

the former, and this is what had been done before the contract in question was executed."

These decisions and others of this state firmly settle the doctrine that a tax cannot be levied for a purpose authorized by law, when it is not to be used for that purpose, but is intended, when collected, to be transferred to another fund, to be used for a purpose for which it could not legally have been levied under the Constitution. See, also, *Petty v. McReynolds*, 157 S. W. 184; *City Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003.

It is vigorously urged by appellant that all of the cases cited herein and relied upon by appellee only go to the extent of prohibiting the unlawful *levy* of taxes, and that under article 1440, supra, if the tax had been collected and *the money on hand*, that an exclusive discretion is vested in the commissioners' court to transfer the excess thereof from one fund to another, and that this court has no authority to interfere with the judgment of the commissioners' court in that respect. We do not believe that article 1440 vests the commissioners' court with any discretion or authority whatsoever to transfer the excess of one fund to another fund, where the effect of such transfer would place in the latter fund a sum in excess of the constitutional amount which could have been legally levied and used for that fund. It was the intention and purpose of article 8, section 9, of the Constitution to limit the *expenditure* as well as the *levy* of taxes to certain stated amounts. To give to this section of the Constitution the interpretation contended for by appellants would make nugatory the purpose and intent of the provision itself. What would it avail the taxpayer to say that the provision simply means to place a limitation on the tax *levy* for the specific purpose stated, and then to allow the taxes, after collection, to be transferred and switched about so as to permit unlimited and indefinite amounts to be expended through the specific fund for such purpose? This section, if it means anything, means that the money derived from taxes cannot be used in excess of the constitutional provisions for the specified purposes enumerated therein. This court, of course, would have no power to interfere with the commissioners' court in the exercise of a judgment or discretion upon its part to transfer the excess of one fund to that of another, so long as the exercise of such judgment or discretion does not overstep the limitations set out in the Constitution.

We do not consider that the constitutionality of Rev. St. § 1440, is in question in this case, but we do feel and determine that its proper construction and interpretation must be made to square with the purpose and intent of the Constitution, and that the transfer of the excess of moneys from one fund to another must conform to the limitations therein, and that such transfer, when the effect of such

transfer is, either directly or indirectly, to expend more money on those specified projects than is allowed by the Constitution.

The alleged specific wrongful act complained of by the appellee in the petition filed herein is the attempted appropriation under the order of the commissioners' court of the sum of \$40,000 raised by taxation for "general county purposes" to the road and bridge fund, to be expended for road and bridge purposes; it being contended that the adding of that amount to the road and bridge fund exceeds the constitutional limitation of funds allowed for such purpose; and in this connection, appellee contends that it has been the custom of, and that the commissioners' court has knowingly and with a preconceived purpose and design, levied more taxes for the general fund, the jury fund, and the contingent fund, for the several years past, including the year 1914, than was necessary to meet the lawful expenditures rightly chargeable to such funds, so as to create an excess in such funds, that such excess might be available for transfer to the road and bridge fund, in evasion of the constitutional prohibition, and that on this account the taxpaying property owners of the county have been subjected for the last four years, by reason of such unlawful customs and schemes of the commissioners' court in such manipulation of tax levies and transfers of funds, to burdensome taxation for the maintenance, construction, and upkeep of roads and bridges.

The trial court found that the allegations and contentions of the appellee were substantially true. The testimony introduced upon the trial of this cause shows the following facts:

On November 1, 1910, there remained a balance of cash in the jury fund of Jefferson county of \$3,205.92, and for the next succeeding 12 months there was collected in taxes levied and assessed to pay jurors, and also from occupation taxes, jury fees, etc., which went into this fund, the sum of \$24,520.15. During the 12 months prior to November 1, 1911, there had been paid to jurors out of the jury fund the sum of \$10,974.69, and transferred out of the fund into the road and bridge fund the sum of \$10,000. In 1911 the commissioners' court levied a tax for jurors of 2 cents on each \$100 valuation of property in Jefferson county. On November 1, 1911, there was a balance in the jury fund of \$6,751.39. During the year there was received into this fund for jurors \$23,092.43, and prior to November 1, 1912, there was paid out of this fund for jurors \$12,869.25, and transferred to the road and bridge fund \$13,000. In 1912 the commissioners' court levied a tax in the same amount as for the previous year, 2 cents on each \$100 valuation of property, and from this tax, together with other sources of this fund, was received \$28,973.69, to which amount should be added a balance remaining on hand from the previ-

ous year of this fund of \$3,974.54. During the year previous to November 1, 1913, the commissioners' court transferred out of this jury fund \$9,100 to the road and bridge fund, and paid out of this fund for jurors \$16,018.13. On November 1, 1913, there remained a balance in the jury fund of \$5,830.13, and in 1913 the commissioners' court levied a tax of 2 cents, the same as the previous year, for the payment of jurors, and the receipts into this fund from the property and occupation taxes, etc., during the year previous to November 1, 1914, was \$30,313.95, and during said year \$15,799.38 was paid out to jurors, and there was then transferred to the road and bridge fund \$4,000.

In 1911 the commissioners' court levied a tax of 16 cents on each \$100 valuation of property for general purposes, which taxes were collected and paid into the general fund in due course, and \$18,500 of said amount so collected was transferred to the road and bridge fund. In 1912, although the commissioners' court from the former year's tax of 16 cents for general purposes was able to realize a sum sufficient to pay all demands against this fund and then transfer \$18,500 to the road and bridge fund, the commissioners' court raised the county ad valorem or general purpose tax to 25 cents on each \$100 valuation of property of the county. During the year from November 1, 1912, to November 1, 1913, the commissioners' court paid out of the general fund \$92,681, and transferred to the road and bridge fund \$31,625. In 1913 the same tax of 25 cents was levied for general purposes, and out of this tax money there was paid out for the 12 months previous to November 1, 1914, for general purposes, \$89,039.49, and transferred to the road and bridge fund \$45,000.

For the year 1911 the commissioners' court levied a tax of one-half of 1 cent on each \$100 valuation of property for the so-called contingent fund, and during the same year paid out of this fund \$108.90, and transferred to road and bridge fund \$2,012.26. In 1912, although only the sum of \$108.90 had been lawfully paid out of this fund during the previous year, and all of the balance transferred to the road and bridge fund, the commissioners' court raised the amount of this tax to 1½ cents and during the year paid out of the contingent fund in the regular way \$122.58, and transferred to the road and bridge fund \$6,167.76. In 1913 the amount of this tax was the same as for 1912, from which was received during the 12 months prior to November 1, 1914, \$6,808.85, all of which was transferred to the road and bridge fund.

With reference to the taxes levied and collected for road and bridge purposes, the record shows the following:

In 1911 the commissioners' court levied a tax of 15 cents on each \$100 valuation of property, to pay interest and sinking fund

on road and bridge bonds outstanding, and also a tax of 15 cents for current road and bridge fund, which made the total amount taxed that year for road and bridge purposes the full 30 cents. In 1912 the commissioners' court, to pay interest and sinking fund on road and bridge bonds, levied a tax of 15 cents, and for the current road and bridge fund 15 cents. In 1913 the commissioners' court levied a tax of 15 cents to pay interest and sinking fund on road and bridge bonds, and also 15 cents for the current road and bridge fund. In 1914 the commissioners' court levied and collected a tax of 12.05 cents on each \$100 valuation of property for interest and sinking fund and road and bridge bonds, and 15 cents for the current road and bridge fund.

Summarizing the figures contained above, it is found that in the year 1911 there was received into the road and bridge fund, from taxes lawfully levied for said fund, the sum of \$63,427.61, and paid out of this fund \$107,928.81; in 1912, received for road and bridge fund from taxes lawfully collected \$65,003.24, and paid out of this fund \$113,180.98; in 1913, received into this fund for taxes collected for road and bridge purposes \$69,597.22, and paid out \$125,633.11. The difference in the amounts received into this fund for taxes lawfully collected for roads and bridges and the amounts paid out was made up by transfers from other funds, as heretofore shown. The amounts herein specified in sums of money do not include, and have no reference to, the taxes collected every year for the interest and sinking fund on the road and bridge bonds. The assessed valuation of all property in Jefferson county, as is shown by the assessors' rolls for the past four years, is as follows:

1911	\$44,000,564.08
1912	45,681,692.00
1913	49,299,934.00
1914	50,703,025.00

In 1911 the commissioners' court transferred out of the general jury and contingent funds altogether \$44,501.20, and by taking the assessed value of property for that year, and making a mathematical calculation as to the percentage, it will be found that in order to raise the amount transferred would have required a tax of approximately 10 cents on each \$100 valuation of property in Jefferson county. For the year 1911 the commissioners' court levied the maximum amount allowed by the Constitution and statutes for the road and bridge fund and for the payment of interest and sinking fund on road and bridge bonds, which was 30 cents on each \$100 valuation, and indirectly, by collecting taxes for other purposes and transferring them to the road and bridge fund, approximately 10 cents on each \$100 valuation, thus making the amount collected and expended for that year for roads and bridges approximately 40 cents on each \$100 valuation of property in Jefferson county. In

1912 the commissioners' court transferred tax money levied and collected for other purposes into the road and bridge fund in the sum of \$43,577, and by taking the assessed valuation of that year it will be found that to raise said amount would require taxation amounting to over 10 cents on the \$100 valuation. The commissioners' court in that year (1912) regularly assessed for roads and bridges 30 cents on each \$100 valuation of property for the current road and bridge fund and for the payment of interest and sinking fund on road and bridge bonds. It will therefore be seen that the total tax levied for that year, and collected, directly and indirectly, for road and bridge purposes, was over 40 cents on each \$100 valuation of property. In 1913 the commissioners' court transferred from the general fund, jury fund, and contingent fund into the road and bridge fund \$63,035.89, which represented tax money levied and collected for general county purposes, for the jury, and for the contingent fund. This year (1913) the court levied and collected in the regular way for the current road and bridge fund, and for the payment of the interest and sinking fund on the road and bridge bonds, a tax of 30 cents on each \$100 valuation of the property in the county. The amount transferred from other funds to the road and bridge fund, \$63,035.89, represented a taxation amounting to approximately 13 cents on each \$100 valuation of property in the county, and therefore the tax levy and the money expended in Jefferson county, directly and indirectly, in 1913 for roads and bridges, amounted to approximately 43 cents on each \$100 valuation. The assessed valuation of all property for taxation in Jefferson county for 1914 was \$50,703,025, and for this year the commissioners' court levied and collected for roads and bridges, and to pay interest and sinking fund on road and bridge bonds, a tax of 27.05 cents on each \$100 valuation of property. To swell this fund by an addition of \$40,000 would require a tax that would of necessity approximate 8 cents on each \$100 valuation of property in Jefferson county, and would equal a tax, directly and indirectly, of 35.05 cents on each \$100 valuation for roads and bridge purposes—that is, the amount actually appropriated out of this year's taxes for roads and bridges would have been 5.05 cents more than the maximum amount allowed by law for such expenditure.

It is evident from these proceedings and transactions that the commissioners' court realized that the amount of taxes received for the road and bridge fund under the constitutional levy of 30 cents on the \$100 valuation was not sufficient to meet the demands on that fund, and that they undertook, by the indirect means herein set forth, to swell that fund so as to meet the ever-growing demands upon the same. Such practice has been condemned by all the courts of this state whenever the matter has reached them, and such

acts declared illegal. It is not the province of this court to consider or determine the exigencies calling for the construction, upkeep, and maintenance of the public roads, that they may be kept in harmony with the spirit and progress of the community, however prone to that view we might be, but simply to apply the unrelenting principles of the law to the facts as we find them, and to see that such expenditures do not exceed the constitutional limitation.

[11] The appellant urges that the holders of the outstanding warrants against the road and bridge fund were necessary parties to this suit. The instant action is not an attack upon the validity of these warrants, and they will continue a valid and existing indebtedness against the county, regardless of the disposition of this suit. The holders of such warrants have no rights to be litigated, which would authorize them to swell the road and bridge fund beyond the constitutional limitation, so that their claims might be paid.

We do not consider the case of *Pendleton v. Ferguson*, 99 Tex. 301, 89 S. W. 758, in point on the question of parties. That was a suit to enjoin the city treasurer from obeying an order of the city council to pay warrants issued in previous years out of a fund raised during the present year; the plaintiff claiming that he, being the holder of a warrant for the present year, was entitled to priority of payment of same. Under such circumstances it was held that the holders of warrants for the previous years were necessary parties, in that they were materially interested in the subject-matter of the suit. The instant case does not contain a question affecting matters between the owners of warrants, such as priority of payment out of a fund legally existing for the payment of such indebtedness, but is a suit to restrain public officers having charge of taxing funds from creating an illegal fund to liquidate such indebtedness, and the payment of sums out of such fund in contravention of the Constitution.

It is contended by appellants that the injunction ought not to have been issued, for the reason that under any view of the case the commissioners' court had the right to charge such sums of money as were expended on streets within the limits of municipal corporations in the county to the 25 cents on the \$100 valuation allowed for the "erection of public buildings, streets," etc.; that the evidence shows without dispute that many miles of shell road, for which bonds were provided, were erected in the cities and towns of Jefferson county—no evidence as to the number of miles, but that such streets cost from \$5,000 to \$8,000 per mile—and that as a matter of law whatever tax it was necessary to levy to raise a sinking fund and to pay interest on this portion of said bonds, should be charged to said 25-cent rate, and then, if this was done, the general road and

bridge tax, and the rate levied therefor, would have a clear margin.

[12, 13] The burden of proof to show that funds were raised and expended in excess of the 30-cent rate allowed for road and bridge purposes was upon the appellee. The evidence introduced upon that subject, in the nature of copies of the official tax levies for the several years, including the year 1914, show that all levies were for "road and bridge bonds" and for "roads and bridges." Without any further explanation in reference to this matter, it follows that all such levies were made under the two 15-cents provisions of the Constitution hereinbefore set out. And the other evidence introduced on the subject of the various transfers of additional sums into the road and bridge fund indicate a clear excess of the amounts in those funds for the several years mentioned. If there was any explanation to be made of this matter, it was incumbent upon appellants to show that the statute governing the expenditures of county funds on the streets of municipalities had been complied with, and that the commissioners were authorized to make such expenditures. Such expenditures are only authorized when the streets are continuations of the public roads, and with permission to make such expenditures first obtained from the city council. It was also incumbent, on account of the nature of the evidence introduced by appellee, for the appellant to have shown the number of miles of streets constructed within the limits of municipal corporations, and the cost of same, so that a basis for such calculation or estimate might be made. The trial court was therefore, in the state of the record, justified in considering all of the bond issues chargeable to the two 15-cent rates provided in the Constitution.

Under our conception of this case, the commissioners' court was permitted by the Constitution of this state to levy and expend for and through the road and bridge fund for the current year 1914 a maximum sum equal to a tax of 30 cents on the \$100 valuation of taxable property of the county. Based on this valuation of \$50,703,025, such a sum would equal \$152,109. It would appear that for the year 1914 the total tax levied for road and bridge purposes was 27.05 cents on each \$100 valuation. Based on the taxable valuation of property in the county, for that year, as above stated, this would net a tax of \$137,051. The difference between these amounts, to wit, \$14,958, represents the sum less than the full 30-cent rendition which the commissioners' court was authorized to make, or, in other words, the amount which could have been legally raised for the road and bridge fund by a lawful tax fixed for that purpose for the year 1914, which was not included in the levy of 27.05 cents. It further appears from the record that the road and bridge fund had remaining in it at the time of the proposed transfer complained of

about the total sum of \$4,176.70. It also appears that prior to the service of the injunction \$2,560 of the transferred amount had been used in payment of outstanding warrants. This would make a total of \$6,736.70. This amount, deducted from the said \$14,958, leaves a balance of \$8,222, and this amount, we think, can still be applied to the road and bridge fund for 1914 out of the \$40,000 transferred without exceeding the 30-cent levy allowed for that year.

The judgment of the lower court is therefore reformed, so as to allow an additional payment of \$8,222 out of said \$40,000 fund to the road and bridge fund, and the judgment of the lower court awarding the injunction is in all other respects affirmed.

Reformed and affirmed.

On Motion for Rehearing.

[14] Appellee, in his motion for rehearing, contends that we erred in holding that any part of the tax money refunded in this suit, which tax money was realized by taxation for "county purposes," could be lawfully used for the construction of roads and bridges. Article 1440, Vernon's Sayles' Civil Statutes, authorizing the transfer of the excess in the different funds from one such fund to another, recognizes the impossibility of foretelling just exactly how much money will be required for expenditure through the various funds for any current year. It is beyond the reach of the mind to look into the future and to make accurate prognostications affecting such matters. In the ordinary manipulation of such funds, and under the most careful supervision, there is liable to be more or less money in the one or the other than is needed; and to meet such contingencies, and to thereby adjust the finances accordingly, this statute was enacted. The constitutional provisions we have discussed are only concerned with the *maximum* amounts which can be expended through the several funds therein named, and have no intention of regulating such expenditures when the amounts are less than the maximum.

[15] In considering appellants' motion for rehearing, we have concluded that appellees' bill must be limited to the relief sought; that is, to restrict the unlawful expenditure, through the road and bridge fund, of the tax revenues of the county for the current year 1914. The unlawful amounts levied and expended for road and bridge purposes in previous years is beyond the reach of the injunction. Upon further consideration we have concluded that it is immaterial what amount was in the road and bridge fund at the time the transfer was made. Whatever money was on hand in that fund came from the 27.05-cent tax levy for 1914, inasmuch as no previous transfers from other funds into the road and bridge fund had been made for that year. We were therefore in error in making the deduction of \$4,176.

This opinion is therefore reformed, by allowing an additional payment of \$12,398 out of said \$40,000, instead of \$8,222. The costs in this case are apportioned as follows: One-third against appellee, and two-thirds against appellants.

ATHENS TELEPHONE CO. v. CITY OF ATHENS. (No. 7387.)

(Court of Civil Appeals of Texas. Dallas. Dec. 11, 1915. Rehearing Denied Jan. 22, 1916.)

1. TELEGRAPHS AND TELEPHONES —33 — FRANCHISE — MAXIMUM RATE — WHEN ENFORCEABLE.

Where the operators of a local telephone system in an unincorporated town sought a franchise from the town after its incorporation under the general laws, and it being agreed that the charge for telephones should not be over \$1.50 per month, as it had been previously, a franchise was granted in which such maximum charge was provided for, the charge could not thereafter be raised above such maximum, on the ground that a town incorporated under the general laws has no power to fix telephone rates, since a telephone company, voluntarily accepting a rate imposed by a franchise granted without authority, cannot thereafter contest its reasonableness or refuse to furnish service at such rate.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. —33.]

2. TELEGRAPHS AND TELEPHONES —10—PUBLIC WAYS—USER.

Under Rev. St. 1911, art. 1231, authorizing telegraph companies to utilize public ways, the right of telegraph and telephone companies to enter and pass over streets and alleys of municipalities of the state for the purpose of transmitting telegrams and long-distance telephone messages is absolute, except for the limitation of article 1235 that municipalities may reasonably regulate such use.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. —10.]

3. TELEGRAPHS AND TELEPHONES —33 — FRANCHISE FIXING RATE — SEPARATE CONTRACT.

The fixing of a telephone rate in a franchise granted to a local company by a municipality is not inoperative, because not evidenced by a separate contract signed by the company, since a local telephone company has no absolute right conferred by law to erect and operate its system in municipalities, to which a rate condition could not be lawfully annexed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. —33.]

4. TELEGRAPHS AND TELEPHONES —33—PURCHASE OF LOCAL SYSTEM BY CORPORATION—FRANCHISE—MAXIMUM RATE—INCREASE.

Where the owners of a local telephone system in an unincorporated town legally obligated themselves to a maximum rate by agreeing thereon as a basis for the grant of a franchise by the town after its incorporation under the general laws, defendant telephone company, incorporated to construct, maintain and operate telephone lines, local, rural, and toll, which took over the system in payment for four-fifths of its capital, could not increase such maximum rate, since, its authority to operate being derived solely from the municipal grant to such first owners, it

was bound by the maximum rate therein provided.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. —33.]

Appeal from District Court, Henderson County; F. L. Hawkins, Judge.

Action by the City of Athens against the Athens Telephone Company. From a permanent injunction against collecting a telephone rental of more than \$1.50 per month from the citizens of Athens, defendant appeals. Affirmed.

Marsh & McIlwaine, of Tyler, Miller & Miller, of Athens, and S. A. Lindsey, of Tyler, for appellant. W. R. Bishop and Earnest A. Landman, both of Athens, for appellee.

RASBURY, J. This proceeding was heretofore before us on an appeal from an order of the district judge granting in vacation a temporary injunction restraining appellant from collecting from its patrons more than \$1.50 per month for the use of telephones in places of business in the town of Athens and requiring appellant to furnish telephones for all persons tendering such sum of money in payment therefor. The preliminary action of the trial court in the respect stated was sustained. Athens Telephone Co. v. City of Athens, 163 S. W. 371. Since the proceeding detailed the case has been submitted to the trial judge, without the intervention of a jury, upon full hearing, at which hearing appellant was perpetually enjoined from collecting from the citizens of Athens a telephone rental of more than \$1.50 per month and required to furnish such phones at such rental for a period of 50 years from June 10, 1901. From such final order appellant has appealed to this court, seeking reversal and rendition of the judgment.

[1] Upon request of appellant the trial judge filed conclusions of fact and law. The facts so found, which are unchallenged, essential to a disposition of this appeal, are partially in our own language in substance as follows: In the year 1898 John T. Garrett and W. H. Truett, partners under the firm name of Garrett & Truett, with the consent of the citizens of Athens, then unincorporated, constructed in the town of Athens a telephone exchange, using the streets, alleys, and highways for their poles, wires, etc., charging for the use of telephones in business houses and residences a rental of \$1.50 per month. The town was incorporated in the year 1901, and soon thereafter Garrett & Truett applied to the town for a franchise permitting them to conduct their telephone business therein. Terms were agreed upon, and an ordinance embodying the agreement was enacted, whereby Garrett & Truett were permitted to conduct a telephone business in Athens for a term of 50 years from June 10, 1901, which, among other things, stipulated that, in con-

sideration of the grant, Garrett & Truett should not charge more than \$1.50 per month per telephone for both residence and business telephones. Garrett & Truett, after the enactment of the ordinance, continued to use the streets, alleys, and highways of Athens, and continued to charge the sum of \$1.50 per month for telephones. Prior to October, 1904, Charles Garrett acquired the interest of John T. Garrett in said telephone business, and Can Willis in turn acquired that interest from Charles Garrett. On October 1, 1904, Willis and Truett, by instrument in writing, transferred the business to C. H. and Dick Connally, describing same as:

"The Athens Telephone Exchange situated and carried on in the town of Athens, * * * including all phones now in use or not in use, wires, cables, switchboards, poles, franchise, and all other appurtenances and rights belonging to or constituting part of the said Athens Telephone Exchange."

The Connallys operated the telephone exchange after acquiring it under the provisions of the grant to Garrett & Truett so far as rates were concerned. In January, 1905, the Connallys sold the exchange to J. F. Moore, and in their conveyance described same as:

"The Athens Telephone Exchange, * * * in the town of Athens and adjacent thereto, including all wires, poles, switchboards, cables, and franchise from the town of Athens," etc.

While he owned same Moore operated the exchange under the terms of the grant to Garrett & Truett, complying with the rate charged therein. In March, 1905, Moore sold the exchange to J. A. Jones, describing it as:

"The Athens Telephone Exchange, * * * in the city of Athens and country adjacent thereto, * * * including all phones, wires, poles, switchboards, cables, transmitters, and receivers, and all other apparatus, fixtures, tools, instruments, and appliances, and the franchise from the city of Athens, * * * together with all the rights, privileges, and franchise of every kind and nature used in connection with or appurtenant to the said telephone exchange system and plant."

Jones operated the exchange under the terms of the Garrett & Truett grant, complying with the rate fixed thereby. Subsequent to the time he acquired the business, and on May 25, 1911, Jones, associating himself with J. W. Murchison, E. A. Carroll, T. H. Barron, S. M. Cain, E. Henderson, and Paul Jones, prepared, executed, and acknowledged articles of incorporation for the purpose of securing from the state a charter authorizing them, under the name of the Athens Telephone Company, Incorporated, to construct, maintain, and operate telephone lines, local, rural, and toll, in Athens and the county of Henderson, with its principal office in Athens, with a capital stock of \$25,000, divided into 1,000 shares, of the par value of \$25 each. Those named as incorporators constituted the board of directors for the first year. In compliance with the statutes in reference to the chartering of private corporations, the affidavit of Jones, Murchison, and Carroll

was appended to the articles of incorporation, wherein it was deposed that the full amount of the capital stock of the proposed corporation had in good faith been subscribed and paid in, \$20,000 of which represented the price the proposed corporation, the Athens Telephone Company, Incorporated, had agreed to pay Jones for "the property, property rights, franchises, easements, privileges, and business of the Athens Telephone Company, unincorporated, owned by him, * * * located in Athens, * * *" and consisting of "a local telephone exchange in the city of Athens and various rural and toll lines extending into the county," etc. The articles of incorporation were approved and the concern duly chartered by the state May 27, 1911. After the incorporation of the Athens Telephone Company it operated in Athens, using the streets, alleys, and highways of said city for its poles, wires, and other telephone business by authority of the grant to Garrett & Truett, and under no other grant or permit from the city of Athens, and complied with the rate stipulated in the said grant until a short time before the institution of this suit, when the rate for business telephones was advanced to \$2.50 per month, to enjoin which this suit was instituted.

Upon the facts as stated the trial judge perpetuated the former temporary injunction. We will not undertake to discuss appellant's assignments of error seriatim, since, due to the action of the trial court on certain special exceptions, the issues are repeated in the brief, but in lieu thereof will discuss the issues as such.

It is urged that the judgment is erroneous, for the reason that, the Legislature not having delegated to cities incorporated under the general laws of the state the power to fix rates to be charged by telephone companies, appellee was without authority to fix the rate to be charged by Garrett & Truett either by contract or ordinance. For the purpose of the discussion, but without determining that issue, the premises of the proposition may be conceded; that is, that appellee city, being incorporated under the general laws, was without authority to fix rates to be charged by appellant, as may also the resulting corollary that a refusal to agree upon rates would be insufficient as a basis for denying the use of its streets at least to a distance telephone company. Nevertheless it cannot be said that either rule is conclusive of the issue as presented by the facts in the instant case. The trial court found, and it is not denied, that Garrett & Truett voluntarily agreed that the rate fixed by their agreement with the citizens of Athens should be embodied in the grant by appellee, after its incorporation under the general laws of the state. An accepted authority asserts the general rule to be that the right to fix rates for the transmission of telegraph and telephone messages is inherently in the Legislature, but that such

authority may be delegated to state boards, etc., or municipalities, though it will not be recognized as reposing in the latter bodies, unless very clearly delegated, yet that—

"a municipality may, * * * in granting rights and privileges to such a company, annex thereto a condition as to the rates to be charged, and although the municipality may not have the power to impose such a condition upon the company against its consent, yet if the company voluntarily accepts the rights granted with the condition annexed, it cannot afterwards contest the reasonableness of such rate, or refuse to furnish services or facilities at the rate stipulated, or deny the authority of the municipality to make such agreement." 37 Cyc. 1630.

Many cases from many jurisdictions are cited in support of the rule so clearly announced.

[2] It should be borne in mind, in connection with what we have just said, that the judgment of the lower court only affects appellant's business in the conduct of its local exchange, and that the agreement with reference to rates as embodied in the grant to Garrett & Truett involves only those to be charged for the use of telephones in the city of Athens, and that the transmission of distance messages and the right to enter upon the streets of appellee for that purpose is not involved. By repeated constructions of article 1231, R. S. 1911, our appellate courts have held that the right of telegraph and telephone companies to enter and pass over the streets, alleys, etc., of cities, towns, and villages of the state for the purpose of transmitting telegrams and distance telephone messages is absolute, save for the limitations contained in article 1235, R. S. 1911, which confers upon such municipalities the right to reasonably regulate the use of their streets, etc., so that the public will not be incommoded by the wires and poles of such companies. We said as much on the former appeal, basing our holding on the case of *City of Brownwood v. Brown Tel. & Tel. Co.* (Sup.) 157 S. W. 1163. Our former holding was before the Supreme Court on application for writ of error and was approved. That court being one of last resort, so far as we are concerned, finally settles the question.

[3] But it is further urged, in connection with what we have just said and notwithstanding the rule cited, Garrett & Truett were not bound by the grant fixing the rate of rentals, because the agreement was not evidenced by independent or collateral agreement in that respect. This contention is based upon the rule announced in *Galveston & Western Ry. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33. In that case it was, in effect, among other things, said that, when by the law of the state a given business was permitted to use the streets of towns and cities, there could not lawfully be annexed to such right by the municipalities conditions which might, upon breach, operate to forfeit the grant, unless evidenced by sepa-

rate or independent contract signed by the railway, and, we presume, upon consideration other than the mere right to go upon the streets as provided by law. The difference between the case cited and the one at bar is that the *Galveston & Western Railway Company* had the right by state law, as have distance telephone companies, to go upon the streets of the city of Galveston, while local telephone companies, such as appellant, do not possess that absolute right. It may be said in passing that it was held in the same case that "if the right of a railroad," and by analogy a local telephone business, "to occupy the streets of a town or city be dependent solely upon the action of such town or city, the latter may, in granting its consent, prescribe terms for the breach of which the right granted may be forfeited."

[4] It is next urged that, appellant having been enfranchised by the state for the purpose of operating a telephone line, and having as a consequence the right by law to use appellee's streets for that purpose without its permission, and having the right to purchase the telephone line from Jones, it was not bound by Garrett & Truett's agreement with reference to rates, since it did not so agree with appellee or any one else. We concede, of course, as we have at another place in this opinion, the right of appellant in respect to distance telephone business, as also its implied right under its charter to purchase as well as construct telephone lines, etc. We do not concede, however, its right to enter at will upon the streets and alleys of Athens for the purpose of transacting a local telephone exchange, nor do we concede that it is not, under the findings of the trial judge, bound by the Garrett & Truett grant. We think it clear that it is. The reasons why we do not think appellant entitled to conduct a local exchange without the consent of appellee are stated at another place in this opinion and in our former opinion in this case. The reason why we conclude it is bound upon the Garrett & Truett contract in respect to rates for local telephones is because it is transacting its business solely under authority of the grant to Garrett & Truett and receiving the benefits of such grant, as shown by the unchallenged findings of the trial judge, as well as its articles of incorporation. The affidavit to the articles of incorporation discloses that the Athens Telephone Company, unincorporated, sold to the Athens Telephone Company, Incorporated (appellant), all its property and franchises, consisting of a local telephone exchange in Athens and various rural and toll lines extending into the country. The property so taken over from the unincorporated company by the incorporated company was taken over at the valuation of \$20,000, and made up to that extent the authorized capital stock of the incorporated company. Further, it was taken over from Jones (who received stock in that

amount from the incorporated company in payment thereof), whose "franchise and rights," by an unbroken line of transfers from his predecessors in ownership and title, were admittedly the grant by appellee to Garrett & Truett. No claim of any character is made that the appellant is operating under any other authority, nor could such claim consistently be made. Holding, as we do, that local telephone exchanges have not been granted the absolute right by the state to enter upon the streets of cities or towns, it follows that appellant, in conducting its local exchange in Athens, is doing so solely by authority of the grant to Garrett & Truett, since that was the only authority possessed by Jones, from whom appellant purchased the business, and from which it follows that appellant is in all respects bound by the terms of the Garrett & Truett grant.

Finding no reversible error in the judgment, it is affirmed.

HOUSTON CHRONICLE PUB. CO. v.
WEGNER. (No. 7004.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 11, 1915. On Motion for Rehearing,
Jan. 22, 1916.)

1. LIBEL AND SLANDER \S 10 — ACTIONABLE
WORDS—MISCONDUCT IN OFFICE.

A newspaper publication that, as a result of an article printed in a Galveston paper, the city commissioners appointed a committee to investigate the charge that plaintiff, contrary to law, had his son on the city pay roll as confidential clerk, which charge had not been made by any one except defendant, and which, as published, was untrue, was a charge that plaintiff put his son on the pay roll intending that he should draw money from the city contrary to law, although it did not charge that any money was ever paid to plaintiff's son, that the city ever sustained any loss by any fraud or secrecy practiced by plaintiff, or that the city was in any way defrauded, and was libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91-96; Dec. Dig. \S 10.]

2. LIBEL AND SLANDER \S 56 — DEFENSES —
REFUTATION.

The fact that such false charge or statement published by defendant simply purported to be a statement or charge made by another, and that defendant itself neither asserted such charge to be true, or vouched for the truth thereof, did not relieve the publication of its libelous character.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 153-156; Dec. Dig. \S 56.]

3. APPEAL AND ERROR \S 980 — PRESUMPTIONS
—INSTRUCTIONS FOLLOWED BY JURY.

In an action for libel a refusal to strike so much of the amended petition as set up a publication on a certain date was not error, where the court instructed that no libel could be predicated on that publication, since it would be presumed, without any showing to the contrary, that the jury obeyed the instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. \S 930.]

4. LIBEL AND SLANDER \S 33 — DAMAGES —
GENERAL DAMAGES—ELEMENTS.

In an action for the publication of a false and libelous charge of plaintiff's misconduct in his office as chief of police, plaintiff was entitled to recover general damages without proof other than the fact of the libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277; Dec. Dig. \S 33.]

5. LIBEL AND SLANDER \S 124 — DAMAGES —
SPECIAL DAMAGES—INSTRUCTIONS.

An instruction submitting as special damages items which would properly come under the head of general damages was technical error.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. \S 124.]

6. APPEAL AND ERROR \S 1140 — HARMLESS
ERROR—INSTRUCTIONS.

Such error was harmless, where all the items of damages allowed under the charge on special damages could have been recovered under the head of general damages; and the court on appeal required plaintiff to file a remittitur before affirmance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. \S 1140.]

7. APPEAL AND ERROR \S 1062 — HARMLESS
ERROR—INSTRUCTIONS—CURE BY VERDICT.

In an action for libel, error, if any, in submitting the question of exemplary damages was harmless, where the jury found that no exemplary damages were recoverable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. \S 1062.]

8. LIBEL AND SLANDER \S 124 — INSTRUCTIONS
—MEANING OF LANGUAGE.

In an action for libel in charging on report that plaintiff, chief of police of another city, was to be investigated for carrying his son on the city pay roll as confidential clerk, in violation of the law, an instruction that the publication did not charge that the son was on the city pay rolls were properly refused.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. \S 124.]

9. LIBEL AND SLANDER \S 124 — LIBELOUS
PER SE—DAMAGES.

In an action for damages for a publication libelous per se, an instruction that the jury might find for plaintiff such damages as from the evidence they believed he suffered was proper.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. \S 124.]

10. LIBEL AND SLANDER \S 5 — "MALICE"—
"INFERENCE."

The publication of a libelous article upon the written communication of defendant's correspondent, without any reasonable inquiry as to its truth when inquiry would have disclosed its falsity, was recklessly made without legal justification or excuse, and in a spirit of wanton disregard of the rights of plaintiff, so that malice might be inferred therefrom.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 278; Dec. Dig. \S 5.]

For other definitions, see Words and Phrases, First and Second Series, Malice.]

11. LIBEL AND SLANDER \S 121 — DAMAGES —
EXCESSIVE DAMAGES.

A verdict of \$2,500 special and \$10,000 general damages in an action for libeling plaintiff by a publication that, when chief of police

of another city, he had carried his son on the city pay roll, in violation of law, was excessive, and would be reversed unless plaintiff's widow and children filed a remittitur of \$5,000.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353, 354; Dec. Dig. ¶ 121.]

On Motion for Rehearing.

12. APPEAL AND ERROR ¶1140—REMITTITUR—STATUTE.

When an error has been committed by the trial court, which has possibly caused the rendition of an excessive verdict, and it is impossible to mathematically determine the sum of the excess found in consequence of the error, Rev. St. 1911, art. 1631, requiring the Court of Civil Appeals, when of the opinion that the verdict is excessive and that the cause should be reversed for that reason only, to indicate to the party in whose favor the judgment was rendered the amount of the excess, and the time within which he may file a remittitur, and requiring the court, if such remittitur is filed, to reform and affirm, and, if not, to reverse, does not apply, and the entire judgment will be reversed, and the cause remanded for another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. ¶ 1140.]

13. APPEAL AND ERROR ¶1140—EXCESSIVE DAMAGES—CURE BY REMITTITUR.

When it can be determined by the appellate court what excessive amount has been erroneously found by the jury by reason of an erroneous instruction, the court is authorized to cure such error by requiring a remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. ¶ 1140.]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by Ernest Wegner, Sr., against the Houston Chronicle Publishing Company, continued after plaintiff's death by his widow and children. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kittrell & Kittrell, of Houston, and E. F. Harris and Harris & Harris, all of Galveston, for appellant. James B. & Charles J. Stubbs and Marion J. Levy, all of Galveston, for appellees.

LANE, J. For the purposes of this opinion the following statement of the case will be sufficient:

Shortly prior to the 5th day of December, 1912, there appeared in the Galveston Labor Herald, a paper published in the city of Galveston, the following:

"We will ask this question until it is answered:

"Who is Chief of Police?

"Delenda Est Money Lender.

"And Jesus went into the temple of God and cast out all of them that sold and bought in the temple and overthrew the tables of the money changers (Loan Sharks, 1912) and the seats of them that sold doves.—Matthew xxi, 12. 'And said unto them: It is written—My house shall be called the house of prayer, but ye have made it a den of thieves.'

"To Mayor-President Lewis Fisher and Commissioners V. E. Austin, I. H. Kempner, A. P. Norman and M. E. Shay of the City of Galveston—Greeting:

"In the issue of the Galveston Labor Herald of date November 3 we asked the question, 'Whether there was such a position provided by the city charter as confidential clerk to the chief of police?' No reply to the contrary has been received, therefore the query will be answered by the Labor Herald itself."

On the 5th of December, 1912, on request of Commissioner Shay, the published communication as above set out was read by the city attorney to the board of commissioners, who then referred the same to the commissioner of fire and police of Galveston city for investigation and report. Thereafter, on the 6th day of December, 1912, the Houston Chronicle Publishing Company, a corporation which publishes the Houston Chronicle, a newspaper, in Houston, Tex., published in its said newspaper the following article:

"Galveston to Probe Police.

"Committee to Investigate Charge That Man Not Provided for is on Pay Roll—Prizes Awarded.

"Special to the Chronicle.

"Galveston, Texas, Dec. 6.—As a result of an article printed in the Galveston Labor Herald, the city commissioners appointed a committee, consisting of Mayor Lewis Fisher, Commissioner of Fire and Police A. P. Norman, and City Attorney Mart H. Royston, to probe the matter. The charge is that, contrary to law, the Chief of Police, E. Wegner, has E. Wegner, Jr., on the city pay roll as 'confidential clerk.' It is said no provision is made for such employment."

After such publication by said Houston Chronicle Publishing Company, hereinafter called the Chronicle Company, Ernest C. Wegner, Sr., brought suit against said Chronicle Company for damages alleged to have been suffered by him as a result of said publication, which he alleged to be maliciously false and slanderous. After said suit was filed, and before the case was tried, plaintiff, Ernest C. Wegner, Sr., died, and thereafter his widow and children made themselves parties plaintiff and carried on the litigation. By amended petition of the new-made parties, filed after the death of Ernest C. Wegner, Sr., allegation is made that in repetition and aggravation of the alleged libel of December 6, 1912, said Chronicle Company, on the 8th day of December, 1912, published an additional libel in the following words:

"An illustration of Galveston commission methods has just been given. Mr. Blair, editor of the Labor Herald, wrote to the commission, charging that the chief of police was employing 'a confidential clerk,' and asking if there were any charter provision for such position. The commissioners acted promptly. Instead of following the immortal Vanderbilt in his attitude to the public, they considered the question seriously and appointed a committee to make a thorough investigation of the matter. There is no provision in the charter for the employment of a 'confidential clerk' by the chief of police, or by any other official of the city. From the moment of filing the charges until the final verdict is rendered the people will know all about the case. There will be no secrecy about

it, for there never is about anything the commissioners do."

Prayer was for actual general damages in the sum of \$10,000, special damages in the sum of \$10,000, and exemplary damages in the sum of \$5,000.

The defendant answered by various special exceptions, and admitted the publication of the articles above set forth in the Houston Chronicle, especially denied various allegations of the plaintiffs, and pleaded absolute privilege and qualified privilege, in that the articles published constituted a report of the proceedings of a public body charged with public and official duty, with the proper performance of which duty the public was concerned, and that the publications were a fair, true, and impartial account of executive and legislative proceedings, which were matters of record, and that said articles constituted a true and impartial account of a public meeting organized and conducted for public purposes only, and that said articles were a fair comment upon a statement concerning official acts of public officials, published for general information; that the defendant publishes a newspaper, and rests upon the obligation to furnish its readers with a true account of all matters of public interest, and that it endeavored to report concerning E. C. Wegner, Sr., only that which was true and which it believed to be true, and defendant had no purpose in making the publication other than to set forth to its readers what it believed to be the truth; that defendant entertained no feeling of ill will against the plaintiff, and neither it nor any officer nor any employé of defendant had any purpose to do any injury to the said Ernest C. Wegner, Sr.

The case was tried before a jury, which was instructed by the court that they could not predicate any verdict of libel based upon the editorial of December 8, 1912, being the same set out in the amended petition filed by the substituted plaintiffs after the death of the original plaintiff, Ernest C. Wegner, Sr. The verdict of the jury was for appellees for \$2,500 special and \$10,000 general damages, and for no exemplary damages. Judgment was rendered in favor of appellees in accordance with said verdict, from which the Chronicle Company has appealed.

Appellant's assignments 1 to 5, inclusive, insist that the trial court erred in overruling appellant's special exceptions A. B. C. D. and E. to appellees' petition, wherein it is alleged that the article published by appellant is libelous, because: (1) It does not appear from said article that any charge is made by the defendant that any person is (or was) on the pay rolls of the city of Galveston; (2) it is not libelous per se, nor can such language be amplified or extended or construed into libel by plaintiffs by innuendo; (3) it is not libelous because it does not charge that any money was ever paid to the said E. Wegner, Jr.,

by the city of Galveston or from its funds, or that the city of Galveston ever sustained any loss, or that any of the funds of said city were diverted or applied to the payment of or for the use or benefit of said E. Wegner, Jr., or the said E. Wegner, Sr.; (4) it is not libelous because it alleges no fraud or secrecy on the part of the plaintiff, and does not allege nor convey the meaning that plaintiff was using the services of his son otherwise than for his (plaintiff's) convenience as his employé, and does not allege that the city of Galveston was in any wise defrauded or attempted to be defrauded; and (5) it is not libelous because it does not purport to be a charge made by the Chronicle Company against E. Wegner, Sr., but simply purports to be, and is, equivalent in law and in fact to a statement that such a charge had been made by another or other person, and that the Chronicle Company only so gave it, neither itself asserted it to be true, nor vouching for the truth thereof.

We will not undertake to consider these various assignments separately, as no good can be subserved in so doing, but will do so in a general way, as they practically present but one proposition; that is, that the alleged libelous article is, in fact, not libelous, and cannot be made so by innuendo averments.

[1] The undisputed evidence shows that no such charge as was stated in said article had been made by any one except the Chronicle Company; that such charge, as published by the Chronicle Company, was untrue; and that appellant gave publication to the same recklessly, in a spirit of wanton indifference, and without reasonable, if any, effort whatever to ascertain the truth or falsity of the communication of its correspondent which contained the false charge before publishing same.

We think the indisputable substance of the alleged libelous article is that E. Wegner, chief of police of Galveston, had been charged with having, contrary to law, placed E. Wegner, Jr. (his son), on the pay rolls of the city of Galveston as his confidential clerk, intending that said E. Wegner, Jr., should draw pay from said city contrary to law. Such being the substance of such publication, it is, we think, unquestionably libelous per se, being admittedly untrue. To constitute such article libelous it was not necessary that it should charge that any money was ever paid to E. Wegner, Jr., by the city, or from its funds, or that it ever sustained any loss, or that any of its funds were diverted or applied to the payment of or for the use or benefit of the said E. Wegner, Jr., as suggested by appellant in its third assignment. A false charge that he had attempted to do the unlawful act alleged or charged was sufficient. Nor was it necessary that the libelous article should state that any fraud or secrecy was practiced by plaintiff, E. Wegner, Sr., or that the city of Galves-

ton was in any wise actually defrauded, as suggested in appellant's fourth assignment, to constitute libel.

[2] Nor does the fact that the false charge or statement made in said Chronicle simply purports to be a statement or charge made by another or other person, and that the Chronicle only so gave it, and that it neither itself asserted such charge to be true nor vouched for the truth thereof, relieve such statement of its libelous character, as suggested by appellant's fifth assignment. *Guisti v. Galveston Tribune*, 105 Tex. 497, 150 S. W. 874, 152 S. W. 167; *Walker v. Pub. Co.*, 70 S. W. 558; *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609; *Belo v. Smith*, 91 Tex. 225, 42 S. W. 850; *Publishing Co. v. Lewy*, 52 Tex. Civ. App. 22, 113 S. W. 574; *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; *Sanders v. Hall*, 22 Tex. Civ. App. 282, 55 S. W. 594.

In *Patterson v. Wallace & Frazer*, 93 S. W. at page 150, the court said:

"One who publishes a defamatory statement made by another cannot justify [himself] by proving that the other made the statement. By publishing it he becomes responsible for his own act in so doing, and, if he seeks to justify, he must prove the truth of the charge published."

And again, quoting from *Nicholson v. Rust* (Ky.) 52 S. W. 933:

"Nor is it any justification for a repetition of a slander that it had been reported in the neighborhood, or that appellant, at the time he communicated the slander, gave the party to whom he related it the name of the person from whom he learned said report; * * * and it cannot be relied on by way of justification that he did not intend to charge appellant with the offense of fornication."

"It will afford no justification in any action for slander that the defamatory matter had been previously published by a third person, or that the defendant, at the time of his publication, disclosed the name of that third person, and believed all of the statements to be true." *Burt v. McBain*, 29 Mich. 260; *Newell on Defamation, Slander, and Libel*, pp. 354, 355; and authorities above cited.

In *Kelley v. Dillon*, 5 Ind. 426, the court said:

"Let it be understood that a bare rumor * * * is sufficient to justify the retailing of slander, and character would be at the mercy of the artful and designing, as such defenses could be * * * manufactured beforehand to suit any emergency."

Every repetition of a slander is a willful publication of it, rendering the speaker liable to an action. Talebearers are as bad as tale-makers.

We construe the language of the publication complained of to be libelous per se, and that its publication by the Chronicle Company made it liable to the plaintiff Wegner, Sr., for any damages he suffered by reason of such publication. Whether the publication alleged that any moneys belonging to the city of Galveston were paid to Wegner, Jr., or that said city sustained any loss, or in any way suffered actual loss by the unlawful act wrongfully charged to E. Wegner, Sr., or whether said publication was but a repeti-

tion of a charge made by another person, which the Chronicle Company believed to be true, are immaterial questions, especially so as no exemplary damages were recovered in this suit. We therefore overrule said assignments 1 to 5, inclusive.

[3] Appellant insists by his sixth and seventh assignments that the court erred in not striking out so much of appellees' amended petition as set up the editorial published in said Chronicle on the 8th day of December, 1912, for various reasons stated in its special exception thereto. There is no merit in this assignment, as the court in his charge instructed the jury as follows:

"You are further instructed that you cannot predicate any verdict of libel based upon the said publication of December 8, 1912, by defendant in said Houston Chronicle."

Such charge in its practical effect was equivalent to sustaining appellant's said exception. It must be presumed, in the absence of any showing to the contrary, that the jury obeyed the instruction given. *Patterson v. Wallace & Frazer*, 93 S. W. 146.

[4] The eighth assignment insists that the trial court erred in refusing to give to the jury appellant's special charge No. 2, which was, in substance, an instruction to the jury to find for the Chronicle Company on the issue of special damages, because there was no evidence authorizing a recovery of special damages, and because the only damages recoverable under the pleadings and proof are embraced on the charge of the court, given under the head of general damages.

When the article upon which the suit is based, is, as in this case, libelous per se, the plaintiff is entitled to recover such general damages as he has sustained thereby without proof other than of the fact of the libel. But, if he would enlarge the recovery beyond the general damages he has sustained, then only it is incumbent upon him to both allege and prove that he has suffered damages. The plaintiffs under the general allegations of damages may, upon proof of a libel per se, recover for injury to his reputation, mental and physical distress, sickness produced by humiliation, etc. These would be the direct result of the publication, and can be recovered for under the allegations of general damages, although not specifically pleaded as such.

[5, 6] In this case the court, in addition to submitting the question of general damages to the jury, submitted as special damages several items which would properly under the head of general damages, and not special damages, and we think this was technical error, but that it could not possibly have been of harm to appellant, for the reason that after all such items of damages as were allowed under the court's charge as a whole could have been recovered under the head of general damages, and the fact that the court erroneously charged on special, and the jury designated some portion of such

recovery as special damages, is immaterial. But, if it be conceded that the erroneous charge complained of tended to increase the amount of recovery, such error is rendered harmless in view of the fact that this court will require appellees to file with the clerk of this court a remittitur of \$5,000 before affirmance. *Belo v. Smith*, 40 S. W. 856.

[7] Appellant's ninth, tenth, thirteenth, fifteenth, twentieth, and twenty-first assignments insist that the trial court erred in instructing the jury on the question of exemplary damages, and in not instructing the jury, at the request of defendant, that no such damages could be recovered. In this case the jury found that no exemplary damages were recoverable; so, if the court erred in submitting the question to the jury, it was harmless error, as the jury found against plaintiff and for defendant upon this issue. We therefore overrule said assignments.

[8] Assignments 11 and 12 complain of the action of the trial court in refusing appellant's special charges 4 and 5. The substance of these special charges were that the publication complained of was not a charge by defendant that E. Wegner, Jr., was on the city pay rolls. It meant only that it was so rumored or reported, and the language therein was not libelous. The complaints made in these assignments are untenable. The court did not err in refusing to give said charges to the jury. *Patterson v. Wallace & Frazer*, 93 S. W. 146; *Kelley v. Dillon*, 5 Ind. 426, *supra*.

[9] The fourteenth assignment insists that the main charge as a whole is erroneous because it, in effect, peremptorily directs a verdict against the defendant, and nowhere allows the jury to find for the defendant. We think the trial court properly held that the language of the article complained of is libelous per se, and therefore the court correctly instructed the jury to find for plaintiffs such damages as they should find from the evidence E. Wegner, Sr., suffered by reason of such libel, and, so believing, we overrule said assignment.

The same may be said of assignments Nos. 16 and 17 as of assignment No. 14, and for the reasons given for overruling assignment 14 we overrule assignments 16 and 17.

[10] Assignment 18 insists that the trial court erred in defining the meaning of the term "malice," because there is no evidence tending to prove malice, or any act on the part of the Chronicle Company showing a reckless disregard of the rights of E. Wegner, Sr.

We have already shown that the article complained of was published upon the written communication of appellant's Galveston correspondent without any reasonable inquiry as to the truth of such communication, and that, had such inquiry been made, the falsity of the same would have been disclosed. We therefore conclude that said

publication was recklessly made without legal justification or excuse, and in a spirit of wanton disregard of the rights of E. Wegner, Sr., and that from such publication malice may be inferred. *Cotulla v. Kerr*, 74 Tex. 90 and 95, 11 S. W. 1058, 15 Am. St. Rep. 819; *Forke v. Homann*, 14 Tex. Civ. App. 670, 39 S. W. 213; *Mayo v. Goldman*, 57 Tex. Civ. App. 475, 122 S. W. 449; *Ellis v. Garrison*, 174 S. W. 964; *Houston Chronicle Co. v. McDavid*, 157 S. W. 224; *Reid v. Publishing Co.*, 158 Ky. 727, 166 S. W. 245.

In *Courier Journal Co.*, 104 Ky. 835, 47 S. W. 229, the court said:

"If, as a matter of fact, the words published were false, and tended to the injury of plaintiff, and were published recklessly, even without special ill will, defendant is equally guilty, and punitive damages may be recovered."

We therefore overrule the eighteenth assignment.

We overrule the nineteenth assignment for the reasons already given for overruling the eighth assignment.

Assignments 20, 21, 22, 23, 26, and 27 have been considered, and are overruled for reasons given for overruling assignments hereinbefore considered.

[11] The twenty-fourth and twenty-fifth assignments insist that the judgment for \$12,500, rendered by the trial court is grossly excessive, and for that reason such judgment should be reversed, and the cause remanded.

After a most careful reading of the entire statement of facts, we have reached the conclusion that said judgment is excessive, and, so believing, it is ordered that the judgment of the lower court be reversed, and the cause be remanded for another trial, unless appellees shall, within ten days from the 25th day of November, 1915, file with the clerk of this court a remittitur of \$5,000; but, in the event such remittitur is so filed, then in that event judgment shall be here entered for appellees against appellant for the sum of \$7,500.

It appearing to this court that appellees have within the time stipulated in our opinion filed with the clerk of this court a remittitur of \$5,000, judgment is here entered in favor of appellees against appellant for the sum of \$7,500.

On Motion for Rehearing.

In their petition appellees allege that the publication of the said libelous article by appellant injured Ernest C. Wegner, Sr., in his reputation, caused him to suffer pain, anguish, and distress, both mental and physical, and that the same greatly impaired and injured his health, and prayed for \$10,000 actual and \$10,000 special, and \$10,000 exemplary, damages. The court instructed the jury: (1) That the publication complained of by appellees was libelous per se, and that plaintiffs were entitled to recover such general compensatory damages as the jury

should find Ernest C. Wegner, Sr., suffered by reason of said publication to his *character* or *reputation*, and for such damages as he suffered by reason of *mental* pain, if any, as the result of said publication; (2) that if the jury should find that by reason of said publication E. C. Wegner, Sr., was injured and impaired in *health*, that plaintiffs were further entitled to recover such *special* damages as the jury might find from the evidence said Wegner, Sr., so suffered by reason of injury and impairment of his *health*, thus separating the alleged items of damages into two classes. Under this charge the jury found general damages in the sum of \$10,000 and special damages in the sum of \$2,500.

While appellees have alleged injury to the character and reputation, the mental and physical suffering, and impairment of the health, of said Ernest C. Wegner, Sr., by reason of said publication, and have prayed for both general and special damages, there is no allegation alleging special damages; and as the entire recovery to which appellees were entitled under their pleading could and should have been recovered under a charge submitting the question of general damages only, we held in the main opinion that the learned trial court erred in his charge in separating the different alleged items of damages into two classes, i. e., general damages and special damages, and in authorizing a recovery of general damages for a part of the alleged items of damage, and the recovery of special damages for another item of said alleged damage. But as it is clear that double damage was not authorized by such charge, and could not have been given by virtue of the court's charge, the mere fact that recovery was permitted for the alleged items separately, when such recovery could have been had under a charge submitting all the items conjunctively, should not be cause for a reversal of the judgment of the trial court, especially so as this court has required a remittitur of \$5,000.

Counsel for appellant has filed a motion for rehearing, in which he vigorously and earnestly attacks the holding of the court referred to, and insists that said charge of the court authorized double damages, and that such double or excessive damages as was probably found by the jury by reason of said erroneous charge cannot be mathematically determined, and therefore the judgment cannot be legally cured by a remittitur of \$5,000, or any other sum less than the whole. We think such contention untenable. Suppose the court had added to the items named in the first portion of his charge the further item of "physical pain resulting in

the impairment of health," which was submitted in the second part of said charge as an element of special damages; would any one insist that it would have been possible that such addition would or could have had the effect to decrease the amount found by the jury as general damages? On the other hand, would not such addition have tended to furnish further reason for the jury to find \$10,000 general damages, the full amount prayed for as general damages, as they did find? We think so, and, so believing, we think we can to a mathematical certainty say that such erroneous charge could not have increased and did not increase the amount of recovery found by the jury in any sum in excess of \$2,500, and therefore a remittitur of \$5,000 clearly rendered such charge harmless.

[12] After a review of the cases cited by counsel in support of the motion we have concluded that they are not applicable to the facts in the present case. We are of opinion that when an error has been committed by the trial court which has probably, or perhaps even possibly, caused the rendition of an excessive verdict, and that it is impossible for the appellate court to mathematically determine the sum of such excess erroneously found by reason of such error, article 1631, Revised Statutes, would not apply, and the entire judgment should be reversed, and the cause remanded for another trial. *Railway v. Wesch*, 85 Tex. 593, 22 S. W. 957; *Nunnally v. Taliaferro*, 82 Tex. 286, 18 S. W. 149; *Electric Co. v. Green*, 48 Tex. Civ. App. 242, 106 S. W. 463; *Railway Co. v. Bird*, 48 S. W. 756.

[13] But when it can be determined by the appellate court what excessive amount had been erroneously found by the jury by reason of an erroneous instruction, as in this case, the court is authorized to cure such error by requiring a remittitur. *Railway v. Trawick*, 80 Tex. 275, 15 S. W. 568, 18 S. W. 948; *Railway v. Bellevue*, 22 Tex. Civ. App. 264, 54 S. W. 1079; *Railway Co. v. Keel Grain Co.*, 132 S. W. 837; *Petroleum Co. v. Townsite Co.*, 48 Tex. Civ. App. 555, 107 S. W. 609; *Old River Irrigation Co. v. Stubbs*, 137 S. W. 154. The case of *Railway Co. v. Keel Grain Co.*, supra is one in which the court first ordered a reversal because of erroneous charge, but on motion for rehearing the judgment was affirmed upon appellee's filing a remittitur, thereby rendering such charge harmless.

After a careful review and consideration of all the assignments in appellant's motion, and the authorities cited in support thereof, we conclude that the motion should be refused; and it is so ordered.

GILBERT v. FUHRMAN. (No. 511.)

(Court of Civil Appeals of Texas. El Paso.
Jan. 13, 1916.)

APPEAL AND ERROR \S 230 — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Under Rev. Civ. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), requiring the court's charge to be in writing and to be submitted to the parties or their attorneys for inspection and a reasonable time given for examination, and providing that objections not then made shall be considered waived, defendant, who did not object to the court's charge before it was given or present appropriate charges, waived any errors, and must be considered as having adopted the charge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 230; Trial, Cent. Dig. \S 680-682.]

Appeal from El Paso County Court; A. Pool, Judge.

Action by S. A. Fuhrman against F. B. Gilbert. From a judgment for plaintiff, defendant appeals. Affirmed.

Adolf Hoffman and Del W. Harrington, both of El Paso, for appellant. G. L. & Atlas Jones, of El Paso, for appellee.

WALTHALL, J. This suit was filed in the county court at law by appellee against appellant, in which he sought to recover judgment for the sum of \$280, alleged to have been stolen from his grip in his room while a guest in appellant's hotel. Appellee alleged that said loss of said money was occasioned through the negligence, carelessness, and default of appellant, in that appellant—

“had no safe or place of deposit in the office of said hotel for the money or valuables of its guests, and no notice, in any way, was given plaintiff by defendant as to depositing money or valuables of guests while plaintiff was abiding at said hotel.”

Appellant denied any knowledge of the fact that appellee had any money in his grip while he was a guest in the hotel; denied a knowledge of the loss of the money; denied that he was guilty of any act of negligence; alleged that while he had no safe for keeping valuables of guests, he had always safely kept valuables of guests when requested so to do; alleged that appellee at no time advised him that he had money in his grip, and made no request of appellant for its safe deposit or keeping. The case was tried to a jury. A verdict was returned in favor of appellee, on which the court rendered judgment in his favor.

Appellant presents four assignments of error, all complaining of the court's charge. The court gave the following charge to the jury:

“The court instructs the jury that the only issues in this case for the jury to pass upon are the issues whether or not the plaintiff had in his possession \$280, in good and lawful money, and whether or not he had the same stolen

from the room occupied by him in defendant's hotel, after plaintiff had locked the door to his room in said hotel and was absent from the same.”

The record filed in this court does not show that appellant, at any time, presented any objection or took any exception to the charge of the court. Article 1971, Revised Civil Statutes 1911, as amended by chapter 59, p. 113, Gen. Laws 33d Leg., requires the court's charge to be in writing, and by the court submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine it and present objections thereto, and provides that all objections not so made and presented shall be considered as waived. We must therefore conclude that appellant was satisfied with the charge given and the issues therein submitted, and waived any errors in said charge he now offers to present to this court. He should have presented them to the trial court at such time as the statute requires, when the supposed errors, if any, could have been corrected, and when such additional issues as the pleadings and evidence would admit could have been submitted to the jury. As said by the appellate court for the Second district in Stephenville, N. & S. T. Ry. Co. v. Wheat, 173 S. W. 977: “The act is not only explicit, but it is also mandatory in its terms.” It seems to us quite clear that any error in a charge, though fundamental in its nature, can be and is waived by not presenting objections to it within the time and in the manner prescribed by the statute. To hold otherwise would make the statute of no effect.

For the reasons given, we cannot consider any of the assignments of error, and the case is affirmed.

HARPER, O. J. (concurring). This suit was instituted by S. A. Fuhrman against F. B. Gilbert, to recover \$280 United States money, alleged to have been stolen from plaintiff's (appellee's) valise while a guest in defendant's hotel. The defense was that appellant had no knowledge that appellee had any money; that he, defendant, was not guilty of negligence. The cause was submitted to a jury by general charge, and resulted in verdict and judgment for appellee for the money sued for, from which this appeal is taken.

The appellant's four assignments all complain of the following portion of the court's charge:

“The court instructs the jury that the only issues of this case for the jury to pass on are the issues whether or not the plaintiff had in his possession \$280 in good and lawful money, and whether or not he had the same stolen from the room occupied by him in defendant's hotel and was absent from same.”

First. Because it does not instruct the jury that the loss must have occurred by reason of the negligence of the defendant. Sec-

ond. Because it limits the right to recover to the fact that the money was stolen from the room regardless of whether the defendant was negligent in not having an iron safe or sufficient lock to the door of the room, or keeping sufficient lookout. Third. Because the court charged that the jury were not to consider any evidence of negligence upon the part of plaintiff. Fourth. Because the charge given is tantamount to a peremptory instruction; is therefore fundamental error. The record does not disclose any proper exception to the charge as given, or that there were any special charges prepared and requested by defendant, as is now required by statute, as amended by chapter 59, p. 113, Gen. Laws 33d Leg. There appears in the transcript a statement that the appellant excepted to the charge of the court (no reasons given), which statement is from the stenographer reporting the case. It is not approved or signed by the court, nor does it show that it was urged or presented to the court at the time required by the statutes. Therefore, if it was error for the court to fail to instruct the jury that the loss must have occurred by reason of the negligence of defendant, in any respect, or if it was error for the court to charge the jury that they would not consider any negligence upon the part of the plaintiff, the error was waived as provided in the act cited, and as to the fourth, it is apparent from the portion of the charge quoted (and there is nothing in the other portions to the contrary) that the charge was not a peremptory charge as contended for.

I am therefore of the opinion that the assignments should be overruled, and the cause affirmed.

TEXAS & P. RY. CO. v. CONWAY.
(No. 1548.)

(Court of Civil Appeals of Texas. Texarkana.
Jan. 4, 1916. Rehearing Denied
Jan. 13, 1916.)

1. REMOVAL OF CAUSES §107—REMAND BY FEDERAL COURT—REVIEW.

Where, upon the removal of a cause from the state to the federal court, the latter remanded it, the state court's jurisdiction to try the cause could not be questioned on the ground that the remand was wrongful, since the action of the federal court in that respect is not subject to review by the state courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. §107; Appeal and Error, Cent. Dig. § 725.]

2. RAILROADS §22—PERSONAL INJURIES—NONRESIDENT PLAINTIFF—VENUE.

Where plaintiff, while a resident of Texas, was injured by defendant railroad's train, but had moved to another state at the time he commenced his action in Texas, the action was properly brought in a county other than that in which he resided at the time of the injury, and in which the accident occurred, since the provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 26, that a nonresident may sue in any county where the corporation operates its railroad, or in which it has an agent, refers

to residence at the time when suit is commenced, and not to the time of injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 46-50; Dec. Dig. §22.]

3. DAMAGES §132—INJURED EMPLOYEE—EXCESSIVE DAMAGES.

Where plaintiff employee's leg was injured by his slipping from the defective footboard of defendant railroad company's tender, and it appeared that plaintiff was 40 years of age, with an earning capacity of \$110 to \$175 per month, that the injury would probably disable him from working and would cause him severe mental and physical pain and suffering for life, and that he was likely to die at any moment, a verdict of \$20,000 was not so excessive as to indicate that the jury was influenced by other than proper motives in arriving thereat.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. §132.]

4. MASTER AND SERVANT §297—PERSONAL INJURY—FINDINGS—CONSISTENCY.

Where, in an action for such injuries, the jury found that plaintiff's duties required him to use the footboard, but that proper attention to such duties would not have caused him to observe its defective condition, such findings were not necessarily contradictory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. §297.]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Action by E. J. Conway against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This was a suit by appellee against appellant for damages for personal injury suffered by him, in which judgment was rendered in his favor for \$20,000. It was commenced in the district court of Harrison county, from which, on application of appellant, it was removed to the United States District Court for the Eastern District of Texas, which, on motion of appellee, remanded it to the court in which it was commenced.

It appears from the record that during the night of April 3, 1914, appellee, in the performance of his duty as a switchman in appellant's yards at Bonham, stepped upon the footboard attached to the tender of the engine then being used in switching cars. The footboard should have been level, but, instead, as the testimony conclusively showed, it was "very badly bent towards the ground," which "gave it a slanting position." Because of the position of the board, appellee's foot slipped from and went under it when he stepped upon it. He testified:

"In attempting to get on the footboard my left leg was caught between the footboard and the rail. My left hand was a hold of the grabiron on the flat car. My right hand was going everywhere trying to catch something. My left knee and leg was inside the rail, and my foot dragging on the ties. The footboard caught my knee, and was pressing my knee against the rail. I was dragged in this position, as near as I could estimate, about 70 feet. I realized at the time the danger I was in. It was hold on or get killed. I certainly realized the situation. I held on the best I could to the flat car with my left hand. I knew that I was in danger.

but couldn't tell what would be the result. My strength held out, and I didn't get hung up on anything to tear my hold loose. I was a very strong man and had a very strong arm, and that was the only thing I had to rely on. It inflicted severe injuries on my leg. It sprained the left knee and ankle, and also my side, and caused a sprain of the shoulder. I could not raise the shoulder for several days. On the outside of the left knee the skin was scratched off and showed the white bone in one place, a cut across the cap here and one here. The right shin had a four-inch skin wound across it, and the big toe there was bruised on the right foot. The wheel caught the shoe here and the shoe bursted. The ligaments and muscles were twisted and torn. It twisted my leg like a rope. When my right foot came loose it threw me back down and left me hanging with one hand. My left leg was fastened between the rail and foot board, and was twisted."

The judgment involves findings, and we find that appellant, as charged against it, was guilty of negligence, which was a proximate cause of the injury to appellee, in that it permitted the footboard to become and be out of repair as stated above; that the risk appellee incurred in stepping upon the footboard as he did was not one he assumed; and that he was damaged in the sum of \$20,000.

F. H. Prendergast, of Marshall, for appellant. S. P. Jones and T. P. Harte, both of Marshall, for appellee.

WILLSON, C. J. (after stating the facts as above). After the cause was remanded by the federal to the state court, appellant insisted that the latter court thereby did not acquire jurisdiction to try it, because, it asserted, the federal court had power to try it, and therefore had no right to remand it to the state court; and further insisted that because the injury to appellee occurred in Fannin county, where he at the time resided, he must have commenced his suit in that court, and did not have a right to sue in Harrison county. The action of the court below in overruling these contentions is made the basis of the first and second assignments.

[1] So far as the first of the two contentions is concerned, it is enough to say that the action of the federal court in remanding the cause is not subject to revision by this court. *Telegraph Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 860.

[2] It conclusively appeared (1) that appellee was injured in Fannin county, Tex., and that he resided in that county at the time he was injured; and (2) that he resided in Carroll county, Ark., at the time he commenced his suit. Therefore, whether the second of the two contentions should have been sustained or not depends, first, upon whether subdivision 26 of article 1830, Vernon's Statutes, should have been so construed as to require him to sue in said Fannin county, or whether it should have been so construed as to authorize him to sue as he did in Harrison county, Tex.; and, second, upon whether, if he must have sued in Fannin county, it

appeared that appellant had waived its right to insist that he do so.

The subdivision of article 1830 referred to is as follows:

"All suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in the state of Texas, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury; provided, that if the defendant railroad corporation does not run or operate its railway in or through the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent; and provided, further, that, in case that the plaintiff is a nonresident of the state of Texas, then such suit may be brought in any county in which the defendant corporation may run or operate its railroad, or may have an agent; provided, that, when an injury occurs within one-half mile from the boundary line dividing two counties, suit may be brought in either of said counties."

It will be readily seen that if the language used in the proviso, to wit, "in case the plaintiff is a nonresident of the state of Texas," refers to the time when he commenced his suit, and not to the time when he was injured, appellee had a right to sue in Harrison county; for he was then a nonresident of this state and appellant then operated its line of railway and had an agent in that county.

Before the enactment of the subdivision set out above of article 1830, a person having a cause of action for damages for personal injury against a railroad company, without reference to whether he was a resident or nonresident of this state, might have sued thereon in any county in which the company had an agent or into which its line of railway extended. Subdivision 24, art. 1830, Vernon's Statutes. The effect of the enactment of subdivision 26 was to so limit the right of a resident of this state having such a cause of action as to require him to sue thereon in the county where he was injured, or in the county where he resided when he was injured, unless the company did not have an agent or did not operate its line of railway there, in which event he was authorized to commence his suit in the county where the company had an agent or operated a line of railway nearest the one in which he resided at the time he was injured. The main purpose of the enactment of subdivision 26 seems to have been to so limit a resident plaintiff's right; for the right of a nonresident of the state having such a cause of action to sue thereon in any county in the state where the company had an agent or where it operated a line of railway not only was not thereby in any way limited, but, on the contrary, was expressly affirmed. Why the Legislature thought it proper to discriminate against a resident of this state

having a cause of action for damages for personal injury against a railway company, by limiting a right it conferred without limitation upon a nonresident having such a cause of action, is not disclosed by anything appearing in their enactment. But that they did so is plain. As before the enactment of subdivision 26 a nonresident, without reference to whether he had ever been a resident of the state or not, and without reference to the county in which he was injured, might have commenced a suit for damages for personal injury he had suffered in any county where the company had an agent or operated a line of railway, we see no reason why a statute expressly affirming such a right in a nonresident should be construed as denying it to him because he was a resident of the state at the time the cause of action arose in his favor. There is nothing in the statute indicating that the Legislature intended to discriminate between nonresidents by denying to one who had removed to another state a right it conferred upon one who had never resided here. On the contrary, the language used in the statute indicates, we think, that it was intended to apply in favor of all persons who were nonresidents of this state at the time they commenced suit against a railway company for damages for personal injury suffered by them in this state. Being of opinion that appellee, because a nonresident of the state of Texas at the time he commenced his suit, had a right to commence and prosecute it in Harrison county, where appellant had an agent and operated a line of railway, it is not necessary, as it would be if we were of a contrary opinion, to determine whether appellant had waived a right it would then appear it had to have the cause tried in Fannin county.

[3] In the third and fourth assignments the verdict is attacked on the ground that it is excessive. It is not pretended that there is anything in the record, except the amount of the verdict, indicating that the jury in assessing the damages were influenced by other than proper motives. When the injury the jury had a right to believe from the testimony appellee suffered is kept in mind, we do not think the amount of their verdict indicates that their judgment was controlled by any other consideration than an honest desire to discharge their duty by awarding to appellee a sum which would compensate him for the injury he sustained. At the time he was injured, appellee was 40 years of age and had an earning capacity of from \$110 to \$175 per month. The jury had a right to believe from the testimony that the injury he sustained probably would permanently disable him from engaging in remunerative labor. Moreover, they had a right to believe he would suffer severe physical and mental pain as a consequence of the injury as long as he lived, and that as a fur-

ther consequence thereof he was liable to die at any moment. They might very well, we think, have concluded that the condition the injury left him in was worse than it would have been had he lost his leg entirely as a result thereof.

[4] Special issues were submitted to the jury. Among them were two, as follows:

(1) "Did Conway's duties require him to use the footboard on the engine in performing his regular duties?" The jury answered that they did.

(2) "If Conway had given attention to the duties required of him in performing his duties, would he have observed the condition of the footboard?" The jury answered that he would not.

In propositions under the fifth, sixth, and seventh assignments the findings set out above are attacked on the ground that they contradict each other; and the second of the two is further attacked on the ground, it seems, that it was without support in the testimony. We do not think the findings are necessarily contradictory. The jury doubtless meant by the first that it would have been appellee's duty, had an occasion requiring him to do so arisen, to use the footboard; and by the second that in the discharge of his duties on the night when he was injured it had not been necessary for him to use the footboard before he stepped upon and slipped off of it, and he had not been called upon to observe, and therefore did not know, its condition. Appellee testified that he did not know the footboard was bent until after he was injured. The jury, we think, might very well have concluded that in giving the attention he should have given to the duties he was engaged in performing, and not having had occasion before he was injured to use the footboard, as he testified was true, he would not have discovered its condition.

The judgment is affirmed.

AMERMAN et al. v. MISSOURI, K. & T. RY.
CO. OF TEXAS. (No. 6990.)

(Court of Civil Appeals of Texas. Galveston.
Dec. 17, 1915. Rehearing Denied
Jan. 13, 1916.)

1. BOUNDARIES \Leftrightarrow 20 — LOT ON PLATTED STREET—VACATION—TITLE IN STREET.

Where one of plaintiff heirs sold to defendant railroad company her lot abutting on a platted, but unopened, street, the conveyance being after an ordinance was passed by the city giving defendant the right to construct buildings and tracks over and across all streets crossing its yards, within which the lot in question was embraced, defendant acquired title to the middle of such street in front of the lot, since neither the existence of the street nor the rights of abutting owners thereon were affected by the city's abandonment of any rights it may have had therein.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. \Leftrightarrow 20.]

2. DEDICATION ¶65—STREETS—ABANDONMENT—REVERSION.

Where, in a partition of land among heirs, the tract was platted, reserving a strip for a street upon which the allotments were made to abut, but the street was never opened, and the city afterwards abandoned its rights therein by an ordinance granting a railroad company the right to erect buildings and tracks thereon, the absolute fee did not thereby revert in common to the heirs, since their vested abutting rights as distributees were not dependent upon whether the public accepted the dedication of the street, or abandoned its rights therein.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 103; Dec. Dig. ¶65.]

3. EMINENT DOMAIN ¶317—ABUTTING LOT—CONDEMNATION—TITLE IN STREET.

The condemnation by the railroad of other of such lots also passed title to the middle of such street, though the property was described in the proceedings simply by lot and block number, since the description which in a deed would include the vendor's rights in a street is sufficient to pass title thereto in condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. ¶317.]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by Mary F. Amerman and others against the Missouri, Kansas & Texas Railway Company of Texas, to try title to real estate. Judgment for defendant, and plaintiffs appeal. Affirmed.

Fisher, Campbell & Amerman, of Houston, for appellants. Baker, Botts, Parker & Garwood and Walter H. Walne, all of Houston, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title brought by appellants against the appellee. The land involved is a strip 40 feet wide and 522 feet long out of a tract of 13 acres in the John Austin survey in the city of Houston, known as the G. W. Collings tract. The plaintiffs in the court below were Mrs. Mary F. Amerman, a daughter of G. W. Collings and his wife, Catherine, both deceased, and C. J. Collings, C. E. Collings, and H. A. Collings, children of a deceased son of said G. W. and Catherine Collings. Pending the suit G. E. Collings died, and the heirs made themselves parties plaintiff. The 13-acre tract, of which the strip of land in controversy is a part, was the homestead of G. W. Collings and Catherine Collings. G. W. Collings died in 1889, leaving a will by which the 13-acre tract was bequeathed to his wife, Catherine. Mrs. Collings died intestate in 1890. After the death of Mrs. Collings her daughter, Mrs. A. E. Conn, brought suit for partition of her mother's estate. All of the parties at interest were parties to this suit, in which a final decree of partition, to which all parties agreed, was rendered. By this partition decree the 13 acres of land was subdivided into blocks A, B, C, D, and E, and block D was further subdivided into lots numbered

from 1 to 8, inclusive. As shown on the plat accompanying the report of the commissioners of partition, and which is referred to and made a part of the decree, a street 40 feet in width was reserved and designated between blocks C and D and block A. This street, which is the land in controversy, connected with Montgomery avenue, one of the principal streets of the city of Houston, and was named and designated on said plat as Pearl or Third street. A copy of this decree of partition with the accompanying map or plat was duly recorded in the deed records of Harris county on June 24, 1891. By this decree subdivision or block A, which extends along Pearl street on its southeast side, was allotted to Mrs. Conn, subdivision or block D, which extends along the northwest side of Pearl street, was allotted to G. E., C. J., and H. A. Collings, who were then minors, and subdivision or block C, which lies immediately west of block D, and also extends along Pearl street, was allotted to plaintiff Mrs. Amerman. In 1892 the appellee railway company purchased from the remote vendee of Mrs. Conn subdivision A., allotted to her by said partition decree, and also purchased that portion of subdivision C, allotted to Mrs. Amerman by said decree, which abuts upon and extends along said Pearl street. By condemnation proceedings, in which the petition was filed July 16, 1892, and final judgment rendered October 8, 1892, appellee acquired for railway and depot purposes lots 1 to 8, inclusive, in subdivision D, allotted to G. E., C. J., and H. A. Collings by said partition decree. The parties last named were parties defendant in this condemnation proceeding. On June 20, 1892, the city council of the city of Houston passed an ordinance which authorized the railway company to construct such tracts and erect such buildings as it might find necessary over and across all parts of streets which might cross or intersect its depot, shop, or yard grounds between Montgomery avenue and White Oak bayou. Pearl street was one of the streets included in the boundaries named in said ordinance and to which it referred. The deed from Mrs. Amerman to appellee, conveying that portion of subdivision C lying along Pearl street, was executed subsequent to the passage of this ordinance. It is not shown that Pearl street was ever opened or used as a public street of the city of Houston. All of the deeds under which appellee holds title to subdivision A, allotted to Mrs. Conn in said partition suit, refer to said partition decree, and call for Pearl or Third street as one of the boundaries of said subdivision, and appellants concede that by said deed appellee acquired fee-simple title to one-half of said street. The deed from Mrs. Amerman to appellee also calls for the north line of Pearl or Third street, and refers to said partition decree.

The petition in the condemnation proceedings and the final judgment rendered therein describes the land condemned as:

"All of lots 1, 2, 3, 4, 5, 6, 7 and 8 of block D of the subdivision of the Collings 18 acres."

The questions presented by this appeal are thus stated in appellants' brief:

"(1) Did the deed from Amerman to the railway company convey the title of the owners to the center of Pearl or Third street? (2) Did the condemnation of 'lots 1, 2, 3, 4, 5, 6, 7 and 8, in block D,' in like manner pass title to the owners to the center of the street?"

At the outset appellants conceded that the railway company should recover the east half of Third or Pearl street, and this appeal affects only the west half of Third or Pearl street.

[1, 2] Appellants' contention that the Amerman deed did not pass title to appellee to the center of that portion of Pearl street upon which the property described in said deed abuts is based upon the proposition that, because the city had released its rights in the street prior to the execution of said deed, the street had ceased to exist, and therefore the general rule that the conveyance of property bordering on a street or public highway, which calls for such street or highway, passes title to the vendee to the center of the street or highway is not applicable. The contention is not sound. The abandonment by the city of any rights it may have had in said street in no way affected the existence of the street. The rights of all persons owning property abutting thereon or adjacent thereto, and who held under conveyances referring to and calling for said street to keep the street open was not dependent upon whether the public accepted the dedication or abandoned its rights thereto. *Oswald v. Grenet*, 22 Tex. 94; *Wolf v. Brass*, 72 Tex. 133, 12 S. W. 159. This street was reserved in said partition proceedings for the benefit of the parties to whom the abutting blocks were allotted, as well as for the public, and the title to the center of the street vested in the persons to whom such blocks were allotted by the decree, regardless of any rights therein that may have been conferred upon the public by the record of the map or plat and the decree of partition, and it necessarily follows that the release by the city of its rights in the street did not have the effect of destroying the street as an easement, and Mrs. Amerman's deed, made after the city had released its rights in the street, conveying block O to appellee, in which the street is referred to and called for, was just as effective in passing her title to the center of the street as it would have been if it had been made before the release by the city.

[3] What we have said in regard to the effect of this deed applies equally to the judgment in the condemnation proceedings. But appellants further contend that the judgment in the condemnation proceedings

did not give appellee any right in that portion of the street upon which the lots condemned abutted, because the description of the property in the petition for condemnation and in the condemnation decree was not sufficient to include the rights of the owners of the property in the street. We cannot agree with appellants in this contention. The authorities sustain the proposition that a description which would be sufficient in a deed to include the vendor's rights in a street upon which the property conveyed by the deed abuts would be sufficient in a condemnation proceeding to subject to the purposes for which the condemnation was had the owner's rights in the adjoining streets. We find no case in this state directly in point, but the authorities from other jurisdictions are abundant. In *Railway Co. v. Patch*, 28 Kan. 470, the Supreme Court of Kansas, in an opinion by Justice Brewer, speaking of the effect of the condemnation of lots fronting upon a street and described in the condemnation proceedings by lot and block number only, say:

"The report of the commissioners shows that they appraised the lots, naming them, without any survey or any special indication as to what was embraced by the terms 'lots so and so.' Now, the defendant in error contends that the portions of the street in front of her lots became her property upon the passage of the ordinance vacating the street, precisely as though the previous owner had conveyed to her by deed. That as the commissioners did not appear to have appraised that property, as it was not named in nor covered by their report, she is entitled to an injunction restraining the company from occupying such part of her property."

The landowner's application for an injunction was refused. Judge Brewer holding that condemnation proceedings were included within the term "any conveyance," the opinion concluding with this language:

"Under these circumstances we think it fair to consider that it [the street] becomes, as it were, a part of the lot—something in the nature of an accretion to it—and, if so, then any conveyance of the lot takes with it this attached portion of the vacated street."

In the case of *Challis v. Depot Co.*, 45 Kan. 398, 25 Pac. 894, the same court says:

"By the condemnation proceedings, the company acquired the perpetual use of the lot, a use which in its nature practically excludes any other use or occupancy. Through the appropriation of the lot, the company acquired the incidental and appurtenant rights in the street, and, upon the legal vacation of the street, that portion situated in front of lot 1 temporarily became, as it were, a part of the lot, and passed to the company."

In the case of *Railway Co. v. Miller*, 172 Mich. 201, 137 N. W. 555, the Supreme Court of Michigan holds that under condemnation proceedings, in which the property was described as "lots number 259 and 263 of the subdivision of part of private claim 473, known as the Stanton farm, as per plat recorded in Liber 47 of Deeds, pages 558-559, Wayne County Records," the Railway Company acquired the rights of the owners of

the property in the street upon which the lots abutted. The court says:

"While the owners of the lots in question had undoubted rights in the street in front of said lots, the condemnation by the jury of the lots themselves includes all rights in the ways appurtenant thereto. Cincinnati, etc., Ry. Co. v. B. C. etc., Ry. Co., 106 Mich. 473, 64 N. W. 471."

In the case of Witt v. Railway Co., 38 Minn. 122, 35 N. W. 862, the Supreme Court of Minnesota says:

"As respects lots 8, 9, and 13, the trespasses complained of consisted in excavations or embankments caused to be made by the company in that half of the street in front of and next adjoining the lots. By the descriptions under which the lots were condemned and appropriated, the company took presumptively to the center of the street; and, subject to the rights of the public, the defendant may enter upon and may use that portion of the street, so acquired for its improvements, just as it may use and occupy any other portions of the lots in question. Under a description of village lots *eo nomine*, as platted, the land in the street passes as parcel of the lots, and not as appurtenant. In re Robbins, 34 Minn. 99, 24 N. W. 356 [57 Am. Rep. 40]. And under that description, the title, right, or interest acquired, whatever it be, in the street is presumed to be included in the estimation of the value of damages in the condemnation proceedings, and such estimation is usually deemed to be the value of the lot as described, whether in such proceedings, under railway charters, the company requires the fee or the land for its corporate purposes only. Robbins v. Railroad, 22 Minn. 287. No damages were recoverable by plaintiff for the alleged trespasses to these lots."

The proposition also finds support in the following cases: Railway Co. v. Mims, 71 Ga. 242; Railway Co. v. Reading Paper Mills, 149 Pa. 18, 24 Atl. 205; Illyes v. Light & Power Co., 175 Ind. 118, 93 N. E. 670; Railway Co. v. Brewing Co., 174 Ill. 548, 51 N. E. 572. We think the rule announced in these cases is sound and should be followed by our courts.

It has been unnecessary to discuss appellants' assignments in detail. The questions above discussed are the only material questions raised by the appeal.

It follows from the views above expressed upon these questions that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

HARDEE v. ALEXANDER. (No. 6994.)

(Court of Civil Appeals of Texas. Galveston. Dec. 2, 1915. Rehearing Denied Dec. 23, 1915.)

1. TENANCY IN COMMON — 33 — MUTUAL RIGHTS OF TENANTS — ACQUISITION OF WHOLE TITLE — PLEADING.

Pleadings held insufficient to remove a transaction by one of two tenants in common from the rule that a tenant in common who discharges an incumbrance against the common property acquires only an equitable lien, and not the whole title.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. — 33.]

2. TENANCY IN COMMON — 33 — MUTUAL RIGHTS — AGREEMENTS FOR DEFAULT.

Where an agreement of tenants in common was that in case of default by either in payments for the common property the one paying should take the whole title, the forfeiture could not be effected unless one party defaulted in all payments due by him, since any other construction would be inequitable.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 25; Dec. Dig. — 33.]

3. EQUITY — 65 — TENANCY IN COMMON — 33 — MUTUAL RIGHTS — EQUITABLE RELIEF.

Where a tenant in common refused to permit a sale of the property to which he had agreed, thereby preventing his cotenant from making payments, he could not have the equitable relief of forfeiture of his cotenant's interest to him under their contract providing for forfeiture of the rights of either to the other in case of default in payments, under the maxim that he who comes into equity must come with clean hands.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. — 65; Tenancy in Common, Cent. Dig. § 25; Dec. Dig. — 33.]

Error from District Court, Harris County; Norman G. Kittrell, Special Judge.

Action by O. A. Alexander against Mrs. V. D. Hardee. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Stevens & Stevens and A. R. & W. P. Hamblen, all of Houston, for plaintiff in error. M. G. Fakes, of Houston, for defendant in error.

PLEASANTS, C. J. This suit was brought by appellee against appellant to have the title conveyed to defendant by two deeds executed to plaintiff and defendant, and conveying to them two tracts of land aggregating 744 acres, declared a trust in favor of plaintiff and have said title vested in plaintiff.

Plaintiff's petition alleges, in substance, that in March, 1911, he and the defendant agreed to purchase and did purchase a tract of 300 acres of land from the First National Bank of Victoria, Tex., for the consideration of \$227 in cash, and \$207.11 to be paid in 6 months, \$207.12 to be paid in 12 months, \$621.37 to be paid in 24 months, and \$621.40 to be paid in 36 months, and also purchased from the firm of A. Levi & Co. a tract of 444 acres of land, the consideration being \$321 in cash, and the following deferred payments, to wit: \$292.89 payable in 6 months, \$292.18 payable in 12 months, \$878.63 payable in 24 months, and \$878.60 payable in 36 months; that all of said notes for the purchase price of said two tracts of land were executed by the plaintiff and defendant jointly, and were secured by a lien upon the land, and bear 8 per cent. interest per annum, interest payable semiannually; that at the time of the purchase of said tracts of land on the 11th of March, 1911, the plaintiff and defendant entered into a written agreement by the terms of which the plaintiff was to make the

cash payment, and the defendant, Mrs. V. D. Hardee, was to take care of the first note for \$500 due in 6 months, and that the remaining notes should be paid equally by the plaintiff and defendant; that the deeds to the property above set forth were taken in the joint names of plaintiff and defendant; that in case either party should default in their payments as aforesaid the party paying would derive all of the benefits from the purchase of the lands. The plaintiff further alleged that the defendant had made no payments upon the land, and that she had cut timber therefrom of the value of \$105, for which she had made no accounting, that the plaintiff has paid all of the notes to the First National Bank, with the exception of the last note of \$621.40, and that he has paid all of the notes which were executed to A. Levi & Co., with the exception of the last note due them for \$878.60, upon which he has paid \$478.63. Plaintiff further alleged that whatever interest is shown on the face of said deeds, which were executed jointly to himself and Mrs. V. D. Hardee, as being vested in her, that the same is held by the latter in trust for the plaintiff, and that the same constituted a dry trust, making now a full title in plaintiff to all of the lands. The plaintiff, in his petition, estimated the value of the land at \$7 per acre. He prayed that the deeds, in so far as they were shown to vest any title in the defendant, Mrs. V. D. Hardee, be construed in favor of the plaintiff as being held by the defendant in trust, but that, in the event the defendant should have to pay any part of the notes outstanding against the lands so conveyed, the defendant be subrogated to all the rights in and to said notes as against said land. Plaintiff further asked for a personal judgment against the defendant for the value of the timber alleged to have been cut by her.

The defendant answered by a general demurrer and by special exceptions, setting up that the plaintiff was attempting to forfeit all of the rights of the defendant without placing the latter in statu quo, and further excepted to plaintiff's petition because it appeared therefrom that the plaintiff and the defendant were tenants in common, and that the plaintiff was seeking to forfeit the entire interest of the defendant in the land in controversy in violation of the equities which obtained between tenants in common. The answer admits the allegations of the petition as to the purchase price of the land, the execution of deeds to plaintiff and defendant, and the execution by them of the notes given for the purchase money. It denies that these notes have been paid by plaintiff, and also denies that the agreement between plaintiff and defendant was as alleged by plaintiff. (A copy of this agreement was attached to the answer and will be hereinafter set out.) The defendant further answered as follows:

"Defendant admits that she received about \$100 stumpage on account of timber cut from said land, but alleges that this timber, together with an additional quantity of the value of \$150, was cut by one Walker with the knowledge and consent of the plaintiff; that before she collected any of the amounts for said timber, and that after she collected the amounts due for said timber, she tendered the same to the plaintiff, who declined to receive the same; that the plaintiff agreed to collect the remaining amount of \$150 due for said timber on an order from the defendant, but afterwards declined to do so, wherefore this defendant says that plaintiff has been negligent in failing and refusing to collect, according to the agreement, the said fruits and revenues of said land, amounting to the sum of \$150, and applying the same to the purchase money of said land. In this connection the defendant denies that she refused to make any accounting of the sale of said timber to the plaintiff, or declined to pay him for the same, but that, on the contrary, the plaintiff, under the pretended claim that, if he should accept or collect any of the stumpage due by said Walker for cutting said timber, he would thus recognize defendant's interest in said land; whereas, as a matter of fact, the plaintiff has at all times recognized the interest of defendant in said land until he attempted to forfeit her rights by bringing this suit.

"This defendant says that she has not sufficient knowledge of which to form a belief as to the plaintiff having made great sacrifices in order to pay off the notes described in his petition, and this defendant denies that she is attempting to hold on to the deeds and abstract of title, and here now tenders the same into court to be delivered to the plaintiff.

"This defendant alleges that she performed valuable services in acquiring said land for the joint benefit of the plaintiff and herself at the price of \$5 or \$6 per acre; that said land at said time was worth much more than \$5 or \$6 per acre, and it is now of the value of not less than \$10 per acre; that for this court to forfeit the interest which this defendant has in said land as a cotenant and her interest in the increased value thereof would be inequitable.

"Defendant alleges that she and the plaintiff purchased the land in controversy as tenants in common, and that, while the plaintiff may have paid more of the purchase price of said property than has been paid by the defendant, nevertheless the defendant was instrumental in acquiring said land at a price much less than its real value, to wit, approximately \$5 or \$6 per acre; that about the — day of —, 1912, this defendant, with the concurrence of the plaintiff, procured a purchaser for the timber upon said land at the sum of \$1,500, the purchaser being one Haralson; that the plaintiff agreed that the purchase price for said timber was to be paid by said Haralson either in cash or one-third cash, and the balance to be paid in installments, and that said purchase money for said timber should be applied to the retirement of the vendor's lien notes outstanding against said land, which are described in plaintiff's petition; that, after defendant had obtained the sanction of the plaintiff to make the deal for said timber at said price and terms, she succeeded in getting the said Haralson to purchase the same, but that the plaintiff, disregarding his agreement to sell said timber, refused to comply with the same; that afterwards, to wit, on the — day of March, 1914, the defendant obtained the plaintiff's consent to sell said timber upon the said land to A. E. Kerr and J. J. Balderack, of Dayton, Tex., for the sum of \$1,700, it being understood that the said purchase money for said timber should be applied to the extinguishment of the said vendor's lien notes outstanding as aforesaid against said land, but that after this defendant had procured the said Kerr and Balderack as purchas-

ers at the price named the plaintiff refused to comply with his agreement and to apply said purchase money for said timber to the payment of said notes; that either of the aforesaid sales of said timber would have been advantageous and a good price for the same, and would have enabled this defendant to have participated in the payment of said notes by using the fruits of said land for that purpose; that the plaintiff by his act in failing to comply with either of his aforesaid agreements to sell the said timber prevented this defendant from paying per pro rata of the purchase price of said land to the extent in the first instance of \$750, and in the second instance to the extent of \$850; that the timber on said land is not of much value, for the reason that it is known as 'cut-over land'; that it would have been good business judgment to have closed the deal for said timber under either one of the propositions and agreements above set forth; that the plaintiff, in refusing to join the defendant in selling said timber as aforesaid, and in failing to comply with his agreement to sell the same, as above set forth, prevented the defendant from acquiring her interest in said land in the way of the fruits and revenues thereof to the extinguishment of said vendor's lien notes.

"Wherefore the defendant says that the plaintiff is not entitled to ask for contribution against her to the extent of one-half of the value of the purchase price of said timber as aforesaid, and of this she puts herself upon the country."

The court overruled the defendant's exceptions to the plaintiff's petition touching the right of the plaintiff as tenant in common to forfeit the interest of the defendant without placing her in statu quo and adjusting the equities between the parties, to which action of the court the defendant excepted.

The case was tried before the court without the intervention of a jury; the court finding that the plaintiff was entitled to recover on all the matters as set out in his petition against the defendant.

The judgment of the court further "finds that the plaintiff and defendant purchased jointly the lands described in plaintiff's petition, and that at the time of taking the deeds to the lands the plaintiff and defendant entered into an agreement under which, if either party failed to meet his or her part of the obligation, the other should derive all benefit therefrom; the defendant binding herself to pay off the first notes. The court finds as a matter of fact that said defendant has never paid any portion of any of said notes, either principal or interest; that she has not paid anything toward getting several of the notes extended for which the plaintiff has been compelled to pay bonuses; that plaintiff has borne the whole burden of paying off and carrying said notes; that, as set out in said plaintiff's petition, he has paid off all the indebtedness due against said lands aforesaid, with the exception of the last note for \$621.40, due the First National Bank of Victoria, and some \$1,200 due on the third and fourth notes given A. Levi & Co.

"The court further finds that the defendant has unlawfully appropriated \$100 for wood sold off aforesaid lands.

"Wherefore it is ordered, adjudged, and decreed by the court that all title in and to aforesaid lands above set out as vested in the defendant herein be divested out of her and vested in the plaintiff, C. A. Alexander, and he have all and full title thereto.

"It is further ordered, adjudged, and decreed by the court that said defendant, C. A. Alexander, shall pay off all the balance of the outstanding notes given for said land, he assuming all liability thereon; that in the event that

said plaintiff shall fail to pay off any portion of said notes that she, the defendant, shall be subrogated to all the rights in and to said notes as against said land, and as against said plaintiff, in proportion to any moneys she may have to pay thereon.

"It is further ordered, adjudged, and decreed by the court that the plaintiff have judgment over against said defendant for \$100, and for all costs of this suit."

At the time the land was purchased plaintiff and defendant executed the following agreement:

"Witnesseth that in the purchase of seven hundred and fifty-eight acres (758) of land out of the north half of the Reason Green survey, Liberty county, Texas, from A. Levi & Co. and the First National Bank of Victoria, Texas, for a consideration of forty-five hundred and forty-eight (\$4,548.00) dollars, payable as follows: Five hundred and forty-eight (\$548.00) dollars cash, and the balance on the following terms, to wit: One note due and payable in six months for five hundred (\$500.00) dollars; one note due and payable in twenty-four months for fifteen hundred (\$1,500.00) dollars; and the last note due and payable in thirty-six months for fifteen hundred (\$1,500.00) dollars. All notes dated from date of deed, interest eight (8%) per cent., payable semiannually.

"It is understood and agreed that the said C. A. Alexander, party of the first part, is to make the first cash payment of five hundred and forty-eight (\$548.00) dollars on the said land, and the said V. D. Hardee is to make the payment of first note due and payable in six months for five hundred (\$500.00) dollars. The balance of said payments are to be paid when due equally by the said Alexander and Hardee, and all interest that may accrue. It is understood and agreed that, in case either party defaults in payments on their part of this contract, the one paying will derive all benefits therefrom.

"It is further understood and agreed that the said C. A. Alexander, party of the first part, is to sign deed for any amount over and above the total costs of said land to the said Alexander and Hardee at any time the said V. D. Hardee finds purchaser at price agreeable to her; all profits to be equally divided on sale of this land, after deducting all expenses.

"The purpose of this written agreement is to show that we, the said Alexander and Hardee, purchased this land for speculation purposes only."

Defendant has paid no part of the purchase-money notes given for the land, and plaintiff has paid all of said notes except those mentioned in the judgment of the court, aggregating the sum of \$1,821.40; \$600 of the amount paid by plaintiff was with borrowed money secured by deed of trust on the land, the amount still due on the land being between \$2,400 and \$2,500. The evidence shows that the land has enhanced in value since its purchase by plaintiff and defendant for \$6 per acre, and is now worth \$8 to \$10 per acre. The undisputed evidence further shows that prior to the institution of this suit defendant, with plaintiff's consent, had contracted to sell the timber upon the land for \$1,750, and had arranged to borrow on the land enough additional money to pay off the outstanding purchase-money notes. At that time a suit of trespass to try title, brought by plaintiff against the defendant, for the land, was pending in Liberty county. When the time came to carry out the arrangement

before stated which had been agreed to by plaintiff, the parties who were to purchase the timber and furnish the money to pay off the vendor's lien notes demanded that plaintiff dismiss his Liberty county suit. This he refused to do, and as a result defendant was unable to consummate her arrangements for the sale of the timber and loan of the money to take up the vendor's lien notes.

Plaintiff very candidly testifies to this agreement, and gives his reasons for refusing to carry it out. He says:

"I agreed last March with Mrs. Hargree to sell the timber to Mr. Balderack for \$1,750, but he refused to accept it; and I agreed then to apply the proceeds to these outstanding notes. I figured that was where the money was going, to the outstanding notes. When the matter came up I insisted on the money being deposited with Mr. Fox, of the Houston National Exchange Bank, but before I did that I saw Mr. Balderack, and he said they would trade, and they put the matter up to Ross & Wood, and he refused to do anything unless the suit was dismissed. I had it in my power to have the suit dismissed. If it was dismissed, Balderack and Kerr's lawyer agreed to buy the timber; and if it was dismissed Mr. Penn agreed to furnish the money to take up what was due. I agreed to sell the timber to Kerr and Balderack and to take the loan from Mr. Penn if he would make it. I figured that I had been carrying the load for three years, and that was long enough. I agreed to all these things; I had the key to the situation, and I declined to dismiss the suit in order to pay the land out; that is a fact. I thought I would have to do that, but then I found out I could get the money without it, and I would not do it; that has been four months ago. I found I could get the money, and I refused to dismiss the suit."

It is unnecessary to set out or discuss the several assignments of error presented in appellant's brief in detail. Under appropriate assignments it is contended that neither the pleading nor the evidence is sufficient to sustain the judgment of the trial court forfeiting defendant's title to the land.

[1] We agree with appellant in this contention. The petition shows that plaintiff and defendant were tenants in common, and the allegations as to the agreement between plaintiff and defendant are not sufficient to take the case out of the general rule that a tenant in common who discharges an incumbrance against the common property only acquires an equitable lien on the interest of his cotenant to the extent of the cotenant's liability on the discharged incumbrance, and does not acquire title to the cotenant's interest. *Moore v. Moore*, 89 Tex. 29, 33 S. W. 217; *Niday v. Cochran*, 42 Tex. Civ. App. 292, 93 S. W. 1027.

[2] The allegation in the petition that the agreement under which the land was purchased provided "that in case either party should default in their payments, as aforesaid, that the party paying would derive all of the benefits from the purchase of the land aforesaid," is not an accurate statement of the agreement, which we have before set out. But, taking the allegation as true, we do not

think it would sustain a forfeiture unless defendant had defaulted in all of her payments and plaintiff had paid the entire purchase money, and the facts alleged in the petition show plaintiff had not paid all of the notes. When we consider the agreement itself, we think it cannot be properly construed as providing for a forfeiture of title or that the parties so intended it. The purpose of the agreement, as stated therein, is to show "that the parties had purchased the land for speculative purposes only," and plaintiff expressly agreed to permit the defendant to sell the land when she could find a purchaser at a price satisfactory to her, provided such price was in excess of the cost of the land. When the agreement is considered as a whole the provision "that in case either party defaults in payments on their part of the contract the one paying will derive all benefits therefrom" cannot be given the construction placed upon it by the trial court and authorize a forfeiture of the defendant's title for her failure to pay her portion of the notes that have been paid. Under the construction placed upon the agreement by the trial court, if defendant had made all her payments but one, and plaintiff paid that one, defendant would lose her title to all interest in the land. No construction of a contract which would produce such inequitable results should obtain if the contract be susceptible of any other construction. As we have before said, we do not think a forfeiture could be based upon this provision of the contract, if at all, until there was default in all the payments. The evidence which we have before set out shows the agreement between plaintiff and defendant in regard to the sale of the timber and the loan of the money to pay off the purchase-money notes, and plaintiff's action in the consummation of the agreement should defeat his right to a forfeiture, if any he had.

[3] The admission of plaintiff that the land has greatly increased in value and that his reason for refusing to dismiss his suit, and thus enable defendant to carry out the agreement, was his desire to profit at the expense of his cotenant, does not accord with the rule of equity which requires that he who asks relief from a court of equity must come with clean hands. He cannot ask that defendant's title in the property be declared forfeited and vested in him because of defendant's failure to pay her portion of the purchase money for the land, when he admits that he has not kept his agreements with defendant in good faith, and that but for his refusal to carry out his agreement defendant would have been enabled to discharge her obligations in a large measure, at least, if not entirely.

It follows that the judgment of the court below should be reversed, and the cause remanded; and it has been so ordered.

Reversed and remanded.

HOUSTON CHRONICLE PUB. CO. v.
BOWEN. (No. 6998.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 9, 1915. Rehearing Denied
Dec. 2, 1915.)

1. APPEAL AND ERROR ⇨742 — ASSIGNMENT
OF ERROR—STATEMENT OF OBJECTION.

An assignment of error in the admission of evidence cannot be considered, where the statement following it does not show what objection was made to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ⇨742.]

2. LIBEL AND SLANDER ⇨103—ACTION—EVIDENCE.

In an action for libelous publication, including what took place in plaintiff's room, the officers arrested him on suspicion that he might be guilty of a murder committed in another state, undertaking to describe with great particularity what happened at that time, it was permissible for plaintiff to show the untruth of the publication by testimony as to the actual occurrences when he was arrested.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. ⇨108.]

3. APPEAL AND ERROR ⇨742—ASSIGNMENTS
OF ERROR—SUFFICIENCY OF STATEMENT.

In an action for libel, an assignment of error in permitting plaintiff and another witness to testify that plaintiff had not been taken before a magistrate after his arrest was not supported by a statement that plaintiff, on direct examination as to whether the officer read any warrant to him when he was arrested, answered that they did not have any warrant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ⇨742.]

4. LIBEL AND SLANDER ⇨7 — ACTIONABLE
WORDS—CHARGE OF CRIME.

A publication in a daily newspaper of large circulation that plaintiff, who had come from Atlanta, Ga., had acted so peculiarly as to attract the attention of detectives, and had been arrested and imprisoned without a warrant upon a mere unfounded suspicion that he was guilty of the murder of a girl who had been killed in Atlanta, and for whose murderer a reward had been offered, and of the finding of a girl's blood-stained clothing hanging from the window sill of the room occupied by plaintiff, with a personal description of plaintiff and a publication of his picture and that of the murdered girl in the same issue, was libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. ⇨7.]

5. LIBEL AND SLANDER ⇨55 — ACTIONABLE
LIBEL—DAMAGES.

The publication and circulation of matter libelous per se as to the plaintiff entitled him to actual damages, even though a part of the publication was privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 333; Dec. Dig. ⇨55.]

6. LIBEL AND SLANDER ⇨5 — MALICE —
DAMAGES.

Plaintiff, libeled by the publication of an article libelous per se, was entitled to recover actual damages, and was not required to prove malice except as a basis for the recovery of exemplary damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. ⇨5.]

7. TRIAL ⇨194—INSTRUCTIONS—WEIGHT OF
EVIDENCE.

In an action for libel, defendant's requested charge that, the plaintiff having failed to show by a preponderance of the evidence that defend-

ant in publishing the article was actuated by express malice, defendant was not liable, was properly refused, as being on the weight of the evidence, in that it assumed that plaintiff had failed to prove malice by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ⇨194.]

8. LIBEL AND SLANDER ⇨4—"MALICE."

"Malice," in an action for libel, means an act done with a bad or wicked intent and the specific intention to injure, or an act done with such wanton or gross indifference as to indicate an utter disregard of consequences.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. ⇨4.]

For other definitions, see Words and Phrases, First and Second Series, Malice.]

9. TRIAL ⇨260 — INSTRUCTION — REQUESTS
—DAMAGES.

In an action for libel, defendant's requested charge on the issue of exemplary damages was properly refused, where the court's main charge thereon was sufficiently full and fair to protect the defendant in all its rights.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⇨260.]

10. LIBEL AND SLANDER ⇨42—PRIVILEGE—
JUDICIAL OR ADMINISTRATIVE PROCEEDINGS.

The publication of plaintiff's unwarranted arrest and imprisonment by police officers on a mere suspicion of his connection with a murder then being investigated in another state was not, in the absence of malice, privileged as a publication of a proceeding in the administration of law, where the entries on the police blotter showing the time of arrest, plaintiff's name, occupation, and residence, that he was being held and that he was released, was not shown to be required by any ordinance or shown to have been made in a proceeding in the administration of the law; and, even if that were so, nothing contained in the entries justified the publication that plaintiff had been arrested and imprisoned for the murder by a certain named person.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. ⇨42.]

11. LIBEL AND SLANDER ⇨5—"MALICE"—
WHAT CONSTITUTES.

In an action of libel, it is not necessary that malice be shown by proof of ill will, animosity, or hatred, or by willful or wanton act of gross indifference or an act done with the specific intent to injure the person injured; but it may be inferred from the fact that the publication was made with such utter recklessness as to indicate a disregard of the consequences.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. ⇨5.]

12. LIBEL AND SLANDER ⇨112 — ACTION —
SUFFICIENCY OF EVIDENCE OF MALICE.

Evidence, in an action for libel in publishing plaintiff's unwarranted arrest and imprisonment on the mere suspicion of his connection with a murder committed in another state, held sufficient to show actual malice, justifying an award of exemplary damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. ⇨112.]

Appeal from District Court, Harris County; J. W. Woods, Special Judge.

Action by Paul P. Bowen against the Houston Chronicle Publishing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hunt, Myer & Teagle, of Houston, for appellant. W. W. Kirkpatrick, G. W. Tharp, and W. J. Johnson, all of Houston, for appellee.

McMEANS, J. Paul P. Bowen brought this suit against the Houston Chronicle Publishing Company, a corporation, Marcelus E. Foster, Charles B. Gillespie, George E. Kepple, Leon J. Van Laeys, and Robert A. Higgins, for the recovery of \$20,000 as actual and \$10,000 exemplary damages, growing out of a publication in the Houston Chronicle, a daily newspaper published in the city of Houston, in its issue of May 6, 1913, of an alleged libelous and defamatory article of and concerning him. Plaintiff dismissed as to all the defendants except the Houston Chronicle Publishing Company. A trial before a jury resulted in a verdict and judgment for the plaintiff for \$2,000 as actual and \$1,000 as exemplary damages, from which the defendant has appealed.

The article in question is as follows:

"Phagan Murder Suspect Held in Houston.

"Youth From Atlanta Is Placed in Jail by the Police of This City.

"His Moans and Weeping at Hotel St. Jean Result in His Arrest.

"Mary Phagan, 14-Year Old Girl Who Was Killed.

"[Then follows a picture of Mary Phagan.]

"Why Did I Do It?" Weeps Youth in His Room.

"Arrested He Denies He Ever Knew Girl.

"Paul P. Bowen, a bookkeeper and stenographer from Atlanta, Ga., is being detained by police authorities here in connection with the murder of 14-year old Mary Phagan of that city. Bowen was arrested last night by Chief of Police Davison, Chief of Detectives Peyton and Detective Hilton at 1520 Texas avenue, at the corner of Crawford street.

"A night of terror," as officers term it, led to the detention of Bowen. Sunday night in room 214 at the St. Jean Hotel, Main street and Prairie avenue, the young man paced the floor and moaned. Persons in adjoining rooms were unable to sleep and reported to the management that something was wrong in the room. An investigation discovered Bowen poring over letters and newspaper accounts of the murder and crying aloud.

"Oh, why, why did I do it," he is said to have cried. "I would not have done it—I ought not to have done that—if I had it to go over I wouldn't do it," were repeatedly heard by those who listened and who frequently walked through the hall in an effort to get some cause for the peculiar actions of the man.

"Shadowed All Day Monday.

"Monday the young man was shadowed and the matter was reported to the detective department. About 5 o'clock he registered off and moved to Texas avenue and Crawford street. There he engaged a room for a week. Last night, shortly after midnight, the officers went to the place and talked with him.

"Bowen answered a knock at his room door and then straightened himself and looked directly at the officers. 'Who are you fellows, and what do you want here?' he asked.

"The officers answered that they wanted to talk to him, and he then invited them into his room. He kept a distance from them, however,

and held in his right hand an open knife. Bowen appeared nervous throughout a conversation of perhaps 15 minutes, but replied to all queries promptly and to the point.

"When one of them told him to 'consider yourself under arrest,' he coolly answered, 'That's all right, but you've got the wrong man.' He closed his knife and handed it to an officer as he sat on the side of the bed. To one officer he pointed out his trunk and grip.

"Officers opened the trunk and started ransacking it. They lifted out clothes—some good ones that indicated a well-dressed man—and then piled letters, post cards and pictures on the floor.

"If I had a gun you would never go (at this point the article is continued on page 13 under the headlines: "'Why Did I Do It?' Weeps Youth in Room. Arrested He Denies He Ever Knew Girl," as follows:) through that trunk," said Bowen. "The things in there are mine and not yours—I don't know anything about this affair and you'll have to show me strong."

"Officers talked to him for more than an hour at the police station, but Bowen stoutly denied any knowledge of the killing of the young girl. He continued to show nervousness, however, and frequently inquired of the detectives why he was being questioned in such a manner.

"If I had had the least suspicion that this would happen to me, I wouldn't have been in Houston long—I would have left here Sunday night," he is attributed as saying.

"No information could be obtained stronger than of a circumstantial nature, such as led to his being taken into custody. He was placed in cell No. 2 upstairs and across the hall from the chief detectives' office. He slept but little and did not undress to lie down. Tuesday morning he was at the cell door early.

"Complains of Being Tired.

"Bowen complained of being hungry. He declared, too, that he was tired—almost worn out. He walked the floor nervously, then sat down on the side of his cot. He next stepped to the grating and inquired if he was going to be 'allowed to starve to death,' or would he be given some breakfast.

"About 9 o'clock he was taken into a private office with Chief of Detectives Peyton and Detectives Andrew and Shelly. He admitted that he had lived in Atlanta and had come from that city to Houston. But that he ever knew Mary Phagan he stoutly denied. He snapped his answers to the officers.

"When shown the pictures found in his trunk and grip he pointed out a number of persons, including several young ladies. He declared though that none of them are 'Mary Phagan or any of her kinfolk.' He told the officers again and again that he had never heard of the girl, but admitted that he knew the place where she had worked.

"The newspaper clippings, all of them accounts of the murder, Bowen failed to explain. He was shown them and portions of them were read to him. He admitted that he is familiar with the story of the crime through reading the papers, and said his interest is simply because Atlanta is his home.

"Bowen came to Houston Sunday night, presumably from New Orleans, although this has not been determined, as the prisoner declined to talk about his arrival as freely as he did other matters. He went directly to the St. Jean Hotel and asked for a room.

"What kind of a room do you want?" was asked him. "I want a dollar room," he replied.

"Sorry, sir, but we haven't got anything less than a dollar fifty," the clerk answered.

"Bowen turned and walked to the door with his grip in hand. The clerk called him, but he did not heed it and started out. The clerk ran to the door and explained that he had just dis-

covered a dollar room vacant. The young man returned and registered.

"On the book he wrote, 'Paul P. Bowen, Atlanta, Ga.,' in a bold hand. There was no effort to conceal his identity or the city from which he came. The clerk assigned him to room 214 and ordered his grip sent to it. He turned to the guest then and inquired:

"Atlanta, eh?"

"Yes, Atlanta," was the only reply.

"The young man went to his room and a few minutes later went out for supper. He had registered at 7:45 o'clock. Before 9 o'clock he was in his room.

"Read Letters and Weeps.

"He did not retire at that hour, though. Opening his grip, it developed, Bowen read and re-read some letters. Most of these were from young ladies. He wept and then threw aside the missives.

"Picking from among the contents of the grip a number of newspaper clippings he pored over them as if eager to get every word of every sentence. Then he moaned aloud: 'Oh, if I hadn't done that! Why did I do it! What did I do it for!'

"Mrs. A. Blanchette of Texas City occupied an adjoining room. She was unable to sleep or even rest. The young man, she told officers, alarmed her and she feared something serious was the matter. She finally advised the night clerk at the hotel and he investigated.

"Mrs. Blanchette and the clerk heard the young man moaning, both told detectives. They decided, however, that it was best not to disturb him.

"Bowen continued his actions and talked to himself complaining of being lonesome. He begged to himself for company. He moaned and paced the floor and sobbed aloud. The clerk peered into the room and saw the letters, pictures and pieces of newspapers were scattered about him.

"The Hotel Clerk Determined to Watch the Young Man.

"Bertillion Expert Jones of the police department has apartments at the St. Jean Hotel and to him the clerk confided the story. It was then the detectives were advised and began to watch him.

"About 5 o'clock Monday Bowen, who had been in and out of the hotel all day, walked to the desk and announced that he would 'register off.' He sent to room 214 for his grip. In the meantime his trunk was still at the railroad station.

"Attachés of the hotel lost trace of the young man when he first left the hotel, but, thinking that something was wrong, decided to locate him again. They found that he did not leave the city. His baggage—a trunk—was discovered at the station and traced to 1520 Texas avenue, a rooming and boarding house.

"Bowen engaged his room late in the evening, and then went uptown. He returned to his room late. A few minutes before midnight the police decided to interview him. The three men—Chiefs Davison and Peyton and Detective Hilton—went to the house, where he was taken into custody.

"Man Is About 22 Years Old.

"Bowen is about 22 years of age and has light hair. He is well dressed and well educated. He has been a bookkeeper and stenographer and claimed that he worked in Atlanta, Ga., for the Morrow Transfer Company. He gave his home address as 108 Ivy street.

"He has worked in several places in Georgia, Alabama, Louisiana and Texas. He claimed that it is his first visit to Houston. He declined to tell the police anything about his rela-

tions or any of his business connections, except as given above.

"Bowen is slight of build, perhaps 5 feet 6 or 7 inches in height. He weighs about 125 pounds and appears brisk and energetic. He admitted to officers that he had lived in Atlanta many years, nearly all his life. He denied, however, that he knows anything about the National Pencil Factory, Leo Frank, the manager, or any persons connected with or employed in the factory.

"To officers he proved a most unusual prisoner. He talked freely about some matters, but was evasive about others. Efforts to corner him in every instance proved in vain, though at times it seemed that he was on the verge of complete explanation.

"His whereabouts and movements for the past several weeks are a blank to the officers. While he has seemed to be giving information, when threshed out and connected it has resulted in nothing worth while. Several times he has crossed himself in stories, the officers say, but always has managed to clear up the discrepancies.

"Evidently a 'Ladies Man.'

"That he is a 'ladies man' is conceded from the numerous letters and photos found among his effects. He had in his grip and trunk perhaps a hundred pictures, the most of them amateur work. They show young men and women on auto rides and picnic parties, individual pictures, couples and in groups. When shown them he merely laughed and made a jocular remark about some girl being 'pretty.'

"Batches of letters and post cards were found. The letters are nearly all from young ladies. Some of them are endearing ones. A few are from young men friends. Many of the letters are signed 'Mary.' None was signed 'Mary Phagan.' The signature of one letter bore the initials 'M. J. P.' This the police thought might have been written by the Phagan girl.

"\$3,200 in Rewards Offered.

"Rewards aggregating \$3,200 have been offered for the arrest and conviction of the person who killed 14-year old Mary Phagan.

"The Atlanta Constitution and the Georgian each has offered \$1,000 reward.

"At the suggestion of Mayor Woodward, the city of Atlanta has offered a reward of \$1,000.

"The state of Georgia, through the Governor, has offered a reward of \$200.

"Bowen's detention was continued Tuesday at the suggestion of Chief of Police Beavers of Atlanta, Ga. He wired Chief of Detectives George Peyton as follows:

"Hold Bowen and investigate. I am investigating here. Will Rush Information. Keep office advised."

"Girl's Undervest Is Found Hanging from Window Sill of the Room Bowen Occupied.

"Hanging from the window of room 214, St. Jean Hotel, the room occupied by Bowen, has been found a blood-stained undervest, such as might be worn by a girl. It was of small size as if to suit a girl from 14 to 16 years of age.

"The discovery of the undervest was made Monday morning. A guest of the hotel saw it fluttering from the window and advised an attaché of the place. It was wrapped in a paper and sent to the police station.

"It is believed that an effort was made to throw the vest out of the window and that it caught on the ledge. It was not seen there before Monday morning. Two guests at the hotel declared that it was not there Sunday early in the night.

"The vest has blood stains toward the top of the breast and about half way down at the front. At the back, between the shoulders, a slight trace of blood was also found. The vest is being held in connection with other proper-

ties by the detectives. Bowen has not been advised of the finding of the vest.

"What bearing it has on the case has not yet been developed. Chief Peyton said Tuesday that he would determine it this afternoon, perhaps, as well as some other things that are believed to be worth while—but yet in incubation."

The publication of this article in the Houston Chronicle, owned and published by the Houston Chronicle Publishing Company, in its issue of May 6, 1913, was admitted by defendant, as was also the publication of the picture of the murdered girl, Mary Phagan, and the picture of the plaintiff in the same issue. The circulation of the Houston Chronicle containing the publication amounted to more than 33,000 copies.

[1] Appellant's first assignment of error complains of the action of the court in admitting in evidence, over the objection of defendant, the testimony of the witness George Andrews, who testified as to a conversation between the witness and the witness Peyton with reference to holding plaintiff in custody until the chief of police of Atlanta could be heard from. The assignment cannot be considered for the reason that the statement following it does not show what objection was made to the introduction of this testimony.

[2] We overrule the second assignment of error, which complains of the action of the court in permitting the plaintiff to testify as to what happened at his (the plaintiff's) room, at the time the officers placed him under arrest. The article complained of, and above set out, undertook to describe with great particularity what happened at that time, and it was permissible for plaintiff to show, if he could, the untruth of the publication by testimony as to the actual occurrences at his room when he was arrested.

[3] The third assignment complains that the court erred in permitting the plaintiff and the witness Peyton to testify, over its objection, that plaintiff was not taken before a magistrate after his arrest. The statement following the assignment is substantially as follows:

"While the plaintiff, Bowen, was on direct examination, his counsel asked him the following question: * * * 'Did the officer read any warrant to you that night?' 'No, sir; they did not have any warrant.' Counsel for plaintiff then asked the witness George Peyton: 'Did you have any warrant for his arrest?' Answer: 'No, sir; we did not have any warrant.'"

It is manifest that this statement is insufficient to sustain the assignment complaining, as it does, of the action of the court in permitting the witnesses to testify that plaintiff was not taken before a magistrate.

[4, 5] The publication as a whole was libelous per se, and the court therefore did not err in so instructing the jury and in also instructing them, that the publication and circulation by the defendant being admitted, to return a verdict in favor of plaintiff for actual damages, even though a part of the publication was privileged, which we are not

prepared to concede. The fourth assignment, raising the point, is overruled.

[6, 7] The fifth assignment complains of the refusal of the court to give the following special charge requested by appellant:

"The plaintiff having failed to show by a preponderance of the evidence that the defendant in publishing the article complained of was actuated by express malice, you will let your verdict be for the defendant."

The article being libelous per se, the plaintiff was entitled to recover actual damages, and was not required to prove malice except as a basis for the recovery of exemplary damages. This being true, the charge requested was an erroneous statement of the law, for by its terms it denied a recovery of actual damages unless express malice actuating the publication was shown. The charge was also properly refused because it was on the weight of the evidence, in that it assumed that the plaintiff had failed to prove malice by a preponderance of the evidence. The preponderance of the evidence, under the facts of this case, was a question peculiarly within the province of the jury to determine, and not a question of law to be decided by the court. The assignment is overruled.

[8, 9] The sixth assignment complains of the refusal of the court to give the following special charge requested by appellant:

"In order to find exemplary damages against the defendant, the publication charged to have been made by it must have been wanton and malicious. By the term 'malice,' as used herein and in other charges submitted to you by the court, is meant a bad, wicked, or vile intent; the intentional and wicked doing of a wrong hurtful to another. Therefore if you should find that the publication as made, if it was made by the defendant, was libelous, and that it was not privileged, yet if you find from the evidence that the defendant, acting through its officers and agents, was not actuated by malice in making said publication, then as to exemplary damages you will find for defendant."

The charge was correctly refused on two grounds: First, the definition of malice, therein given, was too restricted; and, second, the court's main charge on the issue of exemplary damages was sufficiently full and fair to protect the defendant in all of its rights. In *Houston Chronicle Publishing Co. v. McDavid*, 173 S. W. 470, in defining the word "malice," it is said:

"A willful or wanton act or gross indifference, as used in the definition of malice, means an act done with the specific intention to injure the person that was injured, or an act done with such utter recklessness as to indicate a disregard of consequences."

The requested charge omits from the definition of malice the matter of gross indifference and of recklessness that would indicate a disregard of consequences, and would deny a recovery except upon proof that the publication was actuated by a bad, wicked, or vile intent, and with the specific intention to injure the plaintiff. The assignment is overruled.

[10] The seventh assignment complains of

the refusal of the court to give the jury the fourth special charge requested by the appellant, which contained the instruction that the publication in a newspaper of a fair, true, and impartial proceeding in a court of justice, or a proceeding in the administration of the law, such as the arrest of a person, is privileged matter under the law, and no action will lie for the publication of such proceedings unless such publication is made from actual malice on the part of the party publishing.

It is asserted by the proposition under the assignment that it being true that plaintiff was arrested and incarcerated, and these facts being matters of public record in the police department of the city of Houston, defendant had the right to publish same, for which plaintiff could have no cause of action except under proof of actual malice.

We think that in refusing to give the charge the court committed no error. It is not pretended that the arrest was made upon a warrant issued therefor by the proper authorities, but the contrary was conclusively shown. When, after his arrest, plaintiff was taken to the police station, the following entries were made in the blotter or police docket there kept for such purpose:

"Time of arrival, Tuesday, May 6, 1913, 1 a. m. Entered F. P. Bowen, white, 22; male. Occupation, clerk. Residence, Newman, Ga. Offense, hold. Arresting officer, Peyton and Hilton. Disposition of case, released by Chief, May 6, 6 p. m."

There was no evidence to show that the ordinances of the city of Houston required the keeping of such a docket, or from which it can be inferred that the entries made therein was a proceeding in a court of justice, or other official proceeding authorized by law in the administration of the law, such as to render as privileged the publication of entries made therein. But even if this is not true, there is nothing contained in the entries to justify the publication that the plaintiff had been arrested and incarcerated for the murder of Mary Phagan, and, this being true, the charge was correctly refused. The assignment is overruled, as well as the eighth, ninth, and tenth, which present substantially the same point.

[11, 12] The eleventh assignment complains that the verdict of the jury awarding exemplary damages was unsupported by the evidence and by a total lack of testimony to show actual malice upon the part of the defendant, its officers and agents.

It may be conceded that there was no ill will, animosity, or hatred entertained by the defendant or its officers toward the plaintiff, and that in that sense there was no express malice shown by the evidence. But in a case of libel it is not required that malice be shown by proof of ill will, animosity, or hatred, nor is it essential to show a willful or wanton act or gross indifference or an act done with the specific intention to injure the

person that was injured; but malice may be inferred from the fact that the act complained of was done with such utter recklessness as to indicate a disregard of the consequences. *Houston Chronicle Pub. Co. v. McDavid*, 173 S. W. 470; *Fessinger v. El Paso Times Co.*, 154 S. W. 1175; *Cotulla v. Kerr*, 74 Tex. 95, 11 S. W. 1053, 15 Am. St. Rep. 819; *King v. Sassaman*, 54 S. W. 304.

The facts that gave rise to the publication are that the plaintiff was unjustly suspected by certain police officers of Houston to be guilty of the murder of Mary Phagan in Atlanta, Ga. Acting upon a mere suspicion they took the plaintiff into their custody, without any warrant having been issued for his arrest, and therefore without authority of law (Code Crim. Proc. art. 259), and incarcerated him. It was upon these facts that the article hereinbefore copied was bullded. There was no proof to show that the reporter for the newspaper was justified in writing, or the defendant in publishing, the statement that "his moans and weeping at the Hotel St. Jean result in his arrest," or the statement, "Why did I do it," weeps youth in room," or that a "night of terror" led to the detention of Bowen, nor that "Sunday night in room 214, at the St. Jean Hotel, * * * the young man paced the floor and moaned. Persons in adjoining rooms were unable to sleep and reported to the management that something was wrong in the room. An investigation discovered Bowen poring over letters and newspaper accounts of the murder and crying aloud. 'Oh, why, why did I do it,' he is said to have cried. 'I ought not to have done it—I ought not to have done that—if I had it to go over I wouldn't do it,' were repeatedly heard by those who listened and who frequently walked through the hall in an effort to get some cause for the peculiar actions of the man."

It seems that, upon the mere fact of the arrest and incarceration of the plaintiff, an energetic and enterprising reporter of the *Chronicle*, Higgins by name, evolved from his fertile brain a mass of circumstantial evidence tending to establish that plaintiff had murdered Mary Phagan; and, if the truth of any of the statements was proved on the trial, the appellant has failed to call attention to it in its brief. From aught that appears to the contrary, the damning circumstances as related in the publication were without the semblance of truth, and the defendant published the entire sensational article without question or inquiry as to its truth or falsity, so far as the evidence shows, and with reckless disregard of the consequences. There was an entire absence of probable cause for the publication, and, as shown by the authorities above cited, malice, in such circumstances, may be inferred. We overrule the assignment.

The twelfth assignment complains that the verdict is excessive. We have carefully re-

viewed the evidence in this regard and have concluded that the amount of the award was justified.

No reversible errors appear in the record, and therefore the judgment of the court below is affirmed.

Affirmed.

CAMDEN FIRE INS. CO. v. YARBROUGH. (No. 6952.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 12, 1915. Rehearing Denied
Dec. 23, 1915.)

1. INSURANCE — 335 — POLICY — CONDITIONS — INVENTORY.

A provision of a fire insurance policy that insured would take a complete itemized inventory of stock on hand, and that otherwise the policy should be void, was met by the insured's inventory showing the number of pieces of his pine, oak, and gum lumber, the dimensions of each piece, and the total number of feet of each kind separately, though it did not give the class of the lumber or state its value.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. 335.]

2. EVIDENCE — 461 — PAROL EVIDENCE — FIRE INSURANCE.

In an action upon a policy covering a stock of lumber, defended on the ground that it is void for want of an inventory required by it, testimony of the insured that before it was issued the insurer's agent told him what the inventory should contain, that he followed such instruction, and that his inventory was approved by the agent, was admissible to show the kind of inventory contemplated by the parties before and at the time the policy was issued.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. 461.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Action by R. H. Yarbrough against the Camden Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

June C. Harris and Audley Harris, both of Nacogdoches, and Thompson, Knight, Baker & Harris and Geo. S. Wright, all of Dallas, for appellant. King & Seale, of Nacogdoches, for appellee.

LANE, J. This suit was instituted by R. H. Yarbrough, plaintiff, against the Camden Fire Insurance Association of New Jersey, a corporation, to recover upon a policy of fire insurance for \$2,000 issued by said association upon a stock of lumber owned by the plaintiff, and which was thereafter destroyed by fire. The case was tried before a jury upon special issues submitted by the court, and in answer thereto it returned the following answers:

First. The total cash market value of the lumber of plaintiff that was burned in the fire in July, 1913, at Grisby, Tex., was \$5,176.88.

Second. The lumber burned was not set on fire by any one.

Third. The plaintiff did not set the lumber on fire.

Upon such findings of the jury the court rendered judgment in favor of the plaintiff against the defendant for \$2,000, interest, and costs of court. From this judgment, the Camden Fire Association has appealed.

In appellant's brief it has grouped its first and second assignments, which are as follows:

First assignment of error:

"The court erred in refusing defendant's special charge No. 1, wherein the court was requested to instruct the jury to return a verdict for the defendant, for the reason, among others, that the undisputed evidence shows that the plaintiff neglected and failed to comply with the record warranty clause requiring the taking and presenting of books, inventories, and records, and that the policy was void."

Second assignment of error:

"The court erred in refusing defendant's special charge No. 2, wherein the court was requested to instruct the jury to return a verdict for the defendant, for the reason, among others, that the undisputed evidence shows that the plaintiff failed to substantially comply with the record warranty clause, one of the provisions of the contract of insurance sued upon."

Under this group of assignments appellant submits but one proposition, which is as follows:

"The provision of the policy sued upon to the effect that, unless a complete, itemized, and detailed inventory of the stock has been taken within 12 months prior to the issuance of the policy, such an inventory shall be taken within 30 days after the issuance of the policy, is a reasonable one, and a failure of the assured to produce such an inventory, taken within 12 months prior to the issuance of the policy, or within 30 days thereafter, avoided such policy, and entitled the defendant to an instructed verdict."

Section 1 of said insurance policy is as follows:

"The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and within twelve months of the last preceding inventory, if such has been taken. Unless such inventory has been taken within twelve calendar months prior to the date of this policy, and together with a set of books showing a complete record of the business transacted since the taking of such inventory is on hand at the date of this policy, one shall be taken within thirty days after the date of this policy, or in each and either case this entire policy shall be null and void. It is understood and agreed that this clause and the requirements thereof is one of the inducing clauses of the acceptance of this risk herein assumed, and the issuance of this policy, and that the terms and requirements thereof are material to the risk, and to this insurance, and to any loss and damage happening to the property described in this policy."

That the policy sued upon was issued by the defendant, that it was dated June 7, 1913, and was to run to December 7, 1913, that after the middle of May next preceding the issuance of the policy plaintiff had taken a complete list of the lumber insured, showing the number of pieces of each class thereof as to its width, thickness and length, and showing amount of pine, gum, and oak lumber separately, was unquestioned and undisputed.

R. H. Yarbrough, after testifying, on direct examination, that the local agents of the appellant who negotiated the contract of insurance with him were Miss Jennie Harris and Thos. J. Hall, testified further as follows:

"I furnished Mr. Hall and Miss Jennie Harris with an inventory of this lumber when I took out the insurance. They looked over it and accepted the risk. I had a conversation with them when I took this policy out as to the value of this lumber. I placed a value of \$12.50 per 1,000 feet all around on the lumber when I insured it. I made the inventory so I would know how much lumber I had there. I wanted to get it insured. Yes, sir; I say I wanted to get it insured. I went to Miss Jennie Harris, and she told me what to do. Yes, sir; I say they told me what to do. I followed their instructions all the way through."

This testimony was uncontradicted. Appellant, however, excepted to the admission of that portion of said testimony wherein the witness said "she told me what to do," as being immaterial and could in no way affect the contract of insurance upon which plaintiff sues. This witness, on cross-examination by counsel for appellant, testified as follows:

"I think it was some time in June, I believe it was just before that inventory was taken, that I had this conversation with Miss Jennie Harris. I was here and talked to her a month before I got the insurance policy issued, I think. I talked to her and Mr. Hall both. Yes; I talked to both of them. I talked to Mr. Hall. It was up there in the office. There are two offices right there together. I talked to both of them. I talked to them in her office and in his office, too. I hardly know them apart. Hers is the first one, and his is the next. Yes, sir; in the agency office. Yes, sir; I had a conversation with Mr. Hall before the policy was issued. I had a conversation with him several times, and I think I did before, and I know I did afterwards. Yes, sir; I had one before. I couldn't give any dates. I think it was back in June, back of May, I think. I had the conversation with Mr. Hall up there in the office. I think I talked with them both the same day. They were both there. The two were there when I was talking. Yes, sir; before the policy was issued, and I had a conversation with them after it was issued, too. The very first conversation I ever had up there was with Miss Jennie, and she gave me the outline of what it would take to get insurance, about the location and distance, and all of that, and then about the inventory; told me how it should be gotten up. Miss Jennie did that, and I went ahead then and got this inventory and furnished it to them, had Mr. Rhodes to make it and I furnished it to them, and I think Mr. Hall was present when I presented it."

[1] It will be seen that by appellant's only proposition under his first and second assignments it is alleged that appellee had failed to have or take a complete itemized inventory of his stock of lumber insured, as provided in section 1 of said insurance policy, and therefore said policy is void. His insistence is that the inventory taken does not meet the requirements of the policy, in that it does not give the class of lumber, as to how much of it was first class, how much second class, and so on, and in not stating its value.

We have already stated the inventory shows the number of pieces of the pine lum-

ber, the number of pieces of the oak lumber, and the number of pieces of the gum lumber, separately. It also shows the length, breadth, and thickness of such pieces and the total number of feet of the pine, gum, and oak separately. The policy does not require an appraisalment of the lumber as insisted upon by appellant.

In support of appellant's proposition we are cited to *Western Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661; *Fire Ass'n of Philadelphia v. Calhoun*, 28 Tex. Civ. App. 409, 87 S. W. 153; *Roberts-Willis-Taylor Co. v. Sun Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559; *Orient Ins. Co. v. Dorroh-Kelly Co.*, 135 S. W. 1165; *Royal Exchange Ins. Co. v. Rosborough*, 142 S. W. 70; *Delaware Ins. Co. v. Monger & Henry*, 74 S. W. 792; *Shawnee Fire Ins. Co. v. Rowell*, 30 Okl. 466, 119 Pac. 985; and others.

That the purported inventories shown in the cases cited are not in any sense complete inventories of the properties to which they were intended to relate there can be no doubt, and we fully agree with the holdings in those cases as to the insufficiency of inventories therein set out. But in the present case we think the inventory shown by the facts is in substantial compliance with section 1 of the policy of insurance in this case, and that it was just such inventory as was contemplated and demanded by the appellant association of appellee. We therefore overrule appellant's assignments of error one and two.

What has been said as to assignments 1 and 2 will also apply to assignment 3, and for the same reason given for overruling said assignments 1 and 2 we overrule assignment 3.

[2] The fourth assignment insists that the court erred in permitting R. H. Yarbrough to testify that before the issuance of the policy Miss Harris, the agent of the insurance association, with whom he negotiated for the issuance of the policy, told him what the inventory required by the policy was to contain, that he followed her instructions in making the inventory in question in every particular, and after its preparation and before the issuance of the policy he presented same to said agent, and that she approved the same and issued the policy. Appellant's proposition under this assignment is that:

"A conversation between the agent of an insurance company and the assured in reference to what should be done to comply with the written contract of insurance, which took place prior to the writing of the contract, is merged into the written contract, and in a suit upon the written contract evidence of such conversation is not admissible."

We think the inventory taken was a substantial compliance with the requirements of the policy, independent of the testimony objected to, but we also think such testimony was admissible to show what kind of inventory was contemplated by the negotiating parties before and at the time the policy was issued, and we therefore overrule the fourth assignment.

This disposes of all of appellant's assignments, and, as we find no error committed by the court in the trial of the case, the judgment of the trial court is affirmed.

Affirmed.

REEVES v. SIMPSON et al. (No. 6995.)
(Court of Civil Appeals of Texas. Galveston.
Nov. 24, 1915. Rehearing Denied
Dec. 23, 1915.)

1. WILLS §608 — CONSTRUCTION — ESTATES CREATED—RULE IN SHELLEY'S CASE.

Where the testator devises a life estate in lands to his son and the remainder to his heirs, and his heirs predecease the devisee, the life tenant takes the fee under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. §608.]

2. WILLS §682 — CONSTRUCTION — ESTATES CREATED—TRUSTS.

A will devising lands to trustees to control and manage the property and to pay the income for the support of a son and his family, the remainder on his death to his heirs does not create a life estate in the son, but he is only a beneficiary of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1602, 1607-1611; Dec. Dig. §682.]

3. TRUSTS §114—EXECUTED TRUSTS.

In such case, where the will provided that the devise should be used for the benefit of all children lawfully born to the son, the trust was not executed; no time being stated for the ascertainment of the children of the class.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 164; Dec. Dig. §114.]

4. EVIDENCE §58 — PRESUMPTIONS — POSSIBILITY OF ISSUE.

In ascertaining when children of a class not otherwise determined shall be ascertained, it is presumed, under the common law, that a man or woman is capable of having issue until his death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 80; Dec. Dig. §58.]

Appeal from District Court, Burleson County; Ed. R. Sinks, Judge.

Action by J. H. Reeves against P. H. Simpson and another, as substitute trustees, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Garrett & Gerland, of Caldwell, and Wallace & Moore, of Cameron, for appellant. C. S. Williams and R. J. Alexander, both of Caldwell, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against appellees P. H. Simpson and W. E. Simpson, substitute trustees under the will of Edward Reeves, deceased, and Lula J. Cromartie, a sister of appellant, and her husband, Neil J. Cromartie, D. E. Reeves, a brother, and Annie Hollingsworth, a sister of appellant, each of whom is a devisee and legatee under said will. The purpose of the suit was to have the will construed as giving appellant a fee-simple title in one-fifth of the estate of the testator.

The record discloses the following facts: Edward Reeves died testate in Burleson

county, Tex., in July, 1900, leaving five children, Mrs. Lula J. Cromartie, D. E. Reeves, J. H. Reeves, plaintiff, Mrs. Annie Hollingsworth, and Xemines Reeves, as his only heirs at law. Xemines Reeves died during the pendency of this suit intestate and without issue. Edward Reeves' will was duly probated in Burleson county, Tex., on the — day of September, 1900, and in accordance with the will the estate of said Reeves was partitioned, and the land described in plaintiff's petition was awarded to the trustees named in said will as trustees of the plaintiff. Plaintiff's wife, Ethel, died in 1899, before the testator, Edward Reeves, and the only child of his marriage died in infancy before the death of its mother. The plaintiff married Mattie Wheeler on May 13, 1900, and she was his wife and living with him at the death of the testator; plaintiff and said Mattie Wheeler were divorced in 1903. The plaintiff now has no living wife, and has no living children and no descendants of living children, and plaintiff's heirs at law are the defendants Mrs. Lula J. Cromartie, D. E. Reeves, and Mrs. Annie Hollingsworth. The trustees named in the will, viz., A. W. McIver and Emmett B. Bell, are deceased, and the defendants P. H. Simpson and W. E. Simpson have been appointed trustees by the court in the manner provided in the will. At the time of the making of the will and before, the plaintiff was of extravagant and dissolute habits and had made away with all property inherited from his mother's estate and also from his grandfather's estate, and all property given him by his father, the testator; that such extravagant habits were well known to his father before and at the time of making the will. The estates inherited by plaintiff as aforesaid were small and were expended by plaintiff prior to the making of the will by the testator.

The following is a copy of so much of the will as relates to the points at issue:

"Item III. I will and bequeath the residue of my estate, after paying my debts and giving the piano to my daughter, Annie Reeves, as follows: To my daughter Lula J. Cromartie, wife of Neil Cromartie, subject the limitations below named, one-fifth part of my said estate, but with the exceptions and reservations, that she shall not be permitted to sell any part of the lands which she may receive, in the partition of my estate, but she may receive and enjoy the rents and revenues arising from said lands during her natural life and at her death the same to pass to her children; to my son David E. Reeves one-fifth part, to my daughter Annie Reeves one-fifth part and to my son Xemines Reeves one-fifth part, and to A. W. McIver and Emmett B. Bell as trustees for my son James Henry Reeves, and his wife and such children as may lawfully born unto my said son James Henry Reeves, one-fifth part to be held and used by them as hereinafter directed in this will, and direct that in the partition of my estate that each receive an equal share of land and personal property or as nearly so as is practicable.

"Item IV. It is my will that all of my personal property, except notes and accounts, be sold by my executors hereinafter named, as soon af-

er my death as is practicable, and that the same be sold for cash, or on credits as to my executors may seem best, and in case they sell on a credit that they take notes with approved securities for the purchase money therefor.

"Item V. I direct that the said A. W. McIver and Emmett B. Bell, as trustees for my son James Henry and his wife Ethel, and such children as may be lawfully born unto him, shall manage and control the one-fifth part willed to them as trustees as aforesaid, as follows: They shall invest what money they may so receive, over and above a reasonable support to the parties above provided for, in good interest-bearing notes, secured by vendor's lien on land, or a deed of trust on ample real estate, with the highest legal rate of interest they can get therefor; to manage and control the land and such other property as may be set apart to them as such trustees in the partition of my estate, in such manner as may seem best to them for their said trust estate, to rent or lease the land of said estate; and out of the rents and revenues arising from said trust estate, by way of interest or otherwise to allow to the said James Henry Reeves, and his wife Ethel, as long as she may be the wife or widow of said James Henry Reeves and to such children as may be lawfully born unto said James Henry Reeves, a reasonable support. In case the said Ethel shall be divorced from the said James Henry Reeves, or in case she shall after his death marry again, then she is to receive no further support or allowance from said trust estate. In case of the death of my said son James Henry Reeves, then the one-fifth part willed in trust for him and his wife and children or as much thereof as may be left thereof shall pass and descend to his lawful heirs saving such part however as may be sufficient to support and maintain the said Ethel Reeves, should she under the provisions of this will be entitled to receive the same. In case of death or refusal to act of either said trustees, then the district court of Burleson county, Texas, shall appoint a substitute or substitutes for said trustees and in case of the death of either or both of the substitute trustees of the said court shall appoint another substitute or substitutes, as the case may be, the power to appoint to continue as long as the said James Henry Reeves may live; it being my intention to at all times have two trustees for said estate. Said trustees to have reasonable compensation for managing said trust estate."

[1] Under appropriate assignments, appellant contends that, his wife and child having died before the death of the testator, the bequest as to them lapsed, and that the devise to him being in effect a devise for life with remainder to his heirs, under the rule in Shelley's Case, he took a fee-simple title, and that the trial court erred in not so holding.

If, as contended by appellant, the will should be construed as giving him a life estate in the lands thereby divided with remainder to his heirs at law, under the rule in Shelley's Case which has been uniformly enforced by the courts of this state and is a well-settled rule of property in this jurisdiction, the intention and desire of the tes-

tator cannot be given effect, and appellant would have a fee-simple title to the property. *Lacey v. Floyd*, 99 Tex. 112, 87 S. W. 835; *Hancock v. Butler*, 21 Tex. 804; *Hawkins v. Lee*, 22 Tex. 544; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160.

[2] We do not think, however, that this will should be so construed. The legal title to the property in controversy is placed by the will in the trustees therein named, and the only estate given to appellant is a reasonable support during his life out of the income of the trust estate. By the clear and unambiguous language of the instrument the estate is willed and bequeathed to the trustees, not to appellant, and when the instrument is considered as a whole it is, we think, clear that it was the intention of the testator to place the legal title in the trustees, who are given the exclusive control and management of the property and directed to apply such portion of the income as might be necessary to the reasonable support of appellant, his wife, and such children as might be lawfully born to appellant, and the will cannot be construed as bequeathing a life estate in the property to appellant, but only makes him a beneficiary of the trust estate bequeathed to the named trustees and their successors. *Dulin v. Moore*, 96 Tex. 135, 70 S. W. 742; *Eskridge et al. v. Trust Co.*, 29 Tex. Civ. App. 571, 69 S. W. 987; *Farrell v. Cogley*, 146 S. W. 315; *Appel v. Childress*, 53 Tex. Civ. App. 607, 116 S. W. 129.

[3, 4] It seems clear to us that so long as appellant lives the trust imposed upon the trustees named in the will, and their successors as provided in the will, cannot be regarded as an executed trust. They are directed to control and manage and invest the income of the trust estate in part for the benefit of appellant "as long as the said James Henry Reeves shall live," and also for the benefit of any children that may be lawfully born to him. This latter provision establishes a trust not only for the benefit of appellant during his life, but also for the benefit of any children born to him. Under the common law, which is in force in this state, men and women are regarded as capable of having children as long as they live. *Coke on Littleton*, 28; 2 *Blackstone*, p. 125; *May v. Bank & Trust Co. (Ky.)* 150 S. W. 12, 48 L. R. A. (N. S.) 865; *Quigley v. Quigley (Ky.)* 170 S. W. 523, and 172 S. W. 1071; *Kesterton v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97; *Rand v. Smith*, 153 Ky. 516, 155 S. W. 1134.

From the views above expressed, it follows that the judgment of the trial court should be affirmed, and it has been so ordered.

Affirmed.

SHIPP v. CARTWRIGHT et al. (No. 6960.)
(Court of Civil Appeals of Texas. Galveston.
Nov. 12, 1915. Rehearing Denied
Dec. 9, 1915.)

1. APPEAL AND ERROR \S 742—ASSIGNMENTS
—STATEMENTS—SUFFICIENCY.

An assignment that the trial court erred in setting aside a judgment rendered at a former term can be reviewed only upon a full statement, showing what issues were joined and what the evidence was on the former trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742.]

2. APPEAL AND ERROR \S 742—ASSIGNMENTS
—SUFFICIENCY.

An assignment, complaining that the court erred in not disregarding the findings of the jury on special issues and in not rendering judgment in favor of plaintiff, cannot be considered, where not followed by a statement showing the special issues submitted, the answers of the jury, and all of the material evidence relied upon to show that the answers were not warranted; therefore where the only statement was that the answers were not supported by the facts, the assignment cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742.]

3. APPEAL AND ERROR \S 759—BRIEFS—SUFFICIENCY.

Under rule 29 for Courts of Civil Appeals (142 S. W. xii), declaring that assignments of error shall be copied in the brief, the brief of an appellant presents no matter for review when the assignments were not literally copied therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3094; Dec. Dig. \S 759.]

4. TRIAL \S 143—DIRECTED VERDICT—EVIDENCE.

Where the evidence is conflicting, the court should not direct a verdict for either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 342, 343; Dec. Dig. \S 143.]

5. IMPROVEMENTS \S 4—COMPENSATION—GOOD FAITH.

That one in possession knew of plaintiff's adverse claim to the land will not deprive him of the right to compensation for improvements; for he might, in good faith, have believed himself the true owner, and have been ignorant of plaintiff's superior rights.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. \S 4, 7-26; Dec. Dig. \S 4.]

6. APPEAL AND ERROR \S 1068—REVIEW—HARMLESS ERROR.

Where the jury found in favor of defendant, the erroneous refusal of a charge on defendant's right to compensation for improvements is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4225-4228, 4230; Dec. Dig. \S 1068.]

7. APPEAL AND ERROR \S 1068—REVIEW—HARMLESS ERROR.

Where the jury found that plaintiff and his predecessors had occupied the land for 10 consecutive years before institution of suit, the erroneous refusal of the court to so charge was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4225-4228, 4230; Dec. Dig. \S 1068.]

8. APPEAL AND ERROR \S 742—ASSIGNMENTS OF ERROR—PROPOSITIONS.

An assignment of error, followed by a proposition not germane, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742.]

9. APPEAL AND ERROR \S 742—ASSIGNMENTS OF ERROR—STATEMENT.

An assignment, complaining of the introduction of testimony given by plaintiff on a former trial, presents nothing for review, where the statement did not show the nature of the testimony, its materiality, or the objections urged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3000; Dec. Dig. \S 742.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Action by J. C. Shipp against Leonidas Cartwright and others. From a judgment for defendants, plaintiff appeals. Affirmed.

June C. Harris, Audley Harris, and Geo. F. Ingraham, all of Nacogdoches, for appellant. Blount & Strong, of Nacogdoches, for appellees.

McMEANS, J. J. C. Shipp brought this suit against Leonidas Cartwright, R. T. Patterson, and M. S. Griffin to recover 100 acres of land, part of the J. W. Anderson survey, in Nacogdoches county. In addition to the ordinary allegations in suits of trespass to try title, plaintiff pleaded the statute of limitations of 10 years. The case was tried before a jury, and resulted in a verdict in response to special issues in favor of the defendants, upon which a judgment in defendants' favor was entered, and from which the plaintiff has appealed.

[1] Appellant, by his first assignment of error, complains of the action of the court in setting aside a judgment rendered in his favor at a former term of court and granting to the defendants a new trial. If the action of a trial court in setting aside a judgment rendered at a former term could ever be reviewed at all, it could only be done upon a full statement, showing what issues were joined and what the evidence was on the former trial. The statement made by appellant under the assignment is wholly insufficient to authorize our consideration of the question presented.

[2] The second assignment complains that the court erred in not disregarding the findings of the jury upon the special issues submitted, and in not rendering judgment in favor of plaintiff. The proposition advanced under the assignment in effect is that, where the answers of the jury to the special issues are contrary to law and the facts proved, it is the duty of the court to disregard such findings and to render judgment in accordance with law. This assignment, to require consideration by this court, should have been followed by a statement, showing, not only the special issues submitted and the answers of the jury thereto but all of the material evidence relied upon by the appellant to show that the jury's answers were not warranted by the facts, the only statement made by appellant in support of his assignment and proposition is as follows:

"The answer of the jury to the questions propounded by the court to them were not supported by the facts, and were clearly contrary to law; therefore it was the duty of the court to set aside the verdict and render judgment for the plaintiff."

Manifestly the statement is insufficient to require our consideration of the assignment, and we decline to consider it.

[3] A consideration of all the other assignments presented by appellant in his brief is objected to by the appellees upon the ground that the assignments of error in the record have not been truly copied in the appellant's brief. A comparison of the assignments found in the record with those in the brief shows that they were not literally copied, but in some the substances only were stated, while in others some matters not contained in the original were added. Rule 29 for the Courts of Civil Appeals (142 S. W. 11) provides that:

"The appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) * * * and each assignment not so copied * * * shall be regarded as abandoned. * * *"

This rule has not been observed by the appellant in preparing this case for submission, and for that reason this court is not required to consider the assignments. *Horseman v. Coleman*, 57 S. W. 304; *Alexander v. Bowers*, 79 S. W. 342; *Martin v. Bank*, 102 S. W. 131; *Dees v. Thompson*, 166 S. W. 57; *Overton v. Colored K. of P.*, 163 S. W. 1053; *Iowa Mfg. Co. v. Walcovich*, 163 S. W. 1054.

[4] But we have, however, considered the question raised by the fourth assignment, which complains of the refusal of the court to peremptorily instruct a verdict in his favor, and are of the opinion that no reversible error is shown. As before stated, the plaintiff pleaded that he had acquired title to the land in controversy under the statute of limitations of 10 years. Upon the trial he introduced proof upon this issue which, had it stood alone, would probably have required a verdict in his favor. But the proof offered by him in this regard was controverted by proof offered by the defendants, and sufficient proof was made by them on this issue to make the question peculiarly one for the determination of the jury, and in such circumstances the findings of the jury are conclusive upon the appellate court. It was not error, therefore for the court to refuse to instruct the jury as requested, and the assignment is overruled.

[5] There was no error in refusing to give the special charge complained of in the sixth

assignment of error, in which plaintiff sought to have the jury instructed that, if they found that the defendant M. S. Griffin knew of the adverse claim of the plaintiff or those under whom he claimed before he made any improvements on the land, to find against him on the issue of improvements in good faith, etc. The charge is an incorrect statement of the law, for Griffin could have known of the plaintiff's adverse claim and yet could, in good faith, have supposed himself to be the true owner and have been ignorant of a better right in plaintiff.

[6] Again, the refusal to give the charge could not have prejudiced plaintiff, in view of the fact that the case was decided against him on the issue of title.

[7] The submission in the first special issue of the question of whether the plaintiff and those under whom he claimed occupied and held the land in suit for 10 consecutive years at any one time before the institution of this suit was not reversible error. True, under the facts proved, the court could have instructed the jury that he and they had occupied the land for 10 consecutive years before the filing of the suit, but the jury answered the question in the affirmative; hence the result to plaintiff is the same as if they had been instructed to so find. The question of such possession being adverse to the claim of the owner of the legal title was properly submitted to the jury in another special issue.

[8] The eighth assignment in the brief is not only not a copy of the assignment found in the record, but is followed by a proposition not germane to it, and for both reasons it will not be considered.

[9] The sixteenth assignment, complaining of the action of the court in permitting the defendant to introduce certain portions of the testimony of the plaintiff, J. C. Shipp, adduced on the former trial of this case, is overruled. There is nothing in the statement following the assignment to show what the testimony was, or what objection was urged to the introduction, and we cannot say, therefore, that the testimony was upon a material point, or pass upon its admissibility. Other assignments, not herein specifically referred to are not presented in the manner required by the rules, and for that reason we refuse to consider them. We have examined them, however, and are of the opinion that, should we consider them, we would be compelled to overrule them for the reason that none of them points out reversible error. We find no reversible error in the record, and the judgment of the court below is therefore affirmed.

Affirmed.

TENNEGKEIT v. GALVESTON ELECTRIC CO. (No. 6895.)

(Court of Civil Appeals of Texas. Galveston. Nov. 22, 1915.)

1. APPEAL AND ERROR \S 759—**ASSIGNMENTS OF ERROR—REQUISITES AND SUFFICIENCY—MOTION FOR NEW TRIAL.**

Under Rev. St. 1911, art. 1612, requiring that plaintiff in error file with the clerk of the court below all assignments of error distinctly specifying the grounds on which he relies, Court of Civil Appeals rule 29 (142 S. W. xii), requiring that the brief shall separately present each ground of error under the proper assignment, and rule 101a (159 S. W. xi), providing that where a motion for a new trial is filed the assignments contained in such motion shall constitute the assignments of error, assignments of error presented in the brief of plaintiff in error need not be considered, where they are not portions of or copied from the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3004; Dec. Dig. \S 759.]

2. CARRIERS \S 348—**INJURY TO STREET CAR PASSENGER—INSTRUCTION ON UNAVOIDABLE ACCIDENT—EVIDENCE.**

Where, in a street car passenger's action for injuries from falling from the running board of a car, plaintiff's testimony that his fall was due to the act of defendant's conductor in attempting to pass between him and the side of the car was denied by the conductor, and by another witness who testified that the conductor was not near plaintiff, and also by a witness who testified that plaintiff lost his balance and fell while attempting to climb around other persons standing on the running board, an instruction that plaintiff could not recover if his injuries were caused by an unavoidable accident was authorized by the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1403-1405; Dec. Dig. \S 348.]

3. APPEAL AND ERROR \S 1066 — **HARMLESS ERROR—INSTRUCTIONS.**

Under Court of Civil Appeals rule 62a (149 S. W. x), providing that a judgment shall not be reversed for error not affecting the result, the giving of such instruction, even if it were not authorized by the evidence, would not require a reversal of a judgment for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

4. TRIAL \S 253 — **INSTRUCTIONS—IGNORING ISSUES—LACK OF EVIDENCE.**

Where, in a street car passenger's action for injuries from falling from the running board of a car, the only negligence as to which there was evidence was the act of the conductor in attempting to pass between him and the car, an instruction that plaintiff could not recover, unless he was thrown from the car by such act of the conductor, was not erroneous for failure to take into consideration defendant's alleged negligence in failing to furnish plaintiff with a seat and permitting the running board to be overcrowded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 613-623; Dec. Dig. \S 253.]

5. CARRIERS \S 296—**INJURY TO STREET CAR PASSENGER — ACTIONABLE NEGLIGENCE — FAILURE TO FURNISH SEATS.**

The failure of a street car company to furnish a passenger with a seat in the car is not actionable negligence, where the fact that all the seats are occupied is apparent to the passenger when he takes his position on the running board, from which he thereafter falls.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1200-1203; Dec. Dig. \S 296.]

6. TRIAL \S 243—**CONFLICTING INSTRUCTIONS—NEGLIGENCE.**

In a street car passenger's action for injuries from falling from the running board of a car, an instruction to find for defendant if plaintiff's injury was caused by unavoidable accident, or if defendant was not guilty of the negligence charged by plaintiff, was not in conflict with an instruction to find for defendant if plaintiff was contributorily negligent in attempting to pass around another passenger on the running board of the car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 564, 565; Dec. Dig. \S 243.]

Error from District Court, Galveston County; Clay S. Briggs, Judge.

Action by Fred Tengekeit against the Galveston Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for plaintiff in error. Terry, Cavin & Mills, of Galveston, for defendant in error.

McMEANS, J. Fred Tengekeit, herein after called plaintiff, brought this suit against the Galveston Electric Company, a corporation operating an electric railroad in the city of Galveston, hereinafter called defendant, to recover damages for personal injuries sustained by him through the alleged negligence of the defendant.

Plaintiff alleged that on or about September 6, 1913, in the city of Galveston, he boarded one of the defendant's street cars, paying the sum demanded by defendant for his passage thereon, and thereby became a passenger on said street car, and was entitled to a seat and passage to his destination; that the street car which plaintiff boarded was crowded, and plaintiff was unable to obtain a seat, and was permitted by the conductor on said car to stand upon the running board of the car until defendant's conductor could procure him a seat, and believing that he could safely do so the plaintiff stood upon the running board, holding onto the post and other structures of the car for safety while he was riding thereon, and while the car was in motion; that while riding on said running board the defendant's conductor came along on said running board and was collecting the fares from the several passengers on said car, and while plaintiff was holding onto the post and handhold of the car, and while the car was moving rapidly, the said conductor attempted to pass between the person of plaintiff and the car, thus forcing the plaintiff to lose his hold on the handhold and post, and causing him to fall to the ground while the car was moving; and that the force of the fall and the impact of plaintiff with the ground caused the plaintiff to sustain serious and permanent bodily injuries, causing plaintiff to be damaged in the sum of \$5,000.

Plaintiff further alleged that the defendant was in duty bound to use the highest de-

gree of care for his safety while he was a passenger on said car, and was in duty bound to provide a safe and comfortable seat for plaintiff, and the defendant wholly failed in all of these duties, and the defendant and its conductor was further negligent in attempting to squeeze by and pass between plaintiff's body and the side of the car while the car was in motion, and in squeezing and forcing plaintiff off of said car; that the car was crowded, and the running board was also crowded, with passengers standing up and riding thereon at the time plaintiff fell from the car, and that the failure of the defendant to perform its duty to him in providing a seat was negligence, proximately causing his injuries; and that the acts and omissions of the defendant's conductor at said time was negligence for which defendant is liable, and that all of said negligence was the proximate cause of the damages, injuries, and losses by plaintiff sustained.

Defendant, in addition to a general denial, pleaded that plaintiff was guilty of contributory negligence, in that, while riding upon the running board of the street car, he attempted to pass around and outside of another passenger, also riding upon the running board, and in doing so fell from the car.

A trial before a jury resulted in a verdict and judgment for the defendant, from which the plaintiff has appealed.

[1] We are met in limine with an objection urged by the defendant to the consideration by this court of any of the assignments of error presented by plaintiff in his brief; the objection being that the assignments so presented are not portions of or copied from the plaintiff's motion for a new trial. Plaintiff's motion for a new trial covers 13 or more typewritten pages, while the three assignments of error presented in his brief would require very little more than half a page. While it is true that the language of each assignment may be found somewhere in the motion, there is lacking the requirements of the statute and rules which provide that all errors shall be distinctly specified therein. R. S. 1911, art. 1612; rules 29 (142 S. W. xii) and 101a (159 S. W. xi).

The article of the statute above referred to dispenses with the prior requirement that assignments of error shall be filed where a motion for a new trial has been filed, and provides that the assignments in the motion for a new trial shall constitute the assignments of errors, and need not be repeated by the filing of separate assignments of error, and also provides that all errors not distinctly specified shall be waived. But while the filing of separate assignments of error, where a motion for a new trial has been made, has been dispensed with, the rule requiring distinct specifications of error has not been relaxed; the only change in the law and the rules being that they must be made in the motion, where a motion for new trial is re-

quired or has been filed. The following cases bear upon the proper manner of making and presenting assignments of error to the appellate courts and may be read with profit: *Horseman v. Coleman*, 57 S. W. 304; *Bowers v. Goats*, 146 S. W. 1018; *Biggs v. Lee*, 147 S. W. 709; *Lime & Stone Co. v. May*, 150 S. W. 758; *Fessenger v. El Paso Times Co.*, 154 S. W. 1171; *Dees v. Thompson*, 166 S. W. 57; *Edwards v. Youngblood*, 160 S. W. 288.

This court could well refuse to consider the assignments, because not presented in the manner and form required by the rules; but nevertheless we have considered them, and will now discuss them in the order in which they have been attempted to be presented.

[2, 3] The first assignment complains of that portion of the court's main charge to the jury which reads as follows:

"If you do not so believe from the evidence, or if you believe from the evidence that the injuries, if any, to plaintiff, were caused or occasioned by an unavoidable accident, without any negligence upon the part of the defendant, and without any negligence on the part of the plaintiff, as submitted, which contributed to the same * * *."

The objection to this charge is that there was no evidence adduced to authorize the submission of unavoidable accident. As before stated, the plaintiff alleged that he was injured by the act of the defendant's conductor in attempting to pass between the person of the plaintiff and the side of the car while both were on the running board. Defendant pleaded that plaintiff was injured as a result of plaintiff's contributory negligence in attempting to pass around and on the outside of another passenger while both were riding on the running board. The plaintiff testified that the accident happened as alleged by him, while this is denied by the conductor, and also by the witness Golden, who testified that the conductor was not near plaintiff at the time he fell, and by the witness Willetts, who testified that plaintiff lost his balance and fell from the car while attempting to "climb around behind some other person that was standing on the running board of the car," and that when plaintiff fell "neither the conductor nor any one else was trying to pass between him and the body of the car."

We think that the court did not commit error, at least not prejudicial error, in giving the charge complained of. Obviously the jury found that plaintiff's fall was not caused by the conductor crowding between him and the body of the car. If the jury found as a matter of fact that the plaintiff, while attempting to pass around another passenger on the running board, fell, but that he was not guilty of negligence in attempting to pass around the other passenger, and this issue was also submitted in the charge, then his fall and injuries could neither be attributed to the negligence of the defendant, nor the contributory negligence of the plain-

tiff, but to an accident only. But, even if the issue of unavoidable accident was not raised by the evidence, we are of the opinion that the plaintiff could not have been prejudiced by the giving of the charge complained of. Rule 62a (149 S. W. x); *Railway v. Greenlee*, 70 Tex. 561, 8 S. W. 129. The assignment is overruled.

[4, 5] The second assignment assails the following portion of the court's charge:

"* * * Or if you believe from the evidence that the plaintiff assumed a position on the running board of the car without any direction or permission from the defendant's conductor, and if you fail to find from the evidence that plaintiff was thrown from the car by the act of the conductor by pushing between plaintiff and the car, you will return a verdict for the defendant."

The complaint directed at this part of the charge in effect is that, plaintiff having alleged several grounds of negligence on the part of the defendant as being the proximate cause of his injury, viz.: (1) The act of defendant's conductor in attempting to pass between the plaintiff and the body of the car, whereby he was pushed from the running board; (2) the failure of defendant to furnish him a seat in the car; and (3) the permitting by the defendant of the running board to become overcrowded with passengers—the court should not have limited the inquiry to negligence of defendant first above stated, but should also have submitted as grounds for recovery the other acts of negligence charged.

The testimony of the plaintiff himself is to the effect that at the time he took passage on the car all the seats were filled and there were several passengers then riding upon the running board. The evidence justifies the conclusion that plaintiff rode upon the running board because there was not a vacant seat in the car. All of the seats being occupied when plaintiff took his position upon the running board, and this being then apparent to him, it was not actionable negligence upon the part of defendant to fail to furnish him a seat in the car. Again, it does not appear from the allegations of his petition that plaintiff's injuries resulted from the failure of defendant to furnish him a seat in the car, or by reason of allowing the running board to become overcrowded, for it is expressly alleged that plaintiff's injuries were brought about solely by the act of the conductor in attempting to pass between the plaintiff and the body of the car, and plaintiff himself testified that he was injured from this cause. There was no proof that plaintiff's failure to procure a seat or the overcrowding of the running board even remotely occasioned his fall. It is clear therefore that the charge limiting recovery, as it did, to the very act of negligence which plaintiff alleged, and himself testified, caused his injuries, was proper, and it is equally clear that there was no error in failing to

submit the other grounds of negligence charged, because under the proof no issue is raised that such alleged negligence was the proximate cause of his injuries. *Railway v. Carter*, 98 Tex. 196, 82 S. W. 782, 107 Am. St. Rep. 626. The assignment is overruled.

[6] There is no merit in the third assignment, which complains that the seventh and eighth paragraphs of the court's charge are in conflict. The seventh instructs the jury that if they believe from the evidence that plaintiff's injury was caused by unavoidable accident, or if they fail to find from the evidence that the defendant was guilty of the negligence charged by plaintiff to have been the cause of his injury, to find for the defendant, while the eighth merely submitted the issue of plaintiff's contributory negligence, and instructs, if the jury find from the evidence that plaintiff was guilty of contributory negligence in attempting to pass around another passenger on the running board of the car, to find for defendant.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

LUCAS et al. v. HARRISON et al.
(No. 6970.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 22, 1915. Rehearing Denied
Dec. 16, 1915.)

1. JUSTICES OF THE PEACE \S 44—JURISDICTION—AMOUNT INVOLVED—ATTORNEY'S FEES.

Where plaintiff in a suit brought on account in a justice's court filed no written pleadings, and the citation asked judgment only "for the balance of the amount of the account due of \$188.68," the amount involved was within the justice's jurisdiction, though an entry in the justice's docket read, "Suit upon account for \$188.68 * * * interest 6%. Attorney's fees —%"—especially where the justice's judgment did not include attorney's fees and neither the court nor the parties considered the suit as involving a claim for attorney's fees.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 157-172; Dec. Dig. \S 44.]

2. APPEAL AND ERROR \S 1002—VERDICT—EVIDENCE.

A verdict on findings for plaintiff on each item of the account sued on will not be disturbed on appeal, where each finding is supported by evidence and the verdict is not so against the weight of evidence as to be clearly wrong, though the evidence is conflicting as to some of the items and as to some is apparently in favor of defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. \S 1002.]

Appeal from Fayette County Court; George Willrich, Judge.

Action by C. P. Harrison against Chas. Lucas and others. From a judgment for plaintiff on appeal to the county court from a like judgment rendered in a justice's court,

the defendant named and another appeal. Affirmed.

John T. Duncan, of La Grange, for appellants. C. D. Krause, of La Grange, for appellees.

PLEASANTS, C. J. This suit was brought by appellee Harrison against appellants, composing the firm of Lucas & Meier, and appellee Woods, upon an account of Woods against appellants which plaintiff had purchased from Woods, who at the time of said purchase guaranteed the payment of the account. The suit was brought in the justice court for precinct No. 1 of Fayette county. Plaintiff filed no written pleadings. The entry upon the justice court docket showing the cause of action and the nature of defendants' answers is as follows:

"Suit upon account for \$188.68 of date 1908 & 1909 due — interest 6%. Attorney's fees —%. Filed 9th day of Nov. A. D. 1909. Citation issued the 9th day of Nov. A. D. 1909. Returnable to Dec. term 1909, and placed in the hands of — returned — day of — A. D. 190 — Executed 10th day of November, A. D. 1909.

"Plea of personal privilege filed Dec. 9, 1909, by Chas. Lucas & H. Meier to be sued in the county & precinct of their residence. Plea overruled Dec. 13, 1909. Judgment for \$188.68."

Citation issued from the justice court thus states the cause of action:

"For debt due to plaintiff upon an open account due by said Lucas & Meier to C. F. Woods earned during the years of 1908 and 1909, which said account was transferred by said C. F. Woods to plaintiff and its payment guaranteed by the said Woods to plaintiff at Flatonia, Texas, for a valuable consideration, plaintiff asks judgment for the balance of the amount due of the account due of \$188.68 against Chas. Lucas and H. Meier jointly and severally as principal debtors and against C. F. Woods on his guaranty."

The account was for commissions claimed to be due Woods on sales of monuments or tombstones sold by him as agent of appellants. The transfer and guaranty of the account by Woods to plaintiff Harrison is as follows:

"I, C. F. Woods, do hereby transfer the attached account to C. F. Woods against Lucas & Meier of San Antonio, Tex., to C. P. Harrison for the sum of \$188.68. And I also hereby guarantee the payment of said account to the said C. P. Harrison at Flatonia, Tex., should the said Lucas & Meier fail or refuse to pay the same. I also agree that should the said C. P. Harrison be compelled to institute suit to collect said account to pay all costs of collection, including 15 per cent. attorney's fees. This 11th day of October, 1909."

As above shown, judgment was rendered in the justice court against appellants on their plea of privilege and in favor of plaintiff Harrison against appellants and Woods for the sum of \$188.68, the amount claimed upon the account. Execution was ordered to be first issued against appellants, and against Woods only in event the judgment could not be collected by execution against appellants. Upon appeal and trial de novo with a jury in the county court a like judgment was rendered.

The evidence shows that appellants reside and have their place of business in Bexar county. The appellee Woods resides in Fayette county. Appellee Harrison purchased the account from Woods on the 11th day of October, 1909, for \$165, of which amount he paid \$25 in cash and gave his note for \$140, due one day after date. It is not shown that this note has been paid in full, but Woods has an account with Harrison, who is a merchant, and owes him for goods purchased. No balance between this account and the note for \$140 seems to have been made and the note is not shown to have been renewed. Both Woods and Harrison testified that the assignment of the account was made in good faith.

[1] By their first assignment of error appellants complain of the refusal of the trial court to dismiss the suit on the ground that the amount in controversy was beyond the jurisdiction of the justice court. We do not think the trial court erred in holding that the amount in controversy was not in excess of \$200 exclusive of interest, and therefore was not beyond the jurisdiction of the justice court. Appellants' claim that the amount sued for exceeds \$200 is based on the contention that the suit was for \$188.68 and the attorney's fees agreed to be paid by Woods in his contract of guaranty. We do not think the record shows that attorney's fees were included in plaintiff's demand. The citation, which in the absence of a written petition must be primarily looked to for a determination of what was the subject-matter of the suit, makes no mention of attorney's fees and only asks judgment "for the balance of the amount of the account due of \$188.68 against Chas. Lucas and H. Meier jointly and severally as principal debtors and against C. F. Woods on his guaranty." We think this language clearly restricts the amount asked against Woods on his guaranty to the stated amount of the balance due upon the account, and that plaintiff would not upon this citation have been entitled to a judgment against Woods for attorney's fees. The fact that the justice's docket, after the statement that plaintiff's cause of action was a suit upon an account for \$188.68 with interest, contains the words, "Attorney's fees —%," cannot be regarded as conclusive that the suit was for attorney's fees in addition to the amount due upon the account and interest thereon, when the citation, as we have before shown, does not ask for the recovery of attorney's fees. The record further shows that the judgment in the justice court did not include attorney's fees, and that neither the court nor the parties to the suit considered that the suit involved a claim for attorney's fees. Upon this state of the record, we do not think it can be held that attorney's fees were included in plaintiff's demand.

It would serve no useful purpose to discuss

the remaining assignments of error contained in appellants' brief in detail.

There are no errors in the charge of which the appellants can complain, and the several special charges requested by appellants, in so far as they contained correct statements of the law applicable to the issues presented by the evidence, were included in the charge given by the court, and were therefore properly refused.

[2] The evidence was conflicting as to several of the items of the account, and upon one or two of these items the preponderance of the evidence appears to us to have been in favor of appellants; but there is sufficient evidence to support the finding of the jury upon each of said items, and we cannot say that the verdict is so against the great weight and preponderance of the evidence as to be clearly wrong, and we are therefore not authorized to disturb it.

We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

LANE, J., not sitting.

MATAGORDA COUNTY et al. v. HORN. (No. 7009.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 17, 1915. Rehearing Denied
Nov. 24, 1915.)

HIGHWAYS §90—ROAD DISTRICTS—PROCEEDS OF BONDS—BREACH OF CONTRACT.

Under Rev. St. art. 627, declaring that any county or any road district may issue bonds for the purpose of constructing and operating macadamized, graveled, or paved roads and turnpikes, payment of a claim for breach of a contract for work on a road cannot be made out of the proceeds of road bonds, for such claim is one closely akin to a tort, and is not one for the construction, maintenance, or operation of roads or turnpikes.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 801, 802; Dec. Dig. §90.]

Appeal from District Court, Matagorda County; Sam'l J. Styles, Judge.

Action by W. R. Horn against the County of Matagorda and Matagorda County Road District No. 2. From a judgment against the latter defendant, it appeals. Reformed and affirmed.

W. E. Davant and Krause & Wilson, both of Bay City, for appellant. Gaines & Corbett, of Bay City, for appellee.

LANE, J. W. R. Horn brought this suit against Matagorda county, and Matagorda county road district No. 2, a road corporation, organized under, and exercising the rights and powers conferred by, article 627 of the Revised Statutes of 1911, to recover the sum of \$1,885.50, for damages alleged to have been suffered by him by reason of the breach of a certain contract entered into be-

tween him and said road district for the hauling and distribution of certain mud shell upon the roads of said road district. Matagorda county was dismissed from the suit before the trial. Judgment was rendered against the road district in favor of W. R. Horn for the sum of \$550. The judgment also directs that a proper warrant be issued by the proper officers and delivered to Horn, to be paid out of the proceeds arising from the sale of road bonds issued and sold by said road district, under the provisions of said article 627—

"for the purpose of constructing and maintaining, and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof."

From the judgment so rendered said road district has appealed.

The only error assigned is, in substance, that the trial court erred in directing and decreeing that said judgment so rendered shall be paid out of the proceeds arising from the sale of said bonds, because said judgment was not upon a claim or demand for services or labor performed, or for any aid otherwise given, or performed, in the construction, maintenance, or operation of said roads or turnpikes, and therefore was not for any of the purposes for which bonds can be issued and sold under the provisions of the statutes, and cannot lawfully be made payable out of said road funds. It seems to be assumed by all parties to the suit that at the time this suit was brought, the bonds had been sold, and the proceeds of such sale were in the custody of the proper officer for the uses for which they were sold. Nothing to the contrary being shown, we shall also so assume. After the issuance of said bonds said road district entered into a contract, which it was authorized to make, with appellee, Horn, to haul and distribute certain mud shell on its contemplated roads for an agreed compensation. Horn made all necessary preparations for the hauling of said shell, and notified the proper officers of said road district that he was ready to begin the performance of his part of the contract, and at all times stood ready, willing, and able to fully so perform the same. The road district, however, wholly failed and refused at all times to furnish said shell for hauling and wholly breached its contract. The judgment recovered by Horn was upon his claim for profits he would have made had the contract not been breached by the road district, and for the value of feed for his teams which remained idle because of such breach of contract. That Horn and the road district entered into the contract alleged; that it was a contract which the road district had the lawful right to make; that the road district breached the contract and that appellee Horn suffered damage in the sum of \$550, the amount of recovery—is not questioned. The road district is not complaining of the recovery, or the amount of the judgment rendered against it,

but only of that part of same as directs its payment out of said funds.

Article 627, supra, under which said road district was incorporated, and from which it derives its authority to issue and sell bonds, for the construction, maintenance, and operation of roads and turnpikes, reads as follows:

"Art. 627. Any county in this state, or any political subdivision or defined district, now or hereafter to be described and defined, of a county, is hereby authorized and empowered to issue bonds, or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof, for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof."

Funds arising from the sale of bonds issued and sold under the provisions of the article quoted can be used only for the purposes expressly named therein, or for purposes implied thereby, by a fair and reasonable construction thereof. Unless the claim of appellee, Horn, can be held to be a claim founded upon some aid given in the construction, maintenance, or operation of said roads and turnpikes, authorized to be constructed, maintained, and operated by means of said bond issue, under the statute, the same cannot be lawfully paid out of proceeds arising from the sale of such bonds. We cannot see how a claim against said road district for damages for breach of contract can be construed to be a claim "for constructing, maintaining, or operating roads or turnpikes," or in any other way aiding in such construction, etc. The claim of appellee is for damages for breach of contract; and, while it is not for tort, it is close akin to a claim for tort, and we think cannot be lawfully paid out of the road construction funds of the appellant. That there should be some adequate remedy for the relief of appellee cannot be questioned, but that this court is powerless to supply such remedy or to give such relief, in the absence of some lawful authority, is equally true. When the law imposes restrictions upon the uses of special funds lawfully in the hands of public officers, they cannot lawfully divert such funds from the specific purpose for which it was collected. In the case of *City of Sherman v. Smith*, 35 S. W. 294, the court says:

"The argument that unless a mandamus be granted, in some form requiring provision for or payment of this claim, it might never be satisfied is not a consideration that would justify the diversion of a city's income from the purpose to which the law intends it to be primarily applied."

Harrison County v. Love, 94 Tex. 398, 60 S. W. 871, is a case disclosing that Harrison county, under an act of the Legislature passed April 12, 1871 (Acts 12th Leg. c. 37), issued certain bonds. The law under which said bonds were issued, among other things, provided that all taxes levied and collected thereunder should be paid into the state

treasury and paid out upon warrant of the comptroller, and should be applied solely to the objects for which they were levied and collected, as follows: First, to the payment of the expenses of assessing and collecting the same; second, to the payment of the annual interest of such bonds, and not less than 2 per cent. of the principal; and, third, that if there remained any excess after said above payments, for the current year, it should be used in the purchase and cancellation of said bonds. The taxes were levied and collected as provided by the law and placed in the hands of the state treasurer. After all the bonds issued had been paid off and canceled, there remained in the hands of said treasurer the sum of \$27,000. In 1893 the Legislature passed an act which provided:

"That whenever it shall appear to the state treasurer that any money paid into the state treasury by any county of this state for the liquidation of * * * bonds issued by such county remains to the credit of such county after all of said * * * bonds and interest have been paid, said state treasurer shall pay to the treasurer of such county such remaining sum, and the treasurer of such county shall receipt therefor." (Acts 23rd Leg. c. 53.)

Upon the refusal of the comptroller to draw his warrant upon the state treasurer for said sum of \$27,000 Harrison county sought by mandamus to compel the comptroller to issue his warrant for said sum. In deciding the case the Supreme Court, speaking through Judge Gaines, says:

"We think it a clear proposition that, before the comptroller can be required to draw his warrant upon the treasurer, the Legislature must prescribe the duty. We also think it clear that the act of April 12, 1871, the provisions of which, in so far as they bear upon the question before us, we have set out either in their express terms or in substance, nowhere makes it the duty of the former to draw upon the latter in favor of any party for the surplus of a fund raised for the payment of the bonds provided for after the bonds have been fully paid. The act is as silent upon the subject as if no such surplus was contemplated. * * * It was probably thought that the provision which prescribes that the comptroller shall use any surplus which might remain from the annual collection after paying the annual interest and 2 per cent. of the principal, as prescribed by the act, in the purchase of the bonds, was a sufficient provision for the disposition of any surplus that might arise. However, it is clear that there is no express provision for the disposition of a final surplus. It is true that section 11 expressly provides that the treasurer shall pay out the fund upon the warrants of the comptroller, and from this provision there is a clear implication that the comptroller shall draw his warrants when necessary to carry out the provisions and purposes of the act. But the statute does not leave us in doubt as to the objects to which the fund, when collected, should be applied. These are expressly declared by section 8. The application of the money is: (1) To the expenses of collecting; (2) to the payment of the annual interest and 2 per cent. of the principal; and the balance, if any, in the purchase of the bonds. Nothing being said as to any final surplus, we think it clear that the Legislature did not intend to provide for such disposition in the act. This was probably the result of inadvertence, but it may have been that such provision was purposely omitted for the reason that the contin-

agency which would require such disposition would not arise for many years, and it may have been deemed best to leave the matter to the discretion of future Legislatures. The duty of the comptroller as to drawing warrants being confined to the payment and purchase of the bonds, we conclude that under the original act he was not authorized to determine the disposition of the final surplus, and that he was not empowered to draw his warrant therefor in favor of the county from which the fund came."

Funds created for construction of roads by issuance and sale of bonds are held by the commissioners or other officers in trust for the purposes expressed in the statute, and cannot be diverted to other uses nor to the payment of damages caused by the negligence, or other wrongful conduct of the commissioners. 25 Cyc. § 3, page 198. In the case of *Nugent v. Levee Commissioners*, 58 Miss. 197, at page 217, in differentiating between corporations for strictly public purposes, without power to exact profits, and those with such powers and purposes, it is said:

"They [the commissioners] derive no other profit from the execution and maintenance of the works than a share in the beneficial results anticipated therefrom. The funds for their construction and maintenance are raised by rates imposed upon the district supposed to be benefited thereby; but no business is authorized to be carried on for profit, nor are any tolls authorized to be taken for any use of the works. The object is public, though the direct benefit is local. * * * The commissioners have no property except such as is strictly incident to the machinery for making and maintaining the works and raising the necessary rates, and have no power to levy a rate for any other purpose."

Again, 58 Miss. at page 220, same volume, it is said:

"In some [cases] it is held that the liability arises from the constitution of the body and the business it is charged with, if there be no restrictive language; in others it is said there ought to be an express provision for liability before it can attach. In this case the meaning of the act seems to be clear. The tax is levied, as expressed in the statute, 'for the purpose of repairing and constructing the levees, and for carrying into effect the object and purpose of securing the counties of Bolivar, Washington, and Issaquena from overflow from the Mississippi river.' This does not include the very different object of paying damages for the default and misconduct of the persons charged with the execution of the act. This expression of the purpose of the tax in the act is an exclusion of all other purposes. If such damages were chargeable on the fund, their payment might prevent the accomplishment of the purpose for which the tax was levied."

Having reached the conclusion that the trial court erred in decreeing and directing that the judgment rendered be certified and approved, and that a warrant be issued and delivered to appellee to be paid out of the funds of said road district which arose from the sale of its bonds, we here order that said judgment be, and the same is, reformed so that that portion thereof which orders the road superintendent to certify said judgment to the commissioners' court of Matagorda county, and orders said court to approve

same and issue and deliver to appellee a warrant against the funds of said road district No. 2, be vacated and held for naught, and it is further ordered that said judgment, as reformed, be and the same is hereby affirmed. Reformed and affirmed.

BROUSSARD et al. v. LE BLANC et al.
(No. 44.)

(Court of Civil Appeals of Texas. Beaumont.
Dec. 16, 1915. Rehearing Denied
Jan. 20, 1916.)

1. APPEAL AND ERROR — 931 — PRESUMPTIONS — FINDINGS.

Where the record does not show that findings of fact and conclusions of law were not requested, it will, such findings and conclusions having been filed, be presumed that they were requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.]

2. APPEAL AND ERROR — 230 — GROUNDS OF REVIEW — PRESENTATION BELOW — NECESSITY.

Where, after findings of fact and conclusions of law were filed, exception was taken and notice of appeal given, and appellant after the adjournment of the term filed a paper complaining that there was no request for such findings and conclusions, and protesting against inclusion in the transcript, but no action was taken upon such paper, appellant is not in a position to complain on appeal of the filing of the findings and conclusions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230.]

3. PARTNERSHIP — 203 — ACTION BY FIRM — DEATH OF PARTNER.

Where a sum of money was paid over by one member of a firm with the consent of the others, an action to recover the same does not abate on the death of one of the partners, and judgment is valid, though neither his heirs nor legal representatives were made parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 375; Dec. Dig. § 203.]

4. APPEAL AND ERROR — 1008 — REVIEW — FINDINGS.

The appellate court will defer to findings of fact by the trial judge, who heard the evidence and saw the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.]

5. BANKRUPTCY — 296 — TRUSTEES — RIGHTS OF.

Where a partner was a trustee in bankruptcy of a debtor to his firm, and his copartners secured an injunction in a state court against his delivery to his successor of alleged partnership funds received by the trustee, from the possession of the bankrupt, the funds, having been turned over to the successor without notice of the injunction, are no longer subject to the jurisdiction of the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. § 296.]

6. APPEAL AND ERROR — 544 — RECORD — EXCEPTIONS, BILL OF.

Where alleged improper argument was not preserved by bill of exceptions, and only the pleadings containing reflections on appellants

were before the appellate court, the matter cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.]

7. LIMITATION OF ACTIONS §138—RUNNING OF STATUTE—EFFECT.

Where plaintiffs resorted to action in the state court, instead of the federal court, in a cause of action arising out of bankruptcy proceedings, they could not complain, having been defeated in the prosecution of the action in the state court, that because of the time consumed limitations against an action in the federal courts had run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 573; Dec. Dig. § 138.]

8. APPEAL AND ERROR §981 — REVIEW — PRESUMPTIONS.

Though, in an action tried to the court, incompetent evidence was received, it will be presumed that the trial judge was not affected by such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.]

Appeal from District Court, Jefferson County; Robert G. Street, Judge.

Action by J. E. Broussard and others against E. J. Le Blanc and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Lipscomb & Lipscomb, of Beaumont, for appellants. U. F. Short, of Dallas, Spotts & Matthews, of Houston, and Smith, Crawford & Sonfield, of Beaumont, for appellees.

BROOKE, J. [1] At the outset in this case we are confronted with a motion filed by the appellants to strike from the transcript in this cause the findings of fact and conclusions of law, for the reason, as alleged, that no findings of fact nor conclusions of law were requested of the trial court, in fact, or by any manner that appears of record, and that said document has no place in the transcript of these proceedings, and that said findings of fact and conclusions of law do not fairly represent the facts adduced. There seems to be some uncertainty in the decisions of this state with reference to the matter complained of, and a brief review of a few of same will therefore be necessary.

In the case of Otto et al. v. Halff et al., 32 S. W. 1053, it was said:

"Appellants contend, among other things, that the conclusions of fact filed by the trial judge should not be given any effect, because they were filed without having been requested by either party. There is no force in this point, as it does not affirmatively appear by the record that such was the case; the only suggestion of it being in a motion to strike out the conclusions, which was overruled, perhaps for the reason that a request had been made. We might well presume, from the filing of the conclusions, that a request therefor had been made."

In the case of Riggins v. Trickey, 102 S. W. 918, it is said:

"While it may be that under the provisions of article 1333, R. S. 1895, the trial court has no

authority to file his conclusions of fact and law, without being requested to do so by one of the parties, and the same should not be considered, still, in the absence of a showing in the record that he was not requested to file such conclusions, the presumption will be indulged that the court filed the conclusions of fact and law, because he was requested so to do. This is said, for the reason that it is the contention of appellee that there was no request to file the conclusions of fact and law, and therefore they should not be considered."

In the case of Le Blanc v. Jackson, 161 S. W. 62, the following language is used:

"The trial court filed and had incorporated in the record conclusions of fact and law, but there was no request by any party therefor, so far as is shown by the record. The exact status of such findings has not been, so far as we have been able to find, fixed by the courts. It was held by this court in City of Houston v. Kapner [43 Tex. Civ. App. 507] 95 S. W. 1108, in considering an objection to the consideration of such conclusions, on the ground that, 'when such conclusions are voluntarily filed by the judge, neither party is required to take notice of them, and no exception to the conclusions, nor assignments predicated error on the findings of fact therein contained, are required of the parties against whom such findings are made, to entitle them to attack the judgment on the ground that it is unsupported by the evidence.' * * * The question of whether such conclusions can be considered by the appellate court is not presented, and we do not feel called upon to decide it."

Objection is also made by appellees to the consideration of the motion in the instant case, for the reason that it was filed more than 30 days after the filing of the transcript, and that it comes too late, under rule 8 of the Courts of Civil Appeals (142 S. W. xl). The transcript in this case was filed on June 21, 1915. The motion to strike out the findings of fact and conclusions of law was filed on November 15, 1915. Rule 8 for the governing of Courts of Civil Appeals is as follows:

"All motions relating to informalities in the manner of bringing a case into court, shall be filed and entered by the clerk on the motion docket within thirty days after the filing of the transcript in the Court of Civil Appeals; otherwise the objection shall be considered as waived, if it can be waived by the party."

Even if the motion be conceded to have been filed too late, and for that reason could not properly be considered by this court, we are of the opinion, from the authorities, that the conclusions of fact found by the trial court in this case must necessarily be considered. The presumption obtains always that when conclusions of fact are found in the record filed in the proper time by the trial court, as in the present case, the same were requested, in the absence of an affirmative showing made at the time that the same were not requested by either party to the suit.

[2] This record shows that the conclusions of fact were filed on the 26th day of March, 1915, and it appears from the record that no objection was made that they were not requested, but on the contrary, that exception

was taken and notice of appeal given, and the record shows it was not brought affirmatively to the notice of the trial court in any way, and that no action was taken thereon during said term of court; but after the adjournment of said court, and on the 26th day of May, 1915, the plaintiffs in the lower court filed a paper, and used the following language:

"Now come the plaintiffs, and except to the findings of fact and conclusions of law, and say they are distinctly unfair, and filed without the request of anybody made in open court, and without any request from plaintiffs, or their attorneys, and plaintiffs protest against having said document included in the transcript." Signed by counsel.

No action was taken, so far as the record shows, upon the filing of this paper, which was not shown to and no issue was made in the lower court in the proper time, if it be true, as complained of by appellants, that the conclusions were not requested, but the court was permitted to adjourn without such objections having been made as to such conclusions having been filed without request. We are of opinion that appellants are not in a position to complain, and we are further of the opinion that in this case, as in all others, the presumption must be indulged that the findings of fact were requested; the record not affirmatively showing by action at the time that no such request was made. Therefore the motion to strike out the findings of fact and conclusions of law will be overruled.

In the month of June, 1906, Moore & Bridgman, a firm composed of E. F. Moore and F. W. Bridgman, who were engaged in rice farming in the county of Jefferson and state of Texas, became insolvent. The property was incumbered by mortgages to the appellees and to the Houston Rice Mills. They were indebted to other creditors, whose debts were unsecured. A portion of their property had been removed from Jefferson county, Tex., where their business was conducted, to the state of Louisiana, and there attached by the Parlan & Orendorf Company, who is one of their creditors. On the 16th day of June, 1906, they filed in the United States District Court for the Eastern District of Texas, at Beaumont, their voluntary petition in bankruptcy, and were on the 26th day of said month adjudged bankrupts. Appellants were scheduled as creditors holding a claim partially secured for the sum of \$9,000. E. J. Le Blanc, one of the partners in appellants' firm, was appointed trustee, and qualified as such, giving a bond in the sum of \$5,000, which was subsequently increased to \$20,000, with J. E. Broussard, the partner holding the largest interest in appellants' firm, as surety. The bankrupts were cultivating two farms in Jefferson county at the time their petition was filed—one containing 1,100 acres, known as the Stengle farm; and the other containing 290 acres, known as the McCrimmin farm. Crops of rice were growing on each.

They owned a lot of teams, agricultural implements, and other personal property, which were used in cultivating these lands. The crops grown on the Stengle farm, the teams, implements, and other personal property were scheduled as assets. The crop of rice grown on the McCrimmin tract was withheld therefrom. Complaint was made by the creditors of this omission. Thereupon the trustee undertook to resign, accompanying his resignation with a statement of his account. Creditors opposed the trustee's resignation, and denied the account which accompanied it. They charged that Moore & Bridgman were the owners of the McCrimmin rice, and were in possession of the same when they were adjudged bankrupt. That it was delivered to Le Blanc, trustee, when he was appointed and qualified as such, and that he took possession of it as their property. The account of the trustee was denied, and it was alleged that it was grossly exaggerated; that the bankrupts and their families had been put upon the pay rolls at extravagant salaries, when they performed little service; and that the estate had been administered for their accommodation and benefit of the bankrupts in the appellant partnership.

Le Blanc filed his reply. He alleged the Beaumont Rice Mills were owners of the McCrimmin rice, and that the bankrupts were in possession of it as the representatives of the owners. The facts constituting the alleged ownership are pleaded. Appellants, in the name of Le Blanc, insisted that the referee was without jurisdiction to determine the matters in controversy between the creditors and the trustees. Their objections to the jurisdiction were sustained by the referee. Upon his petition for review his conclusions were overruled, and the contention of the creditors sustained. It was held by the United States District Court that the property in controversy belonged to the bankrupts; that as such it came into the possession of Le Blanc, and said trustee was directed to account for the same in the administration of their estates and to pay the value thereof, and deposit to the credit of Moore & Bridgman the value of said rice. The trustee appealed from the decision of the District Court, and at the same time filed his petition for review. Each was heard in the Circuit Court of Appeals at New Orleans on the 4th day of January, 1909, and the judgment of the trial court was affirmed. Upon a return of the mandate to the trial court, creditors filed their petitions for an order upon the trustee to show cause why he failed to comply with the order of the court to account for the fund found to have been in his possession and pay the same into court; *that he should be fined for contempt, and committed unless such payment was made.* Thereupon appellants began the present action to prevent their copartner, Le Blanc, from withdrawing the funds of the partnership to pay

the sum which he has been directed to pay by the United States District Court. A temporary restraining order was granted, and thereafter made known to the federal court by Le Blanc, who sought to be relieved of the necessity of violating the order which he claimed he would have to violate if he brought into court the sum required by the federal court, since he claimed the money in question had been taken and appropriated by his firm, and he had no other source for obtaining it, and he suggested that issues had been tendered in the state court and the fund actually deposited there by his firm, and prayed that the order of the federal court be so modified as to admit of his merely accounting for the fund as part of the estate, and being discharged, leaving his ownership and right of custody to be tested by plenary trial. The federal court denied his application for modification, and notified him that he would be immediately committed unless he produced the fund. He thereupon took the fund of about \$13,000 and placed it in the federal clerk's hands. At the same time he was dismissed as trustee, and appellee W. J. Crawford was appointed in his stead.

The plaintiffs in this suit gave notice to the clerk of the federal court and also to Crawford and the Gulf National Bank, as a depository for the bankruptcy funds, that the fund in question was taken in violation of the injunction issued by the state court in this cause, and thereafter said Crawford and the bank were made parties hereto by supplemental bill, and they filed their exceptions, pleas, and answers. Later the federal District Court enjoined prosecution of this suit against them. There was an appeal therefrom to the Supreme Court of the United States, which reversed them both, holding that the state court had a right to enjoin against taking the partnership funds, and to try the question of whether Crawford had notice, when he received the funds, of their having been taken in violation of the state court's injunction.

On the trial of the case in the state district court judgment was rendered generally against plaintiffs, that they take nothing and pay all costs. The plaintiffs filed and urged their motion for new trial, which was overruled, to which they excepted and gave notice of appeal. Later the plaintiffs filed and urged a second motion for new trial, and to reconsider, showing that one of the copartners interested in the suit between the partners was dead at the time of the trial, and that neither his heirs nor legal representatives had been made parties, and urged this, among other grounds, why the judgment ought to be set aside. This motion was also overruled, and exception reserved, and notice of appeal given, and the case was brought to this court in due course.

The court trying the case filed the following findings of fact, which of necessity must be incorporated in the opinion, to wit:

"(1) On the 16th day of July, 1906, Moore & Bridgman, a firm composed of E. F. Moore and F. W. Bridgman, filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of Texas at Beaumont, and were on the 25th day of said month adjudged bankrupts.

"(2) The Beaumont Rice Mills, a partnership composed of plaintiffs, J. M. Hebert, D. C. Hebert, L. C. Hamshire, J. A. Bordages, J. E. Broussard, and the defendant, E. J. Le Blanc, were at that time, and for a long time had been, conducting a rice milling business in Beaumont, and were scheduled as a creditor of said bankrupts to the amount of \$9,000.

"(3) The bankrupts had raised and cultivated a crop of rice on a tract of land containing 280 acres of leased land known as the McCrimmin farm. The crop growing thereon was not scheduled as the property of the bankrupts.

"(4) The defendant E. J. Le Blanc was appointed trustee by the referee in bankruptcy, and duly qualified as such by giving bond in the sum of \$5,000, and otherwise complying with the order appointing him, and took charge of the estate of said bankrupt.

"(5) After remaining in possession of the property of the bankrupts for a time, complaint was made by the creditors that no inventory had been filed and that the bond he had given was insufficient. He thereupon undertook to resign his trust, and tendered his resignation in writing, accompanied by an account of his administration of said estate. Objection was made to his account, creditors maintaining that the rice grown upon the McCrimmin land, amounting to 3,583 sacks and of the value of \$11,542.25, was the property of the bankrupts, that it had come into his possession as trustee, and that he should be charged with its value.

"(6) The claim by the creditors was resisted on the ground that the bankrupts had sold the rice to the Beaumont Rice Mills in payment of their indebtedness to said mills and that it had been delivered to said Beaumont Rice Mills and was no part of the estate of the bankrupts. It was further insisted that the referee was without jurisdiction to determine the matters in controversy.

"(7) Upon a trial before the referee the objection urged to the jurisdiction by the trustee was sustained and the action of the creditors dismissed.

"(8) Upon a petition for review the judgment of the referee was reversed, and the rice in controversy held to be the property of the bankrupts; that it was of the value of \$11,642.25, and the trustee was held to account in that sum, and ordered to pay the same into court.

"(9) From this action the trustee appealed to the Circuit Court of Appeals, and also filed his petition for review. Upon hearing in the Circuit Court of Appeals, judgment of the trial court was affirmed, and the liability of the trustee for the value of the rice finally established.

"(10) Upon the return of the mandate, the trustee not having complied with the order directing the payment of said sum of money, the creditors applied for order to show cause why he should not be committed for contempt. From the hearing of said application the trustee was directed to pay forthwith or be committed for contempt.

"(11) Whilst acting as trustee for the estate of the bankrupts, defendant, Le Blanc's account as such was kept upon the books of the Beaumont Rice Mills on all of his transactions in connection with that estate.

"(12) At the time this suit was brought, the defendant Le Blanc had never threatened to take the sum necessary to comply with the court's order from the funds of the Beaumont Rice Mills. His copartners, the plaintiffs in this case, never forbade him to take such funds for that purpose. Neither of them ever notified the bank in which said funds were deposited

to decline the payment of a check drawn for that purpose.

"(13) On the 12th day of April, 1909, the judgment of the District Court against the trustee was satisfied by the payment in cash of \$13,130.50, being the amount of the judgment against Le Blanc, with interest, obtained from the bank upon a check drawn in the name of the Beaumont Rice Mills by E. J. Le Blanc, and his account as trustee of Moore & Bridgman, bankrupts, on the books of the Beaumont Rice Mills, is charged with that sum. This entry was made upon the books with the consent of all plaintiffs in this case. Neither the deputy clerk of the court, to whom the money was paid directly, nor the substitute trustee, to whom he turned it over, were notified that it was partnership funds until after the money had been actually applied in payment of the judgment.

"(14) The court finds from all the evidence in the case that said judgment was paid by the Beaumont Rice Mills with the knowledge and consent of all plaintiffs in this case, and that it was paid willingly; that the plaintiffs intended by the filing of this action to attempt to recover the sum paid by them for the value of the rice to comply with the order of the court for their copartner, Le Blanc, and not for the purpose, alleged in the petition, of preventing their copartner, Le Blanc, from depleting their funds, by withdrawing said sum over alleged objections, which they never made. The pounding was not in good faith.

"Conclusions of Law.

"The court concludes that the plaintiffs are not entitled to any recovery from the facts in this case, and that their application for an injunction should be denied, and the cause dismissed, to which findings both of fact and law the plaintiffs except.

"Robert G. Street,
"Judge 58th District Court, Presiding by
Exchange of District.

[3, 4] Appellants' first assignment of error assails the action of the lower court in proceeding to judgment in this case without having new parties in place of plaintiff L. Hamshire, deceased, before it. The judgment herein rendered, they say, is void because at the time of its rendition the plaintiff L. Hamshire a necessary party, was dead, and neither his heirs nor legal representatives were made parties. There was no suggestion made in the lower court of the death of Hamshire; appellants alleging that it had been overlooked. The cause was tried on the 3d day of February, 1915, and it was not until the 20th day of March, 1915, that plaintiff filed a motion to set aside the judgment, because of the fact of the alleged death of Hamshire. We understand the law to be that, in a suit by partners for the benefit of the partnership to preserve and protect its property, if one dies pending the action, the suit does not abate, but the right to prosecute the action survives, and the surviving partners may proceed with the action. *Dunman v. Coleman*, 59 Tex. 199; *Gunter v. Jarvis*, 25 Tex. 582; *Blackman v. Green*, 17 Tex. 222; *Thomas et al. v. Greene County*, 159 Fed. 343, 89 C. C. A. 405; *Sweetser v. Fox*, 43 Utah, 40, 134 Pac. 599; *Northness v. Hillestad*, 87 Minn. 304, 91 N. W. 1112; *O'Shea v. Kavanaugh*, 65 Neb. 639, 91 N. W. 578; *Bond v. Hilton*, 51 N. C. 180; *Moore v. Terhune*, 161 Ill. App.

155; *Robinson v. Pikeville Bank*, 56 S. W. 660; *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461.

A different case would have been presented if it had been shown that Le Blanc, a partner in appellants' firm, was about to take partnership funds and apply the same to the payment of his own individual debt, over the objection of appellants, and without their consent; but from the findings of fact made by the court below, which we feel obliged to consider, the money was taken with their consent, and without objection on the part of appellants. The court, in its findings, as above set out, says that from all the evidence the judgment was paid by the Beaumont Rice Mills, with the knowledge and consent of all the plaintiffs in this case, and that it was paid willingly, and that the plaintiffs intended, by the filing of this action, to attempt to recover the sum paid by them for the value of the rice, and not for the purpose, alleged in the petition, of preventing their copartner, Le Blanc, from depleting their funds by withdrawing said sum, over alleged objections, which they never made.

The trial court was in a better position, having heard the testimony, and the case being tried before the court, to judge of these matters, and we are not disposed to disturb his finding. The appellants' first assignment is therefore overruled.

[5] The appellants' second assignment of error is as follows:

"The decision of the Supreme Court of the United States, made a part of the evidence in this cause, showed that the temporary injunction issued herein by Judge Hightower was properly ordered and issued, and that the only inquiry necessary to be made in this cause was whether the trustee, Crawford, at the time of his receiving the fund in question, took it with notice that it was by way of violation of the state court's injunction, and the court has erred in upholding him and other federal court officers in such violation of the temporary injunction issued under the order of Judge Hightower herein, since the evidence shows that not only Crawford had such notice, but that the federal court officers concerned in the evasion of this court's jurisdiction had notice of the existence of said injunction and its bearing upon this case."

The trial court found that:

"Neither the deputy clerk of the court, to whom the money was paid directly, nor the substitute trustee [Crawford], to whom he turned it over, were notified that it was partnership funds until after the money had been actually applied in payment of the judgment."

The trial court having found that notice had not been given until after the money had been actually applied in payment of the judgment, and, as said before, it having heard the testimony in the case and passed upon the credibility of the witnesses, we are not inclined to disturb its findings on this point. Therefore we overrule appellants' second assignment.

Appellants' third assignment claims that the evidence shows that, when the fund in

question came into the hands of the several defendants, it was partnership funds of plaintiffs and defendant Le Blanc, under the protection of a temporary restraining order then issued by the direction of Judge L. B. Hightower, Jr., then judge of the court, and that, before any steps were taken in the administration of same by the federal court officers, all of them were fully apprised of the violation of the state court injunction involved in their receipt of the funds, and that it was clearly their duty forthwith to restore said fund to plaintiffs' partnership funds, and that it was error in this court not to so order.

This is practically the same as the second assignment of error, and, as above said, the court below having found that the money was not received with notice until it had been actually applied in payment of the judgment, what has been said above will apply to this assignment, and it is therefore overruled.

[6] Appellants, by their fourth assignment of error, challenge the action of the lower court in permitting impertinent reflections against plaintiffs to be made on the trial, involving charges of fraud, given utterance to in pleadings and remarks of counsel for creditors of the bankrupts, and in documents presented by them and introduced in evidence by counsel for defendants, Crawford, and the creditors of the bankrupts, and not supported by the evidence.

There is no bill of exceptions in the record to the introduction of illegal testimony or impertinent reflections, and it is presumed that, if such were made, objection would have to be promptly taken, and a bill of exceptions would be before this court complaining of such action, and showing the language used and wherein the same was incompetent. In the absence of a bill, we cannot say from the record before us, which only contains the written pleadings, and does not contain remarks of counsel, that no such impropriety was indulged as would cause this court to reverse this cause. The said assignment is therefore overruled.

[7] The appellants, in their fifth assignment of error, claim that the court erred in refusing to require defendants to restore the fund taken in violation of the temporary injunction, for this: That the ruling, if upheld, would result in these plaintiffs having to prosecute in the federal court a new suit, which is probably barred by limitation, whereas the trustee in bankruptcy could assert his and the creditors' equities, if any, in the fund by suit in the federal court, without fear of the bar of limitation, since it has been held that such a suit by the trustee would not be barred or affected by limitation statutes.

The court that tried the case, having before it the testimony of the transactions which resulted in the producing and with-

drawal of this fund, found that the money was voluntarily paid, and in refusing to require the defendants to restore the fund we cannot say such action was without warrant, and the result of the action of the lower court in so refusing is not thought to be a proper subject for investigation, as we have only to deal with the case as presented to us, and as shown by the record; but it may be said that when a right is claimed to be violated, and a remedy is resorted to, the party would not have cause to complain that in the attempted enforcement of the remedy time has been consumed covering the period of limitation for a different remedy. The fifth assignment is therefore overruled.

Their sixth assignment of error complains that the court erred in rendering judgment against the plaintiff, and they say that under the evidence the fund in question was manifestly taken from the funds of the plaintiffs' partnership in violation of the order of this court, and that at the time it was delivered to the trustee in bankruptcy, and that at each step from the time it was wrongfully withdrawn from said funds the defendant W. J. Crawford, and all those through whom it passed to his custody, had notice that said fund had been taken by defendant Le Blanc in violation of this court's order.

The findings of the lower court are against appellant on this question, and we do not feel, in view of all the facts, which were gone into at length and considered by the lower court, that we would be justified in holding that the court committed error in this respect. The case seems to have been fully developed, and while incompetent and irrelevant matters, perhaps, were introduced in evidence, it was being tried before the court, and in the consideration of the whole case the court, perhaps, was justified in its finding.

[8] We feel confident that the trial court, who heard the evidence in its entirety, and whose province it was to pass upon the evidence, did not allow improper evidence to influence his action, and thus his findings, and we cannot say from this record that the case was not properly disposed of by the lower court.

The sixth assignment is therefore overruled, and the judgment of the lower court is in all things affirmed.

CONLEY, C. J., recused.

CHICAGO, R. I. & G. RY. CO. v. COSIO.
(No. 887.)

(Court of Civil Appeals of Texas. Amarillo.
Jan. 5, 1916. Rehearing Denied
Jan. 26, 1916.)

1. ATTORNEY AND CLIENT \S 148—COMPENSATION—ASSIGNMENT OF CONTINGENT INTERESTS.

Where the attorney of an injured servant suing for damages was before the filing of the

petition assigned one-half the amount which might be recovered in the action, the attorney's interest was contingent upon collection, and was a mere assignment of funds to be collected.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 352, 353; Dec. Dig. ¶ 148.]

2. ASSIGNMENTS ¶129—NECESSARY PARTIES—NATURE OF INTEREST.

An attorney to whom was assigned a contingent interest in the amount to be recovered was not such an interested party as to require that he be made a party to the action or to make the petition which failed to make him a party subject to a plea in abatement for defect of parties.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 213-219; Dec. Dig. ¶129.]

3. MASTER AND SERVANT ¶256—INJURIES TO SERVANT—ACTIONS—PLEADING—SUFFICIENCY.

Where the petition of a servant seeking recovery for his injuries showed that the defendant was a railroad operating from Texas into New Mexico, and that the servant was employed in maintaining that line in repair, and where the answer alleged that the defendant was an interstate carrier, it was not necessary for the plaintiff to state that he brought his action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), since the facts alleged were sufficient without specific statement to show that it was brought under that act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. ¶256.]

4. MASTER AND SERVANT ¶284—INJURIES TO SERVANT—ACTIONS—PLEADING—QUESTIONS FOR COURT.

In a servant's action for injuries in operating a motor tool car on an interstate railway, it is a question for the court whether the injuries were received while employed in interstate or intrastate commerce, thereby determining whether state or federal laws shall control.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. ¶284.]

5. COMMERCE ¶27—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT.

Before recovery can be had under the federal Employers' Liability Act, it must appear first that the defendant railroad was engaged at the time in interstate commerce, and that the employé was injured while actually so employed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ¶27.]

6. WITNESSES ¶269—EXAMINATION—CROSS-EXAMINATION.

It is not error in a servant's action against the employing railroad to permit a witness to state that the track was uneven and rough and unballasted, where defendant had introduced him, and on direct examination had elicited the testimony that the road had no track rough enough to have caused plaintiff to lose his hold on the car with the resultant injury claimed, since that was proper cross-examination, and the testimony so elicited was material.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. ¶269.]

7. APPEAL AND ERROR ¶1050—REVIEW—EVIDENCE—HARMLESS ERROR.

Where a witness for defendant stated that defendant's track was a little rough all along the line, and that every day some part of the track would have to be raised, the error, if any, in admitting on cross-examination testimony that the track was not ballasted and was rough

in some places was harmless; the cross-examination being covered by the direct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

8. WITNESSES ¶269—EXAMINATION—CROSS-EXAMINATION.

Where a servant of a railroad was injured in starting a gasoline motor car by pushing it until the engine started, and the defendant railroad introduced evidence as to the character of the car on the issue whether it had used due care in providing a reasonably safe instrumentality with which to work, it was not error to admit on cross-examination the testimony of the witness that the motor could have been equipped with a self-starter at a certain cost, although no pleading authorized the testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. ¶269.]

9. APPEAL AND ERROR ¶758—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS—BRIEF.

Where the brief on appeal does not show whether objections were interposed to the charges of the court complained of before or after submission to the jury, the assignments of error thereon must be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ¶758.]

10. MASTER AND SERVANT ¶286—INJURIES TO SERVANT—LIABILITY OF MASTER.

It is the duty of the employer to furnish a reasonably safe implement for the work required, so that where a servant was injured by falling from a gasoline car which he attempted to start by pushing it, whether it was the duty of the company to furnish a car with a starting apparatus was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1060; Dec. Dig. ¶286.]

11. TRIAL ¶260—INSTRUCTIONS—SUFFICIENCY.

It is not error to refuse a requested instruction already substantially covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

12. MASTER AND SERVANT ¶278—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE.

Evidence in a railroad servant's action for injuries held sufficient to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 964, 966-958, 960-969, 971, 972, 977; Dec. Dig. ¶278.]

13. MASTER AND SERVANT ¶280—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE—ASSUMPTION OF RISK.

Evidence in a railroad servant's action for injuries by falling from a gasoline motor car which he had attempted to start by pushing it held insufficient to show that he assumed the risk in attempting to board the moving car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. ¶280.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by Flaviano Cosio against the Chicago, Rock Island & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. E. Gustavus, of Amarillo, and N. H. Lassiter, of Ft. Worth, for appellant. L. C. Barrett and Jas. N. Browning, both of Amarillo, for appellee.

HUFF, C. J. The appellee, Flaviano Cosio, brought this suit against the appellant railway company for damages for alleged personal injury. He alleges that the appellant railway company is a railroad corporation carrying passengers and freight for profit and hire over its line of road, which runs from Amarillo, Potter county, Tex., through Oldham county, Tex., to Tucumcari, N. M.; that the appellee was employed by appellant and engaged in building and repairing the defendant's road at and near a place called Vega, in Oldham county, and that appellant had motor cars for the purpose of carrying tools and material for repairing its road, which was required to be propelled along the road by the servants of appellant, and in propelling said car, and in carrying the tools and material, the appellee was engaged as the servant of appellant in such work at the time of his injury, and that, while so engaged, he attempted to mount the car, and was thrown therefrom and injured in the manner set out. The negligence alleged is that he was required to start the car by hand by pushing it for some distance until the motor by which the car was propelled was started, and that he was required to mount the car while in motion, and that he was so required by the direction of the foreman; that it at that time was loaded with certain tools, the handles of which were round, etc., and in getting on the car the tools turned so that his foot slipped and he fell. He also alleges that the track at that point was rough and uneven, and that the car struck a rough place and bounced as he stepped on the car, which contributed to the fall, and he also alleges that the appellant failed to warn him of the danger in getting on the car while in motion; that he was ignorant of the danger at the time and was wholly unacquainted with such work; that he was a Mexican, and not acquainted with the English language, and had had no experience in such matters; that all of said acts were negligence on the part of appellant and proximately caused his injury.

It will not be necessary at this time to set out the answer of the appellant. The case was tried to a jury on special issues, and upon their findings a judgment was rendered for appellee for \$750.

[1] Under the first assignment, the contention is made that defendant's plea in abatement should have been sustained or L. C. Barrett should have been made a party. The plea in abatement set up that prior to the filing of the suit appellee conveyed to L. C. Barrett an undivided one-half interest in the cause of action, and that Barrett is therefore

a necessary party plaintiff, and that the cause should be abated, unless Barrett was made a party plaintiff. The appellee filed a pauper's oath, and it was admitted on the trial below that Barrett was able to pay and secure the costs. L. C. Barrett, as attorney for appellee, filed this suit against appellant in the name of appellee for the damages alleged, and the record shows Barrett represented appellee as his attorney in the trial court, and that he is representing appellee in this court in such capacity. The bills of exception taken on this plea show that the original petition was filed August 21, 1914; that the transfer set up by the plea was filed with the papers of the cause on the above date. The transfer recites that appellee, on the date thereof, August 17, 1914, employed L. C. Barrett to represent him and to sue appellant for the injury negligently inflicted on appellee, and to compensate Barrett for his services in such suit he assigned and transferred one-half interest in the cause of action, as well as all moneys realized by compromise or otherwise; that it was understood that all proceedings in court or out of court should be carried on in the name of appellee. The appellee empowered Barrett to bring the suit and prosecute it to final determination, collect all moneys arising therefrom, to compromise, and sign all papers and receipts for all moneys, and, when collected, to pay over one-half to appellee. Appellee was to stand for all costs or make necessary arrangements by affidavit, if required therefor. This transfer or power of attorney was duly acknowledged. It is apparent from the record that Barrett objected to being made a party plaintiff. The trial court refused to abate the suit or require Barrett to be made a party plaintiff. While the contract was made before suit was filed, the clear import thereof was an assignment of an interest in the funds to be collected in the future, and was contingent upon such collection. *Railway Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166; *Railway Co. v. Vaughn*, 16 Tex. Civ. App. 403, 40 S. W. 1065; *Railway Co. v. Wood*, 152 S. W. 487.

[2] It has been held that an attorney with a contingent interest in the subject-matter of a suit is not such as will make him a party to the suit requiring of him a bond for costs or to secure same. *Railway Co. v. Scott*, 28 S. W. 457. It has also been held by the Supreme Court that where an attorney had a contingent interest in the suit, who was the brother of the judge trying the case, the trial judge was not thereby disqualified, although such interest existed in the brother. *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768; *Railway Co. v. Reeves*, 35 Tex. Civ. App. 162, 79 S. W. 1090. Appellant cites the case of *Hughes v. Mendoza*, 156 S. W. 329. In that case it is held a one-third interest was transferred in the claim sued on, and that the attorneys could be made parties, and that

the plea in abatement was properly presented. The court therein says:

"Undoubtedly the transfer in this case to Patterson & Wallace constituted them joint owners with plaintiff of the cause of action herein sued upon, rather than the owners of a contingent interest in a possible future recovery."

It was held, however, in that case, as the attorney represented the plaintiff therein, they would be bound by the judgment therein rendered, and that the action of the court in overruling the plea in abatement was harmless, citing *Bonner v. Green*, 6 Tex. Civ. App. 98, 24 S. W. 835. We think the contract in this case, when considered in its entirety, evidenced the fact that Barrett had only a contingent interest in the future possible recovery, and that it is by its terms in the class with the contract mentioned in the case of *Railway Company v. Ginther*, supra. It was held in *Wickizer v. Williams*, 173 S. W. 288, where the plaintiff conveyed part of the land to the attorneys prosecuting the suit, that it was not error to refuse to make the attorneys parties to the suit over their objection, citing *Bonner v. Green*, supra. We think there was no error on the part of the trial court in refusing to make Barrett a party, but if there was error it was harmless for the reason under the showing in this record Barrett would be bound by the judgment rendered.

[3] The second assignment complains at the action of the trial court in overruling the first special exception to appellee's petition, to the effect that appellee did not show whether he was suing under the state or federal law, and that appellant is not informed by the petition under what law appellee is claiming. The petition alleges that appellant operated a line of railroad from Amarillo, Tex., to Tucumcari, N. M., and through Oldham county, Tex., appellee's place of residence, and that the injury of which complaint is made was received by appellee while he was employed in repairing appellant's roadbed and track so used, and that it was his duty, as one of the employés of appellant, to operate a certain car along the line of road for the purpose of carrying appellant's servants, together with their tools and the material for repairing the road in which appellee was then employed as a servant of the appellant, and that he was injured while thus employed.

The appellant answered that it was engaged in interstate and intrastate commerce, and that the appellee was employed to assist in repairing and maintaining its roadbed and track when injured, and that, if he had any cause of action, it was under the federal Employers' Liability Act of the United States, and not of the state of Texas. The appellant in this case cites us to Thornton's Employers' Liability and Safety Appliance Acts, pp. 32 and 33. The author in the note suggests that, if the pleadings do not show the plaintiff was employed in interstate commerce, when the evidence developed the fact

that he was, this would constitute a fatal variance, and, if the defendant by answer should set up the plaintiff was so employed, and this was proven, this would defeat a recovery, etc. The Supreme Court of the United States held:

"It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employés injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases; *Mondou v. N. Y., N. H. & H. R. Co.* [223 U. S. 1] 32 Sup. Ct. 169 [56 L. Ed. 327, 38 L. R. A. (N. S.) 44]. Therefore the pleader was not required to refer to the federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done." *Railway Co. v. Wulf*, 226 U. S. 570, 575, 33 Sup. Ct. 135, 137, 57 L. Ed. 355, Ann. Cas. 1914B, 134.

Chief Justice White of the Supreme Court, in the case of *Grand Trunk, etc., v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168, said:

"It is true that to avoid the irresistible consequences arising from this situation it is insisted in argument that as no express claim was made under the Employers' Liability Act, therefore there was no right in the plaintiff to avail of the benefits of its provisions, or in the court to apply them to the case before it. But this simply amounts to saying that the Employers' Act may not be applied to a situation which is within its provision, unless in express terms the provision of the act be formally invoked. Aside from this manifest unsoundness, considered as an original proposition, the contention is not open, as it was expressly foreclosed in *Seaboard Air Line R. Co. v. Duvall* [225 U. S. 477], 32 Sup. Ct. 790 [56 L. Ed. 1171]."

Under the statute of this state in force at the time this case was pleaded, the allegations that appellant was engaged in interstate commerce and that appellee was working on its line in furtherance of such commerce will be taken as true, if not denied, which was not done in this case. Again, it is a familiar rule in this state that an omission in the pleadings will be cured by the allegation in the adversary pleading of the omitted matter. It was held in *Railway Company v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 868, 59 L. Ed. 1433, that the admission in the replication that White was employed in interstate commerce cured the defect in the declaration. This holding was made in deference to the holding of the state court, which in matters of practice and pleading was binding on the Supreme Court. This court, in the case of *Railway Co. v. Stalcup*, 167 S. W. 279, held substantially that, when the petition showed the employé, when killed, was employed in interstate commerce, the allegation was sufficient to designate the statute controlling. A writ of error was refused in that case by the Supreme Court of this state, as well as by the Supreme Court of the United States. We also held that, when there was a shipment of cattle, shown

by the pleadings to be from Texas to Kansas, on a through bill of lading, the Carmack Amendment would apply, even though the case was apparently tried in the court below under the state statutes. *Railway Co. v. Word*, 159 S. W. 375; *Railway Co. v. Meyer*, 155 S. W. 309. Writs of error were denied in these last two cases by both the higher courts.

In this case the petition shows that appellant was a carrier railroad operating a line of road from Texas into New Mexico, and that appellee was injured while employed in maintaining this line of road in repair. The appellant alleges that it was so operating the road as an interstate commerce carrier, and admits appellee was so at work. It is not required, we do not think, when the facts are stated which themselves indicate under which statute the case should be tried, to specifically allege under which statute the court should try it. The federal statute is supreme when the facts are presented which bring the case within the statute, and the court must try the case under the law. To require an employé to hazard his rights by requiring him in every case to allege that his case is under the state or the federal statute, under the penalty of losing if he fails to name the proper statute, would, in our judgment, be placing a burden on him which ought not to be imposed. When he alleges the kind of employment in which he was engaged and where employed, it occurs to us he has gone far enough. The allegation that a line of road runs from one state into another is *prima facie*, we think, an allegation that the road was engaged in interstate transportation. The fact that he was employed in repairing that line of road when injured, as a section hand thereon, will be sufficient to show such injury "while" employed in interstate commerce, if the law attached to such labor the character of interstate commerce.

[4] It is on the facts established a question for the court to determine whether his injuries were received while employed in interstate or intrastate commerce, and it will also be a question for the courts to determine which statute shall control.

[5] Two things must appear before the federal statute is paramount: First, that the railroad was engaged at the time in interstate transportation; and, second, that the employé was injured while employed in interstate commerce. Thus a yardmaster, who at the time of his injury was handling cars for intrastate shipment, would recover, if at all, under the state statute; but if while handling cars for interstate transportation, the federal statute will control. *Railway Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Railway Co. v. Rosenbloom* (Sup.) 177 S. W. 952. A carpenter repairing a bridge over which

state and interstate shipments pass on a line of railroad, while carrying bolts with which to repair the bridge thereon, was injured on the track by a passing train. He was held by the Supreme Court to have been injured while employed in interstate commerce. *Pedersen v. Railway*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The holding in the case last cited rests apparently on the fact that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and legal contemplation a part of it. Practically the average employé would not know whether there were commodities in the car for out of state transit. This knowledge rests largely with the railroad; it alone in many instances knows the character of the freight. We believe the just rule to be, when the facts at the trial show the character of the commerce, the court should apply the law governing the case as made. The employé ought not to be required to allege that which is in the knowledge of the road. The time, place, circumstances, and the employment at which the servant is at work when injured will be sufficient to notify the road of the character of commerce in which the servant was employed. This assignment will be overruled.

[6] The third assignment is to the action of the court in permitting the question to be asked, and the answer of the witness Gruhlkey to the effect that the railroad track from Amarillo to the state line was not first-class road; that it was not ballasted, and in some places rough. The witness was introduced by appellant, and on direct examination had stated that the road had no track rough enough that a man would be in danger of losing a handhold on the car, and testified generally as to whether there were high or low places. The allegation was that in boarding the car appellee was thrown by reason of a rough place in the road. He also testified he observed a high point where he fell. The testimony objected to was elicited by appellee upon cross-examination. Under the circumstances of this case we think it was proper cross-examination (*Railway Co. v. Porter*, 156 S. W. 267); and under the issues it was material, and made so by the pleadings and other evidence.

[7] Without objection the witness stated the track was a little rough all along the way from Amarillo to the state line, and that every day some part of the track would have to be raised. This testimony was substantially the same as that objected to. This will render the testimony objected to harmless.

[8] The fourth assignment is to the action of the court in permitting the witness Gruhlkey, on cross-examination, to state that the motor could have been equipped with a self-starter, and that its cost would have been

about the price of the motor. The objection was there was no pleading authorizing such testimony, and that it was theorizing and speculating, and, as to the cost, it was immaterial to any issue in the case. The appellant introduced this witness, and on direct examination went into a detailed history and description of the various hand cars used by appellant and for the make of the motor in question, its construction, and how it started, etc. We think the issues of this case are whether the car, as then used by appellant, by pushing it to start, under such circumstances, was a reasonably safe instrumentality, and whether there was negligence in so using it; and from the fact that this appears under the circumstances to have been a legitimate cross-examination of the witness, we believe there was no such error shown by the testimony as would require a reversal.

[9] The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error will be regarded as waived, for the reason that the statements under the assignments in appellant's brief do not show when the charges given by the court and here complained of were objected to, whether before or after the case was submitted to the jury. The objections made to the charges are not shown in the brief, or when called to the attention of the trial court. Appellant does not set out the bill of exceptions to the charge in its statement, but only refers to the record for such bill. *Railway Co. v. Culver*, 168 S. W. 514; *Insurance Co. v. Rhoderick*, 164 S. W. 1067.

[10] The fourteenth assignment: We believe the court properly refused the charge requested set up under this assignment. The charge sought to have the court instruct the jury that there was no duty to furnish the car with an apparatus for starting it without the necessity of pushing it before starting. It was the duty on the part of appellant to furnish a reasonably safe implement for the work required, and whether the appellant used ordinary care in doing so was a question for the jury under the facts of the case. Ordinary care may have required such a motor, under the facts of this case, or the pushing of the car in question may have been a reasonably safe instrumentality, and in furnishing it the appellant may have used ordinary care. As a rule, it should be left to the jury to determine whether the employer did all ordinary care required. *Railway Co. v. Welsheimer*, 170 S. W. 263, 266.

[11] The fifteenth assignment is overruled. This is simply a requested instruction that appellee assume all the risk ordinarily incident to the work and such as would arise in the use of the car in question. The court, in the last paragraph of his charge, gave the proper instruction on this subject, and in so

far as the requested charge was the law the instruction of the court covered it.

The sixteenth and seventeenth assignments are overruled, for the reason that the issues here requested were substantially submitted by the court in issue No. 22.

The eighteenth assignment is overruled. We think the court properly refused to submit the issue whether appellant was engaged in interstate commerce. This is a question of law from proven facts. The fact that appellant transported freight (state and interstate over its line of road) was not a controverted fact. Both parties hereto substantially alleged it was so engaged. The allegation of appellant to that effect was not denied.

[12] Assignments 19 to 25, inclusive, assail the answers of the jury to the issues submitted, to the effect that appellant was guilty of negligence in the particulars alleged, and answering that appellee did not assume the risk. There are facts from which the jury could find that the instrumentality used was not reasonably safe, that is, that the car was not safe to board while in motion, and that appellee was working under the direction of the foreman, who required the car to be put in motion before boarding it, and that the motor could have been started by a crank without requiring the appellee to push the car by hand in order to start the motor before attempting to get on the same while in motion; that the track was rough, uneven, and in bad condition, and liable to cause the car to jump and to ride rough; that the appellee was inexperienced in the use of such an instrumentality, and knew nothing or but little of its use, and was not warned by appellant of the danger. We believe that, all these matters concurring in the injury of the appellee, the jury had some evidence to show that appellant was negligent therein, and that such negligence proximately caused appellant's injury.

[13] The jury found that appellee was guilty of contributory negligence and gave the per cent. that his negligence bore to that of appellants, and judgment was rendered accordingly. We do not think we should, as a matter of law, hold the facts conclusively established that the appellee assumed the risk. Under the facts we cannot say that appellee knew of the danger from the negligence of the appellant, or that he must necessarily have known of such danger, and that he would have known that the manner of doing the work was not a reasonably safe one, especially when his foreman was present directing the work. *Bonnett v. Railway*, 89 Tex. 72, 33 S. W. 334; *Railway Co. v. Scott*, 160 S. W. 432; *Bennett v. Railway*, 159 S. W. 132.

We have concluded the judgment of the trial court should be affirmed.

Affirmed.

SHEARLOCK v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 1634.)

(Springfield Court of Appeals. Missouri. Jan. 8, 1916. Rehearing Denied Jan. 26, 1916.)

1. INSURANCE ⇐539—LIFE INSURANCE—ACTIONS—LIMITATIONS.

Where plaintiff's husband died in 1897 and she sued on the policy in 1915, the cause was barred, in the absence of waiver or estoppel of the company, since she had, at most, only a reasonable time after her husband's death in which to make proof of death on the making of which her cause of action accrued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. ⇐539.]

2. INSURANCE ⇐615—LIFE INSURANCE—ACTIONS—DEFENSES.

The statute of limitations and failure to submit proofs of death within 90 days, as required by Rev. St. 1879, § 5985, are special defenses, a matter of privilege to the defendant insurance company, but do not extinguish the cause of action, operating merely to bar the remedy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. ⇐615.]

3. INSURANCE ⇐146—LIFE INSURANCE—ACTIONS—DEFENSES.

Such defenses, being in the nature of forfeitures, are not favorites of the insurance law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. ⇐146.]

4. INSURANCE ⇐555—LIFE INSURANCE—CONDITIONS OF STATUTE—WAIVER.

Though a statute required proofs of loss to be submitted to the insurer within 90 days of the insured's death, that condition might be waived by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367-1373, 1382-1390; Dec. Dig. ⇐555.]

5. LIMITATION OF ACTIONS ⇐175—WAIVER OF BAR.

The statute of limitations, being for the protection of the defendant, may be waived by defendant insurance company, so that action may be brought after such waiver beyond the statutory period.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 662; Dec. Dig. ⇐175.]

6. LIMITATION OF ACTIONS ⇐175—WAIVER OF BAR.

Waiver of the statute of limitations may occur after as well as before the time limit has expired, but if made after such expiration, the waiver must contain the element of estoppel.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 662; Dec. Dig. ⇐175.]

7. INSURANCE ⇐396—LIFE INSURANCE—LIMITATION OF ACTIONS—WAIVER.

Where a beneficiary is encouraged by the insurer to go to substantial expense in furnishing proofs of loss, the insurer is estopped to assert that the time for such proofs had expired.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071-1077; Dec. Dig. ⇐396.]

8. INSURANCE ⇐396—LIFE INSURANCE—DEFENSES—ESTOPPEL.

Where an insurance company, on application of plaintiff under the policy on her deceased husband's life, required her to make proofs of loss on forms furnished by them, which she did at a considerable expense, the company could not escape the estoppel worked against it thereby by asserting that it did not compel her

to fill the blanks, since failure to file them would have been an abandonment of her claim.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071-1077; Dec. Dig. ⇐396.]

9. INSURANCE ⇐396—LIMITATION OF ACTIONS ⇐175—LIFE INSURANCE—ESTOPPEL OF INSURER.

Where plaintiff made claim for loss of her husband under a life policy 17 years after his death, whereupon defendant required proofs of loss to be submitted, defendant was estopped to assert the defenses of the statute of limitations or of failure to file proofs of loss in time, although, when requiring proofs, it specifically asserted that it waived no defense it had, since such a statement, without specific reference to the particular defense, was valueless.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071-1077; Dec. Dig. ⇐396; Limitation of Actions, Cent. Dig. § 662; Dec. Dig. ⇐175.]

10. INSURANCE ⇐634—LIMITATION OF ACTIONS ⇐177—LIFE INSURANCE—PLEADING—WAIVER.

Plaintiff's failure to plead waiver by the insurer of delay in making proofs of loss or of statute of limitations would not defeat her action, which was tried on an agreed statement of facts, which showed the waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1593, 1596, 1598, 1603-1606, 1608; Dec. Dig. ⇐634; Limitation of Actions, Cent. Dig. §§ 663-666; Dec. Dig. ⇐177.]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Ida J. Shearlock against the Mutual Life Insurance Company of New York. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Lorts & Breuer, of Rolla, and James J. O'Donohoe, of St. Louis, for appellant. Fordyce, Holliday & White, of St. Louis, and Frank H. Farris, of Rolla, for respondent.

STURGIS, J. This suit is on a 15-payment policy on the life of plaintiff's husband. But one point is made as to the pleadings, and that will be noted later. The case was submitted to the court on an agreed statement of facts. The facts necessary to be considered are that the policy was issued on July 15, 1886, to plaintiff's husband, and is a Missouri contract under the ruling of *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 306, 71 Am. St. Rep. 628, that the insured paid the premiums due in quarterly installments to April 15, 1894, 7% years; that default in payment of premium was then made and none paid thereafter; that the insured died August 18, 1897; that under the laws of this state in force when this policy was issued (section 5983, R. S. 1879) the policy was not forfeited by the non-payment of premium, but the amount of premium paid on the policy was sufficient to, and did, keep the policy in force for the full amount under the rule of commutation there specified for a term of temporary insurance extending beyond the death of the insured, and by the terms of section 5985,

R. S. 1879, the insured having died within the time of temporary insurance, the defendant became bound to pay the amount of said policy, unless there be something shown to defeat such liability.

Only two defenses are made to the defendant's otherwise conceded liability. They are: (1) The statute of limitations of 10 years; and (2) that no proofs of death of the insured were submitted to defendant within 90 days of his death, as required by section 5985, R. S. 1879.

[1] As to the first defense, we have no doubt but that plaintiff's cause of action accrued to her on the death of her husband, plus, at most, a reasonable time within which to make proof of his death. Such is the ruling in *Kauz v. Great Council*, 13 Mo. App. 341, 344. In 25 Cyc. 1198, the law is stated to be:

"Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; if the time for such performance is not definitely fixed, a reasonable time, but that only, will be allowed. The rule that where the right of action depends upon a preliminary step to be taken by plaintiff he cannot indefinitely delay the taking thereof rests upon the principle that plaintiff has it in his power at all times to do the act which fixes his right of action."

See *Boyd v. Buchanan*, 176 Mo. App. 56, 60, 162 S. W. 1075. It is clear, therefore, that as the insured died in 1897 and this suit was commenced in 1915, the plaintiff's cause of action is barred, unless defendant has waived or estopped itself from availing itself of this defense, of which we will speak later.

It is likewise conceded that no proofs of loss were submitted to the defendant within 90 days of the insured's death, and in fact not until shortly before this suit was commenced, more than 17 years after the death of the insured. It is argued here, in able briefs of counsel both for and against the proposition, that section 5983, R. S. 1879, forbids any forfeiture of the policy for nonpayment of premium in case two annual premiums have been paid, as here, regardless of any proof of loss being made, and that even section 5985 does not contain any words of forfeiture for not furnishing proofs of death, and that the law, which abhors forfeitures, will not supply the same. We think, however, that this question is not necessary for decision here, as the same or stronger grounds are presented for claiming a waiver of this defense than of the statute of limitations. In other words, if defendant waived the defense of the statute of limitations, it also waived this defense of failure to furnish timely proofs of death; and if it did not waive the defense of the statute of limitations, then defendant does not need any other defense.

[2] This brings us to the all-important

question of waiver. The facts on which a waiver of both the defenses mentioned is predicated are briefly thus: No suggestion of any claim on this policy was made until by letter, July 5, 1914, the plaintiff informed the defendant that her husband died August 18, 1897, and asked the status of this policy. To this defendant replied, July 11, 1914, that its record showed that the policy on her husband's life was forfeited in accordance with its terms for the nonpayment of the premium due in 1894 and has no value. The plaintiff then wrote to defendant, with the assistance of a friend, stating that her husband had died within 3 years after default in payment of premium, and that the insured had paid about 8 annual premiums on the policy. To this defendant replied that it could not recognize any claim under the policy because the contract was issued in 1886, when policies of the company provided for forfeiture of the same in case the laws of the respective states were not fully complied with; that under the laws of New York when three annual payments had been paid, the policy had a surrender value in paid-up insurance if applied for within six months; but that none had been applied for, and consequently the policy was forfeited in 1894 and has no value; that in case such conditions were not complied with, it was the custom of the company in 1894 to forfeit the policy and carry any profit thereon to the general profits of that year. To this letter the plaintiff replied, calling specific attention to sections 5983 and 5985, R. S. 1879; that under the rule provided by these statutes, the premiums paid were sufficient to purchase temporary insurance, carrying the policy beyond the death of the insured; that under the ruling in *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628, the policy was governed by the laws of Missouri and not those of New York; that the custom of the company or any policy provision could not override the laws of Missouri (*Price v. Insurance Co.*, 48 Mo. App. 281); that such being the facts, the company ought to pay this policy. To this letter the company, by its general solicitor, replied:

"Your letter of the 23d inst. to Associate Actuary Hall has been referred to this department for attention. For the purpose of bringing the matter before the company's committee on mortuary claims I inclose a blank form of proof of death, which, if properly executed and returned to me, I will submit to the committee for its action. It must be distinctly understood, however, that the company by furnishing these blanks does not waive any legal defenses that may exist in its favor, the blanks being furnished merely to facilitate the orderly consideration of the claim. The blanks are sent on the assumption that Mr. Shearlock's death occurred in 1896 or 1897."

Proofs of death were duly made on the blanks inclosed and forwarded to the company. It is agreed that plaintiff expended \$21.50 in making up such proofs of death. Thereupon the defendant, by its general so-

licitor, wrote a letter, acknowledging receipt of the proofs of death, and stated that the company declined to make any payment; that the policy is null and void, as no claim was made for either term or paid-up insurance within the time required by the Missouri statutes, nor was any claim made within the time required by the New York statutes; that the policy has long ceased to be a contract under both the laws of Missouri and of New York, and the statutes of limitations of both states has run against any action in the matter.

[3] We think there is no doubt that both the defenses here interposed are affirmative and special and in the nature of personal privileges. The law allows them to a defendant if he chooses to insist upon same in the proper way and, at the proper time, but they are not matters going to extinguish the cause of action, but merely to bar the remedy, and, being for defendant's benefit, may be waived by it. Such defenses are generally termed "forfeitures;" that is, the plaintiff forfeits his cause of action (or, as defendant claims, does not bring it into being) by failure to furnish proofs of loss or to bring his suit within a certain time. Forfeitures are not favorites of the law, and especially of the insurance law. In *Keys v. Knights & Ladies of Security*, 174 Mo. App. 671, 680, 161 S. W. 345, 348, the court said:

"Slight evidence, indicating an intention to waive, will be sufficient to prevent a forfeiture from taking effect and thereby defeating valuable rights. *Francis v. A. O. U. W.*, 150 Mo. App. 347, loc. cit. 356 [130 S. W. 500]. A waiver of forfeiture may be inferred when the insurer, after knowledge of the act of forfeiture, requires the assured, by virtue of the requirements in the policy, to do some act or incur some expense."

The leading case on this subject seems, from its frequent citations in so many jurisdictions, to be *Titus v. Insurance Co.*, 81 N. Y. 410, where the court stated the law thus:

"But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

The doctrine is stated in 2 *Bacon's Life Insurance* (3d Ed.) § 435, as follows:

"If the company, after being notified of a loss, has knowledge of false answers in the application or of a breach of the conditions of the policy, and, notwithstanding that fact, calls for proofs of loss, or if, after receiving proofs, with knowledge of such false answers, it asks for additional proofs, it thereby waives the right to rely on the breach of warranty or of the condition. The reason of the rule is obviously that the company should not be permitted by its conduct to cause insured to go to the expense of proofs of loss, when it knows it will be a useless act."

This doctrine has received repeated recognition in this state, and has been applied to defenses far more vital than furnishing proofs of loss or bringing suit within a specified period. *Dolan v. Insurance Co.*, 88 Mo. App. 666; *Keys v. Knights & Ladies of Security*, 174 Mo. App. 671, 687, 161 S. W. 345; *Bowen v. Insurance Co.*, 69 Mo. App. 272; *Pace v. Insurance Co.*, 173 Mo. App. 485, 158 S. W. 592; *Oehler v. Insurance Co.*, 159 Mo. App. 707, 708, 139 S. W. 1177.

[4, 5] The doctrine of waiver is more frequently applied to furnishing timely proofs of loss or violation of some warranty or stipulation in the policy, but we can see no reason why it should not be applied to bringing suit within a given time, whether fixed by statute or by the policy itself. In fact, in this state, by reason of the statute and contrary to the general rule, the policy cannot limit the time of bringing suit differently from the general statute. Section 2780, R. S. 1909; *Roberts v. Insurance Co.*, 133 Mo. App. 207, 209, 113 S. W. 726; 4 *Cooley's Briefs on Insurance*, 3964. "Conduct of the insurer after the expiration of the policy limitations, by which the insured or beneficiary is induced to go to trouble or expense in the procuring of proofs of loss, etc., will amount to a waiver of the clause limiting the time within which an action may be commenced." 4 *Cooley's Briefs on Insurance*, 3993. "Demanding and receiving proofs of death after the time has expired waives the limitation of suit." *May on Insurance*, § 488. See, also, section 464. That the statute of limitations may be waived is shown by the cases of *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555, and *Dry Goods Co. v. Goss*, 65 Mo. App. 55. "A statutory right or benefit given for its protection can be waived the same as any other right." *Chandler v. Ins. Co.*, 180 Mo. App. 394, 399, 167 S. W. 1162; *McLeod v. Mutual Life Ins. Co.*, 190 Mo. App. 653, 659, 176 S. W. 234.

It is well-settled law that when one is called upon in court to assert his defenses, he must plead limitation, both as to bringing suit and furnishing proofs of loss, or he is held to have waived it, and we think the same rule works out of court also. *Keys v. Knights & Ladies of Security*, 174 Mo. App. 671, 687, 161 S. W. 345 (commenting on *Canon v. Home Insurance Co.*, 53 Wis. 585, 11 N. W. 11) and page 690, 161 S. W. 345. See, also, *Insurance Co. v. Evans*, 25 Tex. Civ. App. 300, 61 S. W. 536.

[6] There is no doubt but that such waiver can take place after as well as before the time limit has expired, as will be seen by the authorities, supra, but we agree that in such case the facts constituting the waiver must then contain the element of estoppel. *Chandler v. Insurance Co.*, 180 Mo. App. 394, 400, 167 S. W. 1162; *Boren v. Brotherhood*, 145 Mo. App. 136, 129 S. W. 491; *Cohn v. Insurance Co.*, 62 Mo. App. 271, 277; *Bolan*

v. Fire Ins. Co., 58 Mo. App. 225, 231; Walker v. Knights of Maccabees, 177 Mo. App. 50, 53, 163 S. W. 274. This last case considers the elements of waiver both before and after the time limit has expired. Crenshaw v. Insurance Co., 68 Mo. App. 673, 681. "But the facts need not be strong enough to create a technical estoppel." 2 Bacon on Life Insurance (3d Ed.) § 435, quoting from Hollis v. Insurance Co., 65 Iowa, 454, 21 N. W. 774, and citing other cases.

[7] All the cases agree, however, that where, as here, the plaintiff is encouraged or induced to go to substantial expense in furnishing the proofs of loss or otherwise, such fact supplies the element of estoppel.

[8] Nor will it do to say that the insurance company did not require the plaintiff to go to this expense, but left it to the plaintiff to do so or not as she pleased, where, as here, a failure to do so meant a complete abandonment of her claim. In such case, the amount of the expenditure is not material, unless it be so small as to be inconsequential, which is not true here. Kidder v. K. T. & M. L. I. Co., 94 Wis. 538, 69 N. W. 364; Keys v. Knights & Ladies of Security, 174 Mo. App. 671, 161 S. W. 345, where the expense of appointing a guardian was \$6.50.

Applying these principles to the present case, we find that the first letter written to defendant by plaintiff informed it that the insured had died 17 years previous, and asked as to the status of this policy. The defendant must be held to have known that no proofs of death had ever been furnished it, and no suit had been brought, and the time for doing both was long since past. Defendant's reply made no mention of either defense now interposed, but said the policy was forfeited according to its terms (and such are its terms) by nonpayment of premium and had no value. This, of course, utterly ignored the Missouri statutes, sections 5983 and 5985, R. S. 1879, which became a part of the policy. When reminded by plaintiff's next letter that the insured had paid nearly eight annual premiums and had died within 8 years of his default, the defendant again answered, saying nothing of the defenses now interposed, but replied that the terms of the policy and the laws of New York provided for paid-up insurance if applied for in six months, but as none was applied for, the policy was forfeited and of no value; that in such case its custom was to carry the profits of the forfeited policy to the general profits. By plaintiff's next letter the defendant was specifically cited to the Missouri statutes, supra, as governing this policy instead of the laws of New York, and was again told that the insured had died within the time of the term of temporary insurance thereby provided, and that the defendant was clearly liable on this policy under the cases of Cravens v. Insurance Co., 143 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71

Am. St. Rep. 628, and Price v. Insurance Co., 48 Mo. App. 281, and so it is, as against each defense theretofore mentioned by the defendant. This letter was referred to the legal department of defendant, and the letter written, requesting proof of death, sending blanks for that purpose, but stating that the company did not waive any legal defense, and adding that the blanks were sent on the assumption that the insured died in 1896 or 1897. Nothing was, so far, said as to either defense now interposed.

It seems to us that at this time and before plaintiff was called on to incur this expense, the defendant was put to its election to set up these defenses, then perfectly well known to it, and inform the plaintiff of its intention to rely thereon, and that it was preserving the same (even if it could do so) or be held to have waived these defenses, just as it was afterwards required to do in court. The plaintiff may well have believed that no claim would be paid by defendant, however valid, unless passed on by its mortuary committee with the proof of death before it, and that unless there was some merit in the matters before mentioned, relating to forfeiture of the policy for nonpayment of premium, then the defendant would allow the claim. Why should the company want proofs of death if it intended to defend on the ground that such had not been furnished? Why want such proof to help out on the statute of limitations when the defendant knew no suit had been brought and plaintiff was asserting that the insured had died 17 years previous, and the blanks were being "sent on the assumption that Mr. Shearlock's death occurred in 1896 or 1897"? Why lure plaintiff on to incur this expense under the belief that she had or could overcome the defenses made known to her when the defendant intended, at it did do later, to spring these present defenses, absolutely destructive of her claim, irrespective of any proof of death? To hold that defendant did so intend is to convict it of bad faith. If it did not so intend, then when defendant once waived these defenses, such waiver could not be recalled. "It cannot be gainsaid that defendant by these acts gave plaintiff to understand that the right to declare a forfeiture would be waived, that the claim would be considered on its merits, and that plaintiff acted on this assurance to his detriment." Myers v. Casualty Co., 123 Mo. App. 682, 688, 101 S. W. 124, 126.

[9] In the absence of the statement in defendant's letter accompanying the blanks for proof of death that defendant did not thereby waive any legal defense that may exist in its favor, and that the blanks were merely furnished to facilitate the orderly consideration of the claim, there would be no question but that defendant would be held to have waived these defenses. Should these general words of reservation change this result?

We think not. In *Granger v. Fire Assurance Co.*, 119 Mich. 177, 77 N. W. 693, the court was dealing with the question of waiver of change of ownership of the insured property in violation of the policy. After the company had knowledge of this fact, it called on plaintiff for additional proof of loss, saying, in a letter accompanying the same, that by doing so "it did not waive any defense it had," but made no specific reference to its intention to claim a forfeiture because of the change of ownership. The court said:

"If the company intended to insist upon these defenses, it was its duty, after it had learned the facts, to so inform Mr. Granger, instead of remaining silent and asking for further proofs."

This case is cited in *Keys v. Knights & Ladies of Security*, 174 Mo. App. 671, 688, 161 S. W. 345. In *Marthinson v. Insurance Co.*, 64 Mich. 372, 384, 81 N. W. 291, 297, the court disposed of the question thus:

"It is argued by defendant's counsel that the defendant saved its rights, and waived none of its defenses under the application or policy, by reason of the last clause of Cornell's first letter, to wit: 'You will further take notice that in returning said papers, and making the objections thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself'—which clause, in substance, was repeated in the other letters. We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proofs of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proofs of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct. *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423 [5 N. W. 642]."

To the same effect are *Corson v. Insurance Co.*, 113 Iowa, 641, 85 N. W. 806; *Home Ins. Co. v. Kennedy*, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 688; *Keys v. Knights & Ladies of Security*, 174 Mo. App. 671, 690, 161 S. W. 345; *Myers v. Casualty Co.*, 123 Mo. App. 682, 687, 688, 101 S. W. 124.

[10] It is suggested that the defense of waiver, to be available to plaintiff, should have been pleaded in her reply to defendant's answer setting up these defenses. It may be conceded that the rules of good pleading so require. However, this case was tried on an agreed statement of facts, and the facts showing a waiver are agreed to. This should certainly be given an effect equally as favorable to plaintiff as if the case had been tried on the theory that such waiver was properly pleaded. In any event, it would be useless to reverse and remand this cause for the pur-

pose of allowing the reply to be amended in this respect, and then have the case submitted on the same facts, with the certainty that the same result would be reached.

We hold, therefore, that the defenses interposed by defendant are not available to it on the agreed facts, and the cause is reversed and remanded, with directions to enter judgment for the plaintiff.

FARRINGTON, J., concurs. ROBERTSON, P. J., concurs in the result.

F. HATTERSLEY BROKERAGE & COMMISSION CO. v. HUMES. (No. 14517.)

(St. Louis Court of Appeals. Missouri.
Jan. 4, 1916. Rehearing Denied
Jan. 26, 1916.)

1. SALES §17—INDIVIDUAL OR CORPORATE CHARACTER—ESTOPPEL.

The seller of goods, by entering the sale in his books as made to a corporation, is not estopped to pursue individually the person who negotiated the sale when the credit therefor was extended solely and exclusively to him individually, and not to the corporation of which he was a member; the buyer having stated to the seller that he, the buyer, was the corporation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 26-30; Dec. Dig. §17.]

2. APPEAL AND ERROR §1001 — REVIEW — CONCLUSIVENESS OF VERDICT.

Where there was substantial evidence to support the jury's finding, the court on appeal is concluded by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. §1001.]

3. WITNESSES §188 — COMPETENCY — INTERESTED WITNESSES—CONVERSATIONS WITH DECEASED.

In an action for the purchase price of goods sold defendant on his individual credit, though intended by him for use of a corporation in which he was interested, testimony of plaintiff's stenographer that deceased said, in her presence, to plaintiff's president that he (deceased) was the corporation is admissible; the stenographer in such case not being a party to the contract so as to render her testimony inadmissible, since she was not the agent accomplishing the sale.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 574, 575; Dec. Dig. §138.]

4. EVIDENCE §121—RES GESTÆ—PERSONS TO WHOM GOODS WERE SOLD.

In an action by the seller of goods for the purchase price, letters and telegrams passing between the plaintiff and a milling company, relating to the goods sold the defendant, since deceased, were admissible to show to whom the plaintiff extended credit, where they had been submitted to the deceased and he had suggested answers to be made to them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 308, 307-338, 1117, 1119; Dec. Dig. §121.]

5. WITNESSES §178—COMPETENCY—WAIVER OF DISABILITY.

Where an officer of plaintiff company was incompetent to testify as to personal transactions with the deceased, but in probate proceedings he was called by the executrix of the deceased for the purpose of identifying an account rendered by him in behalf of the plaintiff company, he was thereafter competent for all pur-

poses in the plaintiff's action on the account for which statement was rendered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 722-725; Dec. Dig. ¶178.]

6. WITNESSES ¶178—COMPETENCY—WAIVER OF DISABILITY.

Where a party to a suit is disqualified by statute to testify because of the death of the other party, the taking of his deposition by the adverse party is a waiver of such incompetency, though the deposition so taken may be filed and not read, or even not filed at all.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 722-725; Dec. Dig. ¶178.]

7. WITNESSES ¶178—COMPETENCY—WAIVER OF DISABILITY—EVIDENCE OF WAIVER.

Evidence, in an action by seller of goods for the purchase price against the estate of deceased buyer, held to show such examination of plaintiff's agent by executrix of deceased as to waive his disability to testify as to personal transactions with the deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 722-725; Dec. Dig. ¶178.]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

"To be officially published."

Action by the F. Hattersley Brokerage & Commission Company, a corporation, against Mamie W. Humes, executrix of the will of F. W. Humes, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Reynolds & Harlan and Lydia Lee, all of St. Louis, for appellant. W. B. & Ford W. Thompson, of St. Louis, for respondent.

NORTONI, J. This is a suit on an account for flour sold and delivered. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff is a corporation engaged in the brokerage business, and defendant is executrix of the estate of her late husband, F. W. Humes. Defendant's husband was president of the Humes Flour Company, a corporation, for several years before the date of his death, and purchased the flour from plaintiff. Plaintiff insists that it did not know the Humes Flour Company was incorporated, and dealt with Humes wholly on his personal credit, while defendant insists the estate of her deceased husband is in no wise responsible for the indebtedness because it was contracted by the Humes Flour Company, a corporation. The case was tried before the court without a jury, and no instructions were asked or given on either side.

[1] It is argued that the judgment against the estate of F. W. Humes may not be sustained, in that plaintiff is estopped to assert a claim against the estate for the reason it sold and delivered the flour to the Humes Flour Company, a corporation. This argument proceeds from the fact that plaintiff charged the flour at the several dates of its sale on its books to the Humes Flour Company, rendered its invoices to the Humes Flour Company, and that it received a number of checks of the Humes Flour Company, which appear to be credited as payments on

the account. If this were all the evidence, the argument would be more persuasive, but other facts and circumstances in the case are to be looked to. It appears that F. W. Humes purchased flour frequently from plaintiff during the years 1907 and 1908 under the trade-name of F. W. Humes & Co. At that time Humes was conducting his business as an individual under the trade-name above mentioned. He suspended trading, however, with plaintiff for some two or three years, and in the meantime incorporated the Humes Flour Company, of which plaintiff says it had no knowledge. Thereafter Mr. Humes commenced trading again with plaintiff, and at the time of opening the account in suit here he instructed plaintiff to render invoices for the flour to Humes Flour Company, saying, "I am the Humes Flour Company." Plaintiff proceeded to deliver flour on different occasions, and charge it as above stated. The invoices were also rendered to Humes Flour Company. However, plaintiff insists that it did not know Humes Flour Company was an incorporated concern, but regarded it merely a trade-name employed by Mr. Humes. There is an abundance of evidence in the record, tending to prove plaintiff extended credit to F. W. Humes personally in the sale of the flour, and there is evidence, too, tending to show that the business was all transacted with and in the name of the corporation Humes Flour Company. Obviously plaintiff is not, in such circumstances, to be regarded as estopped from asserting its claim against the estate of Humes if the credit was given in the first instance to Mr. Humes individually. The real question in such circumstances is rather one of fact as to whom the credit was given. See *Wittenberg v. Fisher*, 183 Mo. App. 347, 166 S. W. 1106; *Stokes v. Mills*, 171 Mo. App. 638, 154 S. W. 455; *Steele v. Ancient Order*, etc., 125 Mo. App. 680, 103 S. W. 108; *Rottmann v. Pohlmann*, 28 Mo. App. 399.

[2] The court found the issue for plaintiff as if the flour were sold by it to Mr. Humes individually and on his credit, and there is substantial evidence tending to show such was indeed the fact, and the matter is therefore concluded here.

[3] Plaintiff's stenographer, Miss Spilker, testified, over defendant's objection and exception, that at the time Mr. Humes commenced doing business with plaintiff—that is, purchasing the flour on the account in suit—he said in her presence to plaintiff's president, Hattersley, he was doing business under the name of Humes Flour Company; also that later in the conversation, on an inquiry as to who constituted the Humes Flour Company, he said, "I am the Humes Flour Company." It is argued the court erred in permitting the witness to give this testimony, for that she was incompetent under the statute because Mr. Humes, the other party, is

dead, but we are not so persuaded. In the case of the death of one party to the contract the statute forbids the other party thereto from testifying concerning it, but obviously this does not forbid a mere bystander from giving testimony as to what was said between the parties to the contract. See *Snider v. McAtee*, 178 S. W. 484; s. c., 165 Mo. App. 260, 147 S. W. 136. In order to effectuate the spirit of the statute and attain a just result through applying its principle so that the parties may stand on an equal footing, the courts have declared, when the contract is made by an agent for a corporation, such agent may not give evidence concerning it when the other party thereto is dead. But the inhibition in such circumstances goes to the agent who negotiated the contract, and not to all of the employes of the corporation who may have some knowledge, apart from the contract itself, relating to the incidents of a trade relation. See *Carroll v. United Rys. Co.*, 157 Mo. App. 247, 137 S. W. 303. See, also, though not directly in point, but for an exposition of the principle touching the agent, *Leavea v. Southern R. Co.*, 171 Mo. App. 24, 153 S. W. 500; s. c., 181 S. W. 7. Miss Spilker, plaintiff's stenographer, was in no wise agent for defendant in negotiating the contract of sales under which Mr. Humes purchased the flour, and she was therefore competent to speak concerning the matters given in evidence by her.

[4] Plaintiff introduced in evidence several letters and telegrams which passed between it and a milling company in Minnesota, concerning flour sold by plaintiff to Mr. Humes. This correspondence was introduced in evidence apparently as tending to show that plaintiff dealt with Humes as an individual, and not the Humes Flour Company. Every reference to the transaction in this correspondence is to Mr. Humes and not to the Humes Flour Company. This correspondence was objected to as incompetent under the rule against hearsay, etc. Manifestly the correspondence between plaintiff corporation and the company from whom it purchased flour, standing alone, was not competent evidence here, for that it impinged the rule against hearsay and savored of self-serving declaration. But when considered in connection with the testimony of plaintiff's president, Mr. Hattersley, it is not to be so regarded. This correspondence related to different carloads of flour sold by plaintiff to Humes and ordered to be shipped from the mill in Minnesota. The shipments were delayed, and other times some controversy arose about the price, but touching all of this Mr. Humes was fully advised at the time, for he read and considered all of the correspondence together. It is said he called at plaintiff's office on different occasions and inquired concerning the subject-matter about which the letters and telegrams in evidence appear, and all of the correspondence was submitted to

him. He would read the letters and the telegrams, make suggestions to plaintiff as to what the reply should be concerning the delay in shipment and the prices, etc. In such circumstances, it would seem that Mr. Humes should be treated as a party to the correspondence, relating, as it did, to the purchase of the several cars of flour by him from plaintiff, for he read it, digested it, commented upon it, made suggestions as to what answers should be made to some of the letters, etc. The correspondence in these circumstances is competent as of the *res gestæ*, for that Mr. Humes is to be regarded as a party to it, although it passed between plaintiff and the milling company in Minnesota. In this connection see *Glenn v. Lehnen*, 54 Mo. 45.

[5] The case originated in the probate court where plaintiff filed the verified account sued upon. On the trial of the issue in the probate court, defendant called as a witness Mr. Hattersley, the president of the plaintiff corporation, caused him to be sworn and examined him as a witness to identify the account sued on as an account made up and rendered by his company after the death of Mr. Humes. This account, so far as relevant to the question here, is as follows:

"Account.

"St. Louis, Mo., May 15, 1913.

"F. W. Humes, Transacting Business under the Name and Style of Humes Flour Company.
"Estate of F. W. Humes to F. Hattersley Brokerage and Commission Company, Dr."

[6, 7] Then follow the items sued upon. At the time defendant called Mr. Hattersley as a witness and introduced him in the probate court, plaintiff's counsel suggested to him that Mr. Hattersley was an incompetent witness under the statute, and if defendant saw fit to use him in the probate court, it would operate as a waiver of such incompetency, and that plaintiff would introduce him in the trial in any further proceedings thereafter. Notwithstanding this warning defendant's counsel caused the witness to be sworn, and examined him to the extent at least of identifying the account sued upon as above stated. On the trial in the circuit court, after showing these facts, plaintiff introduced Mr. Hattersley as a witness, and he was permitted to testify touching the transaction involved; that is, the merits of the case throughout in the view that, though incompetent in the first instance, the matter concerning that had been waived by defendant. Defendant objected and excepted, and argues here that the court erred in respect of this matter, but we are not so persuaded. It is to be conceded that Mr. Hattersley was an incompetent witness in the first instance under the statute, for that he personally, representing plaintiff corporation, contracted the sale of the flour to Humes, since deceased. However, it was competent for defendant executrix to call him as a witness in behalf of

the estate if she chose to do so. Indeed, the statute (section 6356, R. S. 1909) so provides. But by calling as a witness an adverse party thus incompetent and examining him touching the merits of the controversy one waives the right to object thereafter on the grounds of the incompetency of the witness. In other words, such renders the witness competent to speak thereafter throughout the proceeding. The cases all declare the rule to this extent. So it is where a party to a suit is disqualified by the statute because of the death of the other party to testify, the taking of his deposition by the adverse party constitutes a waiver as to such incompetency. See *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201. See, also, *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930; *In re Soulard's Estate*, 141 Mo. 642, 43 S. W. 617. The rule is the same if the adverse party sees fit to take the deposition of the incompetent witness and file it in the cause, even though such deposition is not read in evidence at the trial. See *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567. So, also, is the matter of the incompetency waived in such circumstances through the taking of the deposition of a witness who would otherwise be excluded from speaking in the case perforce of the statute, even though such deposition so taken is not filed in the case at all. See *Rice v. Waddill*, 168 Mo. 99, 101, 67 S. W. 605.

But it is argued that, though defendant caused Mr. Hattersley to be sworn and placed him on the stand as a witness for the estate in the probate court, she did not waive her right to object to his competency to testify concerning the merits of the case, because her counsel did no more than present the account sued upon to him and ask him to identify it as the account made out in his office since the death of Mr. Humes, which he admitted to be the fact. It is said this in no wise went to the merits of the case, but we are not so persuaded when the real issue between the parties is considered. It is not denied that plaintiff sold the flour to either Mr. Humes or the Humes Flour Company. The sole defense throughout the case is that the debt sued for is the debt of the Humes Flour Company, a corporation, and not of Mr. F. W. Humes individually so as to be enforceable against his estate. This is the matter about which the controversy arises. The account sued upon was prepared in plaintiff's office, and recites in caption on its face, as above set forth, "F. W. Humes, transacting business under the name and style of Humes Flour Company." It is apparent that Mr. Hattersley was examined by defendant's counsel in the probate court to elicit from him an admission under oath at the trial that he had rendered the account since the death of Mr. Humes, showing the

business was transacted under the name and style of Humes Flour Company. Manifestly such related to the very crux of the case and when the examination of Mr. Hattersley even to this extent is considered in connection with the account sued upon and the issue on trial, it is apparent this testimony went to the merits of the controversy. This being true, no one can doubt that Mr. Hattersley was then authorized to give in evidence the facts touching the matter tending to show why the account appeared to relate to transactions had with Mr. Humes in the name and style of Humes Flour Company. Indeed, in the situation, an apparent undue advantage would accrue to defendant if the further evidence of Mr. Hattersley were excluded, for the admission by him under oath that the account was made out with relation to transactions had under the name and style of Humes Flour Company are to be viewed as against the interests of the plaintiff. In this connection see 40 Cyc. 2346; also *Hoehn v. Struttman*, 71 Mo. App. 399. It is the design of the statute and the purpose of the courts in interpreting it to place the parties on equal footing at the bar of public justice.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

WARREN v. NEW YORK LIFE INS. CO. (No. 11786.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. INSURANCE \Leftrightarrow 646—LIFE INSURANCE—AFFIRMATIVE DEFENSE—BURDEN OF PROOF.

In suit on a policy of life insurance, the burden was on the insurer to establish its affirmative defense that insured made misrepresentations as to his previous health and having consulted a physician, in his application for the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. \Leftrightarrow 646.]

2. TRIAL \Leftrightarrow 139—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

In suit on a policy of life insurance, where the proof offered by the insurer in support of its affirmative defense, as to which it had the burden of proof, consisted of oral testimony, and there was no admission of its truth by plaintiff, the denial of a peremptory instruction for the insurer at the close of the case was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. \Leftrightarrow 139.]

3. APPEAL AND ERROR \Leftrightarrow 1001—REVIEW—VERDICT.

An appellate court cannot interfere with the trial court's judgment on the ground that the verdict is against the evidence, if there is any substantial evidence in support of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. \Leftrightarrow 1001.]

4. INSURANCE \S 668—LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION—QUESTION FOR JURY.

In suit on a policy of life insurance, whether the insured, in his application, misrepresented his previous health, or whether he had consulted a physician, *held* for the jury under the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1556, 1732-1770; Dec. Dig. \S 663.]

5. TRIAL \S 260—INSTRUCTIONS—REPETITION.

The refusal of instructions fully covered by those given the party was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651-659; Dec. Dig. \S 260.]

6. TRIAL \S 114—ARGUMENT OF COUNSEL—PROPERTY.

In suit on a life policy, argument of plaintiff's counsel having no tendency to rouse the passions or prejudices of the jury, and merely referring to things which were before the jury and apparent to them, was not improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 275-278, 296; Dec. Dig. \S 114.]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"Not to be officially reported."

Suit by Nina E. Warren, a minor, by D. P. Warren, her guardian, against the New York Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition that an excess be remitted.

Hoffman & Hoffman, of Sedalia (James H. McIntosh, of New York City, of counsel), for appellant. A. L. Shortridge, of Sedalia, for respondent.

TRIMBLE, J. This is a suit upon a life insurance policy. It was issued January 15, 1913, to Orville B. Warren, 24 years of age, in favor of his minor sister, the plaintiff herein. He died January 14, 1914, of tuberculosis of the bowels.

The only defense was misrepresentation and concealment of material facts by insured in obtaining the policy. The answer set up that he did this knowingly, and that the company did not discover it until after an investigation made by it after receipt of proofs of death; whereupon the insurance contract was promptly rescinded and the return of the premiums tendered, which, upon the beneficiary's refusal to accept, were deposited in court when suit was brought. The representations and concealments are said to be contained in insured's answers to two questions in the Company's Medical Examiner's report which formed a part of insured's application for the insurance, and upon which answers the company's officers testify that they relied in accepting the risk and issuing the policy. One of these two questions was: "Have you ever suffered from any disease of the heart or lungs?" To which the insured made answer: "No. Excepting pneumonia when six years old; sick three weeks; complete recovery." The other question was:

"Have you ever consulted any physician for any ailment or illness not mentioned above?" To which insured replied: "No." The applicant further certified in said application that he had carefully read each and all of the answers made therein; that they were each written as made by him; that each of them was "full, complete and true"; and that to the best of his knowledge and belief he was a proper subject for life insurance.

The application and the representations therein contained were made January 15, 1913. It is the contention of the company that at that time the insured was suffering with tuberculosis; that he had in 1912 consulted a physician therefor, and had been told by him that he had pulmonary tuberculosis, that is, consumption of the lungs; that from January 4, 1913, to the 24th of that month he had consulted another physician and had been treated for tonsillitis or sore throat and influenza by such other physician, who, in the latter part of January or the early part of February of that year, finding that his patient was not recovering as fast as he should, made an examination of him and of his sputum, and found he was suffering with pulmonary tuberculosis. The defendant therefore says that insured's answers were not full, complete, and true, but were false and were known by him to be false, and that he concealed from defendant the fact that he had consulted and had been treated by said physicians or either of them. The answer, in setting up the defense of misrepresentations and concealment, and pleading a rescission of the contract on that account, admitted the execution and delivery of the policy, the payment of the premiums, the death of the insured, and the receipt of proofs thereof. The plaintiff, however, introduced the policy, proved that insured paid his last premium on December 13, 1913, that he died at the home of his grandparents which was also his sister's home, in Sedalia, Mo., on January 14, 1914, that she was his sister and the person named as beneficiary in the policy, and that the insurance had not been paid. This evidence, taken in connection with the admissions in the pleadings, made a prima facie case, and plaintiff rested. Thereupon, after a demurrer to plaintiff's evidence had been overruled, the defendant offered evidence to establish its defense, namely, that insured misrepresented and concealed material facts at the time he applied for the insurance.

At the close of all the evidence, the company asked a peremptory instruction to find for defendant. This was overruled. Thereupon the defendant applied for and obtained permission from the court to open and close the argument to the jury. This, of course, was a recognition and admission of the fact that the burden was upon the company to establish its defense of rescission based upon

misrepresentations and concealment. The jury returned a verdict for plaintiff in the sum of "\$2,000 with interest at 6 per cent. from date of death, amounting to \$160." Thereupon judgment was rendered for plaintiff in the sum of \$2,160. After an unsuccessful motion for a new trial, the defendant has appealed.

[1, 2] It is very earnestly contended that the defendant's peremptory instruction at the close of the case should have been given and the jury directed to return a verdict for defendant. But the plaintiff had made a prima facie case. The burden was on defendant to establish its affirmative defense, and this defense was denied in the reply. The proof offered by defendant in support of its defense consisted of oral testimony and there was no admission of its truth by plaintiff.

"Under the practice in this state, it is beyond the power of a trial court to direct a verdict in favor of the party sustaining the burden of proof, unless the testimony is admitted to be true or the proof is documentary, which the opposite party is estopped to deny. Such a direction, under other circumstances, would be an invasion of the province of the jury." *Jefferson v. German-American Mutual Life Ass'n*, 69 Mo. App. 128, loc. cit. 133; *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *First State Bank of Corweth v. Hammond*, 124 Mo. App. 177, 101 S. W. 677; *Printz v. Miller*, 233 Mo. 47, 185 S. W. 19; *Milliken v. Thyson Com. Co.*, 202 Mo. 637, 100 S. W. 604; *Winn v. Modern Woodmen of America*, 157 Mo. App. 1, loc. cit. 11, 137 S. W. 292; *Troll v. Protected Home Circle*, 161 Mo. App. 719, 141 S. W. 916.

But, if we understand the extent of defendant's contention, it seems to be that the evidence in support of plaintiff's case had no bearing whatever upon whether the representations were true or untrue and raised no issue upon that question, and that defendant's evidence so overwhelmingly established the fact that insured had misrepresented and concealed the facts as to make the verdict so palpably against the weight of the evidence that, even though the verdict has received the sanction of the trial judge, we are authorized to interfere. In *Jefferson v. German-American Mutual Life Ass'n*, 69 Mo. App. 128, loc. cit. 134, it is said:

"It is the duty of the trial judge to interfere whenever in his opinion the verdict of the jury is opposed to the weight of the evidence. His refusal to set aside a verdict for this reason is subject to review only when the appellate court is satisfied that there has been a palpable disregard of the law and evidence, and that he acted arbitrarily or showed an 'unjudicial bias' in refusing to grant a new trial. *Taylor v. Scherpe*, 47 Mo. App. 257; *Whitsett v. Ransom*, 79 Mo. loc. cit. 260."

[3] Without regard to whether defendant is right or wrong as to the power of the appellate court to interfere under the circumstances mentioned, we cannot agree with its view that the defense has been conclusively established or that there has been no issue raised by the evidence. And therefore, without committing ourselves to the principle

insisted upon by defendant, we do not content ourselves with resting the case upon the rule hereinabove stated. We may go further and say that there was substantial evidence tending to show that insured had not misrepresented or concealed the facts at the time he made his application. An appellate court cannot, under any circumstances, interfere with the trial court's judgment on the ground that the verdict is against the evidence if there is any substantial evidence in support of the verdict. *McFarland v. United States Mutual Accident Ass'n*, 124 Mo. 204, 27 S. W. 436. That there was substantial evidence in support of plaintiff's denial of the alleged misrepresentations and concealments may be seen from the additional facts of the case here set forth.

[4] As stated, the representations were made January 15, 1913. To prove that the insured's statement that he had not consulted any physician for any disease not mentioned in the application was false, defendant introduced the deposition of a physician, a Dr. G., of Miles City, Mont., where insured was working as a telegraph operator at the time he made application for and received the policy. This witness in his final deposition taken February 12, 1915, testified that, to the best of his belief, insured first consulted him on January 4, 1913, and at that time he was suffering with an attack of tonsillitis or sore throat. He was unable to say how often he treated him after that, but thinks he was under treatment from that time until January 24, 1913. He appears to base his testimony largely on what he says he found on the records of some Hospital Association, though those records were not introduced in evidence. Prior to this deposition, however, the witness had on October 28, 1914, given a statement to the company in which he placed the date of insured's first consultation in January or February, 1913. Of course, if it was in February, 1913, or even in the latter part of January, it was after the date of the application. Now, if deceased was under treatment in the hospital for tonsillitis and influenza from January 4 to January 24, 1913, he was suffering therewith on January 15, 1913, the very day he was examined by the company's medical examiner, Dr. Wendell. He was the company's agent, and in his report, which shows he made a close personal examination of insured's physical condition, including an examination of his urine, he says he found no evidence of past or present disease of the heart or lungs or of any of the diseases asked about in the application or any disease of any part of the body. The defendant did not offer Dr. Wendell as a witness.

To establish the fact that insured was suffering with tuberculosis of the lungs at the time he made his application, the defendant introduced the deposition of another physician of Miles City, a Dr. B., who testified on

February 13, 1915, that insured consulted him August 3, 1912; that Warren was then suffering from a chronic cough and loss of weight; that upon an examination of his chest and sputum he found he had tuberculosis, and that he took a picture of his lungs with the X-ray machine which disclosed "a pathological process of the entire left upper lobe" of his lung; that Warren was at that time suffering with "a moderately advanced case of tuberculosis"; that, in his opinion, the insured, at the time he examined him, had had the disease for one or more years; and that the deponent told Warren he had pulmonary tuberculosis. The witness says he had Warren under treatment all of the time thereafter until September 9, 1912, but made no record of it except the last date at which time he was better; that Warren consulted him after that, but he has no record of it. The other physician, Dr. G., also testified in his deposition that after the 24th of January, 1913, he saw insured on a few occasions at irregular intervals, but he had no record of them. He testified that to the best of his belief he looked into insured's case more thoroughly after he found he was not recovering from the "attack of tonsillitis, influenza, or whatever it may have been," as he thought he should, and that in the latter part of January or early in February, 1913, he came to the conclusion that Warren was suffering from pulmonary tuberculosis, but that it was impossible to tell with any degree of certainty how long he had had it.

Against this testimony was the report of defendant's agent and medical examiner, Dr. Wendell, that insured had no disease of the lungs nor of any part of the body at the time of the application, and also the testimony of Dr. Bandy, of Sedalia, who was insured's physician and treated him during his last illness. He swore positively that he examined the insured in December, 1913, and found that he had no tuberculosis of the lungs and was not suffering from that, but was suffering with tuberculosis of the bowels arising after an attack of cholera morbus which the insured suffered about June 1, 1913. Dr. Perdue, of Kansas City, also testified that he examined the insured in November, 1913, and found no indications of tuberculosis in the patient, but did find that he was suffering with an inflammation of the large intestine. This witness also testified that if the insured had had tuberculosis a year prior to that time his examination would have disclosed it. In addition to this, one of defendant's experts testified that tuberculosis of the bowels usually came from tuberculosis of the lungs, but admitted that it could originate in the bowels without coming from the lungs, and could follow an attack of cholera morbus, though no more liable to do so than otherwise.

The foregoing is sufficient to show that whether insured's representations were true or false was a matter peculiarly for the

jury to pass upon. This is true both as to the representation that he had not suffered from any disease of the lungs and as to the representation that he had not consulted a physician for any disease not mentioned in the application; because, if the jury did not believe the testimony of the physician who said he examined insured and found he had tuberculosis of the lungs, they would have the right to disbelieve his testimony that he was consulted by insured shortly prior to and during the very time the company's medical examiner said he examined him and found nothing the matter with him. Besides, there was enough uncertainty as to whether this consultation was before or after the date of the application, to authorize the jury to say it was after that time and not before. Under all these circumstances, there is no room for the contention (even if otherwise sound) that no issue as to representations was made by plaintiff's evidence and that the defense was so overwhelmingly and conclusively established as to authorize us to say the trial court should have directed a verdict and should have granted a new trial because the verdict was against the evidence. It was a question for the jury to determine. *Keller v. Home Life Insurance Company*, 198 Mo. 440, 95 S. W. 903. "The plaintiff was entitled to have the jury determine the credibility of the testimony offered, even though she offered nothing to contradict that offered" by defendant. *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, loc. cit. 516, 517, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Winn v. Modern Woodmen*, 157 Mo. App. 1, loc. cit. 11, 137 S. W. 292. As said in the last-mentioned case, the wisdom of this rule is especially apparent in a case like this where the witnesses for the defendant testify concerning alleged treatments of a person whose lips are sealed in death, and the matters testified to are such as in their very nature are not susceptible of disproof by the directly contradictory testimony of any one who is alive. Whether insured consulted the two physicians offered as witnesses by defendant depends upon the value to be given their testimony. That was a question for the jury and not for the appellate court. And when the trial court refused to set aside the verdict, we cannot say there was no support whatever in the evidence for his action, since there was some substantial testimony tending to show a foundation for the jury's finding.

[5] The defendant complains of the refusal of three of its instructions Nos. 6, 7, and 8. But these instructions were fully covered by defendant's given instructions. These given instructions carefully, accurately, and fully presented to the jury every feature covering the defense raised. In them all the facts necessary to establish the defense were stated and left to the jury to determine. The refused instructions contained nothing that was not included in those al-

ready given. Hence it was not error to refuse them.

[6] Complaint is made of plaintiff's counsel's speech in his argument to the jury. We have carefully examined each instance wherein objection was made, and are convinced that the case ought not to be reversed on that account. There was no line of argument indulged in that had a tendency to rouse the passions or prejudices of the jury. Mere references to things which were before the jury and apparent to them did not bring in matters outside of the evidence, nor can we say that the verdict may have been the result of such mere references when the things referred to were before the jury and patent to their observation as sensible men.

As will be noted, the jury returned a verdict for \$2,000 with interest from date of insured's death. Under the terms of the policy however, the company was under no liability to pay the policy until after proofs of death were furnished. The plaintiff furnished these a month and ten days after insured's death. It was incumbent upon the company to pay from this date but not before. Hence the company ought not to be required to pay any interest prior thereto. The interest on \$2,000 for one month and ten days is \$13.33. The verdict is therefore excessive to the extent of this amount.

If the plaintiff will remit the excess within ten days from the announcement of this opinion, the judgment will be affirmed; otherwise it will be reversed and remanded. All concur.

KENNEDY v. KENNEDY. (No. 11573.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. DIVORCE \Leftrightarrow 132—ACTIONS — SUFFICIENCY OF EVIDENCE.

In a husband's suit for divorce upon the ground of indignities, in which the wife filed a cross-bill on similar grounds, evidence held to support a decree in favor of the husband.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. \Leftrightarrow 132.]

2. DIVORCE \Leftrightarrow 29—GROUNDS—INDIGNITIES.

In a husband's action for divorce, he charged the wife with having called him objectionable names, striking him, threatening him with a butcher knife, and, upon an occasion when he was holding her to prevent her from striking him, with telling one of the children to get the butcher knife and stab him. On one occasion she had him arrested and thrown into jail for an alleged assault, but the charge was dismissed and the husband claimed that he merely put his arm around her. Held, that if his claims were true he was entitled to a decree, though on some occasions he lost his temper under provocation and was to blame a part of the time in their "spats."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 84-92, 94; Dec. Dig. \Leftrightarrow 29.]

3. DIVORCE \Leftrightarrow 51—"CONDONATION"—REVIVAL OF OFFENSES CONDONED.

A husband did not, by living and sleeping with his wife after alleged indignities for which he sought a divorce, condone the offenses where,

after such cohabitation, other unhappy occurrences took place, as condonation is merely forgiveness upon condition, and if the condition is broken, the condonation is removed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187; Dec. Dig. \Leftrightarrow 51.]

For other definitions, see Words and Phrases, First and Second Series, Condonation.]

4. DIVORCE \Leftrightarrow 298—CUSTODY OF CHILDREN.

A divorce decree in favor of a husband upon the ground of indignities gave the wife the care and custody of two girls 16 and 14 years old, and gave the custody of a boy in his twelfth year to the husband. The husband was a man of good character and standing, and nothing was urged against him, except indignities charged by the wife in a cross-bill. The boy was getting to an age where his mother found it difficult to control him and wanted to go with his father, and the decree provided for allowing him to visit his mother and to continue to love and respect her. Held, that no error was committed in giving the husband the custody of the boy, especially as the trial court had ample jurisdiction at any time to change the custody if the husband neglected him and allowed him to run the streets and get in bad company, as the wife feared.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. \Leftrightarrow 298.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Suit by William Allen Kennedy against Cora I. Kennedy. From a decree of divorce, defendant appeals. Affirmed.

Edwin C. Orr, of Chillicothe, for appellant.
J. M. Davis & Son, of Chillicothe, for respondent.

TRIMBLE, J. A husband's suit for divorce upon the ground of indignities. The wife's answer was a cross-bill on similar grounds. The court granted a divorce upon the husband's petition, awarding the wife a certain portion of the property and the care and custody of two of the children, both girls, one 16 and the other 14 years of age, and gave the custody of the other child, a boy in his twelfth year, to his father. The wife has appealed, claiming that the judgment is against the evidence and the weight of the evidence; that whatever grounds of divorce plaintiff had, if any, were condoned by subsequent cohabitation; and that the custody of the boy should not have been awarded to the plaintiff.

[1, 2] The parties were married August 10, 1896, in Iowa, and lived in various places there and in South Dakota, finally moving to Chillicothe between November, 1911, and March, 1912, where they lived together until January 4, 1914, when they separated, and he afterwards, on February 26, 1914, instituted this suit.

Their first trouble arose in 1905, and it has continued more or less ever since. At one time the wife left home and brought suit for divorce, but the parties became reconciled, and the suit was dismissed. After they came to Chillicothe they separated, but, through the mediation of the pastor of their church

and perhaps others, they again went to living together.

Both of the parties are upright, respectable, persons of good standing, and are well spoken of by their friends and neighbors. Their troubles seem to grow out of that prolific source of discord in the conjugal relation, the inability to agree in regard to sexual matters upon any basis conducive to harmony in the family or with due regard to individual rights. Economic causes also played a part in bringing unhappiness to their home. She was an energetic, industrious, ambitious woman, anxious to succeed financially, and inclined to blame her husband for all that did not turn out well, though he seems to have been industrious and steady in his habits. She is a nervous woman, and in a fit of temper is inclined to be hysterical. She is older than her husband, and has reached a period in life where, on account of her nervous state, and from other causes, the attentions of her husband—even those having no sexual significance—have doubtless become repulsive to her. At the same time she is no invalid, but says, herself, she is a strong woman and can do lots of work. The evidence tends to show that she has not observed the forbearance and self-control she might perhaps have exercised; that she has nagged her husband and has made his home unhappy in many ways.

He charges her with having called him objectionable names, with striking him, with threatening him with the butcher knife, and that upon another occasion when, he says, he was merely holding her to prevent her from striking him, she told one of the children to get the butcher knife and stab him. She also had him arrested and thrown into jail over night for an alleged assault, but this charge was dismissed by the police judge, it appearing that he had merely put his arm around her while in bed in a sexual advance, or, as he says, merely to get her in a good humor, she being displeased with him for having romped and joked in the house that Sunday night with the children. She charges him with being "grouchy" and sullen about the home, with going away, and staying away, from home for several days and nights at a time without telling the family where he was. She also says he struck her and knocked her down; and that he made inordinate, excessive, and unusual sexual demands upon her.

She does not explicitly deny the charges he makes against her, but seems to intimate that if she did them she was so wrought up that she did not know what she was doing. He denies having ever struck her or with making unreasonable demands upon her, but admits that at times he was provoked and rendered unhappy in his home and on that account sat silent with his face in his hands. His absence from home was accounted for by the nature of his work. He seems to have

willingly furnished money to provide for his family to the extent of his ability.

The fundamental causes of the unhappiness and discord in such cases are usually so deep-seated and obscure, and relate to matters so carefully guarded and hidden, that it is frequently difficult even for the trial judge, who sees the parties and observes their demeanor, to decide accurately just where the real blame lies. We have carefully read and studied the record and find that the husband's testimony was given with a fairness and candor, with a natural straightforwardness, and with no attempt to palliate or shield himself, all of which impresses us that the learned trial judge was correct in awarding him the divorce. If the husband's testimony was true, he was entitled to the decree. We do not agree with appellant that merely because the plaintiff admitted that on some occasions he lost his temper under provocation and in their "spats" was doubtless to blame a part of the time, he has put himself out of court and is not entitled to a decree.

[3] Nor do we agree with appellant that plaintiff has condoned the offenses charged against his wife. The condonation relied upon is that plaintiff admitted having lived and slept with defendant as his wife up to and including January 4, 1914, and the claim is that all the alleged offenses occurred prior to that date. But the evidence shows that unhappy occurrences took place after that date and before the institution of suit, hence the cohabitation of January 4th can no longer be considered as condonation. Condonation is merely forgiveness upon condition. If the condition is broken, the condonation is removed. *Viertel v. Viertel*, 123 Mo. App. 63, 99 S. W. 759.

[4] Nor can we disagree with the trial judge as to the disposition of the boy. He is getting to an age where his mother already finds it difficult to control him. His father is said to be a man of good character and standing. Nothing is urged against him, except the charges made by his wife. The provisions made for allowing the boy to visit his mother and to continue to love and respect her are wise and ample and the best that can be made under the unhappy circumstances with which the court was confronted. In answer to the fear of appellant that the father will neglect his boy and allow him to run the streets and get in bad company, we say the trial court has ample jurisdiction at any time to change the custody, upon a proper hearing, in case such apprehended conditions should arise. At present, however, there is no evidence that the boy will be neglected. No disposition of the boy can be ideal under the circumstances, but the boy wants to go with the father, and there is nothing shown, inimical to the child's welfare, to prevent such disposition being made of him.

The judgment of the trial court is therefore affirmed. All concur.

LE COUNT v. FOUNTAIN'S ESTATE et al.
(No. 11789.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. EXECUTORS AND ADMINISTRATORS — CLAIMS — SERVICES — SUFFICIENCY OF EVIDENCE — AGREEMENT TO PAY.

In an action on a claim against the estate of plaintiff's mother to recover for board, nursing, and services, evidence held to make a question for the jury as to whether there was an agreement between plaintiff and her mother whereby plaintiff expected to receive and the mother expected to pay for the services.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 906, 1877-1882; Dec. Dig. § 451.]

2. EXECUTORS AND ADMINISTRATORS — CLAIM FOR SERVICES — INSTRUCTIONS.

In an action against the estate of plaintiff's mother to recover for board, nursing, and services, defendant pleaded that there was no agreement, express or implied, calling for payment. Plaintiff, to show that her mother recognized an obligation and made arrangements to partially discharge it, introduced her mother's will, in which she directed her executor to pay plaintiff the sum of \$70 for board furnished her. Held, that, as plaintiff's own case showed that she had or would receive under the will \$70 for a portion of the services, an instruction that if the jury found for plaintiff they should allow her the value of the alleged services, not exceeding the amount sued for, should have directed the deduction therefrom of any amount which the mother had arranged to be paid plaintiff therefor, defendant not being estopped from having the \$70 deducted.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 906, 1877-1882; Dec. Dig. § 451.]

3. WILLS — CONSTRUCTION — PRESUMPTIONS — DIRECTING PAYMENT.

Where plaintiff furnished board, nursing, and services to her mother, and the mother by her will directed her executor to pay plaintiff \$70 for board furnished her, there was no presumption that this payment for board also covered nursing and services.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1016-1022; Dec. Dig. § 486.]

4. APPEAL AND ERROR — MODIFICATION — REMITTITUR OF CASE.

Plaintiff sued the estate of her deceased mother to recover for board, nursing, and services. The mother's will, introduced in evidence, directed her executor to pay plaintiff \$70 for board. This will was made prior to a large portion of the nursing and services. Held, that the court's failure to direct the jury to deduct the \$70 from the value of the alleged services could be cured by a remittitur of the \$70, as the payment for board could not be regarded as covering the other items of the bill, especially as defendants did not contend that this constituted full payment if there was any contract to pay.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.]

Appeal from Circuit Court, Boone County;
D. H. Harris, Judge.

"Not to be officially published."

Action by Sarah F. Le Count against the Estate of Eliza Fountain, deceased, and another. Judgment for plaintiff, and the executor appeals. Affirmed, on condition that plaintiff enter remittitur.

Arthur Bruton, of Centalla, for appellant.
Don C. Carter, of Sturgeon, for respondent.

TRIMBLE, J. This is a suit by plaintiff against the estate of her mother to recover for board, nursing, and services rendered to the mother during a portion of the latter's declining years. Plaintiff recovered judgment in the probate court and upon appeal by the executor to the circuit court plaintiff again prevailed, the jury awarding her \$440, upon which judgment was rendered, and defendant has again appealed.

[1] There are but two objections raised. The first is that there is no evidence to support the jury's finding. In our opinion there was proof tending to show an agreement between mother and daughter, whereby the latter expected to receive and the former expected to pay for said services.

There was evidence of a competent witness who testified that the mother said in the presence of her daughter that she would pay her for the services in taking care of and waiting on her, and that the plaintiff said she would expect pay. In addition to this evidence of an express contract, there was evidence of facts which, if true, showed that such an agreement existed between them. Of course, on account of the relationship existing between them there was no presumption of a promise to pay arising from the mere performance and acceptance of the services. But, in addition to the express agreement above mentioned, there were other facts from which an agreement could be reasonably and naturally inferred. The mother owned a small farm which she rented out and lived around at different places, doing a little housework, when able, to pay for her board, and, when not able, paying board. Her daughter was the wife of a farmer in very moderate circumstances. She had a number of children of her own to look after. Her mother lived with plaintiff the first time for a period of nine months, or during the summer, fall, and winter of 1907-1908. For four months and a half of that time she was sick in bed and required constant attention. She then left plaintiff's and stayed around at various places during the summer months, and then in November, 1908, came back to her daughter's and stayed for something over nine months, being sick and bedfast nearly all winter. Thereafter she left, but came back and stayed at different intervals for one period of four months and three periods of one month each. Up to this time none of the mother's other children had a home to which she could go, except to plaintiff's. The mother then bought a small home in Kansas City, where she and one of her unmarried sons lived for a time. She became ill again, however, and her daughter went to her, and for three months, or until she died, nursed her, cared for her, and did all there was to do.

The evidence is that the mother often said she wanted Sarah paid for boarding her, waiting on her, and taking care of her, and that she was going to see that she was paid. A lady neighbor testified that in the spring of 1910, the mother stayed all night at her house and told the witness that she was leaving her daughter's to go to Roy Davis'; that she had been boarding with her daughter during the winter of 1909, and was sorry to go without paying, but that she intended to pay; that she was going to pay Mrs. Le Count for what she had done; that she had not settled, but was going to.

Another neighbor testified that deceased told him in September, 1909, that she was going to stay with the plaintiff that winter, that she was sick both winters she had stayed with her, and that she intended to see that she got well paid for her trouble. A brother of plaintiff's testified that he heard the mother say in plaintiff's presence that she (the mother) would pay her (the plaintiff) for taking care of and waiting on her, and that he had heard the plaintiff say in her mother's presence that she expected pay. We think this evidence was sufficient to take the case to the jury, even if the defendant had filed a demurrer to the evidence. *Cupp v. McCallister*, 144 Mo. App. 111, 129 S. W. 435; *Kingston v. Roberts*, 175 Mo. App. 69, loc. cit. 78, 157 S. W. 1042; *Hartley v. Hartley*, 173 Mo. App. 18, loc. cit. 22, 155 S. W. 1099; *Stone v. Troll*, Adm'r, 134 Mo. App. 308, 114 S. W. 82.

[2] Appellant's other objection is to plaintiff's instruction which embodied her case. The objection is that the instruction misdirected the jury in that it told them, in case they found for plaintiff, to allow her the value of the alleged services, not to exceed \$521, the amount sued for, and omitted to direct them to deduct from the value of such services any amount which her mother had arranged to be paid her therefor.

Plaintiff, in proving her case, introduced the will of decedent in which testatrix left her a legacy of \$5, and also directed her executor "to pay to her the sum of seventy dollars for board furnished to me." There was no contention on defendant's part that this was a payment in full for plaintiff's services. Defendant raised no plea of payment, but the whole theory of the defense was that there was no agreement whatever, either express or implied, which called for payment, and that the bequest of \$70 was a mere expression of appreciation and gratitude, and not the discharge of an obligation. Clearly, plaintiff's purpose in offering the will was to show that testatrix recognized an obligation and made arrangements to partially discharge it in her will. She occupies this position, therefore, that in establishing her right to compensation she has proved that under the will she will receive, or has received, \$70 for a portion of those services,

namely, the board. But in her instruction embodying her right to recover for board, nursing, and services rendered, she has the jury directed to allow her the full value of all of those services up to the amount of her account without taking into consideration the \$70 which she has obtained, or will receive, under the will. When this judgment is paid her she will not only get the value of the services, including board, as found by the jury, but she will also get the \$70 paid her for board by will. And while defendant contended that the \$70 payment in the will was a mere expression of gratitude, yet plaintiff claimed it was not, the will says it is not, and the jury found for plaintiff. Hence defendant is not estopped from having the \$70 deducted from the amount due for all of the services, including board. Of course, the jury may have taken the \$70 into consideration in making up their verdict, but we have no means of knowing that they did.

[3, 4] This omission in the instruction can, however, be cured by plaintiff entering a remittitur of \$70. The payment of \$70 in the will cannot be regarded as a payment in full of plaintiff's claim, since it did not cover the other items of nursing, services, and care. There is no presumption that payment for board covered service for nursing, etc. *Fry v. Fry*, 119 Mo. App. 476, 94 S. W. 990. Besides, the will was made prior to a large portion of the nursing and services. In addition to all this, as above stated, there was no contention on defendant's part that, if there was a contract for pay, the \$70 would constitute full payment. Hence we say the omission to direct a deduction of the \$70 can be cured by remittitur, and does not call for a reversal and remanding of the case.

If, therefore, the plaintiff will, within ten days from the announcement of this opinion, enter a remittitur of \$70, the judgment will be affirmed; otherwise, it will be reversed and remanded. It is so ordered. All concur.

ERNST v. ERNST et al. (No. 11508.)

(Kansas City Court of Appeals. Missouri.
Dec. 6, 1915. Rehearing Denied
Jan. 17, 1916.)

1. PARTITION \S 114—ATTORNEY'S FEES—ALLOWANCE.

While plaintiff's attorneys in a partition suit may ask the court to tax a fee for them as costs against the entire property partitioned, even where there has been no contract for a fee, yet the services which they render on contested issues valuable to those whose interests are being served should not be included in the allowance against all of the interests in the suit.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. \S 440-449; Dec. Dig. \S 114.]

2. PARTITION \S 114—ATTORNEY'S FEE—INTERESTS OF PARTIES.

In a suit to partition property defendant set up a lien for the amount advanced to pay a mortgage, taxes, and repairs, and the wife of one of plaintiff's attorneys, the holder of plain-

tiff's note, secured by his mortgage of his undivided interest, was made a party defendant, and answered, setting up her claim, and asking that it be made a lien, to which there was no objection. Defendant's lien was denied in a reply, and was contested on several grounds, and plaintiff's attorney took a hostile attitude in examining defendant. Defendant purchased the property at a sheriff's sale for a few dollars less than his lien claim. *Held*, that compensation for the attorney's services in opposing defendant's lien claim should not be included in his share of the costs payable out of his share of the property, but that compensation therefor should be included in the share of the costs of all the other parties, though, when defendant bought the property, he took it subject to the costs, including such attorney's fee, and that the services of the attorney for the wife of one of them should not be considered in fixing the fee against the estate.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.]

Appeal from Circuit Court, Buchanan County.

Suit in partition by John P. Ernst against Fred Ernst and others, in which the property was ordered sold. From an allowance of attorney's fees to plaintiff's attorney as a part of the costs, Fred Ernst, defendant and purchaser at the sale, appeals. Reversed, and cause remanded.

Culver & Phillip, of St. Joseph, for appellant. Shull, Thompson & Griswold, of St. Joseph, for respondents.

ELLISON, P. J. A suit in partition styled Ernst v. Ernst et al. was brought in Buchanan county by Thompson, Griswold & Thompson, associated with S. S. Shull, as attorneys for John Ernst. There was a judgment that the property could not be divided, and it was ordered to be sold by the sheriff. Defendant Fred Ernst bought it at that sale. In due course these attorneys asked the court for an allowance of attorney's fees as a part of the costs in the case. The court allowed them \$350, and defendant Fred Ernst appealed.

The facts, as we gather them from the record, are that the action was brought by these attorneys for plaintiff, John P. Ernst, against Fred Ernst and several other heirs of their ancestor Charles F. Ernst, who died several years prior to the institution of the suit leaving a mortgage lien against the real estate here involved. Besides this lien there were numerous tax items, general and special, against the property. To protect the estate defendant Fred advanced the money to pay the mortgage and taxes as well as for some needed repairs; the aggregate sum so advanced being \$6,811.10. Fred set up this in an answer and asked a judgment enforcing his claim for that sum.

After his father's death, plaintiff, John, gave his note for \$350 to one Turner and executed a mortgage on his undivided interest in the estate to secure it, and Ivanora B. Shull, who is the wife of the attorney of that name mentioned above, bought the note of

Turner. She was made a party defendant to the partition suit, and answered, setting up her claim against John's interest, asking that it be declared a lien. The court gave judgment for partition, providing for the enforcement of defendant Fred's lien and for Mrs. Shull's as a second lien, but found that the property could not be divided in kind, and therefore ordered it sold by the sheriff. It was sold, and defendant Fred bought it for \$6,800, being a few dollars less than his lien claim. When defendant Fred set up his lien claim for the advancements aforesaid, plaintiff, John, through these attorneys, filed a reply denying the claim and contesting it on the ground that it was void under the statute of frauds, and that it was barred by the statute of limitations. Besides, it seems that Fred was examined as a witness by these attorneys in a spirit of antagonism to him. Defendant Fred attacks the trial court's allowance of a fee to these attorneys on the ground, in substance, that they were his antagonists, that they fought his interest, and are now seeking to make him pay their fee when they did not render him any service. Judging from the argument for defendant, he entertains the idea that since he bought the land, and since the attorney's fee will come out of the land, it amounts to forcing him to pay for his opponent's effort to defeat his interests.

[1] The law is that, while the plaintiff's attorneys in a partition suit may ask the court to tax a fee for them as costs against the entire property partitioned, and may do so even where there has been no contract for a fee (*Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, 127 Am. St. Rep. 601; *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548), yet this law is based upon the idea that the attorney has acted for the benefit of all the parties in interest in the entire estate. Therefore services which such attorney may render on contested and antagonistic issues are valuable to those whose interests are being served, and should not be included in the allowance against all of the interests in the suit. *Liles v. Liles*, 116 Mo. App. 413, 426, 91 S. W. 983.

[2] Applying the law to the particular facts of this case, we find from the record that these attorneys contested defendant Fred's lien claim; that a great part of their service was against him (Shull's testimony tends to show that was their principal labor), and compensation therefor should not be included in the estimate of his share of the costs to be paid out of his share of the property. But compensation for that part of their work should be included in the estimate of the share of the costs of all the others; since it was to their interest that Fred's lien be contested and disallowed, unless they admitted or confessed it. And the fact that it happened in this case that defendant Fred bought the property at the sheriff's sale in partition,

and therefore will have to pay the attorney's fee and all other costs, should not influence this view. For these attorneys, in fighting Fred's lien claim, were serving all the heirs but him; they were acting in the interest of the estate, and he was claiming against the estate by endeavoring to fasten his lien upon it. So, when Fred bought in the land, he bought it, as a stranger would, subject to the costs, including this attorney's fee.

In view of the foregoing statement of the law and the further rule that one will not be allowed to serve antagonistic interests, there might have arisen a complication in the case that would have called for consideration. As already stated, Attorney Shull was one of the attorneys who brought the suit in partition, and is one participating in the allowance of the fee in controversy. At the same time he appears as attorney for his wife in her claim of a lien against the interest of plaintiff, John. But, as no reply was filed by plaintiff, John, to her separate answer setting up her lien, and no objection seems to have been made, we take it to have been confessed, and all parties entitled to object acquiesced in Shull's position. But in no event should Shull's services for his wife be considered in fixing the fee against the estate. In this connection we will say that we have noted the suggestion that these attorneys did not antagonize defendant Fred, nor contest his claim and that they "handled him with gloves." The record is against them on that point. The record shows an application for an attorney's fee for services "in partitioning said property." The evidence shows, as has been already stated, that a great part of these services consisted in examining the law and in contesting the lien claimed by defendant Fred. Yet the entire fee is assessed against all the parties, which amounts to an adjudication that Fred shall help to pay for the contest made against him. We think such finding is against the law and the evidence as stated in the motion for new trial.

The face of the record showing that the fee allowed was not ascertained on the theory herein held to be correct, the judgment will be reversed, and the cause remanded. All concur.

WARD v. HARVEY et al. (No. 11845.)
(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. APPEAL AND ERROR \S 270—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO JUDGMENT.

Defendants moved for a new trial on the ground that their demurrer to the evidence should have been sustained, and excepted to the overruling of the motion. Subsequently they filed a motion to set aside the order overruling the former motion, and the court overruled such motion, but required plaintiff to enter a remittitur, and thereupon rendered a new judgment.

Held, that defendant's failure to except to the rendition of this judgment, or to move to set it aside, did not prevent a review on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1153, 1609, 1610, 1759, 1760, 1763; Dec. Dig. \S 270.]

2. CARRIERS \S 315—ACTIONS FOR INJURIES—ISSUES, PROOF, AND VARIANCE.

In a street car passenger's action for injuries she alleged that upon her signal defendant's servants slowed down the car and invited her to get off at the regular stopping place near an intersecting street, and that while she was at the rear exit, preparatory to getting off, its speed was suddenly increased, throwing her off. The evidence showed that the car did not slow down at such stopping place, but continued with no change in speed to the middle of the next block, where it slowed down without any invitation to plaintiff to get off, and then suddenly started and threw her off. Held, that the specific negligence charged was not proved, and a judgment for plaintiff would be reversed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1270, 1281, 1282; Dec. Dig. \S 315.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Kate Ward against Ford Harvey and others, Receivers. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

John H. Lucas and Chas. N. Sadler, both of Kansas City, for appellants. W. W. Bryant, of Kansas City, for respondent.

ELLISON, P. J. [1] Plaintiff brought this action for damages flowing from an injury she received while a passenger on one of defendant's street cars. She recovered judgment in the trial court for \$5,000. Defendant filed a motion for new trial, on the ground, among others, that the court erred in not sustaining his demurrer to the evidence. This motion was overruled and defendant excepted. Defendant afterwards, at the same term, filed a motion to set aside the order overruling its motion for new trial and to grant a new trial on account of "additional and newly discovered decisions." The trial court overruled that motion, but on same day required plaintiff to enter a remittitur for \$2,000 and rendered a new judgment for \$3,000. Defendant did not ask to have this judgment set aside, nor did he except to the court rendering it. On this ground plaintiff insists that under the ruling in *Critchfield v. Linville*, 140 Mo. 191, 41 S. W. 786, there is no matter of exception before us. But by reference to *Lemp v. Lemp*, 249 Mo. 295, 305, 155 S. W. 1057, Ann. Cas. 1914D, 307, it will be seen that that case, if not modified, is at least explained.

[2] It is charged in plaintiff's petition that she was a passenger on defendant's car running on Central avenue, Kansas City, Kan., and that she desired to get off at the "safety stop," or regular stopping place, at Seventh street, and she signaled such desire, and that

thereupon defendant's servants caused the car to be "slowed down" and invited her to get off the car at said place, a point about 50 feet east of Seventh street, and that she accepted the invitation and held herself in readiness to get off, under the impression that the car was stopping at the "safety stop," or regular stopping place. It is then charged that while she was standing at the rear exit of the car, preparatory to getting off, while the car was being slowed down, defendant's servants "carelessly and negligently caused the car to move forward with increased speed and shock; * * * that by reason of such negligence she was thrown to the pavement and seriously and permanently injured." There was no evidence to support the negligence charged in the petition. The proof was that the car did not slow down for a stop at the safety stop at Seventh street, 50 feet east of the intersection of Seventh and Central avenue, and that she was not invited to get off. On the contrary, plaintiff testified:

"That it did not make any motion to stop. It went by there at the same rate of speed that it had been going, and about middle way between Sixth and Seventh, the next block, the car slowed down and came to a standstill; and as I was on the platform ready to get off, when the car started up, and in the sudden jerk the car made I was thrown, and that is the last I know."

She further testified:

That after she found the car did not slow down or stop at Seventh street, that "it passed by Seventh and half ways down the next block," that she concluded she would go on to Sixth street, and she "was not looking for the car to stop in the middle of the block"; that when it did "it went off in some hurry, and the jerk it made threw me off."

She alleges that she was invited to get off at Seventh and prepared to do so, and that the car slowed down (but did not stop) for that purpose, and then suddenly increased its speed, which threw her off. Her proof was that no attempt was made to stop at Seventh, and the car went by at usual speed to the middle of the next block, and then came to a standstill without any invitation for her to get off; that then it suddenly started forward and threw her off. It is thus seen that the specific negligence charged was that (though) she was invited to get off at Seventh street; that the car slowed down for that purpose; that before stopping, its speed was negligently suddenly increased and threw her off. The proof was that the car was stopped still in the middle of the next block, and as she was in the act of getting off (without invitation) the car was negligently started forward with a jerk, throwing her off. The negligence alleged was not proven. This question is discussed by Mr. Commissioner Ralley in the recent case of *Northam v. United Railways Co.* (Sup.) 176 S. W. 227.

The judgment is reversed, and the cause is remanded. All concur.

DAVIDSON v. SPITSKAUFISKY.

(No. 11814.)

(Kansas City Court of Appeals. Missouri. Jan. 17, 1916.)

1. BILLS AND NOTES — 485 — EXECUTION — ADMISSIBILITY.

The execution of a note, not denied under oath, stands admitted.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1542-1554; Dec. Dig. §§ 485; Pleading, Cent. Dig. §§ 866, 875.]

2. EVIDENCE — 419, 441 — PAROL EVIDENCE — CONSIDERATION OF NOTE — PROMISE.

The statute permitting a plea of failure or partial failure of the consideration for a note, parol proof that no consideration was received, or that the consideration received has failed in whole or in part, does not contradict or vary the terms of the written contract; but parol evidence that the note sued on, payable on a certain day, was not the promise made by the maker, but that his real promise was that the note should be extended and that he should not be required to pay until he was able to do so, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 1912-1928, 2030-2047; Dec. Dig. §§ 419, 441.]

Appeal from Circuit Court, Jackson County; J. A. Guthrie, Judge.

"Not to be officially published."

Action by Emil B. Davidson against Joseph Spitscaufsky. Judgment for plaintiff, and defendant appeals. Affirmed.

Gage, Ladd & Small, of Kansas City, for appellant. J. C. Rosenberger, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is based on a promissory note for \$4,194, executed by defendant the 21st of August, 1913, due September 17th following. The trial court directed a verdict for that amount and interest.

[1] The execution of the note, not being denied under oath, stands admitted; but it is contested on the ground that "there was no consideration," and "that the consideration had failed." Defendant was the sole witness. From his testimony it appears that he borrowed money of plaintiff and gave his note for the amount, bearing interest. When that note became due he was not able to pay it in money, and by agreement with plaintiff he discharged it by deeding to one Monroe, for plaintiff, certain incumbered real estate and plaintiff giving his note to defendant for \$2,700, the amount of difference between estimated value of the real estate and defendant's note. Next day, and before Monroe recorded the deed, plaintiff ordered him not to do so, and he and defendant then rescinded the transaction thus completed, by plaintiff giving back the real estate and defendant returning plaintiff's note for \$2,700 and executing the note in suit; the amount therein promised to be paid being the amount of the original loan and interest.

[2] To sustain the plea of no consideration,

or failure of consideration, defendant testified that at the time of the execution of the note the agreement with plaintiff was that it should be extended, or renewed, from time to time until he was able to pay it, and that this agreement induced him to rescind the transaction in settlement of the first note and to take back the land he deeded to plaintiff. Our statute permits a plea of failure, or partial failure, of consideration for a note. In order to have the benefit of the statute, on the issue of total or partial failure of consideration, it is necessary that the obligor should be permitted to show what the consideration was, or was to be; otherwise, he could not very well show, either that he never received it, or that it had totally or partially failed. So it may be said, without hesitation, that parol proof that no consideration was received, or, if received, had failed, in whole or in part, does not contradict or vary the terms of a written contract. *Russell v. Tillman*, 89 S. O. 256, 71 S. E. 836.

But defendant's case does not fall within that rule. His case is a direct and affirmative attempt to vary and contradict his written contract (the note) by proving by parol evidence that his written promise to pay on the 17th of September, 1913, was not the promise; that, while it was so stated in the writing, it was not true, and the real promise was that he was not to pay until he was able, and in the meantime that note was to be extended until that contingency happened. The trial court properly disregarded such defense. *Smith v. Thomas*, 29 Mo. 307; *Inge v. Hance*, 29 Mo. 399; *Jones v. Shaw*, 67 Mo. 667, 670; *Insurance Ass'n v. Buchalter*, 83 Mo. App. 504; *Holmes v. Farris*, 97 Mo. App. 305, 309, 313, 71 S. W. 116; *Bank v. Martin*, 171 Mo. App. 194, 201, 158 S. W. 488.

It is earnestly insisted that we assess 10 per cent. damages against defendant for frivolous appeal, as authorized by section 2084, R. S. 1909. Partly persuaded by the fact that the note has been drawing interest, payable semiannually, we will decline the request.

The judgment will be affirmed. All concur.

WILEY v. WILEY. (No. 11374.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. APPEAL AND ERROR § 930—REVIEW—EVIDENCE.

Where verdict was for plaintiff, the appellate court must accept her evidence as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.]

2. WORK AND LABOR § 7 — SERVICES OF CHILD — PRESUMPTION OF GRATUITOUS CHARACTER.

There is a presumption that the services of a child at home as a member of the family

were rendered without creating a liability against the parent to pay for them.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.]

3. WORK AND LABOR § 80—REVIEW—QUESTIONS OF FACT.

In an action by a daughter to recover for services rendered her father in doing household work, questions of fact, such as whether, when she was leaving home, defendant offered her \$200 as payment for her services, not as a gift, were for the jury, and not reviewable on appeal.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 80.]

4. TRIAL § 295 — INSTRUCTION — CONSTRUCTION AS WHOLE.

Instructions will be construed together, and error will not be predicated on any isolated part thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 708-717; Dec. Dig. § 295.]

5. WORK AND LABOR § 7—CONTRACT TO PAY FOR SERVICES OF DAUGHTER.

Where defendant promised to pay his daughter for her household services some months before she reached her majority, but she continued to render such services through the following years, she was entitled to recover on the implied contract to pay arising from acceptance of the services under the circumstances.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.]

6. PLEADING § 428—CONSTRUCTION ON DEMURRER TO EVIDENCE.

Where no demurrer was interposed to the petition, but objection was made to the introduction of evidence on the ground that it did not state a cause of action, every intendment must be made in favor of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Elizabeth Wiley against Oliver Wiley. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Taylor, J. M. Davis & Son, and Frank Sheetz, all of Chillicothe, for appellant. Scott J. Miller, of Chillicothe, for respondent.

ELLISON, P. J. Plaintiff is the daughter of defendant, and brought this action against him for services alleged to have been rendered for him in doing the household work and in caring for her invalid mother. She prevailed in the trial court.

[1, 2] Defendant's family consisted of himself, his afflicted wife, and six children; plaintiff being the oldest. It may be inferred from the evidence that he is a farmer well situated in life. There was evidence in behalf of plaintiff, which we must accept as embracing the facts of the case, that when she became of age her father requested her to continue to do the housework and to care for her mother, and that he would pay her for her work, or, in the words of plaintiff as a witness, that "he would make it right with me." The evidence further showed (without dispute) that she remained at home for eight

or nine years, until she was about 27 years old, and performed the usual household work on a farm, such as managing the house, cooking, washing, and ironing. There was some dispute as to the mother needing any help; it being insisted that she, though afflicted mentally, was able to get along comfortably without assistance. But, if we accept the evidence in plaintiff's behalf as true, as we must, since the verdict was in her favor, she has overcome by proof the usual presumption that the services of a child residing at home as a member of the family are deemed to have been rendered without creating a liability against the parent to pay for them. Accepting the evidence in plaintiff's behalf, she remained with her father at his request and in consequence of his promise to pay her.

[3] To corroborate plaintiff's statement of the facts considerable is found in the record about checks she drew in her father's name, by his consent, for various sums of money. A part of this she testified she credited on her account, and a part was for household necessities. So there was evidence to the effect that defendant offered her \$200 as she was about leaving the home. Defendant testified that such offers bore no relation to the recognition of a contract to pay her for services, but rather were gifts he was offering her as a father, who is able, does for his children when leaving the homestead. All these matters were for the consideration of the jury, and are not a subject of review by us.

[4] Complaint is made of plaintiff's instruction, but we think it not well founded. It is said that it assumes that defendant made payments on plaintiff's account. In one sense it might be said that it does assume such payment, but, taken altogether, we think it clear enough that the jury were to find that as a fact from the evidence; especially is that true when the instructions in the entire case are taken together.

[5] It is suggested that the time fixed by plaintiff as the date of the contract shows that she had not yet arrived at her majority, and therefore could not have contracted. In one view of her statement there may be a discrepancy of some months. But, if there was anything in this, it was made of no moment by the fact that the parties continued through the following years, manifestly under such contract.

On the general legal obligation as applied to the facts in this case we are cited to *Bircher v. Boemler*, 204 Mo. 563, 103 S. W. 40, *Mabary v. Mabary*, 173 Mo. App. 444, 158 S. W. 690, *Taylor v. George*, 176 Mo. App. 218, 161 S. W. 1187, and *Brand v. Ray*, 156 Mo. App. 630, 137 S. W. 623. We think the cases not decisive of the facts as shown by plaintiff in this case.

[6] There was no demurrer to the petition, but objection was made to any evidence on the ground that it did not state a cause

of action. In such circumstances every indictment must be made in its favor, and we think it sufficient.

The case has been decided on the facts against the defendant, and, there being no error at the trial, we must affirm the judgment. All concur.

HENDRICKSON v. KANSAS CITY.

(No. 11833.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

MASTER AND SERVANT \S 177—INJURIES TO SERVANT—LIABILITY OF MASTER—NEGLIGENCE OF FELLOW SERVANT.

A city which made a large excavation to expose a sewer pipe to be cut, affording ample room for the work, was not liable for the injury of its servant, holding a chisel, struck by his fellow servant when the latter's hammer was deflected through being used in such a manner as to strike a timber above supporting street railway ties, since the master is not liable for the negligence of a fellow servant, but is liable if his own negligence is combined with that of the fellow servant, and the injury would not have occurred without it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 307, 352, 353; Dec. Dig. \S 177.]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Adrian Hendrickson against Kansas City. From a judgment sustaining defendant's demurrer to the petition, plaintiff appeals. Affirmed.

Kyle & Coon, of Kansas City, for appellant. H. C. Moore and F. M. Hayward, both of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for personal injury charged to have been received through the negligence of defendant city. A demurrer was filed and sustained on the ground that the petition did not state a cause of action. Plaintiff refused to amend and appealed.

The petition on its face discloses that a foreman and some men, including plaintiff, were engaged in cutting one of the water pipes connected with the waterworks of the defendant city. A hole had been dug exposing the pipe. The excavation was about 10 feet long, 6 feet wide, and 9 feet deep, extending about 2½ feet below the pipe. A part of the pipe was below the ties and roadbed of a street railway track. The ties were braced up by a stick of timber about one foot wide, placed horizontally and extending out about 6 inches beyond the end of the ties, and was about 2½ feet above the water pipe. It is placing the timber in this manner that is alleged to be negligence. The petition charges that plaintiff was directed to hold a chisel on a line where the pipe was to be cut, which extended around the pipe, while another servant struck it with a sledge ham-

mer; that he stood on the bottom of the excavation, and was holding the chisel while it was being struck with the sledge hammer by the other servant, he (plaintiff) moving the chisel along the line at each stroke; that, "after having struck said chisel a number of times as it was being moved across the pipe by plaintiff," the other servant struck the brace timber under the ties above him, which caused the hammer to glance and strike plaintiff's hand instead of the chisel and inflict serious injury.

The law is that the master is not liable for the negligence of a fellow servant, but is liable if his own negligence is combined with that of the fellow servant, and without which the injury would not have occurred. *Young v. Railroad*, 103 Mo. 324, 15 S. W. 771. We think the petition fails to state any culpable negligence on defendant's part, and that the proximate cause of his injury was the careless handling of the hammer by his fellow servant. The master may give an order and expect the servant will carry it out with intelligence and care. *Bowen v. Railroad*, 95 Mo. 268, 8 S. W. 230; *Pulley v. Railroad*, 136 Mo. App. 172, 116 S. W. 430. In this case there was a large excavation made exposing the pipe and affording ample room for the work proposed to be done. It should not be expected that the defendant in providing this place, or the foreman in ordering the work, should foresee that the servant would go so far outside the limit of care in using the hammer as to strike the timber supporting the street railway ties, and thereby strike plaintiff's hand. He had progressed with the work properly, but finally grew so careless in his stroke as to strike the timber. Plaintiff himself must have thought that the work could be done and was being done safely. We deem it clear that no cause of action was stated. *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Card v. Eddy*, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806; *Farrar v. Railroad*, 149 Mo. App. 188, 130 S. W. 373; *Shstrau v. Sullivan*, 201 N. Y. 567, 94 N. E. 600.

The judgment is affirmed. All concur.

DUNN v. MISSOURI PAC. RY. CO. (No. 11573.)

(Kansas City Court of Appeals. Missouri.
Dec. 6, 1915. Rehearing Denied
Jan. 17, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 997, 1001—REVIEW —VERDICT—EVIDENCE.

The refusal of the court below to sustain defendant's demurrer is not reversible, if there is any substantial evidence to support the verdict, giving plaintiff the benefit of every reasonable inference the evidence will bear; nor can a verdict so supported be set aside.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934, 4023, 4024; Dec. Dig. \Leftrightarrow 997, 1001.]

2. MASTER AND SERVANT \Leftrightarrow 235 — EMPLOYÉ STRUCK BY ENGINE—CONTRIBUTORY NEGLIGENCE.

Where plaintiff walked to defendant railroad's switch track and stooped to pick up a piece of pipe lying by the track, over which engines passed to and from a roundhouse, plaintiff's failure to look for approaching engines was negligence, since such track, being one in use, was in itself a signal of danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 655-658; Dec. Dig. \Leftrightarrow 235.]

3. MASTER AND SERVANT \Leftrightarrow 248—RAILROAD EMPLOYÉ STRUCK BY ENGINE—CONTRIBUTORY NEGLIGENCE—LAST CHANCE.

Where plaintiff employé was put to work riveting pipe at a place near defendant railroad's switch track, and while stooping to pick up a piece of pipe lying near the track for use as a riveting base, was struck by defendant's engine, plaintiff, though negligent in not observing the approach of the engine, can recover if, after having placed himself in such dangerous position, the engine crew could have avoided the accident by the exercise of due care, either in warning him or stopping the engine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 801-804; Dec. Dig. \Leftrightarrow 248.]

4. MASTER AND SERVANT \Leftrightarrow 259 — RAILROAD EMPLOYÉ STRUCK BY ENGINE—NEGLECTOR —QUESTION FOR JURY.

Where such engine approached plaintiff with a lookout on the footboard facing plaintiff, whose duty it was to watch for danger, and no signals were sounded, nor any warning given by the lookout, though he must have seen plaintiff walking dangerously near the track, the question of defendant's negligence under the last chance doctrine was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. \Leftrightarrow 259.]

5. MASTER AND SERVANT \Leftrightarrow 137 — ENGINE STRIKING EMPLOYÉ—DUTY OF LOOKOUT.

The duty of such lookout to warn plaintiff did not lie dormant until he actually knew that plaintiff would be struck, but arose as soon as he had sufficient notice of danger to put a reasonably prudent man on the alert.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. \Leftrightarrow 137.]

6. MASTER AND SERVANT \Leftrightarrow 137—EMPLOYÉ— INJURY—TRAIN MOVEMENTS—NOTICE.

Where plaintiff employé was put to work riveting pipe at a point near such switch track, and was told that he would have to fix a place to work, and in so doing he walked over to the track to pick up a piece of pipe for a riveting base, he was a licensee by invitation, entitled to notice of the movements of trains.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. \Leftrightarrow 137.]

7. MASTER AND SERVANT \Leftrightarrow 227 — EMPLOYÉ STRUCK BY ENGINE—CONTRIBUTORY NEGLIGENCE—EXCESSIVE SPEED—LAST CHANCE.

Plaintiff, being negligent in approaching such track without looking for trains, could not recover for defendant's negligence in running such engine in excess of the speed permitted by ordinance, since such contributory negligence constituted a defense thereto, leaving open only the issue of defendant's negligence in failing to avoid the accident under the last chance doctrine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 668, 669; Dec. Dig. \Leftrightarrow 227.]

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Action by Napoleon B. Dunn against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

C. D. Corum, of St. Louis, for appellant. James E. Hazell, of Jefferson City, for respondent.

TRIMBLE, J. A suit to recover damages for personal injuries. Plaintiff, while working near the south side of defendant's south switch track in the railroad yards at Jefferson City, was struck on the head by the end of the pilot beam of an engine being taken to the roundhouse by the engine hostler and his helper. Judgment went for plaintiff, and defendant has appealed.

Plaintiff was 56 years old, and had been employed by two other railroads as a bridge and building carpenter. On the morning of his injury he entered the employ of defendant, and was directed by defendant's foreman to go to work riveting stovepipe at a place some 8 or 10 feet south of defendant's south switch track and within a few feet of where two other employes were at work. Plaintiff was told he would have to fix a place to work. Thereupon he prepared a frame to use in the work and punched holes in several joints of stovepipe. He then found he needed an iron upon which to clinch or fasten the rivets, and, after looking around, he saw a piece of gas pipe lying about 30 feet west of where he was working and about 2½ feet south of the south rail of the switch track. Said piece of gas pipe was lying between said south rail and a pile of ties and rubbish about 4 feet from the track. There was a beaten path alongside of, and some 4 feet south from, the track, and plaintiff, keeping on this path, walked to the gas pipe, stooped and picked it up, and, just as he turned around to face the east, he was struck on the left side of the head and seriously injured by an engine going west on the switch track to the roundhouse. He was not aware of the presence of the engine until the moment it struck him.

[1] The question on this appeal is whether plaintiff is entitled to recover. Defendant says he is not; that its demurrer should have been sustained; and we are asked to reverse the case outright on that account. Of course, before this can be done, it must clearly appear that there is no substantial evidence to support plaintiff's case; that, after giving to plaintiff the benefit of every reasonable inference the evidence will bear, and accepting as true all evidence in his favor, it still is seen that plaintiff, as a matter of law, is not entitled to recover. If, however, under any reasonable view of the evidence, there is any theory upon which plaintiff is entitled to prevail, then the verdict reached by the jury cannot be set aside.

The petition charged that the defendant's servants operating the engine negligently ran it in excess of 8 miles per hour in violation of a city ordinance, and that said servants in charge of said engine negligently ran it against plaintiff without warning of any kind; that plaintiff was in plain view, and by the exercise of ordinary care said servants knew or could have known of the dangerous situation of plaintiff in ample time to have prevented the collision. The answer pleaded contributory negligence.

An ordinance of the city limited the speed to 8 miles per hour. The evidence amply showed that the engine exceeded this speed. The hostler running it said he was going 8 or 10 miles per hour; his helper placed the speed at 10 miles; while another witness said it was going from 12 to 15 miles per hour. However, the speed of the engine is not referred to here as an independent ground of negligence upon which plaintiff can recover, because plaintiff admits that when he started west along the path to get the gas pipe he did not look east to see whether an engine was coming, and he also admits that he did not look east at any time after he started.

[2] One who approaches dangerously near to a railroad track without looking to see whether a train is coming must be held to be guilty of contributory negligence as matter of law. In conceding that plaintiff was thus guilty of contributory negligence, we are not unmindful of the fact that this was a switch track and that plaintiff testified he looked east past the "crossover" (the entrance to the switch track in question, and which was about 100 yards away), and saw no engine coming, but did see one which he supposed was at work down in the yards farther east. But while the track was a switch track, yet it was one that led to the roundhouse, and necessarily engines would pass to and fro over it, and the evidence shows they did so pass. The track was a track *in use* and was in itself a signal of danger. There was, therefore, as much necessity for looking when plaintiff approached this track as any other. And although plaintiff says he looked east and saw no engine on the switch track, yet his evidence shows that this was *before* he saw the gas pipe down the track and started for it. He does not state how long it was before he started to walk west that he looked east, nor how near that was to the time he started. He does say that he looked east as he came around the toolhouse looking for something to rivet the stove pipe on; but it was after this that he noticed the gas pipe west of the toolhouse and west of his place of work; and elsewhere in his testimony he says he did not look east at the time he started west for the gas pipe and that he did not look at any time thereafter.

Possibly plaintiff could not be held to be guilty of contributory negligence as a matter of law if, at the time plaintiff started west, the train was so far away that it could not

have been seen, or was so far distant that any reasonably prudent man would know he had plenty of time to get the pipe before the train could arrive, traveling at a lawful rate of speed. If the train was that far away, but was going at such an excessive and unlawful speed as to enable it to travel that great distance and strike plaintiff in such an unreasonably and unexpectedly short time, then perhaps it would be *solely* the speed that caused the injury, and not plaintiff's failure to look. In that case the question whether his failure to look contributed to his injury would be for the jury to determine. But the speed of the train, while shown to be in excess of that prescribed by ordinance, was not so great as to give rise to an inference that the engine was so far away as that, or that it could not have been seen by plaintiff at the time he started west, had he looked. So that it cannot be claimed that plaintiff, even if he had looked, would not have seen the train, or would have reasonably supposed, as an ordinarily prudent man, that he had time to get the pipe. The train, even if going as high as 15 miles per hour, could not have been an exceedingly great distance away when plaintiff started, because plaintiff says he walked to the gas pipe, picked it up, and was struck just as he arose and was turning around to the east. Plaintiff, therefore, could have seen the train when he started west, and if he then and thereafter failed to look he was negligent, and his negligence must be deemed to have contributed to his injury as matter of law. *Stotler v. Chicago and Alton Railroad*, 204 Mo. 619, 103 S. W. 1; *Schmidt v. Missouri Pacific Railway Co.*, 191 Mo. 215, 90 S. W. 136, 8 L. R. A. (N. S.) 196. Hence we say plaintiff cannot recover upon the ground of negligent speed in the operation of the engine.

[3] But plaintiff's contributory negligence will not defeat his recovery if, *after* he is seen to be in danger, the persons in charge of the train had time, either to *warn him*, so that he could have escaped, or to prevent the collision themselves, by slowing up or stopping the engine, and failed to do so. In such case defendant's servants would be guilty of a violation of the humanitarian rule, against which plaintiff's contributory negligence constitutes no defense. On this feature of the case we must bear in mind the allegations of the petition. It says the plaintiff was *in plain view* of the persons on the engine; that they knew, or by ordinary care could have known, that he was in danger in time to have avoided the injury; but that they negligently ran against him without *warning of any kind*.

[4] The evidence undoubtedly justified the jury in finding that plaintiff was *in plain view* of at least one of the men on the engine. From the "crossover," where the engine entered upon the switch track, down to where plaintiff was struck, was over 100 yards. This ground was level and the view unobstructed. It is conceded that the hostler

helper was *in front of the engine, standing on the footstep of the pilot beam*. He swore that he took this position at the "crossover," and there rode up to the point where plaintiff was struck; *that he was facing west* (which was directly toward plaintiff); that one of his duties in standing on the pilot was *to watch for danger*. If the ground was level and the view unobstructed, what was there to prevent him from seeing plaintiff as the engine came up behind the latter? The man on the pilot was looking in plaintiff's direction, it was one of his duties to watch for danger, and how could he help but see him? Under these conceded facts surrounding the hostler helper as he rode on the pilot toward plaintiff, the jury are entitled to disregard his statement that he did not see plaintiff walking near the track with his back to the engine, and did not see him stoop and pick up the gas pipe which lay in the zone of danger. The jury could well say that, under the conceded circumstances, he did see him. It has been held that the testimony of a plaintiff, who is concededly in a position where to look is to see, will not be accepted, but will be *disregarded*, when he says he looked and did not see. *Weigman v. St. Louis, etc., R. Co.*, 223 Mo. 699, loc. cit. 712, 123 S. W. 38; *Hook v. Missouri, etc., R. Co.*, 162 Mo. 569, loc. cit. 561, 63 S. W. 360. That which is sauce for the goose must be sauce for the gander. Hence the jury are fully justified in not believing the statement of the hostler helper that he did not see plaintiff in a place of danger in time to warn him. Indeed, he admits he saw plaintiff when the engine was 30 feet from him, but says plaintiff at that time was 5 or 6 feet out from the track, *coming east*, and in no danger.

But the jury are not compelled to believe this last part, which excuses him from blame. They have the right to accept plaintiff's statement that he was struck just as he arose from his stooping posture and was turning around. If plaintiff walked west to the gas pipe, and stooped and picked it up, and was struck just as he turned around, then, when the helper saw him 30 feet away, plaintiff must have been dangerously near the track, and was either going west with his back to the engine or was in the act of picking up the gas pipe. In either situation he was in danger, and, if the hostler helper had called to him, can any one say he would have had no time to get out of the way? Unless we can say that this was *conclusively* too late, it would be for the jury to say whether the hostler helper had time, *even in 30 feet*, to warn him. There was no bell ringing on the engine, no whistle blown, and no warning given plaintiff of any kind. The evidence is such, however, as to justify the jury in believing that the hostler helper saw plaintiff *before* he got in 30 feet of him, and must have seen him as he walked west toward the gas pipe with his back to the engine and giving no sign that he was aware of its pres-

ence. The engine was giving no warning of its approach. What was there, then, to lead the man on the pilot to believe plaintiff knew of the engine and would get out, or keep out, of its way? This being so, can any one say it was not the duty of the man on the pilot, as a reasonably careful and prudent man, to at least call to him in warning?

But it is said that plaintiff, as he walked west, was in a place of safety, and did not come into danger until he got close enough to the track to be struck by the end of the pilot beam. It is true the evidence shows there was a path alongside the track which was 4 feet from the south rail. It is also true that plaintiff says he "kept pretty close to" this path as he went west. Now as long as plaintiff's body was fully 4 feet from the south rail, the pilot beam would not strike him. But the evidence was that this pilot beam extended out beyond the rail some 2 feet and 6, 8, or 10 inches. Therefore, if plaintiff was in a path 4 feet from the rail, there would be a distance of from 14 to 18 inches between the center of this path and the end of the pilot beam. This is not making any allowance for the swaying of the engine, as the testimony shows it would do when traveling on a switch, and sway more as the speed increased. But, without taking into consideration any swaying of the engine, this space of from 14 to 18 inches is too narrow for plaintiff's body to move in with safety as he walked along the path, even if the path was in the clear as a mathematical proposition. A slight swaying of his body, a short step or movement to one side, and plaintiff would be in reach of the end of the pilot beam. This margin was too narrow for the man on the pilot to consider plaintiff as being in a place of safety, even if the path was 4 feet from the rail and the pilot beam would clear at that distance. Plaintiff, with his back to the engine and walking in the same direction it was going, so close to the reach of danger and unaware of its approach, cannot be said to be in a place of safety, so as to clearly and conclusively excuse the man on the pilot from the duty of warning him. And if he cannot be clearly and conclusively excused from that duty, it is for the jury to say whether he acted as a reasonably prudent man would have done under the same circumstances. If a reasonably prudent man, exercising ordinary care, would have warned him, and could have done so in time, then the man on the pilot was negligent in failing to do so, and in that case defendant would be liable under the humanitarian rule.

[4, 5] Whether the man on the pilot acted as an ordinarily prudent man under the circumstances, and whether he had time to act, were questions, therefore, for the jury to determine, and cannot be decided by us as matter of law. The helper on the pilot had no right to think plaintiff was aware of

the approach of the engine. It was ringing no bell, blowing no whistle, and giving no warning. Plaintiff was not giving the slightest manifestation that he knew the engine was coming. He was unconcernedly moving with his back to the engine so close to the line of danger that any moment would put him clearly within its reach, and, if that *should* happen, it would then be *too late* to warn him. Under these circumstances, was it not a question for the jury to say whether the helper on the pilot acted as an ordinarily prudent man would have done? His duty to warn did not lie dormant until he actually *knew* plaintiff was within actual reach of the pilot beam. That duty arose as soon as he had sufficient notice to put a reasonably prudent man on the alert. He must then take such precautions as a prudent man would take under similar circumstances. As said by Judge Bond (then on the St. Louis Court of Appeals) in *Klockenbrink v. St. Louis, etc., R. Co.*, 81 Mo. App. 351, loc. cit. 356, quoting from 1 *Shearman & Redfield on Negligence* (5th Ed.) § 99:

"It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted."

This ruling was affirmed by the Supreme Court in the same case. See 172 Mo. 678, loc. cit. 686-689, 72 S. W. 900.

[6] Plaintiff was not a track laborer. He was, however, employed to rivet stovepipe at or near the track. He was told to prepare for that kind of work. In doing this he walked alongside of and near to the track to get the piece of iron in question. He was therefore a licensee by invitation, and as such entitled to notice of the movements of trains. *Nelson v. Wabash R. Co.*, 132 Mo. App. 687, 112 S. W. 1017. Under the facts and circumstances the jury could rightfully find that the hostler helper on the pilot saw plaintiff in such a situation that it became his duty, as a reasonably prudent man, to warn him of danger, and that he saw him thus in time to have avoided the injury, had he warned him. This being so, we are not authorized to disturb the verdict on the ground that under the evidence plaintiff is not entitled to recover.

[7] The case, however, will have to be reversed and remanded because of the instructions. As we have hereinabove shown, plaintiff is not entitled to recover because of defendant's negligence in operating the engine at a speed in excess of 8 miles per hour, because that negligence was neutralized, so to speak, by plaintiff's contributory negligence in approaching the track without looking. Even if plaintiff's contributory negligence was a question for the jury, the instructions should have covered that issue. But the only ground upon which plaintiff can recover, if at all, is for failure to obey

the humanitarian rule. The instructions, however, authorized the jury to find for plaintiff upon *either* ground of negligence. And instruction No. 2 does not tell the jury what facts they should find in order to determine whether the operatives of the engine were guilty of negligence in failing to warn plaintiff. *Hinzeman v. Missouri Pacific Ry. Co.*, 182 Mo. 611, loc. cit. 624, 81 S. W. 1134; *Mather v. Metropolitan Street Ry. Co.*, 166 Mo. App. 142, loc. cit. 149, 148 S. W. 383.

The case is therefore reversed and remanded for a new trial. All concur.

STATE v. ROBINSON. (No. 11792.)
(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. ASSAULT AND BATTERY \S 96—SELF-DEFENSE—INSTRUCTION—EVIDENCE.

The defendant, in a prosecution for assault, is entitled to an instruction on self-defense, though his own testimony is the only evidence to support such instruction.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 142-150; Dec. Dig. \S 96.]

2. ASSAULT AND BATTERY \S 96—SELF-DEFENSE—INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for assault, defendant's own testimony showed conclusively that he was the aggressor throughout the encounter and had no reasonable ground to believe that his antagonist intended to do him bodily harm, the court properly refused an instruction on self-defense.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 142-150; Dec. Dig. \S 96.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

E. J. Robinson was convicted of a common assault, and appeals. Affirmed.

Frank W. Ashby, of Chillicothe, for appellant. Elton L. Marshall, Pros. Atty., of Chillicothe, for the State.

JOHNSON, J. On information of the prosecuting attorney defendant was tried and convicted in the circuit court of Livingston county for a common assault, and a fine of \$1 was assessed as his punishment. He appealed, and insists that since his evidence disclosed that he acted in self-defense, the court erred in refusing to instruct the jury upon that issue.

[1, 2] A defendant, in a criminal prosecution for assault, is entitled to an instruction on self-defense, although his own testimony is the only evidence to support it. *State v. Fredericks*, 136 Mo. 51, 37 S. W. 832; *State v. Alley*, 68 Mo. 124; *State v. Garrett*, 170 Mo. 895, 70 S. W. 686; *State v. Bidstrup*, 237 Mo. 273, 140 S. W. 904; *State v. Arnett*, 258 Mo. 253, 167 S. W. 526; *Brubaker v. Bidstrup*, 163 Mo. App. 646, 147 S. W. 541. But it is proper to refuse such

instruction if there is no evidence to justify a reasonable inference of self-defense, and we find defendant's own testimony shows beyond question that he was the aggressor throughout the encounter, and had no ground for a reasonable belief that his antagonist intended to do him bodily harm at the time he committed the assault by striking him on the body and face. He claims that while he and his opponent were standing holding to each other, he frustrated a movement of the latter to stoop and pick up a stone, but admits that after that, while his opponent was showing no disposition to fight and was begging him to desist and allow the courts to settle their dispute (which was over a debt of 40 cents) he deliberately struck him and "slapped him loose." The unwilling disputant offered no physical resistance and departed as soon as he was "slapped loose." Defendant had neither actual nor seeming necessity as an excuse for such violence, nor belief, nor ground for a reasonable belief, that he must strike to ward off impending harm to himself. Without the justification of, at least, a reasonable belief that he was threatened with immediate harm, he cannot be heard to claim that he was moved to strike by the instinct of self-preservation. *State v. Kloss*, 117 Mo. 591, 23 S. W. 780.

The judgment is affirmed. All concur.

STARR v. PENFIELD et al. (No. 11262.)
(Kansas City Court of Appeals. Missouri.
June 18, 1915. On Rehearing, Jan.
17, 1916.)

1. APPEAL AND ERROR \S 502—PRESENTATION BELOW—DENIAL OF NEW TRIAL—EXCEPTION.

Where the record fails to disclose proper exceptions to the denial of a motion for new trial, complaints embraced in such motion cannot be considered on appeal; the necessity of the abstract showing an exception to the denial of a new trial not being obviated by Court of Appeals rule 26 (169 S. W. xv), providing that an appellant need not abstract the record entries "showing the steps taken below to perfect such appeal," since such an exception is not one of such steps.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2306-2309; Dec. Dig. \S 502.]

2. APPEAL AND ERROR \S 581—ABSTRACT OF RECORD—BILL OF EXCEPTIONS—FILING.

Under Court of Appeals rule 26 (169 S. W. xv), providing that no appellant need abstract record entries evidencing his leave to file or the filing of a bill of exceptions, but it shall be sufficient if his abstract state that the bill of exceptions was duly filed, the abstract of the record was not defective, though it failed to show that the bill of exceptions was filed at the same term that the case was tried or when it was filed, or whether appellant was given time beyond the term to file same, or, if so, whether the bill was filed within that time, where it stated that the "bill of exceptions was duly filed."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2575-2581, 2599, 2601; Dec. Dig. \S 581.]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by Mary E. Starr against Arthur H. Penfield and others. From a judgment for defendants, plaintiff appeals. Affirmed.

See, also, 166 Mo. App. 302, 148 S. W. 382.

W. K. James, of St. Joseph, for appellant.
C. C. Crow, of Kansas City, for respondents.

TRIMBLE, J. [1] Appellant's abstract fails to show that any exception was saved to the overruling of the motion for new trial. The grounds of error complained of by appellant are matters of exception only. If the record does not disclose proper exceptions to the action of the court in overruling the motion for new trial, then there is nothing before this court for review on appeal so far as complaints embraced in such motion are concerned. *State v. Harris*, 216 Mo. 392, 115 S. W. 968; *State v. Crites*, 215 Mo. 91, 114 S. W. 618; *Wilbrandt v. Laclede Gas Co.*, 135 Mo. App. 220, 115 S. W. 497; *Chrisco Bros. v. Carroll*, 149 Mo. App. 378, 130 S. W. 93.

[2] Respondent in his brief calls attention to the above defect in the record, and also says that the abstract is further defective in that it does not show that the bill of exceptions was filed at the same term that the case was tried, does not show when it was filed, nor whether appellant was given time beyond the term to file bill of exceptions, nor, if so, whether the bill was filed within that time.

Appellant in a reply brief, filed after the case was submitted, contends that under our rule 26 (169 S. W. xv), adopted January 6, 1913, the abstract is sufficient. So far as respondent's objections to the record failing to show leave to file, or the filing of, a bill of exceptions are concerned, appellant is right in thinking the abstract is sufficient under rule 26, since the abstract says the "bill of exceptions was duly filed." The portion of rule 26 applicable to the bill of exceptions is as follows:

"Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point."

But we cannot agree with appellant in her contention that rule 26 obviates the necessity of the abstract of record showing that an exception was preserved to the overruling of the motion for new trial. That part of rule 26 relied upon by appellant to cure her abstract in this regard is as follows:

"Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term."

This, however, does not obviate the necessity of showing that exceptions were taken to the court's action. The exception to the overruling of the motion for new trial stands on the same footing as do other exceptions made to the court's action throughout the trial. It is not one of "the steps taken to perfect an appeal." And those steps are all that the above rule refers to. The rule is not ambiguous, and hence there is no room for the charge that appellant has been innocently misled by said rule. There has been no inadvertent mistake of the printer or otherwise by which the required portion of the abstract was left out. The defect arises from an erroneous construction of rule 26. That is, appellant has erred upon a question of law, namely, whether rule 26 obviated the necessity of preserving an exception to the overruling of the motion for new trial. If such an error be overlooked, the case becomes a precedent for the curing of similar errors. Much as we dislike to exclude appellant from a hearing on the matters complained of, we cannot do otherwise except by overruling well-established precedents set by the Supreme Court and binding upon us, or by extending to appellant a leniency which would not only annul the rules applicable to appeals, but which would be impossible to extend, without limit, to others. As said by the Supreme Court in the case of *Harding v. Bedoll*, 202 Mo. loc. cit. 629, 100 S. W. 638:

The construction of the rules "should not be made so liberal as to annul the rules themselves. Nor can the court give a strained construction in one case and a more liberal one in another. The application of the rules, as made by the courts, is without respect to the case or the person. * * * These rules apply to all persons, all cases, and all representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel."

It follows, therefore, that there is nothing before us except the record proper, and, as the judgment follows the pleadings and the face of the record is free from error, the judgment must be affirmed.

It is so ordered. All concur.

On Rehearing.

ELLISON, P. J. A reargument has been had in this case, and we are left convinced that our former conclusion must be adhered to. We add the following cases decided since the promulgation of our rule 26, which is a copy of rule 32 in the Supreme Court: *Dalton v. Register*, 248 Mo. 150, 154 S. W. 67; *State v. Scobee*, 255 Mo. 273, 164 S. W. 198; *Fleming v. Meals*, 179 S. W. 743, decided by us at this term.

Since writing the foregoing, we note a decision of the Supreme Court by Commissioner Williams (*Case v. Carland*, 264 Mo. 463, 175 S. W. 200) fully sustaining the views expressed in the original opinion.

The judgment is affirmed. All concur.

GIVENS v. ROGERS. (No. 11572.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1918.)

1. LIMITATION OF ACTIONS ~~§ 83~~—ACCRUAL OF CAUSE OF ACTION.

While a debt accrues as soon as incurred, the cause of action upon it does not accrue until a right to demand payment arises.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353-375; Dec. Dig. ~~§ 83~~; Action, Cent. Dig. § 708.]

2. LIMITATION OF ACTIONS ~~§ 84~~—TOLLING OF STATUTE—REMOVAL FROM JURISDICTION.

Under Rev. St. 1909, § 1897, declaring that if, after a cause of action has accrued, defendant shall depart from or reside out of the state, the time of his absence shall not be taken as part of the time limited for the commencement of the action, defendant, who removed from the state shortly after executing notes and before their maturity, may set up limitations, for as, at the time of removal, the cause of action had not accrued, the running of limitations was not tolled.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439-448; Dec. Dig. ~~§ 84~~.]

3. LIMITATION OF ACTIONS ~~§ 84~~—TOLLING OF STATUTE—REMOVAL FROM JURISDICTION.

In such case, though the defendant, at the time of executing the notes, intended to leave the jurisdiction, the running of limitations in his favor was not stopped because plaintiff might, under Rev. St. 1909, § 2295, have issued an attachment; such action not having been begun.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439-448; Dec. Dig. ~~§ 84~~.]

Appeal from Circuit Court, Daviess County; Arch B. Davis, Judge.

Action by N. S. Givens against A. H. Rogers. From a judgment for defendant, plaintiff appeals. Affirmed.

L. B. Gillihan and Thos. H. Hicklin, both of Gallatin, for appellant. Leopard & Fair, of Gallatin, for respondent.

ELLISON, P. J. Plaintiff's action was begun before a justice of the peace, and is founded on two promissory notes executed by defendant. On appeal to the circuit court judgment was for the defendant. The sole defense is the 10-year statute of limitations. One of the notes was executed January 6, 1902, and the other on the 7th, each falling due August 1, 1902. At the time defendant executed the notes he was a resident of Daviess county, Mo., but in a few days thereafter (January 10, 1902) he removed to Oklahoma, and has since continuously resided there. On November 11, 1912, he was back in Daviess county on a visit, when plaintiff instituted this action and obtained personal service on him on that day. It will be observed that this action was begun 10 years 3 months and several days after the notes became due and payable. They are therefore barred by the statute, unless saved, under the facts stated, by section

1897, R. S. 1909, invoked by plaintiff, which reads as follows:

"If at any time when any cause of action herein specified accrues against any person who is a resident of this state, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

[1, 2] Plaintiff's point is that, in the meaning of this statute, a cause of action accrued at the time of the execution of the notes. We think not, and so it has been decided in a like case. *Thomas v. Black*, 22 Mo. 330. A cause of action does not accrue until it matures. There is no cause of action—no right to sue—until the debt becomes due. *Sperry v. Cook*, 247 Mo. 132, 189, 152 S. W. 318; *Stark Bros. v. Gooding*, 175 Mo. App. 353, 162 S. W. 333; *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075. There is a difference between the debt and the cause of action. A debt accrues as soon as it is incurred, but the cause for an action upon it does not accrue until a right to demand payment arises. *Bolen Coal Co. v. Ryan*, 48 Mo. App. 512, 516; *Mfg. Co. v. Burns & Co.*, 59 Mo. App. 391; *Feeny v. Rothbaum*, 155 Mo. App. 331, 336, 137 S. W. 82. The terms of the statute are that the debtor must have moved from the state *after* the cause of action accrued; and, since defendant left the state before it accrued, the statute cannot apply. It is a matter of purely statutory regulation; and, since defendant's case does not fall within its provisions, plaintiff cannot lay claim to it. Plaintiff cites a case: *Heflbower v. Detrick*, 27 W. Va. 16. That case, when considered in connection with the dissenting opinion, is somewhat complicated, the statute considered is not like ours, and we cannot allow it to influence a departure from what we consider to be the plain meaning of ours.

[3] Plaintiff also invokes this further consideration: It appears that defendant had formed the intention to leave the state, and had that intention when he executed the notes, and in a few days, as already stated, he did leave. That was a cause for the institution of a suit by attachment under section 2295 of the statute, reading that:

"An attachment may issue on a demand not yet due, * * * but no judgment shall be rendered against the defendant until the maturity of the demand."

It is enough to say that no such action was brought. But we may add that we do not see how the privilege given by that statute to lay hold of the debtor's property before the right of action accrues should affect the construction we have given to the other section.

The judgment is affirmed. All concur.

BOWERS v. WALKER et al. (No. 10840.)
(Kansas City Court of Appeals. Missouri.
Nov. 22, 1915. Rehearing Denied
Jan. 17, 1916.)

1. MALICIOUS PROSECUTION \S 56—**PROBABLE CAUSE—MALICE—BURDEN OF PROOF.**

In an action for malicious prosecution, the burden is on the plaintiff to prove both want of probable cause and malice on defendants' part in instituting the prosecution; both being essential elements of plaintiff's case.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 112-116; Dec. Dig. \S 56.]

2. MALICIOUS PROSECUTION \S 32—**PROBABLE CAUSE—INFERENCE OF MALICE.**

In an action for malicious prosecution, proof that there was no probable cause for the prosecution does not establish malice as an inference of law, though malice may be inferred therefrom as a matter of fact.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 67, 68; Dec. Dig. \S 32.]

3. FRAUD \S 68—**EXECUTING SECOND DEED FRAUDULENTLY.**

The offense of executing a second deed fraudulently, within Rev. St. 1909, \S 4569, consists in not merely making a second deed without reciting therein a former deed which is outstanding and in force, but such omission must be made with intent to defraud some person.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 76; Dec. Dig. \S 68.]

4. MALICIOUS PROSECUTION \S 18—**EXECUTING SECOND DEED FRAUDULENTLY—PROBABLE CAUSE.**

Since under such statute both the grantor and the grantee are guilty of the offense if the omission of the prior deed is made with the knowledge of the grantee, under a design by both to defraud a third person through the sale by the grantee to him, the fact that the grantee was not defrauded does not make the instigation of a prosecution against the guilty grantor without probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 23, 24, 29-38; Dec. Dig. \S 18.]

5. MALICIOUS PROSECUTION \S 24 — **PRIMA FACIE CASE—PROBABLE CAUSE—EFFECT.**

The prima facie case of malicious prosecution made by the failure of the prosecution or the discharge of the accused is rebuttable by proof of probable cause on defendants' part in instigating the prosecution, since the existence of probable cause will justify a prosecution whether or not it fails.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 49-55; Dec. Dig. \S 24.]

6. MALICIOUS PROSECUTION \S 71—**PROBABLE CAUSE—QUESTION OF LAW AND FACT.**

The question whether the facts alleged by defendant as probable cause are true is for the jury, it being for the court to determine whether such facts, if true, constitute probable cause as a matter of law.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 160-167; Dec. Dig. \S 71.]

7. MALICIOUS PROSECUTION \S 21—**ADVICE OF COUNSEL—GOOD FAITH—MALICE.**

Where defendants took the advice of the prosecuting attorney in instituting criminal proceedings against plaintiff, but withheld from the attorney facts which defendants knew would establish plaintiff's innocence, defendants were not, by acting on such advice, legally exonerated

from the imputation of malice in a subsequent action for malicious prosecution, since such advice of counsel was not taken in good faith.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 40-44; Dec. Dig. \S 21.]

8. MALICIOUS PROSECUTION \S 72—**PROBABLE CAUSE—MALICE—INSTRUCTION.**

An instruction, in an action for malicious prosecution, that if the jury found from the evidence that defendants maliciously and without probable cause caused the warrant in evidence to be issued, and maliciously and falsely and without probable cause made an affidavit charging plaintiff with crime in order to procure the issuance of the warrant, and procured the plaintiff's arrest and confinement in jail in consequence, and that plaintiff, on appearing to answer the charge, was discharged, their verdict should be for plaintiff was not erroneous as allowing the jury to determine the law as to what constitutes probable cause, where the question of probable cause in the case embraced such issues of fact, which such instruction properly defines.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 168-173; Dec. Dig. \S 72.]

9. MALICIOUS PROSECUTION \S 69—**COMPENSATORY DAMAGES—VERDICT NOT EXCESSIVE.**

A verdict of \$5,000, in an action for malicious prosecution, was not excessive as compensatory damages for the false arrest, incarceration in jail for half an hour, and malicious prosecution of practicing lawyer in good standing.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. \S 158; Dec. Dig. \S 69.]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Alcide Bowers against H. L. Walker and Joseph G. Ranger. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Haynes, J. N. Walker, and W. K. Amick, all of St. Joseph, for appellants. Geo. W. Eastin, K. B. Randolph, and Gabbert & Mitchell, all of St. Joseph, for respondent.

JOHNSON, J. Action for malicious prosecution. The petition alleges that defendants, "maliciously conspiring together and contriving and intending to injure him in his good name and fame and reputation," procured the arrest, imprisonment, and prosecution of plaintiff without reasonable and probable cause, for an alleged violation of section 4569, Rev. Stat. 1909, which provides:

"Every person who shall make, execute or deliver any deed * * * for the conveyance * * * of any lands, * * * which he had previously, by deed or writing, sold, conveyed, mortgaged or assured * * * to any other person, such first deed being outstanding and in force, and shall not in such second deed * * * recite and describe such former deed * * * with intent to defraud, and every person who shall knowingly take or receive such second deed * * * shall, if the property be of the value of fifty dollars or more, on conviction, be adjudged guilty of a felony," etc.

The defendants answered separately, the answer of defendant Walker being a general denial and that of Ranger a general denial, followed by allegations of probable cause, and that the prosecution was begun in good

faith on the advice of counsel, to whom the facts of the case were fully disclosed. A trial of the issues raised by the pleadings resulted in a verdict for plaintiff, in which his compensatory damages were assessed at \$5,000. After unsuccessfully moving for a new trial and in arrest of judgment, both defendants appealed.

In 1908, plaintiff, who is a practicing lawyer in St. Joseph, became the owner of certain real estate in that city which he purchased subject to a deed of trust for \$900 and to a lien of certain special taxes, and which he further incumbered with a second deed of trust, executed by him and his wife, to secure a loan made to him by Joseph Hoblitzell. On November 10, 1910, plaintiff sold the property thus incumbered to Flora D. Hadley, a married woman, who was represented in the transaction by her husband. The deed from plaintiff to Mrs. Hadley recited that the conveyance was made subject to the liens of the first deed of trust and of the special taxes, but did not mention the second trust deed. Six days after she purchased the property, Mrs. Hadley sold and conveyed it to defendant Ranger, subject to the first two liens and in consideration of the payment of \$200. Her deed to Ranger did not refer to the second deed of trust, and Ranger claims he did not know of the existence of that lien until some time after the sale, when Hoblitzell threatened to foreclose. Afterward the trustee for Hoblitzell sold the property under the deed of trust. Plaintiff attended the sale and bid a sufficient sum to cover the incumbrance, but some one representing defendants overbid him and became the purchaser. We quote from the testimony of Ranger:

"Q. Were you present at the sale by Pinkston, trustee of this property? A. No, sir. Q. Did you furnish the money at that sale to pay the purchase price of the trustee sale? A. Yes, sir."

Plaintiff testified:

"I bid the amount of my obligation, and when I bid the amount of my obligation I quit, and then they bid higher than me, and they got it."

Further, he testified that defendants sued him in a justice court to recover the amount still due on the Hoblitzell loan, and that he defended the case and won on the ground that that cause of action did not inure to defendants, but to Mrs. Hadley.

Before conveying to Mrs. Hadley, plaintiff delivered to her husband an abstract of title, disclosing the fact that a second deed of trust had been executed, acknowledged, and recorded, and it appears from the evidence of plaintiff that in the sale of the property he informed Mr. Hadley of the existence of that lien, and agreed to pay the remainder of the loan which it secured. Plaintiff states that in omitting mention of that incumbrance in the deed to Mrs. Hadley he had no intention to defraud or mislead the grantee, to whose agent he imparted full information

respecting the title, and that he acted on the supposition that it was not necessary to mention a lien which the contract of sale required him to discharge.

The evidence is voluminous, and we shall not go into its details. More than a year elapsed after the purchase of the property by Ranger before he and Walker applied to the prosecuting attorney for the arrest and prosecution of plaintiff. It appears that Walker had a pecuniary interest in the transaction, and that he and Ranger became involved in a series of disputes with plaintiff, which finally culminated in their application to the prosecuting attorney for the arrest and prosecution of plaintiff for a violation of the provisions of the statute. Defendants first consulted an attorney, who advised them that plaintiff had violated the statute, and afterwards they had an interview with one of the assistant prosecuting attorneys, to whom they made a statement of the case, with the request that plaintiff be prosecuted. They exhibited the deeds from plaintiff to Mrs. Hadley and from her to Ranger, but did not inform the assistant that Mrs. Hadley had accepted the deed from plaintiff with full knowledge of the Hoblitzell lien. The assistant would not proceed as requested without further investigation, and, after the interview was closed, he had a conversation with plaintiff, who gave his version of the transaction, from which it appeared that the Hadleys (who, in the meantime, had removed to Florida) had purchased the property with knowledge of the Hoblitzell lien, under an agreement that plaintiff would discharge that lien. Defendants saw the assistant prosecutor three or four times after this, and urged him to proceed, but he refused on the ground that:

"If anybody was guilty, it looked like Mrs. Hadley was guilty for not having mentioned the deed of trust."

Further, it appears from plaintiff's testimony that defendants were in possession of the abstract of title which plaintiff had delivered to Hadley, and which showed the Hoblitzell deed of trust. Finding they could not induce him to act, defendants called upon another assistant of the prosecuting attorney, and stated the case to him, without apprising him of the knowledge the Hadleys had of the Hoblitzell lien at the time they purchased the property. He concluded from their statement of facts, and from an inspection of the documentary evidence they exhibited, that a crime had been committed by plaintiff, and instituted a criminal prosecution against plaintiff upon the affidavit and complaint of defendant Ranger, in which it was charged that plaintiff—

"did not in said second and last deed, so made as aforesaid, recite nor describe said former and first-mentioned deed, nor the substance thereof, with intent to defraud the said Flora D. Hadley."

Plaintiff was arrested and lodged in jail, where he remained half an hour, when he

was released on bond. On the day set for the preliminary hearing the prosecutor dismissed the proceeding for the reason, as he states:

"Because I had made further investigation after it was issued, and came to the conclusion that it should not be prosecuted."

Following the dismissal of the case plaintiff brought this suit for the recovery of compensatory damages. At the close of the evidence each defendant requested the court to give a peremptory instruction, but these requests were refused, and the cause was submitted to the jury.

Among the instructions given at the request of plaintiff were the following:

(1) "That if you believe and find from the evidence that the defendants willfully, maliciously, and without probable cause, acting together, did cause the warrant introduced in evidence to be issued out of the justice court of Daniel N. Nies, who was then and there a justice of the peace of Washington township, Buchanan county, Mo., and in pursuance of such common purpose, if you believe and find from the evidence that the defendants did act with a common purpose, to cause said warrant to be issued, the defendant Joseph G. Ranger made an affidavit before Daniel N. Nies, the aforementioned justice of the peace, and that pursuant to such common purpose between said defendants, the said defendant Joseph G. Ranger did maliciously and falsely and without probable cause charge in such affidavit the plaintiff with having fraudulently omitted to mention a certain deed of trust for \$300 to Edward Pinkston, as trustee, with Joseph Hoblittell as beneficiary named therein, which said deed of trust was of date the 10th day of December, 1908, and which said last-mentioned deed was offered in evidence by the defendants, and which said affidavit further charged that said omission was made with the purpose of defrauding one Flora D. Hadley, mentioned in evidence, and that, further, said defendants, acting together with a common purpose, did willfully, falsely, and maliciously and without probable cause procure and cause thereon the arrest of the plaintiff herein upon said affidavit and complaint and the warrant issuing upon such affidavit and complaint, and did by reason thereof cause plaintiff to be taken by the constable of said Washington township, Buchanan county, Mo., before the aforesaid justice of the peace, Daniel N. Nies, and did by reason thereof and as a consequence thereof cause plaintiff to be arrested and deprived of his liberty and committed to the common jail of Buchanan county, Mo., and therein locked; if you so find from the evidence that he was so deprived of his liberty and locked in said county jail, and that, further, and thereafter, the plaintiff gave bond for his appearance at such time and times as should be required of him by the said justice of the peace, to be and appear before said justice of the peace in answer to the charge so made against him by said affidavit and complaint and warrant, and that the plaintiff did appear at such time as was required of him by said justice of the peace, and on said date the justice of the peace discharged the plaintiff from and on account of said charge so brought against him—then your verdict will be for the plaintiff."

(2) "If the jury believe and find from the evidence that one of the defendants, acting for himself, caused the arrest and prosecution of the plaintiff, then your verdict will be against such defendant alone. If you find, however, that both of the defendants, acting with a common purpose, caused the arrest and prosecution of the plaintiff, then your verdict should be against both defendants, provided you find that

the arrest was malicious and without probable cause as defined in the other instructions."

(3) "By the term 'malice' as used in these instructions is not meant mere spite or ill will, but a wrongful act, intentionally done without just cause or excuse. By the phrase 'probable cause' as used in these instructions is meant belief in the guilt of the accused, based upon circumstances sufficiently strong in themselves to induce such belief in the mind of a reasonable and cautious man."

Among others, the court gave the following instructions at the request of defendants:

(2) "The court instructs the jury that the arrest of the plaintiff, Alcide Bowers, on the charge with the intent to defraud, as set out in plaintiff's petition, must have been instituted by the defendants maliciously and without probable cause, and, unless you find from a preponderance of the evidence that both malice and want of probable cause concurred, your verdict should be for the defendants."

(3) "The court instructs the jury that the issue in this case is not whether plaintiff was guilty of the charge of conveying property with intent to defraud as alleged in the affidavit made by the defendant Joseph G. Ranger, for the arrest of Alcide Bowers, but the issue is, Did the defendant Ranger, at the time he made and filed the affidavit, have probable cause for believing the said Bowers guilty? And if you believe from all the facts and circumstances given in evidence that the said Ranger had probable cause for believing said Alcide Bowers guilty of the offense charged in said affidavit then you will find for the defendants."

(4) "The court instructs the jury that in law what is meant by the words 'with intent to defraud' does not mean to defraud any particular person but with intent to defraud some person."

(5) "You are instructed that the plaintiff cannot recover in this action unless you shall be satisfied from the evidence, not only that there was no probable cause for the prosecution of the plaintiff, but that the defendants in causing his arrest acted with malice; and you are further instructed that, if from the testimony you shall find that there was probable cause, no malice, however distinctly proven, will make the defendants liable."

[1, 2] First we shall consider the argument of defendants that the court erred in not giving a peremptory instruction to the jury to find in their favor. To sustain his burden of proof plaintiff was required to show, not only that the transaction of which he complains was without probable cause, but also that it was maliciously procured by defendants.

"It takes both a lack of probable cause and malice to make out a case. If either be not shown, the case fails. So it is said that, however vile the malice, if there be probable cause, no action can be maintained." *Smith v. Glynn*, 144 S. W. 149; *Callahan v. Kelo*, 170 Mo. App. 338, 156 S. W. 716.

And, further, it is observed in the case first cited that:

"Proof that there was no probable cause for the prosecution does not establish malice as an inference of law, though malice may be inferred therefrom as a matter of fact."

[3, 4] With these rules in mind we turn to the contention of defendants that the evidence conclusively shows probable cause for the prosecution. The nature of the offense denounced in the pertinent statute thus is defined in *Armstrong v. Winfrey*, 61 Mo. 356:

"The statute [now section 4569, R. S. 1909] was obviously intended to prevent fraud, and its penalty is denounced against the making of the deed with a fraudulent intent. The simple making of a second deed, whilst a former one is outstanding and in force, without reciting the same, does not constitute the offense, if there is no intention to defraud, and the deed does not have that effect. There must be a fraudulent intent designed to operate to the injury or detriment of some person."

Such intent to defraud may not be directed against the grantee, but against some third person, to whom the grantor and grantee intend the latter shall sell the property as though unincumbered by the lien of which no mention is made. In such case both the grantor and the grantee would be guilty of an offense against the statute. Therefore defendants are right in their position that if the deed to Mrs. Hadley was not made in good faith, but for a fraudulent purpose, shared by her, of enabling her to sell the property as though unincumbered by the second deed of trust, the fact that she, as grantee, was not the victim, but a guilty participant in the fraud, would not preclude an innocent purchaser from her from invoking the statute against her guilty grantor.

It is manifest from all the evidence that there was no probable cause for the prosecution of plaintiff on the charge that he intended to, or did, defraud Mrs. Hadley, his grantee. The fact being clearly established that she had full knowledge of the Hoblitzell deed of trust at the time the property was conveyed to her, and that she accepted plaintiff's promise to pay and discharge that lien, she was not, and could not have been injured by the omission of any mention of that lien, and therefore was not, and could not have been, the object of any intent to defraud on the part of plaintiff. The prosecution was on a charge which could not be successfully maintained, and the prosecuting attorney was right in dismissing the case.

[5] But it does not follow that such failure of the prosecution, of itself, would support plaintiff's action for malicious prosecution.

"The discharge of the accused makes only a prima facie case for him in an action for malicious prosecution, and defendant still has the right to claim that he has probable cause." *Smith v. Glynn*, supra; *Eckerle v. Higgins*, 159 Mo. App. 177, 140 S. W. 616; *Smith v. Burrus*, 106 Mo. loc. cit. 99, 16 S. W. 881, 18 L. R. A. 59, 27 Am. St. Rep. 329.

Where probable cause for a criminal prosecution actually exists, it is immaterial, so far as the conduct of the accuser is concerned, that some error in the proceeding caused the prosecution to fail. The accuser may be mulcted in damages as for a malicious prosecution only where it appears that he had no reasonable or probable cause to believe that the crime had been committed, and was actuated solely by malice against the accused.

[6] There are some facts and circumstances in evidence from which a jury might have inferred that plaintiff, in making the deed,

was prompted by a fraudulent intent, which was known to and participated in by his grantee. There is evidence tending to show that the Hadleys were in pecuniary straits at the time they bought the property, and that they sold it to Ranger for less than they paid for it to procure money for living expenses. If, as counsel for defendants argue, "the only evidence of conspiracy in this case is that the Hadleys and Bowers were acting together for the purpose of defrauding defendants of their property," it goes without saying that defendants had probable cause for the prosecution, and, having such cause, should not be punished in damages for the mere reason that the prosecution was based upon an erroneous charge. But the difficulty of defendants' position lies in the fact that their evidence is contradicted in its essential features by the evidence of plaintiff, which tends not only to show that the sale to Mrs. Hadley was in good faith, but that defendants purchased from her with full knowledge of all the facts relating to the title, including the fact that plaintiff had agreed to discharge the Hoblitzell lien, and then, in malice, born of the contentions which subsequently arose between them and plaintiff, attempted to turn an innocent omission from the recitals of the deed into a trap that would lay their antagonist by the heels.

It appears from the testimony of plaintiff that immediately after Mrs. Hadley sold the property to Ranger, the latter brought suit against plaintiff in a justice court to recover rent for the property for half a month, and that at the trial of the cause, about 10 days later, Hadley, in the presence of plaintiff, had a conversation with both defendants, in which he charged them with having come to his home at night and with having intimidated his wife into selling the property to them for \$275 less than its value, and that he demanded that they accept a tender of the purchase price and reconvey the property to her. This demand was refused, and in the course of the conversation the statement was made by Ranger concerning the Hoblitzell mortgage:

"Mrs. Hadley and I understand that proposition, and Mrs. Bowers. * * * We understood that at the time; that has been in part paid, but if Mr. Bowers don't pay it, I will pay the rest."

The evidence of plaintiff, which we find no reason for pronouncing to be without substance, clearly shows that he was innocent of any attempt to defraud his grantee or any person who might purchase from her, and that defendants, in fact, were not defrauded or misled, but that the facts establishing his innocence were known to them when they procured his arrest. Plaintiff has sustained his burden of proof and the opposing evidence of defendants on the issue of probable cause, and malice can be accorded no greater effect than that of presenting issues of fact for the jury to solve.

"The question of probable cause is composed of law and fact; it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause." *Hill v. Palm*, 38 Mo. loc. cit. 22.

[7] Nor may defendants be excused from liability on the theory that in taking the advice of counsel and in stating the facts of the case to the prosecuting attorney, they acted in good faith and are exonerated in law from any imputation of malice. The rule as to the legal effect of the accuser seeking the advice of counsel is stated as follows in *Sharpe v. Johnston*, 78 Mo. loc. cit. 674:

"The advice of counsel cannot accurately be said to amount to probable cause, in the face of the judgment of the magistrate discharging the prisoner. The discharge of the plaintiff by the committing magistrate was prima facie evidence of a want of probable cause, although counsel may have advised that plaintiff was liable to a criminal charge; and, although defendant may have communicated to counsel learned in the law all the facts and circumstances bearing upon the guilt or innocence of the plaintiff, which they knew, or by reasonable diligence could have ascertained, yet if, notwithstanding the advice of counsel, they believed that the prosecution must fail and they were actuated, in commencing said prosecution, not simply by angry passions or hostile feelings, but by a desire to injure and wrong the plaintiff, then most certainly they could not be said to have consulted counsel in good faith, and the jury would have been warranted in finding that the prosecution was malicious."

See, also, *Smith v. Glynn*, supra.

Under the hypothesis of plaintiff's evidence, defendants, having knowledge of facts which clearly established the innocence of plaintiff, did not act in good faith on the advice of counsel, but in malice sought to do plaintiff irreparable injury by concealing material facts and in stating to the prosecuting attorneys only such facts as would tend to support their accusation against plaintiff. The jury were entitled to weigh the evidence of plaintiff; and, if they found it to be true—as they did—the defense of taking advice of counsel and of making disclosures of all material facts within their knowledge to the public prosecutor, being false, could not avail defendants.

There is nothing in the recent decision of the Supreme Court in *Wilkerson v. McGhee*, 178 S. W. 471, out of harmony with what we have said. The well-recognized rule is there reaffirmed that the finding of an indictment by the grand jury against a person charged with crime is prima facie evidence of probable cause, in an action for malicious prosecution—

"but it is not conclusive, and may be rebutted by proof that the indictment was obtained by false or fraudulent or other improper means."

The prosecution in the present case was not under an indictment, but followed a willful suppression and concealment of material facts. This case, as disclosed by the evidence of plaintiff, affords a striking instance of a half truth constituting a falsehood. The

demurrer to the evidence was properly overruled.

We have examined the instructions carefully, and find no error in them prejudicial to defendants. The criticism of plaintiff's first instruction that it assumed plaintiff was discharged by the justice of the peace, when there was no evidence of his being thus discharged, is not well founded. It is conceded that the prosecuting attorney dismissed the prosecution, and the justice must have discharged plaintiff from that action.

[8] Nor is there any merit in the contention that the instructions allowed the jury to determine the law as to what does or does not constitute probable cause. The question of probable cause in this case embraced issues of fact which were properly defined in plaintiff's first instruction. The instructions of defendant which we have quoted took the same view of these issues.

[9] Other criticisms of the instructions have been sufficiently answered in our discussion of the demurrer to the evidence. The point that the verdict is excessive must also be ruled against defendants. Considering the elements that enter into the damages in such cases, we cannot say that the assessment of \$5,000 for the false arrest, incarceration in jail, and malicious prosecution of a practicing lawyer in good standing is unreasonable.

The judgment is affirmed. All concur.

DANCINGER BROS. v. CHICAGO, R. I. & P. RY. CO. (No. 11391.)

(Kansas City Court of Appeals, Missouri.
Dec. 6, 1915. Rehearing Denied
Jan. 17, 1916.)

1. CARRIERS ⇐140—GOODS WAITING DELIVERY—LIABILITY AS WAREHOUSEMAN.

A railroad, whose relation to goods at the time of their destruction by fire is that of warehouseman, is only liable for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609, 609½, 611-616; Dec. Dig. ⇐140.]

2. CARRIERS ⇐114—GOODS WAITING DELIVERY—LIABILITY.

A railroad, whose relation to goods at the time of their destruction by fire is that of a carrier, is liable as an insurer to safely carry and deliver.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. ⇐114.]

3. CARRIERS ⇐114—WAREHOUSEMAN—DELAY IN DELIVERY—NOTICE TO CONSIGNEE—CONTRACT FOR RETURN.

It is presumed that the consignee will know of the time of the arrival of goods in the ordinary course, and it is not necessary, unless made so by contract, in order to change the carrier's relation to the goods to warehouseman to notify the consignee, unless there has been an unusual delay in shipment; but where there was an unusual delay and no notice was given to the consignee, the railroad was liable to the consignor as carrier, and the provision in the bill of lading for a return of the shipment in ten days if not accepted, required notice to the con-

signee and in absence of notice the railroad was liable for their loss by fire.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 114.]

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

Action by Dancinger Bros. against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul E. Walker, of Topeka, and Sebree, Conrad & Wendorff, of Kansas City, for appellant. Harry L. Jacobs, of Kansas City, for respondent.

ELLISON, P. J. This is an action on a contract of shipment of ten cases of liquor over defendant's road from Kansas City, Mo., to Coalgate, Okl. The judgment in the trial court was for the plaintiff for the value of the goods, \$80, and interest. The record discloses that plaintiff shipped the goods to C. L. Johnson, consignee, under a written contract or bill of lading containing a provision to "notify C. L. Johnson" of the arrival of the goods; and the further provision to "Return shipment in ten days if not accepted." There was an unusual delay in the arrival of the goods at Coalgate, and when they did arrive defendant stored them without notifying Johnson that they had arrived. After keeping them nine days, one day before defendant was to return them to plaintiff if Johnson did not accept them, they were destroyed by fire, and this action followed.

[1, 2] The question in the case is whether defendant, at the time of the fire, bore the relation to the goods of warehouseman, or carrier. If the former, it is only liable for negligence, and if the latter, it is liable as an insurer to safely carry and deliver. No negligence with reference to the fire appeared in the case, and hence, if defendant was a warehouseman, the judgment for plaintiff should be reversed. If it was a carrier, the judgment should be affirmed.

[3] In some jurisdictions it is the duty of the carrier, in order to put an end to its duty as such, to notify the consignee of the arrival of the goods; but in this state it is presumed the consignee will know of the time of arrival, in the ordinary course (*Ran-kin v. Railway*, 55 Mo. 167, 171; *Bergner v. Railway*, 13 Mo. App. 499, 501) and therefore, in such case, it is not necessary (unless made so by contract) for the carrier, in order to change its relation to the goods from carrier to warehouseman, to notify the consignee, unless there has been an unusual delay in the shipment. If there has been

such delay in arrival, then the carrier must notify the consignee when the goods do arrive, and until such notice is given, the relation of carrier continues. *Frank v. Railway Co.*, 57 Mo. App. 181; *Mill Co. v. Railway*, 127 Mo. App. 80, 92, 104 S. W. 924. As we have already said, there was an unusual delay in this case, and as no notice was given to the consignee, defendant is liable to plaintiff as a carrier, unless the above provision for the return of the goods "in ten days if not accepted," made defendant a warehouseman after the arrival of the goods.

It will be noticed that the goods are to be returned if not accepted. In reason, this means that the consignee must have an opportunity to accept, and since he could not accept them without first knowing they had arrived, it follows that defendant should have notified him of the arrival so that he could make his election. There being no notice, defendant's relation to the goods as carrier and insurer had not ceased at the time of the fire. *Frank v. Railway Co.*, 57 Mo. App. 181.

The other provision of the contract above noted, that defendant should notify the consignee, emphasizes the construction we have put upon the contract. For, while such provision is but declaring what the law demands in delayed shipments like this, yet it makes plain that the parties intended that defendant was to give the consignee an opportunity to accept or reject the goods before returning them.

The plain meaning of the two provisions is that defendant was to notify the consignee; then if he did not take the goods, defendant would then become a warehouseman and be relieved of the necessity of treating them as in ordinary cases where the consignee cannot be found, for it has directions to return them to the shipper. We may remark, parenthetically, that the contract of shipment would doubtless have been complied with by defendant, if it had notified the consignee and he had refused the goods, and it had then immediately returned them to plaintiff, without waiting for the expiration of the ten days.

So we conclude that it would not be giving due regard to both of these provisions of the contract to say that the one concerning the return of the goods controls, without reference to the other as to notice of arrival. It is a fundamental rule that all provisions of a contract should be allowed effective force and construed in harmony when it can be done.

It is believed that compliance with that rule gives this case to the plaintiff, and hence the judgment should be affirmed. All concur.

EINSTEIN v. STROTHER. (No. 11834.)
(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

**1. EXECUTORS AND ADMINISTRATORS — 315 —
SETTLEMENT—CONCLUSIVENESS.**

A final settlement and order of distribution in the probate court has the force of a judgment as to all matters necessarily involved in the settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. —315.]

**2. JUDGMENT — 475 — COLLATERAL ATTACK—
PROBATE PROCEEDINGS.**

The judgments of probate courts are as impregnable to collateral attack as the judgments of other courts of record.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 910; Dec. Dig. —475.]

**3. JUDGMENT — 511 — COLLATERAL ATTACK—
GROUNDS—EQUITY.**

A judgment of a court of record may be impeached collaterally, in equity, after the lapse of the term at which it was rendered, when by mistake or fraud it gives an unfair advantage to the prevailing party, as courts of equity will relieve against mistakes in judgments.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 951, 954; Dec. Dig. —511.]

**4. JUDGMENT — 443 — EQUITABLE RELIEF —
FRAUD.**

The fraud for which equity will relieve from a judgment must be in the very procurement of the judgment and fraud relating only to the cause of action, and which should be interposed as a defense thereto, is not a good ground for setting aside the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 785, 836, 838; Dec. Dig. —443.]

**5. JUDGMENT — 435 — EQUITABLE RELIEF —
MISTAKE.**

The mistakes for which equity will afford relief from a judgment must be mutual and unmixed with the negligence of the injured party in failing to avail himself of the legal remedies open to him.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 785, 821, 822; Dec. Dig. —435.]

**6. PLEADING — 214 — DEMURRER — ADMIS-
SIONS.**

The truth of facts alleged in a petition are admitted by a demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. —214.]

**7. EXECUTORS AND ADMINISTRATORS — 516 —
FINAL SETTLEMENT—APPROVAL—EQUITABLE
RELIEF—JUDGMENT BY AGREEMENT OF PAR-
TIES.**

Where plaintiff, the devisee under a will, with knowledge that a note and its proceeds collected by the administrator had been adjudged the property of another, and that the final settlement included a commission on such collection negligently induced the court to approve the administrator's final settlement containing an allowance of commissions on such collection, the judgment was rendered by agreement of parties, and there was no mistake or fraud entitling plaintiff to equitable relief.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2207, 2220-2232; Dec. Dig. —516.]

**8. EXECUTORS AND ADMINISTRATORS — 516 —
FINAL SETTLEMENT—EQUITABLE RELIEF —
"MISTAKE OF LAW."**

In such case, plaintiff's mistake in assuming that defendant administrator was entitled to charge a commission for taking possession of

a note as the property of the estate and collecting it, though it belonged to and was paid to another, was a "mistake of law" for the correction of which no action would lie, either in law or in equity, after the term in which the settlement of the administrator's final settlement was approved.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2207, 2220-2232; Dec. Dig. —516.]

For other definitions, see *Words and Phrases*, First and Second Series, *Mistake of Law*.]

**9. EXECUTORS AND ADMINISTRATORS — 516 —
FINAL SETTLEMENT—PROBATE JUDGMENT—
RELIEF IN EQUITY—REMEDY AT LAW.**

In such case, where the petition alleged that plaintiff had no adequate remedy at law, that he was ignorant of the true facts at the time of adjudication, and there was a failure of any showing that he did not have full knowledge of the facts relating to the allowance of the commission in question before the close of the term, it did not appear that plaintiff availed himself of an adequate remedy at law by direct proceeding in the settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2207, 2220-2232; Dec. Dig. —516.]

**10. EXECUTORS AND ADMINISTRATORS — 516 —
FINAL SETTLEMENT—COLLATERAL ATTACK
—FRAUD.**

Plaintiff's mistake of law in thinking that defendant administrator was entitled to commissions on a note collected for the estate, but subsequently paid over to another, even though the administrator stood in a fiduciary relation toward plaintiff, a distributee, and was bound to inform him of material facts, did not require the administrator to assume that the plaintiff would fall into an error of law, so that the fraud alleged in allowing the administrator a commission on such account was not fraud in the procurement of the final settlement so as to afford ground for setting it aside.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2207, 2220-2232; Dec. Dig. —516.]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

"Not to be officially published."

Suit by Herman Einstein against Samuel B. Strother, administrator of the estate of Max Einstein, deceased, to set aside the judgment of the probate court, approving the defendant's final settlement as administrator and closing the estate. Judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Rosenberger and Fred R. Wolfers, both of Kansas City, for appellant. Cowherd, Ingraham, Durham & Morse and Strother & Campbell, all of Kansas City, for respondent.

JOHNSON, J. This is a suit in equity, begun in the circuit court of Jackson county July 28, 1913, to set aside a judgment rendered by the probate court of that county at the February, 1913, term thereof, approving the final settlement of defendant as administrator of the estate of Max Einstein, deceased, and closing the administration of the estate. The court sustained a demurrer to the petition on the ground that it failed to state a cause of action, and on the refusal

of plaintiff to plead further, rendered judgment for defendant. Plaintiff appealed.

The facts alleged in the first count of the petition may be stated as follows: Max Einstein died testate in Kansas City, leaving an estate, consisting entirely of personal property, of the value of \$133,000, which his will directed should be divided equally between plaintiff and his brother Louis Joseph Einstein. The will was duly probated, letters of administration were issued to defendant, who was the public administrator, the estate was duly administered and at the February term, 1913, of the probate court, defendant filed his final settlement, which the court approved, and he was discharged. In the final settlement defendant was allowed commissions for his services in the total sum of \$6,911.02, which included an item of \$206, as a commission of 5 per cent. on a certain note called the Gardner note, which, with accrued interest, amounted to \$4,120. This sum was collected by defendant, but the proceeds were claimed by one Kirchbaum as his property. The heirs conceded the claim, and in a proceeding instituted by Kirchbaum in the probate court a judgment was rendered, awarding the proceeds to him and ordering the administrator to pay them over to him. Defendant complied with the order; and, since the fact was conceded by the heirs and established by the judgment that the Gardner note did not belong to the estate, and therefore that its proceeds were no part of the assets of the estate which passed through the hands of the administrator, plaintiff asserts that defendant had no legal right to charge the estate with a commission for the collection of that note. On the hearing of the final settlement, plaintiff informed the probate court that he approved the settlement, and failed to call the court's attention to the erroneous item. The excuse offered for this conduct is that "by mistake and oversight" plaintiff overlooked the erroneous charge, and announced his approval of the settlement in ignorance of its existence. Plaintiff alleges that the court, relying upon his approval and—

"upon the supposed calculations made by plaintiff of said commissions, did, without further inquiry, and as the result of said mistake, enter its order, approving said final settlement and discharging the defendant as administrator, and thereupon, and before discovery of his mistake, the plaintiff gave to defendant his receipt in full as distributee of said estate."

No appeal was taken by plaintiff from this judgment, and the term of court at which it was rendered expired before the present suit was begun. Plaintiff does not allege that knowledge of the mistake came to him after it became too late, because of the lapse of the term, to apply to the probate court for the correction of the allowance, or to appeal from the judgment of that court. The relief prayed for is that the judgment be set aside, that the final settlement be corrected by striking therefrom the charge of \$206, and that

defendant be required to account for and to distribute that sum to the two heirs, etc. The second count is the same as the first, except that it contains the additional averment that at the time the judgment was rendered by the probate court—

"defendant knew that plaintiff had made said mistake, and knew that plaintiff had, by inadvertence, overlooked the fact that said Gardner note and the proceeds thereof were not, and never had been, part of the said estate, and knew that it had been so adjudicated by said probate court, and that therefore the defendant was not, and could not have been, entitled to any commission on account of the same."

[1, 2] This is a collateral attack on the order of the probate court approving the final settlement. The rule is well settled that a final settlement and order of distribution in the probate court has the force of a judgment as to all matters necessarily involved in the settlement, and that such judgments are as impregnable to collateral attack as judgments of other courts of record. *Crump v. Hart*, 189 Mo. App. 572, 176 S. W. 1089; *Camden v. Plain*, 91 Mo. loc. cit. 129, 4 S. W. 86; *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129; *Nelson v. Barnett*, 123 Mo. 564, 27 S. W. 520.

[3] A judgment of a court of record may be impeached collaterally, in equity, after the lapse of the term at which it was rendered, when by mistake or fraud it gives an unfair advantage to the prevailing party. Courts of equity do relieve against mistakes in judgments (*Wilson v. Boughton*, 50 Mo. 17), and—"nothing is better settled than that where, by mistake or fraud, a party has gained an unfair advantage in proceedings in courts of law, which must operate to make that court an instrument of injustice, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus improperly gained." *Bresnehan v. Price*, 57 Mo. loc. cit. 424.

[4] But fraud for which equity will interfere must be in the very procurement of the judgment, and fraud which relates only to the cause of action and should be interposed as a defense thereto, is not recognized as good ground for setting aside the judgment. The reason of the rule is that there should be an end to litigation at some time (*Wolf v. Brooks* [Sup.] 177 S. W. 337), and where the defendant has his day in court, is given a fair opportunity to make a defense, he will not be allowed to resort to equity for relief from a judgment on a cause against which he had a good defense, but did not raise it at the proper time.

[5] As to mistakes for which equity will afford relief, they must be mutual and unmixed with negligence of the injured party in failing to avail himself of the legal remedies open to him. *Payne v. O'Shea*, 84 Mo. loc. cit. 134; *State ex rel. v. Engelmann*, 86 Mo. loc. cit. 562; *Smith v. Taylor*, 78 Mo. App. 633.

[6, 7] The facts alleged in the petition, the truth of which is admitted by the demurrer, fail to disclose a cause of action for either

mistake as claimed in the first count, or fraud as alleged in the second, and do show that the allowance of a commission on the Gardner note, if improper, was induced by the negligence of plaintiff who, with knowledge that the note and its proceeds had been adjudged the property of another and not of the estate, and that the final settlement included a commission on the proceeds, approved the settlement and thereby led the court into making the allowance. The judgment, in short, was rendered by agreement of parties, and the case before us is not similar in essential features to those of which *Wilson v. Boughton*, 50 Mo. loc. cit. 19, is an example, where equity has given relief from mistakes in the calculation of the amount of the demand for which judgment was rendered by default.

[8] The court was entitled to rely on the approval of the settlement by plaintiff as an assurance that it was accurate and just and contained no illegal or unfair items charged against the estate. Reduced to the last analysis, the allegations of the petition show quite clearly that the only mistake plaintiff labored under was that of assuming that defendant was entitled to charge a commission for taking possession of (as property of the estate), and collecting, a note which belonged to a stranger. But this was a mistake of law for the correction of which no action would lie, either at law or in equity, after the term at which the judgment was rendered was ended.

[9] And, further, it may be observed that the petition fails to show that plaintiff availed himself of adequate remedies at law. Aside from the general allegation that he has no adequate remedy at law, which means, of course, that he had none when he filed his petition in this case, there is nothing to show that he did not have full knowledge of the facts relating to the allowance in question before the close of the term, and therefore had an adequate remedy for the mistake by direct proceeding in that case. A constitutive fact in a cause of this character is that the plaintiff continued in the error until by lapse of the term the opportunity to invoke legal remedies ceased. The allegation that plaintiff was ignorant of the true facts at the time of the adjudication is not equivalent to an allegation that he remained, without fault of his own, in such ignorance until the close of the term.

It follows that, even upon the hypothesis that the petition alleges a mistake of fact for which equity should give relief, it fails to state a cause of action, for the reason just stated.

[10] But we are convinced that no actionable mistake is disclosed, and that the only mistake alleged is a mistake of law, directly referable to negligence of plaintiff, who, with all the facts before him, erroneously assumed

that defendant was entitled to a commission on the Gardner note. Such a mistake, as we have said, will not support a collateral action for equitable relief, nor serve as an ingredient of the cause for fraud. Grant that, as administrator, defendant stood in a fiduciary relation towards the distributees, and was charged with the duty of informing them of material facts. He was not bound to answer for their negligence, nor to assume that, with all the material facts before them, they would fall into an error of law. At any rate, the fraud alleged cannot be construed as fraud in the procurement of the judgment within the judicial meaning of that term.

The judgment is affirmed. All concur.

MCKAY v. MCKAY. (No. 11746.)

(Kansas City Court of Appeals, Missouri.
Nov. 22, 1915. Rehearing Denied
Jan. 17, 1916.)

1. APPEAL AND ERROR ⇐1064 — HARMLESS ERROR—INSTRUCTIONS.

In a wife's action against her husband's foster father for alienation of her husband's affections, the petition alleged that defendant, with wicked intent, etc., did entice, influence, and induce plaintiff's husband to leave and abandon her. The evidence showed that, while plaintiff and her husband were living with defendant, defendant heaped the grossest indignities and insults upon plaintiff in the presence of her husband, who exhibited no resentment or purpose to protect her, but passively acquiesced, and finally consented to their separation and plaintiff's enforced return to her father. The court charged that the law gave plaintiff a right of action against any person who willfully and maliciously enticed, persuaded, induced, or influenced her husband to separate or remain apart from her, and that, if defendant willfully and maliciously so conducted himself "as alleged in plaintiff's petition," with the purpose and intent to cause the separation, and thereby accomplished such purpose and intent, the verdict should be for plaintiff. *Held*, that the use of the quoted words was not prejudicial, since, while it is reversible error to refer the jury to the petition for the facts of the case where the evidence, though sufficient to warrant a recovery, does not sustain all of the allegations of the petition, this rule does not obtain where the allegations are no broader than the proofs, and the allegations of the petition in question were general, and not specific, and contained no fact not adequately supported by the proof, and, moreover, the jury were not relegated to the petition, but were told what facts, if found, would warrant a verdict for plaintiff, and the addition of the quoted words neither added to nor subtracted from the stated hypothesis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ⇐1064.]

2. TRIAL ⇐251—INSTRUCTIONS—CONFORMITY TO ISSUES.

In a wife's action against her husband's foster father for alienation of her husband's affections, there was evidence that plaintiff was compelled to leave the home provided by her husband because defendant, who dominated the household, created an intolerable situation for her by his continual hostile and bitter attitude and violent and truculent conduct towards her, and by his open, incessant, and successful efforts

to turn her husband against her. The court charged that in leaving her husband under such compulsory circumstances plaintiff was not guilty of legal desertion, but that such facts constituted an abandonment of her by her husband. The court also modified an instruction requested by defendant, so as to tell the jury that the husband was the head of the family, and the wife had no right to leave a suitable home provided for her without good and sufficient reasons, and that, if she left his bed and board voluntarily and of her own accord, "without reasonable excuse therefor," plaintiff could not recover, the modification consisting of the interpolation of the quoted words. *Held*, that these instructions did not enlarge the pleaded cause of action, nor inject extrinsic and prejudicial issues into the case, as the issue of whether plaintiff left her husband without just cause or excuse, or because she was driven from her home by defendant after he had gained complete mastery over her husband, related to an important and indispensable ingredient of the cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 537-595; Dec. Dig. ¶251.]

3. TRIAL ¶267—INSTRUCTIONS—MODIFICATION.

There was no substantial difference between the instruction requested by defendant and the modified instruction given by the court, as the interpolated clause had the same meaning as the clause "without good and sufficient reasons therefor" contained in the instruction as requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. ¶267.]

4. HUSBAND AND WIFE ¶3 — PERSONAL RIGHTS AND DUTIES—SELECTION OF DOMICILE.

While it is the rule in this state that the wife is bound to follow the fortunes of her husband and live in the home he provides for her, this rule is not intended to reduce her to helplessness if in disregard of his corresponding duty to provide her a home suitable to his means and station in life, he keeps her in a place where he has withdrawn from her all care and protection and allows her to become the victim of gross indignities.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 5-8; Dec. Dig. ¶3.]

5. TRIAL ¶260—INSTRUCTIONS COVERED BY THOSE GIVEN.

The refusal of an instruction which, in substance, was covered by one given, and was merely repetitive, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

6. WITNESSES ¶58—COMPETENCY—HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.

Rev. St. 1909, § 6354, provides that no person shall be disqualified as a witness in any civil suit or proceeding by reason of his interest in the event as a party or otherwise. Section 6359 provides that no married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted by or against her husband in the cases therein specified, and that no married man shall be disqualified in any such civil suit or proceeding prosecuted by or against his wife, when such suit or proceeding is based upon or connected with any matter conducted by him as the agent of his wife. *Held*, that neither of these statutes abrogates the common-law disqualification of husband or wife to testify for or against the other in a suit for alienation of affections, and in such a suit by the wife the husband was incompetent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 166; Dec. Dig. ¶58.]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by Veda McKay against Frank P. McKay. Judgment for plaintiff, and defendant appeals. Affirmed.

Scott J. Miller, of Chillicothe, for appellant. Calfee & Painter and J. M. Wattenbarger, all of Milan, and E. B. Fields, of Browning, for respondent.

JOHNSON, J. Plaintiff sued for the recovery of both actual and exemplary damages for the alienation of the affections of her husband by defendant, his foster father. The jury found for plaintiff, assessed her actual damages at \$3,000, and exemplary damages in the sum of \$1,500, but on the hearing of the motion for a new trial plaintiff (moved thereto by expressions from the court) entered a remittitur of \$2,000, whereupon the motion was overruled, judgment was rendered for plaintiff for \$2,500, and defendant appealed.

Plaintiff, at the age of 15, and Homer McKay, at the age of 20, were married in Sullivan county in January, 1912, and lived together until November, 1914, when they separated. Plaintiff, with their two children, returned to her father's house, and Homer continued to reside with defendant, with whom he and plaintiff had been living. The evidence of plaintiff tends to show that defendant, actuated by virulent hatred, heaped the grossest indignities and insults upon her in the presence of her husband, who not only exhibited no resentment or purpose to protect her, but passively acquiesced in such treatment, finally consented to their separation and her enforced return to her father, and chose to remain with defendant. Further it shows, and this fact virtually is conceded, that after the separation, and with the aid of insincere protestations that he was securing means to establish a new home for himself and plaintiff and their children, Homer, prompted by defendant, induced her to join in the execution of a deed to defendant conveying 40 acres of land Homer had inherited from his foster mother, on the false representation that defendant had bought the land at a fair valuation. Defendant gave Homer a check in pretended payment of the purchase price, but the check was not presented to the bank, and afterward was returned to defendant.

The petition alleges:

"That the defendant, well knowing that plaintiff and Homer McKay were husband and wife, and that they were living happily together, enjoying the aid, support, companionship, society, and affection of each other, wrongfully, wickedly, and maliciously acted with the wrongful, wicked, and malicious intent to cause plaintiff's said husband to cease to love her, and to leave and abandon her, and to cease living with plaintiff as her husband, and to deprive plaintiff of the love, aid, support, companionship, society, protection, and affection of her said husband; that for a long period of time, to wit,

for several months, defendant pursued this wicked, wrongful, and malicious course toward plaintiff and her said husband, until finally, on or about the — day of November, 1914, the defendant, pursuant to his said wicked, wrongful, and malicious intent, did wrongfully, wickedly, and maliciously entice, influence, and induce plaintiff's said husband to leave and abandon her, and her said husband, being influenced by and acting under said wrongful, wicked, and malicious enticement, influence, and inducement of the defendant, did leave and abandon her, and, being influenced by and acting under said wrongful, wicked, and malicious enticement, influence, and inducement, has ever since remained away from and separate and apart from her. And ever since said abandonment the defendant has wrongfully, wickedly, and maliciously detained and harbored plaintiff's said husband, and has kept him separate and apart from her, and has by his said wrongful, wicked, and malicious acts and conduct deprived plaintiff, and still deprives her, of the aid, support, companionship, society, protection, and affection of her said husband."

[1] In the first instruction given at the request of plaintiff the jury were told:

"The law gives her a right of action against any person who willfully and maliciously entices, persuades, induces, or influences her husband to separate or remain apart from her. Therefore, if you shall believe from the evidence that the defendant, Frank P. McKay, willfully and maliciously so conducted himself, as alleged in plaintiff's petition, with the purpose and intent to cause the separation of the plaintiff's husband from her, and that he did thereby accomplish such purpose and intent, then your verdict shall be in favor of the plaintiff."

This instruction is criticized on the ground that it is reversible error for an instruction which assumes to cover the whole case and to direct a verdict to refer to the petition for the essential facts upon which the right of recovery is predicated.

Where the evidence, in its phase most favorable to the pleaded cause, is sufficient to warrant a recovery, but falls short of sustaining all of the allegations of the petition, it is reversible error to refer the jury to the petition for the facts of the case, since the effect of such practice would be to abolish evidentiary limits and restrictions and to allow the plaintiff to recover upon alleged, but unproved, facts. "It was the duty of the court to tell the jury what are the essential facts to be found under the pleadings." *Procter v. Loomis*, 35 Mo. App. loc. cit. 488; *McGinnis v. Railroad*, 21 Mo. App. 399; *Remmler v. Shenuit*, 15 Mo. App. 192; *Edelmann v. St. L. Trans. Co.*, 3 Mo. App. 503; *Corrister v. Railroad*, 25 Mo. App. 619; *Webb v. Carter*, 121 Mo. App. 147, 98 S. W. 776. But this rule does not obtain in instances where the allegations are no broader than the proofs (*Remmler v. Shenuit*, supra), for the obvious reason that in such case the reference to the petition cannot be said to have enlarged the cause defined by the evidence. Unless reference to the petition has the effect of broadening the evidentiary issues, it should not be classed as prejudicial, and therefore reversible error, though it is a practice likely to mislead the jury, and for that reason should be avoided.

The allegations of the petition in hand are general, not specific, and contain no fact not adequately supported by proof. There is no room for the contention that there is any discrepancy between allegation and proof. The field of the one is as broad as the other and no broader, and an instruction which referred to the petition for the facts necessarily would mean the same as one which referred only to the evidence. Moreover, the instruction definitely states the ultimate facts which would entitle plaintiff to recover in practically the same form of their averment in the petition. It may be accurately said that the jury were not relegated to the petition, but were told what facts, if found, would warrant a verdict for plaintiff. The addition of the words "as charged in the petition" neither added to nor subtracted from the stated hypothesis, and therefore was not prejudicial. *State v. Scott*, 109 Mo. loc. cit. 231, 19 S. W. 89; *Hartpence v. Rogers*, 143 Mo. loc. cit. 633, 45 S. W. 650; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366.

[2, 3] Complaint is made of prejudicial error in the seventh instruction given at the request of plaintiff and in the modification by the court of defendant's eighth instruction. On the hypothesis, which we find abundantly supported by evidence, that plaintiff was compelled to leave the home provided by her husband because defendant, who dominated that household, created an intolerable situation for her by his continued hostile and bitter attitude and violent and truculent conduct towards her, and by his open, incessant, and successful efforts to turn her husband against her, the instruction told the jury that, in leaving her husband under such compulsory circumstances, plaintiff was not guilty of legal desertion, but, on the other hand, that such facts would constitute an abandonment of her by her husband. The eighth instruction of defendant, which the court modified, in dealing with the same subject, told the jury that the husband is the head of the family, and that the wife has no right to leave a suitable home he provides for her, without good and sufficient reasons therefor, and "if she [plaintiff] left his bed and board voluntarily and of her own accord *without reasonable excuse therefor*, the plaintiff cannot recover," etc. The modification consisted of the interpolation by the court of the words we have italicized.

We do not share the view of counsel for defendant that these instructions, as well as the instruction given for plaintiff on the measure of damages, injected extrinsic and prejudicial issues into the case by "making defendant responsible for the acts of Homer McKay, who was the husband of plaintiff," and by enlarging the pleaded cause of action for alienation of affections into an omnibus action which included not only a right to recover for assault and slander committed by defendant, but also to recover damages for her husband's abandonment of her. The is-

sue of whether plaintiff left her husband without just cause or excuse, or because she was driven from home by her father-in-law, after he had gained complete mastery over the mind of her husband, was the principal issue of fact contested at the trial, and relates to the most important and indispensable ingredient of a cause for alienation of affections. Whether the wrongful intermeddler employs seductive arts and wiles, or violence and intimidation, or both, the final issue in such cases is whether or not he intentionally thrust himself between husband and wife and pursued a course of conduct which eventuated in the destruction of their marital unity and the estrangement of one spouse from the other.

The proofs of plaintiff tend to show that defendant in his practices ran the gamut of ingenious and malevolent resourcefulness. He courted and cajoled his son, and at times resorted to threats and intimidations to cause him to put away his wife, and by slander and abuse of her made her position one of humiliation and degradation in the sight of her husband, who, instead of protesting and defending her wifely honor and dignity, seems to have fallen into the attitude of regarding and treating her as one who deserved the reproaches and abuses she received.

Certainly proof of the nature, extent, and ultimate result of the influence defendant acquired over the mind of his son and exerted to the disruption of the marital relationship was germane to the issues tendered by the petition, and the court did not err in defining the conditions as outlined by the evidence which would justify the act of plaintiff in leaving the home to which her husband had taken her, but which had been made intolerable. We find no substantial difference between the instruction as asked by defendant and as modified by the court in the definition of the causes which would excuse the wife for leaving her husband. The interpolated clause "without reasonable excuse therefor" has the same meaning as the previous clause "without good and sufficient reasons therefor" given as a qualification of the wifely duty to follow the fortunes of the husband and abide in the home he provides for her. With or without the modification the instruction substantially is the counterpart of plaintiff's seventh instruction, which, inferentially conceding the duty of the wife not to forsake the home of her husband without good cause, submitted an hypothesis of facts which, if true, constituted such good cause.

[4] The rule that the wife is bound to follow the fortunes of her husband and to live in the home he provides for her still obtains in this state. *Coulter v. Coulter*, 175 Mo. App. 1, 161 S. W. 281; *Droege v. Droege*, 52 Mo. App. 84; *Messenger v. Messenger*, 56 Mo. 329; *Kaster v. Kaster*, 43 Mo. App. 115; *Collett v. Collett*, 170 Mo. App. 590, 157 S. W. 90. But, as we observed in *Coulter v. Coul-*

ter, supra, this rule is not intended to make the wife the slave of the husband nor to reduce her to helplessness, if, in disregard of his corresponding duty to provide her a home suitable to his means and station in life, he keeps her in a place where he has withdrawn from her all care and protection and allows her to become the victim of such gross indignities as the evidence of plaintiff shows she was compelled to endure. The instructions under consideration correctly defined material issues and were essential to the proper guidance of the jury.

[5] The fourth instruction asked by defendant, which the court refused to give, in substance was covered by the eighth instruction, and its refusal may be sustained on the ground that it was merely repetitive. Other rulings of the court on instructions of which defendant complains were so clearly proper that special reference to them is deemed unnecessary.

[6] The court did not err in refusing to permit the husband of plaintiff, called as a witness by defendant, to testify, for the alleged reason that he was incompetent. Our statutes (sections 6354 and 6359, R. S. 1909) are interpreted as an enabling act "making persons competent under certain conditions who at common law under like conditions were incompetent witnesses." *Layson v. Cooper*, 174 Mo. loc. cit. 223, 73 S. W. 472, 97 Am. St. Rep. 545. They do not go far enough to abrogate the application of the common-law disqualification of husband or wife to testify for or against his spouse in the latter's suit for alienation of affections. Counsel for defendant urges as applicable an exception to the hearsay rule which, in actions of this character, allows evidence to be received of declarations made at a time when there was no motive to deceive by the spouse whose affections are alleged to have been alienated tending to disclose the state of the affections of such spouse which existed during the exertion of the alleged wrongful influence of the defendant. *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938. But that exception to the general hearsay rule does not perform, and should not be stretched to perform, the functions of an enabling statute which further encroaches upon the field of common-law disability. It is one thing to receive evidence of declarations of the spouse, alleged to have been wickedly influenced, which tend to disclose his state of mind and feelings, and a far different thing to permit him to appear as a witness in his wife's alienation suit and give testimony for or against her. Nothing short of a legislative enactment removing his common-law disability would be sufficient warrant for holding him to be a competent witness in such case. The ruling excluding him was proper.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

McMURRAY v. GARNETT. (No. 11595.)

(Kansas City Court of Appeals. Missouri.
Dec. 6, 1915. Rehearing Denied
Jan. 17, 1916.)

1. PRINCIPAL AND AGENT — 3 — DUTY OF AGENT—LIABILITY FOR MISCONDUCT.

A third party called in by the buyer and seller of a cigar stand merely to put their agreement in legal form for execution was not liable to the seller as for a breach of duty as agent after the buyer's failure to pay.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 3-9, 11, 12; Dec. Dig. 3.]

2. APPEAL AND ERROR — 1001 — REVIEW—VERDICT.

An appellate court cannot interfere with a jury's finding and verdict supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. 1001.]

3. APPEAL AND ERROR — 980 — REVIEW—EVIDENCE SUPPORTING VERDICT.

Where verdict was for plaintiff, the appellate court must accept the evidence in his favor as wholly true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. 980.]

4. JUSTICES OF THE PEACE — 36 — CIVIL JURISDICTION—ACTIONS INVOLVING TITLE OF REALTY—STATUTE.

Rev. St. 1909, § 7397, providing that no justice of the peace shall have jurisdiction where the title to land shall come in question and be in issue, did not deprive a justice of jurisdiction to try an action by the seller of a cigar stand against his agent to procure the sale for the latter's breach of duty in acting in concert with the buyer to defraud the seller by giving him, in payment, a note secured by a mortgage on a worthless lot of land, since, in order for title to real estate to oust a justice of jurisdiction, it must be an element in issue necessary to plaintiff's recovery, while in the instant case the essential basis of plaintiff's cause of action, disloyalty of his agent, could be shown, whether the buyer of the stand had title to the mortgaged lot or not, mere evidence of the disloyalty.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83-97; Dec. Dig. 36.]

5. PRINCIPAL AND AGENT — 71 — BREACH OF AGENT'S DUTY—BASIS OF LIABILITY.

In an action by the seller of a cigar stand against his agent to negotiate the sale, for his disloyalty in aiding the buyer to defraud the seller by inducing him to take, in payment, a note secured by a mortgage on a worthless lot of land, the seller could recover although the agent made no positive misrepresentations, since such an action is based not only upon active representations, but also upon the agent's failure to reveal, and his concealment of, facts which he knows and which he should disclose, an agent, who occupies a fiduciary relation, being bound to act with loyalty and in good faith.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 147; Dec. Dig. 71.]

6. PRINCIPAL AND AGENT — 79 — DUTY OF AGENT — ACTION FOR BREACH OF DUTY—PLEADING—VARIANCE.

In an action by the seller of a cigar stand against his agent in the transaction for the latter's breach of duty in aiding the buyer to defraud the seller by inducing the latter to accept, in payment, a note secured by a mort-

gage on worthless land, where the petition alleged that the mortgage, when signed by the buyer, was on a number of lots, but that afterwards defendant changed the description, thereby substituting a still more worthless lot for the lots originally in the mortgage, which "purported to convey to plaintiff lot 9, block 12, in Southside addition," etc., testimony as to the change in the mortgage did not constitute a variance on the ground that the petition alleged that the original mortgage conveyed one lot and that another was fraudulently inserted, since the quoted language of the petition meant the mortgage after it was changed and not as originally drawn.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 178-193; Dec. Dig. 79.]

7. PRINCIPAL AND AGENT — 79 — DUTY OF AGENT—ACTION FOR BREACH—DELAY IN SUIT.

That the seller of a cigar stand, defrauded by the buyer, with the help of the seller's agent in inducing him to accept, as payment, a note secured by a mortgage on a worthless lot, made futile efforts to find the buyer after the transaction, to collect his note, and was slow to realize the manner of the fraud, so that there was a delay of some months in bringing suit against the agent, did not release the latter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 178-193; Dec. Dig. 79.]

8. PRINCIPAL AND AGENT — 79 — DUTY OF AGENT—ACTION FOR BREACH—INSTRUCTION.

In an action by the seller of a cigar stand against his agent for the latter's breach of duty in having enabled the buyer to defraud the seller by inducing the latter to accept, as payment, a note secured by a mortgage on a worthless lot, an instruction, requiring the jury to find that defendant knowingly and intentionally conducted the sale, though not using the words "fraudulently" and "deceitfully," supplemented by a definite and explicit instruction that plaintiff could not recover unless fraud and deceit were found, by instructions as to every element necessary to create the cause of action, and by an instruction that unless they found that every element of fraud set out was present at the date of the transaction in question, their verdict should be for defendant agent, sufficiently presented the issues to the jury, and was not erroneous as making defendant a guarantor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 178-193; Dec. Dig. 79.]

Johnson, J., dissenting.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by James H. McMurray against J. S. Garnett. From a judgment for plaintiff, defendant appeals. Affirmed.

Garnett & Garnett, of Kansas City, for appellant. Hatch & Middlebrook, of Kansas City, for respondent.

TRIMBLE, J. This case originated in a justice court. Plaintiff obtained judgment there and defendant appealed to the circuit court, where, upon trial anew, judgment was again rendered in plaintiff's favor and defendant brings the case here.

The legal effect of the petition (when its various allegations are boiled down and con-

strued as a justice pleading must be) is to state a cause of action in behalf of a principal against an agent for loss occasioned by the alleged violation of the agent's duty to his principal. The controversy grew out of the sale of plaintiff's small cigar and confectionery stand in the Temple Block building, in Kansas City, to one Hertslet. Plaintiff claims that defendant, acting as his (plaintiff's) agent, fraudulently induced him to sell the stand and accept Hertslet's worthless note in payment thereof, whereby he lost the value of the stand, getting nothing in return therefor; that defendant, although plaintiff's agent and by him relied upon and intrusted with the duty of finding a purchaser and attending to the sale, was not loyal to plaintiff, but acted in the entire interest of Hertslet, the buyer, whereby plaintiff got nothing for his property.

[1, 2] It is very strenuously insisted by defendant that he was not plaintiff's agent in the matter of finding a buyer for the stand; that he had no connection with the sale thereof except to draw the papers connected with the trade at the request of the parties to the deal; and that he neither made fraudulent representations nor concealed anything from plaintiff because he knew nothing more of the facts than plaintiff did. Of course, if the facts are as defendant says they are, he is not liable in any manner to plaintiff, since he occupies the position of an innocent third party, who, having nothing to do with causing the trade and knowing nothing of the facts or the representations on which it is based, is called upon by the parties to put their agreement in legal form for execution. However, the question whether he occupies this position, or the one plaintiff says he does, is one for the determination of the jury; and if there is substantial evidence to support plaintiff's claim, then we cannot interfere with their finding and verdict.

We have carefully read the record and are of the opinion that there is substantial evidence to support plaintiff's claim that defendant acted as his agent; that plaintiff relied upon defendant to make the trade and intrusted the whole matter to him; that plaintiff was induced to trade through defendant's representations; that defendant refrained from telling plaintiff facts which he knew, and which loyalty to his principal required him to reveal, and which if he had revealed would have defeated the trade.

[3] In view of the verdict, we must accept the evidence in plaintiff's favor as wholly true, and it tends to show the following facts: Plaintiff owned a small cigar and confectionery stand in the Temple Block, which was worth at least \$135. Defendant visited him there and told him he was in the business of "legal and financial adviser," and made "business investigations a specialty"; that he had several cigar stands listed for sale and could find a purchaser for

plaintiff's stand. Thereupon plaintiff gave it to him for sale. Shortly thereafter plaintiff was sent for to come to defendant's office, and when he reached there defendant informed him he had sold the stand for \$135, and the purchaser was to pay half cash. Later he said as the purchaser wanted to enlarge the stand, he could not pay cash, but would give a mortgage on six lots in Arcadia, Crawford county, Kan., securing the purchaser's note for the purchase price. Plaintiff knew nothing about the lots, had no way of knowing anything about them, except what defendant told him, and relied upon defendant's representations in regard thereto, which were that the lots were good lots, 50 by 150 feet, and worth \$200 or \$300 apiece; that defendant looked over the abstract and handed it to plaintiff saying it was good; that thereupon a mortgage on the lots was drawn up, securing Hertslet's note for \$135, which was delivered to plaintiff, and the cigar stand was turned over to the buyer. Plaintiff's evidence is to the further effect that as soon as the purchaser obtained possession of the stand it was moved out and taken elsewhere, and the purchaser disappeared, and has never been seen since. He left owing his landlady his board bill, and plaintiff has never been able to collect anything on the note. There is also evidence to the effect that the mortgage drawn by defendant and signed by Hertslet was on six lots in Arcadia, Kan., but after it was sent to that state for record, defendant procured the deputy recorder to change the description to lot 9, block 12, in Southside addition to Arcadia; that lot 9 was merely a fragment of a lot left after the right of way of a railroad ran through the block, and said lot as thus left was worthless for any purpose; that Hertslet did not have title to it; and that defendant knew the condition and worthlessness of the lot at the time. It is needless to set out in detail the evidence as to defendant's knowledge of the true situation. Suffice it to say that it was by a witness other than plaintiff, and, if believed by the jury, undoubtedly justified them in finding that defendant knew the true facts.

[4] It is urged that Hertslet's title to the mortgaged lot was involved in the case, and that, as this is a suit from a justice court, neither the circuit nor this court has any jurisdiction because a justice has no jurisdiction in a case involving title to real estate. Section 7397, R. S. Mo. 1909, says:

"No justice of the peace shall have jurisdiction to hear or try any action * * * where the title to any lands * * * shall come in question and be in issue."

Prior to 1879 the last clause of this statute merely read "shall come in question." Section 4, chap. 177, R. S. Mo. 1865. But in the revision of 1879 the words "and be in issue" were added. Section 2837, art. 2, p. 475, R. S. Mo. 1879, vol. 1. So that under our statute the title must not only come in

question, but it must be in issue. In order for title to real estate to oust a justice of jurisdiction, it must be an element in issue necessary to plaintiff's recovery, and without a determination of which plaintiff's case cannot stand. *Gregory v. Kanouse*, 11 N. J. Law, 62. Whenever the declaration is of such a character that under the issues raised by the pleading the plaintiff is bound to either prove or disprove a title to land, then the justice has no jurisdiction. *Jakeway v. Barrett*, 38 Vt. 316. If the question of title be decisive of the case, then the jurisdiction of the justice ceases. *State ex rel. v. Ganzhorn*, 52 Mo. App. 220.

The constitutive fact of plaintiff's cause of action was disloyalty on the part of an agent to his principal. That could be shown whether Hertslet had title or not. The proof is, according to the jury's finding, that plaintiff went into the trade owning a cigar stand and came out with nothing, the lot being so utterly worthless as not to pay for foreclosure. The question whether Hertslet did or did not have title thereto was not essential to plaintiff's case. That the buyer did not have title is merely another circumstance evidencing the disloyalty in issue. So that his title was not "in question and in issue," but, as said by Ellison, J., in *Adams v. Ellis*, 86 Mo. App. 343, loc. cit. 345, "it was merely a matter of evidence in proof of a fact." See, also, *Davis v. Creamer*, 179 Mo. App. 374, loc. cit. 375, 166 S. W. 819.

The cause of action stated in plaintiff's petition can be upheld, regardless of whether plaintiff went far enough in his proof to show that Hertslet did not have title to the lot. Defendant claims the proof did not go far enough to show this. We need not decide whether it did or not, since there is enough to sustain the cause of action alleged, even if Hertslet had title thereto.

[8] It is next claimed that there is no evidence of any misrepresentations in the case. We think there is, but it must be remembered that the case is not founded upon active representations alone, but is also upon a failure to reveal, and a concealment of, facts which the agent knew and which it was his duty to reveal. This is a suit between principal and agent, and not between parties who are strangers or adversaries dealing with each other at arm's length, and where each must be wary and look out for himself. Defendant occupied a fiduciary relation, and was bound to act with loyalty and good faith, and a failure to do so renders him liable. *Myers v. Adler*, 188 Mo. App. 607, 176 S. W. 538.

[8] The testimony as to the change in the mortgage cannot be held to be inconsistent with the allegations of the petition. Nor was such evidence outside the allegations of the petition, or statement, as such pleading in a justice court is more properly termed. That statement, when fairly interpreted, alleges

that the mortgage when signed by Hertslet was on a number of lots in Arcadia, but that afterwards defendant changed the description "thereby substituting a still more worthless lot for the lots originally in said mortgage." The evident meaning of the statement is that the mortgage was originally on a number of lots, but was afterwards charged to lot 9. Hence, the claim that the statement alleges that the original mortgage conveyed lot 9 and another lot was fraudulently inserted, cannot be maintained. When the statement refers to the mortgage as having "purported to convey to plaintiff lot 9, block 12, in Southside addition to the town of Arcadia, Kansas," it means the mortgage after it had been changed, and not the mortgage as originally drawn and intended. Hence there is neither variance nor failure of proof in the case. In addition to this, the evidence of the deputy recorder as to the change in the mortgage before it was recorded was a circumstance bearing on the loyalty of the agent to the principal, and this evidence was fully supported by an allegation to that effect in the petition, and if there was any inconsistency in the allegations of the petition as to the lots intended to be covered by the mortgage, it was apparent on the face thereof rendering it amenable to attack if any had been made.

[7] The fact that plaintiff made futile efforts to find Hertslet and to collect his note and was slow to realize the manner in which he had gotten into his unfortunate situation does not release defendant. This is not a suit by plaintiff against Hertslet for rescission, but by a principal who intrusted the entire matter of making a sale to his agent, with no opportunity to know or learn the facts for himself. Hence the doctrine as to placing defendant "in statu quo" and of "caveat emptor" have no application. Defendant was not injured by plaintiff's delay of a few months in bringing suit. It was doubtless plaintiff's duty to do what he could to make his loss as light as possible, but that ought not to relieve the defendant from liability for the loss he caused. In a case of this kind, the agent cannot set up the principal's negligence as a defense. 31 Cyc. 1431.

[8] We do not think plaintiff's instruction is open to the charge that it makes defendant a guarantor of the transaction. It requires the jury to find that defendant "knowingly and intentionally" conducted the sale, etc. If it did not use the words fraudulently and deceitfully, the jury were very definitely and explicitly told, in defendant's instruction No. 1, that plaintiff could not recover, unless fraud and deceit were found, and then were also definitely informed as to every element necessary to create a cause of action based thereon, and that unless the jury found that each and every element of fraud therein set out was present at the date of the transaction in question, then their verdict should be for defendant. The instructions present-

ed the issues very clearly to the jury, and they could not have misunderstood them.

It may be, as defendant contends, that he was not plaintiff's agent to find a buyer for, and make a sale of, the cigar stand, but there is substantial evidence that he was, and that, as a direct result of his disloyalty to his principal, the latter lost the value of the stand. In such case we have no right to question the jury's finding.

The judgment must be affirmed. It is so ordered.

ELLISON, P. J., concurs. JOHNSON, J., dissents.

J. A. LAMY MFG. CO. v. MISSOURI PAC. RY. CO. (No. 11785.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1918.)

1. CARRIERS ⇨175 — FAILURE TO DELIVER SHIPMENTS—LIABILITY.

Plaintiff delivered to defendant railway company two shipments of merchandise consigned to C., a station on the line of a connecting carrier, for which only prepaid shipments were received. The freight was prepaid on one of the shipments, but not on the other, defendant's agent having failed to inform plaintiff of the fact that it was a "prepay station," and to require prepayment of the charges. The connecting carrier carried both shipments to the next station beyond C., and the consignees refused to accept delivery at that station. One of the shipments was returned to plaintiff on payment of freight charges, but part of the contents of the shipment had been purloined and the remainder had greatly depreciated in market value. The other shipment was not delivered to plaintiff because it refused to pay storage charges, without the payment of which delivery was refused, and plaintiff claimed the full market value of that shipment. *Held*, that the loss in both instances was caused by the fault of one or both carriers, and defendant was liable to plaintiff therefor, as its contract with plaintiff required it and its connecting carrier to deliver the shipments at their destination, and they had no right to demand that the consignees accept delivery at another station.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 764, 765; Dec. Dig. ⇨175.]

2. ACTION ⇨27 — FAILURE TO DELIVER SHIPMENTS—ACTIONS—NATURE.

A petition alleged that plaintiff delivered to defendant a shipment of merchandise for shipment and transportation to C., and there to be delivered to a named consignee for a consideration to be paid by the consignee, that defendant accepted the shipment and undertook the transportation, that thereupon it became and was its duty to transport and deliver the goods with reasonable dispatch and in good order and condition, that defendant failed to transport and deliver them within a reasonable time, and plaintiff was compelled to order the goods reshipped and delivered to it, which defendant undertook to do, but that defendant failed to transport and deliver the goods to plaintiff, that part of them were returned, but that a large part were never delivered, and the portion which was delivered was greatly damaged and deteriorated in value. In another count it made similar allegations respecting another shipment, except that it was alleged that the goods included in that shipment were not delivered to plaintiff. *Held*, that the cause pleaded in each count

was in substance *ex contractu* and not *ex delicto*, since while allegations that defendant agreed, undertook, or promised to carry goods, are as germane to a cause *ex delicto* as to one *ex contractu*, if in addition to such averments a consideration is averred for the agreement, undertaking, or promise, the pleading is usually regarded as stating a cause *ex contractu*.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. ⇨27.]

3. CARRIERS ⇨76 — FAILURE TO DELIVER SHIPMENTS—ACTIONS—PARTIES.

A suit on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. ⇨76.]

4. CARRIERS ⇨94 — FAILURE TO DELIVER SHIPMENTS—ACTIONS—NATURE.

The plaintiff in an action against a carrier for a failure to deliver a shipment may either sue in tort as for a breach of the carrier's common-law duty to deliver, or for the breach of the contract of transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⇨94.]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"Not to be officially published."

Action by J. A. Lamy Manufacturing Company against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. D. Corum and Edw. J. White, both of St. Louis, for appellant. Montgomery & Montgomery, of Sedalia, for respondent.

JOHNSON, J. This is an action for damages for the failure of defendant, a common carrier, to deliver two shipments of merchandise received from plaintiff at Sedalia for transportation and delivery at Crowder, Mo., to the Crowder Stores Company and J. W. Carlisle, the respective consignees.

Each shipment is made the subject of a separate count in the petition. The first count alleges:

"That on the 28th day of July, 1913, it delivered to the defendant at its said station in the said city of Sedalia a shipment of goods, wares, and merchandise consisting of union suits, gloves, hose, pants, and shirts of the value of \$179.15 for shipment and transportation to Crowder, Mo., and there to be delivered to the consignee, the Crowder Stores Company, for the proper consideration to be paid it by said consignee. That the defendant accepted said shipment and undertook said transportation. That thereupon it became and was the duty of the defendant to transport and deliver said goods with reasonable dispatch, and to deliver the same in good order and condition to said consignee. That the defendant failed to transport and deliver said goods to said consignee within a reasonable time and plaintiff was compelled to and did order the goods reshipped and delivered to it, which the defendant undertook to do, but that defendant failed to transport and deliver said goods back to plaintiff. That part of said goods were returned, but a large part thereof were never delivered, and that that portion which was delivered was greatly damaged and deteriorated in value, and plaintiff suffered great loss and damage, including the freight paid by it aggregating the sum of \$150."

The allegations in the second count which deal with the shipment to Carlisle substantially are the same, with the exception that it is alleged that these goods were not delivered to plaintiff. The answer is a general denial. A jury was waived, and judgment was rendered for plaintiff on both counts. Defendant appealed.

On July 26, 1913, plaintiff, a merchant at Sedalia, delivered to defendant a case of merchandise of the value of \$179.15 for transportation and delivery to the Crowder Stores Company at Crowder, a prepay station on the line of the St. Louis & San Francisco Railway Company, a connecting carrier, to which defendant delivered the case at St. Louis.

By a prepay station is meant one for which shipments are not received without payment of freight charges at the receiving station for the reason that no agent is kept at a prepay station. Defendant knew, but plaintiff did not know, that Crowder was such a station, and from the evidence of plaintiff it appears that it was the duty of defendant's agent at Sedalia to inform plaintiff of that fact and require the prepayment of the charges, but the agent failed to impart that information to plaintiff and accepted the shipment as one for which the transportation charges should be paid by the consignee at destination. Having no agent at Crowder to collect the expense bill, the San Francisco Company carried the case to Vanduser, the next station beyond Crowder, and mailed a notice to the consignee to call at that station and pay the charges and receive the goods. The consignee would not receive the goods at Vanduser, and after plaintiff consumed more than a year in a continuous effort to have the case delivered at Crowder, it finally was compelled to order the case returned to Sedalia. It came back over the same route and was redelivered by defendant to plaintiff on payment of the freight charges. At some time during its long absence the case had been opened and part of its contents purloined. The remainder of the goods had greatly depreciated in market value, and the damages claimed by plaintiff include the value of the stolen goods and the loss occasioned by the shrinkage of the remainder in market value. The case shipped to Carlisle was delivered to defendant two days after the other shipment, and the charges were prepaid by plaintiff. Instead of unloading this case at Crowder, as it should have done, the San Francisco Company carried it to Vanduser and kept it in storage more than a year until its return to Sedalia was ordered by plaintiff, the consignees having refused delivery at Vanduser. The San Francisco Company returned the case to Sedalia, but not over defendant's line, and charged expenses for storage against it, which plaintiff refused to pay. Because of this refusal the case was not

returned to plaintiff, and the damages claimed in the second count are the full market value of those goods which plaintiff treats as having been converted.

[1] It is too clear for argument that in both instances the loss was caused by the fault of one or both of the carriers, and in either case defendant is liable to the injured party. As to the second shipment there was no semblance of excuse for the refusal (for it amounted to that) of the connecting carrier to deliver it at the agreed destination, since the charges were prepaid. As to the first, the mistake of defendant's agent at Sedalia afforded no justification for the refusal to carry the goods to Crowder, especially after plaintiff, in response to defendant's request, did pay the charges. The contract of defendant with plaintiff required defendant and its connecting carrier to deliver the cases at Crowder, and the latter carrier had no right to demand that the consignees accept delivery at another station.

[2, 3] But counsel for defendant argue that the action must fail for the reason that in legal substance it is an action *ex delicto*, and the consignees—not plaintiff the consignor—are the only proper parties to prosecute an action for such loss. The argument is untenable for several reasons, only one of which needs be mentioned. The cause pleaded in each count is, in substance, *ex contractu*, and not *ex delicto*, and the rule is well settled that a suit on a transportation contract is properly brought in the name of the consignor, whether he be the owner or not. *Steamship Co. v. Railroads*, 144 Mo. App. loc. cit. 53, 128 S. W. 822; *Atchison v. Railroad*, 80 Mo. 213; *Ross v. Railroad*, 119 Mo. App. loc. cit. 294, 95 S. W. 977; *Vanbuskirk v. Railroad*, 131 Mo. App. loc. cit. 363, 111 S. W. 832.

[4] A plaintiff in an action of this character has the option of suing in court as for a breach of the carrier's common-law duty to deliver or of suing for a breach of the contract of affreightment. Frequently it is difficult to determine which action the pleader has elected to pursue, since such allegations as "the defendant agreed" or "undertook" or "promised" to carry the goods are as germane to a cause *ex delicto* as to one *ex contractu*. But where, in addition to such averments, the pleader further avers a consideration for such agreement, undertaking, or promise, the authorities incline to the view that the declaration should be regarded as stating a cause *ex contractu*. 3 *Hutchinson on Carriers* (3d Ed.) § 1328; *Smith v. Seward*, 3 Pa. 342; *Meade v. Railroad*, 183 Mo. App. loc. cit. 361, 166 S. W. 1116.

There is no merit in defendant's point relating to the measure of damages. The case was fairly tried, and the judgment is for the right party.

Affirmed. All concur.

GATELY OUTFITTING CO. v. VINSON.
(No. 11782.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. TRIAL — 178—MOTION FOR PEREMPTORY INSTRUCTION—DETERMINATION.

On motion for a peremptory instruction by defendant, the evidence must be considered in the light most favorable to the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. —178.]

2. PARENT AND CHILD — 3 — SUPPORT OF CHILD—ACTIONS—EVIDENCE.

Evidence in an action on account against a father for clothing sold his children for his account held to sustain an order refusing defendant's requested peremptory instruction.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. —3.]

3. HUSBAND AND WIFE — 19—NECESSARIES — AGENCY OF WIFE FOR HUSBAND.

The authority of the wife to purchase actual necessities for minor children suitable to their station in life need not be based on any theory of agency express or implied, since the wife and minor children are entitled by law to support from the husband, and, if he fails therein, a tradesman may supply them at his charge without his consent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. —19.]

4. PARENT AND CHILD — 3 — SUPPORT OF CHILD—"NECESSARIES."

"Necessaries" for the furnishing of which to his children the parent is liable, although furnished without his consent, include food, drink, clothing, washing, medicines, instruction, and suitable places of residence.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. —3.]

For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

5. HUSBAND AND WIFE — 19—NECESSARIES.

Although the husband has the right to control the style of living for his family, provided he selects that which is reasonably suitable to his means and station in life, though they are not strict necessities, the wife has implied authority to purchase on the husband's credit those things which his family's mode of life classifies as necessities.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. —19.]

6. HUSBAND AND WIFE — 235—AGENCY OF WIFE—PURCHASE OF NECESSARIES—ACTIONS — INSTRUCTIONS.

In the absence of an express revocation of a wife's authority to bind the husband for necessities supplied his children, an instruction in an action against the husband that the mother was a proper person to determine what necessities were needed by her children is not error.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 539, 849-852, 932; Dec. Dig. —235.]

7. PARENT AND CHILD — 3—SUPPORT OF MINOR—ACTIONS—BURDEN OF PROOF.

Where a tradesman furnishes goods to a minor as necessities, he must show in an action against the father that they were such as children in like condition in life are usually supplied with, and also that they were strict necessities furnished under such a state of circumstances as created an obligation on the parent to pay for them.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. —3.]

8. TRIAL — 251—INSTRUCTIONS—ISSUES.

No instructions should be given based upon a hypothesis outside the scope of the issues made by the pleadings and the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. —251.]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"Not to be officially published."

Action by the Gately Outfitting Company against J. A. Vinson. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. White and Hall, Robertson & O'Bannon, all of Sedalla, for appellant. Paul Barnett, of Sedalla, for respondent.

JOHNSON, J. This is a suit upon an account for two winter coats of the value of \$12.48 each which plaintiff alleges it sold and delivered to defendant for his two daughters, who, respectively, were 16 and 17 years of age. Defendant concedes the sale of the coats at that price to his daughters, but claims that he did not authorize or subsequently ratify the purchase, and that the garments were not necessities which plaintiff, as a tradesman, might supply to his minor children at his cost and without his express or implied consent. A trial in the circuit court on appeal from the justice court where the suit originated resulted in a verdict and judgment for plaintiff, and the cause is before us on the appeal of defendant.

[1, 2] From the evidence of plaintiff it appears that the wife of defendant and their two daughters came to plaintiff's store in Sedalla on December 7, 1912, and that the wife bought the coats for the two girls on the credit of defendant, paying \$2 on the purchase price, and agreeing to pay the remainder in periodical installments. The girls wore no coats at that time, and appeared to be in need of those purchased which were of a kind and price usually worn by young women of their station in life in that community. Afterwards an installment of \$2 was paid, but no further payments were made, although the girls were wearing the coats and were living with defendant as members of his family. Defendant repeatedly was urged by mail to pay the account which plaintiff notified him was charged against him, but made no response and did not deny the debt until suit was brought to collect it.

The evidence of defendant discloses an entirely different state of facts. It tends to show that defendant, who is a laborer in railroad shops in Sedalla and supports a family of ten out of his wages, never has failed or refused to provide them with such necessities and comforts as his means would allow, that he did not buy anything on credit, had never traded with plaintiff or authorized any one to purchase goods from plaintiff on credit, and that his wife did not

accompany his daughters when they bought the coats nor request plaintiff to charge them to him. The two girls were employed at a packing house, and, according to their testimony, they went to the store with a woman companion and bought the coats on their own credit, but afterwards were discharged by their employer, and, being unable to secure other employment, defaulted in making the agreed payments. They had old coats which still were serviceable, and when they brought the new ones home defendant ordered them returned, as he could not afford to pay for them, but relented upon being informed by his daughters that they had not bought them on his credit, and were to pay the purchase price out of their own wages. Defendant denied the receipt of any letters or bills from plaintiff relating to the account until shortly before suit was instituted.

[3] The court did not err in refusing the peremptory instruction requested by defendant, which, of course, must be considered in the light of the evidence most favorable to plaintiff. On the hypothesis that the coats were ordered by the wife of defendant, all of the disclosed facts and circumstances show that she had implied, if not express, authority to purchase them on the credit of her husband. The authority of the wife to purchase actual necessities for the minor children suitable to the station in life and means of the husband need not be based upon any theory of agency express or implied. The wife and minor children are entitled by law to support from the husband, and, where he fails or refuses to provide the actual necessities of life, a tradesman may supply them at his charge without his consent, and, of course, the wife may exercise the same humane right, even in the face of the husband's objections.

[4, 5] "Necessaries" have been defined as consisting of food, drink, clothing, washing, physic, instruction, and a suitable place of residence (*Sauter v. Scrutchfield*, 28 Mo. App. loc. cit. 157), but in nearly every family some comforts in excess of the strict necessities of life are enjoyed and treated as necessities. Undoubtedly, the husband, who is the sole provider of the means of support, has the right to control the style of living provided that that which he selects be reasonably suitable to his means and station in life, and as to those things which the family's mode of life classifies as necessities, though they be in excess of strict necessities, the wife and mother has implied authority from the husband to purchase on his credit. We are not speaking of cases where, justly or unjustly, the husband has deprived, or sought to deprive, the wife of this common and, we might add, necessary privilege, since no conditions of that sort confront us in the present case, where, though the family was compelled to live in humble style, the wife appears to have enjoyed the full confidence of her husband. Whether or not the coats

were imperatively needed at that time, they were such garments as a workingman in the situation of defendant would be expected to furnish his daughters, and we hold that the authority of defendant's wife to buy them on his credit could not well be disputed. *Sauter v. Scrutchfield*, supra; *Johnson v. Briscoe*, 104 Mo. App. 493, 79 S. W. 498; *Martz v. Fullhart*, 142 Mo. App. 348, 126 S. W. 984; *French v. Burlingame*, 155 Mo. App. 551, 134 S. W. 1100. As is well observed in *Johnson v. Briscoe*, supra:

"In the absence of notice to the contrary, the law will imply authority on the part of a wife who is living with her husband to buy such articles on his credit as pertain to the household arrangements, which are commonly under a wife's care. *Ruddock v. Marsh*, 1 H. & N. 601; *Montague v. Benedict*, supra. Or, as has been said, she is presumed to have all the usual authorities of a wife (*Johnston v. Sumner*, 3 H. & N. 261), or to have authority to purchase necessities on the husband's credit as his agent (*Harshaw v. Merryman*, 18 Mo. 106)."

[6, 7] It is argued that prejudicial error was committed in the following instruction given at the request of plaintiff:

"The court instructs the jury that the mother of the minor children of a household is a proper person to determine what are necessities needed by the minor children."

So she is, and should be, where the implied authority we have discussed stands unrevoked by the husband. Where a tradesman on his own motion furnishes goods to a minor as necessities, it is not enough for him to show in an action against the father that they were such things as children in like condition in life are usually supplied with, but he must show to the satisfaction of the triers of fact that they were strict necessities and were furnished under such a state of circumstances as created an obligation on the parent or infant to pay for them. *Perrin v. Wilson*, 10 Mo. 451. The authority of the wife, as we have said, is not restricted to providing the family with strict necessities, but extends to those things which the family's mode of living treats as necessities, and, when she makes a purchase within the apparent scope of such authority, the tradesman should not be deprived of his right to recover against the husband on the ground that the things he sold, in fact, were not imperatively needed.

There is no merit in the argument that this rule would deprive the husband of his right to control the mode of living and leave him a helpless victim to a spendthrift wife. He may revoke the authority if she abuses it. There is no suggestion of an abuse of authority in the present case, and the instruction must have been understood by the jury as merely defining the general rule that the wife has authority to purchase necessities.

[8] The third instruction asked by defendant was properly refused, since it hypothesized a state of facts not supported by evidence. There is no proof that the minors bought the coats on their own motion and had the bill

charged to defendant. Instructions should not submit hypotheses outside the scope of the issues made by the pleadings and evidence.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

IBA v. CHICAGO, B. & Q. R. CO.
(No. 9971.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. CERTIORARI — DECISION OF INTERMEDIATE COURT—EXCESS OF JURISDICTION—PREVIOUS RULING OF SUPREME COURT.

The failure of a Court of Appeals to follow the last previous ruling of the Supreme Court, as required by Const. Amend. 1884, § 6, is not a mere error of law such as would give the Supreme Court no right to interfere, but is a jurisdictional excess which the Supreme Court has power on certiorari to remedy by quashing the judgment of the Court of Appeals, though the term at which the void judgment was rendered has expired.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. —28.]

2. CERTIORARI — JURISDICTION OF SUPREME COURT—MANDATE TO COURT OF APPEALS.

The power vested in the Supreme Court to order up the record of a Court of Appeals on certiorari and to quash a judgment as rendered in excess of jurisdiction includes the power to issue a mandate, commanding the Court of Appeals to proceed with the cause in the true course of lawful jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185-194; Dec. Dig. —69.]

3. CERTIORARI — COURT OF APPEALS — JURISDICTION—DECISION OF SUPREME COURT.

A Court of Appeals has no authority to inquire into the jurisdiction of the Supreme Court to issue a mandate in certiorari proceedings, requiring that the Court of Appeals rehear a cause wherein it had rendered a judgment held to be in excess of its jurisdiction, though the term at which the void judgment was rendered had expired when the mandate was issued.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185-194; Dec. Dig. —69.]

Appeal from Circuit Court, Buchanan County.

Action by Mary Iba against the Chicago, Burlington & Quincy Railroad Company. From final order of the circuit court overruling motion to quash execution, defendant appeals. Affirmed.

See, also, 186 Mo. App. 718, 176 S. W. 491; 172 Mo. App. 141, 157 S. W. 675.

Culver & Phillip and O. M. Spencer, all of St. Joseph, for appellant. Charles C. Crow, of Kansas City, and John S. Boyer, of St. Joseph, for respondent.

JOHNSON, J. The appeal in this case is from a final order of the circuit court of Buchanan county, entered April 14, 1915, overruling defendant's motion to quash an execution issued March 10, 1915, upon a judgment for \$5,000, recovered by plaintiff in said court February 15, 1911, in an action for

damages for the death of plaintiff's husband which she alleged was caused by negligence of defendant. The appeal was granted to the Supreme Court, but on motion of plaintiff was transferred to this court June 29, 1915, for the stated reason that the Supreme Court "is without jurisdiction of the said cause." Plaintiff filed a motion July 1, 1915, to dismiss the appeal for the reason, in substance, that the circuit court was without jurisdiction to hear and determine the subject-matter of the motion to quash, and therefore this court is without jurisdiction to hear the appeal on its merits. We overruled that motion November 1, 1915, and set the cause for hearing at the foot of the December call of the docket for the October term, at which time it was argued and submitted and is now before us for determination on the merits.

This case has had an unusual and difficult course in both trial and appellate courts. Its history preceding the final decision of this court on the appeal prosecuted from the judgment for \$5,000, rendered against defendant in the circuit court, may be found in our opinion filed January 11, 1915, and reported in 186 Mo. App. at page 718 et seq., 176 S. W. 491. As that opinion shows, we resumed jurisdiction over the cause pursuant to a decision of the Supreme Court, in a proceeding in certiorari begun on the petition of plaintiff, in which that court held that we had exceeded our jurisdiction over the cause in a decision we rendered May 5, 1913, reversing the judgment and remanding the cause to the circuit court. The Supreme Court held (see *State ex rel. v. Ellison*, 256 Mo. loc. cit. 667, 165 S. W. 369) that the rule we applied in finding that prejudicial error had been committed against defendant in the trial court was contrary to certain prior decisions of the Supreme Court, and ordered that our decision and judgment thereon (reported in 172 Mo. App. 141, 157 S. W. 675)—"be quashed and for naught held, and that said cause should be remanded to that court (Kansas City Court of Appeals), to be retried * * * and determined in conformity with the views announced herein."

Pursuant to this mandate we resumed jurisdiction of the cause, and, following a reargument of counsel and a resubmission of the cause on the merits, rendered the decision reported in 186 Mo. App. 718, 176 S. W. 491, in which we affirmed the judgment for \$5,000. The motion to quash, now under consideration, attacks the execution which was issued upon that judgment after the circuit court received our mandate of affirmance, on the ground that we irretrievably lost jurisdiction over the cause at the expiration of the March, 1913, term, at which our decision reversing the judgment was rendered, and that, notwithstanding the mandate of the Supreme Court setting that decision aside and commanding us to rehear the

case, we still were without power or authority to assume a jurisdiction which it is contended was wholly without legal support or justification. The facts on which this attack is predicated are that the March, 1913, term of this court was adjourned to court in course on July 2, 1913, and the proceedings in certiorari were not begun in the Supreme Court until July 23d.

[1] The argument of counsel for defendant proceeds from an erroneous conception of the nature of the error the Supreme Court adjudged we committed in the decision reversing the judgment and remanding the cause. Our jurisdiction over the parties and subject-matter has been, and is, conceded by the parties, and was recognized in the decision of the Supreme Court, and if that tribunal, which is superior to the Courts of Appeals and exercises a power of supervision over the latter courts, within certain defined constitutional restrictions, had found that the error in the judgment we rendered was only an error of law, it would have treated the judgment as a finality and refused the application of plaintiff for extraordinary relief.

"On such a question," the opinion of the Supreme Court says, "in cases wherein they have jurisdiction, the several Courts of Appeals have the same right to decide, even erroneously, as we have, and we may not interfere in any wise, whether in our judgment their opinion be right or wrong."

But the opinion further says:

"Upon a point of law arising from undisputed facts, they [Courts of Appeals] are required to follow the last previous ruling of this court (section 6, Amendment of 1884, Constitution of Missouri). If they do not, we have held that a judgment, rendered by them in contravention of the constitutional mandate above referred to, may be quashed by us upon certiorari."

In other words, the failure to follow the last previous ruling of the Supreme Court is regarded, not as a mere error of law, but as a jurisdictional excess, which the superior court have the power to remedy by quashing; i. e., pronouncing void the judgment thus infected. Manifestly the jurisdiction to exercise this power is not dependent in any respect upon the fact of whether or not the Courts of Appeals, by the lapse of the term at which the void judgment was rendered, have lost jurisdiction over the cause, and consequently are without power to set aside the judgment. The original jurisdiction of superior courts of review in such cases is concerned only with the question of whether a judgment in excess of lawful jurisdiction has been rendered by the inferior court, and whether the aggrieved party has been reasonably diligent in applying for the extraordinary remedy and is not hampered by any other restriction which, if allowed, would reduce the scope of original to that of appellate jurisdiction and be equivalent to a denial of the supervisory control of the superior court over inferior courts.

[2] And if the Supreme Court had the power to order up the record on certiorari and

to quash the judgment, they had the power also to issue their mandate to this court, in which alone resided appellate jurisdiction over the cause, commanding this court to proceed with the cause in the true course of lawful jurisdiction. This, of course, on the theory that the cause, which was properly lodged in this court on appeal, had not been determined, the excessive judgment being a nullity, and therefore that appellate jurisdiction had not been exercised.

[3] We must rule against defendant on the merits of the case presented on this appeal, but if we adopted the opposite view, we still would be compelled to affirm the judgment overruling the motion to quash. Counsel for defendant endeavor to escape the accusation that they are attacking the decision of the Supreme Court in inferior courts—first in the circuit court and now here on appeal—with the argument:

"We are not asking this court to pass upon the power of the Supreme Court, but to pass upon the effect which the order that this court made, pursuant to the direction of the Supreme Court, had upon its judgment setting aside and reversing the judgment for \$5,000. * * * When the judges of this court, in obedience to the mandate of the Supreme Court, made the order which they were directed to make, and the question is raised, for the first time, as to the legal effect of the order upon the judgment of this court reversing and remanding the judgment for \$5,000, this court has the jurisdiction to determine that question."

The opinion of the Supreme Court did not refer to the fact that the term of this court at which the judgment was rendered had lapsed when the petition in certiorari was filed, and the argument from which we have just quoted concludes that, since the jurisdictional question under discussion was raised for the first time in the motion to quash, it is not *res adjudicata*, and the trial court in the first instance had, and we on appeal have, jurisdiction to determine that question, which must mean that we have the power to hold that the Supreme Court had no jurisdiction to entertain the proceeding in certiorari because it was begun out of time, would not have issued the writ and mandate if they had known the true facts, and therefore that we acted without jurisdiction in obeying their mandate. The answer to this argument is obvious. An inferior court is without authority to inquire into the jurisdiction of a superior court, and the decision of the Supreme Court must be accepted as conclusive of the subject of the jurisdiction of that court to quash the judgment and to direct this court to resume appellate jurisdiction over the cause interrupted by the rendition of the void judgment, and also of the authority of this court to give effect to that mandate. Whether or not the fact of the lapse of the term was called to the attention of the Supreme Court, their decision settled, not only every jurisdictional question raised by defendant, but every other such question which would fail

within the scope of that proceeding, and therefore should have been raised by defendant. We are bound to treat that decision as a complete adjudication of the whole subject of jurisdiction, and this view is strengthened by the transfer of the case to this court on the ground that the Supreme Court have no jurisdiction of it. We would not indulge the supposition that the Supreme Court transferred the cause with the thought that we would inquire into and determine the question of whether or not they had exceeded their jurisdiction in the certiorari proceedings, or we ours in obeying their mandate. The transfer, made with knowledge of the fact of the lapse of the term, was a judicial pronouncement by a superior court that the jurisdictional questions sought to be raised by the motion to quash are wholly without merit.

The judgment overruling the motion is affirmed. All concur.

WHITTOM v. ADAMS EXPRESS CO.
(No. 11578.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916.)

1. CARRIERS ⇐116—CARRIAGE OF GOODS—
DELAY.

Where a shipment of dressed poultry could have been brought to its destination in time for the market of a given day by diverting it to another train at an intermediate point, and as a result of failure to so divert the shipment the poultry was spoiled, and was not in fit condition when the market was opened on the following day, the carrier was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 488; Dec. Dig. ⇐116.]

2. TRIAL ⇐114—CONDUCT OF TRIAL—ARGUMENT OF COUNSEL.

Statements of counsel for plaintiff in argument in an action to recover damages from a carrier for negligent delay in shipping poultry, to the effect that in a similar case against a carrier defendant was held liable, and that a named person, who was a friend of plaintiff, knew that plaintiff told the truth was prejudicial error; defendant's objection to such statements being overruled by the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 275-278, 296; Dec. Dig. ⇐114.]

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

"Not to be officially published."

Action by Henry Whittom against the Adams Express Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fogle & Fogle, of Lancaster, for appellant. Higbee & Mills, of Kirksville, for respondent.

ELLISON, P. J. Plaintiff's action is for damages resulting from the shipment of dressed poultry from Downing, Mo., to Chicago, Ill. The judgment was for plaintiff.

The case was tried with the aid of a jury,

and, since the verdict was for plaintiff, we will state the facts as evidence in his behalf tended to establish them: The shipment was accepted by defendant to be transported over the Chicago, Burlington & Quincy Railroad on a train leaving Downing at 7 o'clock p. m. of November 18, 1913. That in the usual time for such shipments the poultry should have arrived in Chicago at 10:30 a. m. the next morning in time for that day's market. That, instead, it did not arrive until 2:40 p. m., too late for the market. That in consequence of this delay some of the poultry was spoiled so as to be unfit for sale and plaintiff was thereby damaged.

Evidence in defendant's behalf tended to show that it shipped the poultry by a carrier whose route was by way of Keokuk and Burlington, Iowa, that this was defendant's regular route of shipment, and that the time the poultry arrived in Chicago in the afternoon was the schedule time by such route. But, as we have stated, the fact remains that there was evidence in plaintiff's behalf to the effect that the usual time of shipments had been so much shorter as to put the poultry at destination in the forenoon in time for that day's market. Defendant's route involved a delay of several hours at Keokuk and at Burlington. This difference in time of arrival at Chicago probably may find explanation in the fact that at a point in Missouri between Downing and Keokuk, Iowa, the carrier, over which defendant made the shipment, passes one of its south-bound trains, and that, if a shipment is transferred to the latter train, it would reach Quincy, Ill., in time to be transferred to the same carrier's Chicago train on another division, and in that way get into the latter city in the forenoon of the next day in ample time for the market.

[1] The record presented is not as satisfactory and definite as we would like it, and, added to that difficulty is a failure on plaintiff's part to file a brief. But we may say, that if the poultry was delivered to defendant in good condition and was negligently delayed in transportation and thereby caused to spoil, in whole or in part, before it could be put on the market, defendant would be liable for the damage.

[2] We feel compelled to reverse the judgment for prejudicial error in argument by plaintiff's counsel. He was permitted to put to the jury, over defendant's objection, a comparison between this case and some case in which one Sloop was plaintiff (defendant not stated) over a shipment of cattle in which he said that:

"I remember having a case where Sloop shipped a load of cattle—Mr. Sloop's cattle were carried to Decatur on one train—the cattle were separated. One part went on one train, and one on the next. That was negligence. Now, that is somewhat parallel to this case where they took the turkeys and chickens."

At each dash in this quotation defendant was vainly objecting to counsel's remarks and excepting to the court overruling the objections. Under the court's approval, counsel continued:

"Now, gentlemen, the thing they are trying to do is to frustrate me. There was negligence in that case, and in this case the law presumes them guilty of negligence in handling these chickens."

Counsel then referred to some one (naming him) who knew plaintiff and knew that plaintiff told the truth and of this man being a friend of plaintiff's. Defendant's counsel here again objected.

The record does not show the pertinency of the Sloop Case, 117 Mo. App. 204, 84 S. W. 111, nor does it show whether the man counsel referred to was a spectator, or a jurymen. But, at any rate, Sloop's cattle and that friend of plaintiff's should not appear in the case at another trial.

Judgment reversed, and cause remanded. All concur.

GREENLEE v. KANSAS CITY CASUALTY CO. (No. 11591.)

(Kansas City Court of Appeals. Missouri. Jan. 17, 1916.)

1. EVIDENCE 6123—ACCIDENT INSURANCE—ACTIONS—RES GESTÆ.

Where, a moment or two after insured's wife heard him fall in the bathroom, she reached his side and asked what was the matter, his reply that he slipped and fell, is admissible as part of the res gestæ in an action on a policy insuring against death by accidental means.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. 6123.]

2. WITNESSES 6190—COMPETENCY—DECLARATIONS.

Insured's statement is not a confidential communication to the wife inadmissible as such.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 737; Dec. Dig. 6190.]

3. INSURANCE 6668—ACCIDENT INSURANCE—ACTIONS—EVIDENCE—JURY QUESTION.

In an action on a policy insuring against death through accidental means, evidence held sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. 6668.]

4. TRIAL 6140—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESSES.

The question which party's witnesses are entitled to belief, is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. 6140.]

5. INSURANCE 6668—CAUSE OF DEATH—PROVINCE OF COURT AND JURY.

In an action on a policy insuring against death through accidental means, the court will not determine as a matter of law, the question how insured met his death, where the opinion of scientists differed, but the matter will be left to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. 6668.]

6. INSURANCE 6146—ACCIDENTAL INSURANCE—CONSTRUCTION.

An accident policy should be construed favorably to the insured and against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. 6146.]

7. INSURANCE 6466—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.

Where a policy insured against the effects of bodily injuries caused directly, solely, and independently of all other causes by accidental means which bodily injuries or their effects shall not be caused wholly or in part, directly or indirectly by any disease, defect, or infirmity, it covered death of the insured resulting from a fall which produced cerebro-spinal meningitis, for the accidental fall was the proximate cause of death, and causal connection was not broken by reason of the disease.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1178, 1186; Dec. Dig. 6466.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

Action by Margaret M. Greenlee against the Kansas City Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McCune, Harding, Brown & Murphy, of Kansas City, for appellant. Boyle & Howell and Jos. S. Brooks, all of Kansas City, for respondent.

TRIMBLE, J. Plaintiff, as the beneficiary in an accident insurance policy held by her deceased husband, sued to recover the indemnity therein agreed to be paid in the event of insured's death by accidental means. She obtained judgment, and the defendant has appealed.

The policy insured "against the effects of bodily injuries, caused directly, solely, and independently of all other causes by accidental means, which bodily injuries or their effects shall not be caused wholly or in part, directly or indirectly, by any disease, defect, or infirmity." The answer set up the defense that the insured did not die from bodily injuries caused directly, solely, and independently of all other causes by accidental means, but that his death was caused wholly or in part directly or indirectly by disease. The controversy, therefore, involves not only whether the insured's death was caused by an accident, but also the meaning of the policy as to the extent of the liability created by it. Plaintiff claims that about 3 o'clock in the morning of April 12, 1912, the insured accidentally slipped and fell in the bathroom of his residence striking his head on the sharp corner of the marble washbasin, and that he thereafter died from the direct results and effects of said accidental injury. Defendant's position may be stated thus: First. That insured's fall was not an accident, but was the result of epidemic cerebro-spinal meningitis then attacking him, and that he died from the effects of said disease. Second. That even if the fall was purely an accident, insured did not die as a result of

the fall, but from an attack of meningitis. Third. That even though the fall was purely accidental and even though the fall was the inducing or predisposing cause of the meningitis, nevertheless, as the insured died of the disease and not solely from the effects of the fall or independently of the disease, still plaintiff could not recover for the reason that the policy by its terms did not create a liability extending that far.

The insured was 43 years of age, a practicing dentist of some 20 years standing, and, at the time of his death, had his office in the business section of Kansas City and his home in a residence district thereof. On the morning of the 11th of April, the day preceding the night of his fall, he ate breakfast with his family, and left home for his office at the usual time, and was in his usual good health. He was engaged all day in his profession at his office, and during the day talked to his wife over the telephone. He came home at the usual hour, about 6 o'clock in the evening, and was in good health, cheerful in disposition, strong, vigorous, and perfectly normal in manner and appearance. About 9:30 or 10 o'clock that night he went to bed as usual. He and plaintiff occupied the same bed and he slept well without being nervous or restless. About 3 in the morning he got out of bed and went to the bathroom, a distance of about 25 or 30 feet. His wife spoke to him and he answered and said he was going to the bathroom, but, upon objection by the defendant that this answer was "incompetent, irrelevant, and immaterial," it was stricken out. There was a light in the hall leading to the bathroom, and as her husband passed into the hall on his way thither, plaintiff glanced at her husband. He was perfectly normal in appearance, conduct, and walk. Plaintiff noticed nothing in him unusual or different from that of other occasions, for he sometimes got up at night and went to the toilet. In about the time it would take him to reach the bathroom, plaintiff heard a heavy fall and a moan from her husband. He was a large man weighing over 200 pounds. The wife instantly sprang out of bed and ran to the bathroom. Her husband was lying on the floor with his head near the corner of the marble basin. He was bleeding profusely from a wound on his head and his night clothes around his shoulders were saturated with blood. He did not get up, but lay there moaning and groaning. On reaching the bathroom plaintiff exclaimed, "What's the matter?" and her husband said, "I slipped and fell." The floor of the bathroom was covered with linoleum, and on this was a short rug in front of the basin and just inside the bathroom door. This rug was in its usual and proper position when Mrs. Greenlee retired that night, but when she found her husband on the floor the rug was pushed to one side and crumpled, and there was water on the floor. On the corner of the basin was some blood and a few strands of hair. A

nickel plated rack on which towels were hung, and which was fastened to the wall and in its proper position when they retired in the evening, was partly pulled down and twisted.

The insured's mother and brother, who was a physician, also lived in the house, and they heard the fall and reached the bathroom almost immediately after his wife did. Insured was unable to rise, and they picked him up and put him to bed. He was still bleeding from a wound about an inch or an inch and a half long located above and a little to the back of the left ear. He appeared to be dazed and was suffering great pain in his head and moaning. His brother washed and dressed his wound, and administered a hypodermic injection of morphine to alleviate the pain. About an hour or possibly longer after his fall, insured had a spasm or convulsion consisting of a more or less contraction or twitching of the muscles and of the skin, lasting not more than a minute, if that long. In half an hour after he was placed in bed he lapsed into unconsciousness, but whether this was or was not the effects of the morphine injection is not shown. At times thereafter he seemed to be conscious, but afterwards again became unconscious, and during the periods of apparent consciousness was unable to talk rationally or coherently. When morning came he was resting quietly. He remained in bed throughout the day of the 12th in very much the same condition as above described, except that he did not rest quietly, but suffered pain. On the morning of the 13th he seemed to be resting, but later in the forenoon of that day he grew much worse. His brother was sent for, and on the way home he called Dr. Tesson, and, after the two arrived, the insured had another convulsion, consisting of a twitching and contracting of the muscles and possibly a drawing up of the limbs, which passed away in a very short time. He was unconscious, and the physicians decided to remove him at once to the hospital. They placed him in an automobile and started. On the way thither, the insured, who was seated between the two physicians, was attacked by a third convulsion, in which he suddenly straightened himself out and died. This occurred about 1:30 p. m. of the 13th. His death, therefore, resulted in a little less than 36 hours after his fall.

Defendant's demurrer to the evidence, which it now insists should have been sustained, raises the question whether plaintiff made a sufficient case to go to the jury. That is, was there evidence tending to show that the insured's fall was accidental, and that his death resulted therefrom? Before considering this question, however, it is necessary to pass upon the objections to some of the evidence offered by plaintiff to show that the fall was an accident.

[1] It is insisted that the insured's statement, "I slipped and fell," made in response

to his wife's exclamation, "What's the matter?" was not a part of the *res gestæ*, and was therefore inadmissible. We are of the opinion that it was a part of the *res gestæ*. The declaration of the deceased was practically coincident in point of time with the main fact to be proved. Mrs Greenlee heard the fall and reached her husband in the momentary interval it took to leap from her bed and run the short distance to the bathroom. Seeing husband upon the floor with blood streaming from a wound in his head, she exclaims, "What's the matter?" and he replies, "I slipped and fell." Everything that transpired formed one continuous transaction, and the insured's statement was a part thereof. It was so nearly contemporaneous with the main fact under consideration, and was so clearly connected with it, that in the ordinary course of affairs it could be said to be the spontaneous exclamation of the real cause, and was a verbal act constituting a part of, and illustrating, said main fact. It, therefore, meets the tests laid down by the authorities as necessary to bring it within the *res gestæ*. 1 Greenleaf on Ev. (16th Ed.) § 108; 2 Taylor on Ev. (9th Ed.) § 588; *Leahy v. Fair Grounds Railway Co.*, 97 Mo. 165, loc. cit. 172, 10 S. W. 58, 10 Am. St. Rep. 300; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 36, loc. cit. 42; *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feigner*, 60 Mo. 214. Nor does the fact that insured's wife exclaimed, "What's the matter?" deprive the statement of its spontaneity or make it a mere narrative of a past transaction. The heavy fall, the rush of the wife to the bathroom, the sight of her bleeding husband upon the floor, the exclamation of the wife, and the statement of the husband in explanation of his situation are all so intimately connected and so natural and made under the nervous excitement and stress of the moment as to wholly differentiate it from those instances where, after the lapse of time, there has been opportunity for the mind to reflect and contrive, and the statement is a mere narrative of the circumstances of a past transaction given in answer to a cool and collected inquiry as to the nature thereof. The circumstances of sudden surprise, startling shock, and nervous excitement, coupled with the lack of time to contrive and misrepresent, entirely exclude the idea that the statement was not a perfectly natural and spontaneous expression. 3 Wigmore on Ev. § 1750. The fact that the deceased appeared to be dazed does not destroy its evidentiary character. He was not irrational at that moment, nor did he become unconscious till afterwards. The fact that he was somewhat dazed affords rather an additional reason for thinking it was a natural expression, and not the result of reflection and fabrication.

[2] But it is insisted that the statement

was a confidential communication from husband to wife. It would seem that it could not be regarded as a confidential communication, for that would imply that it was a mere narrative of a past transaction. But since it was not such, but, as we have seen, was in the nature of a verbal act, connected with and explaining the situation, then it would seem the wife would be as competent to testify to that fact as to any other fact going to make up the transaction. It is unnecessary, however, for us to go into or decide the question whether the plaintiff was incompetent to testify to it on the ground that she was his wife, because no such objection to the evidence was made on that ground. We have carefully read the record and examined every objection made to the evidence of plaintiff, and nowhere was the objection placed on such ground. The defendant, therefore, cannot claim any benefit by reason of such objection here.

[3] These objections to plaintiff's evidence being disposed of, we now return to the question whether the evidence was sufficient to take plaintiff's case to the jury.

In addition to the evidence hereinbefore detailed, Dr. Snyder, a physician of 13 years' experience, testified that he was present at the autopsy held on the body of deceased and found a bruised and torn wound on the left side of the head just above and a little back of the ear; that the pericranium or covering over the external surface of the skull, which is a membrane nourished by blood vessels, was bruised and discolored in the vicinity of the wound and immediately under the bruised and lacerated portion. The wound was over one of the thinnest portions of the skull, except the temple, and was over a suture, which is the line of articulation between the edges of two portions of the skull. On the inside of the skull, right under where the bruised tissue was, there was more or less fluid, and more contusion than on the outside, which indicated traumatism. In answer to a hypothetical question propounded to him, embracing the facts as presented by plaintiff's evidence and including certain facts suggested by counsel for defendant, the physician gave it as his opinion that the fall and the injuries resulting therefrom could and might have caused the death. He also testified that the brain could be injured by a fall or blow on the head without a fracture of the skull bone.

This evidence, taken in connection with the facts hereinbefore stated and with the evidence showing that insured was in normal health prior and up to the very moment of his fall, amply tended to show that deceased sustained an accidental fall, and died as a direct result thereof. Indeed, the fact that insured met with an accidental death would not and could not be questioned were it not for the evidence of defendant's expert wit-

nesses who testified that at the autopsy they found that deceased was suffering at the time of his death with meningitis, and, upon making a microscopical examination, discovered the presence of a germ showing that the particular kind of meningitis was epidemic cerebro-spinal meningitis. (It seems that meningitis is a general term which may, in this instance, be defined as an inflammation of the meninges or enveloping membranes of the brain, while epidemic cerebro-spinal meningitis is that particular kind or form of meningitis which is an acute, infectious disease caused by a microbe, *Diplococcus intracellularis*.) Defendant's experts say insured died of this form of meningitis, and, as there was an epidemic of that disease in Kansas City shortly before and extending into April, 1912, defendant's theory is that the fall in the bathroom was the result of the onslaught of the disease, and was not an accident. In other words, that insured contracted epidemic cerebro-spinal meningitis and died therefrom and the fall in the bathroom was a mere incident manifesting the presence of the disease, and hence the disease and not the fall caused his death. Defendant says that the undisputed testimony is that deceased died from this particular form of meningitis. But, as we have seen plaintiff's evidence was sufficient to authorize the jury to find that insured's fall was purely an accident, and that his death resulted directly from that fall. The evidence in plaintiff's behalf does not admit that insured was suffering from meningitis when he died, but presents a state of facts from which the jury could find that he died from the effects of the fall itself, and did not suffer from meningitis of any kind. We do not understand that plaintiff's case was tried on the theory that meningitis was conceded. The case was tried on the theory that the fall itself was sufficient to and did produce death without the intervention of any other cause. Plaintiff's counsel did follow defendant into the question of meningitis, but this, we understand, was only meeting defendant upon its own ground. In doing so, plaintiff's theory was that even if the jury should find that insured at the time he died was suffering with a meningitis, i. e., an inflammation of the brain membranes, or even with epidemic cerebro-spinal meningitis as claimed by defendant, still plaintiff was not precluded from recovery if the fall was purely accidental and the meningitis, of whatever kind, arose as a direct result of the fall and his death was caused thereby. There was evidence that some forms of meningitis may be caused by a blow on the head, and, if insured was suffering at the time he died with any of those forms of meningitis, there was still room (so far as the evidence was concerned and without regard to the construction to be placed on the words of the policy), for the jury to find that insured fell accidentally, and that his death resulted

directly from the fall. Even if insured was, at the time he died, suffering with epidemic cerebro-spinal meningitis as claimed by defendant, this did not conclusively destroy plaintiff's right to recover. (We are dealing now with the evidence, and not with any construction to be placed on the policy.) There was evidence to the effect that a man can become infected with the germ of this disease from a cut or wound; that when the germ gets into the body it makes its way to the meninges of the brain and there attacks them; that if the germs are introduced directly into the blood stream they can reach their objective and produce their effects much more rapidly; that a blow on the head by lowering the vitality renders one more susceptible to the disease and less able to throw off the germs; that a man can be infected with the germ from an injury to the skin; that where the germ is introduced into the circulation direct it could produce evidences of the activity of the disease within one or two hours. The evidence of defendant's experts was to the effect that after the germ enters the body it requires a certain time called the period of incubation to elapse before the germs have multiplied sufficiently to manifest the disease, and that in insured's case this period of incubation necessarily extended back past the time of the fall, and therefore the insured had the disease at that time, and his fall was merely the symptom or manifestation of the disease. But, their evidence also shows that this period of incubation varies from 24 hours to 32 days according to the virulence of the germs and the resisting power of the victim. And it is not conclusively shown when the symptoms of the disease first manifested themselves in the deceased. The presence of epidemic cerebro-spinal meningitis was not disclosed until the autopsy was made. It is true the insured had several convulsions, but there was evidence that the first one was what might be expected from a man suffering from a blow on the head, and while he thereafter had some of the symptoms of meningitis they were also the symptoms which result from a serious injury to the brain by a blow. In short, there was evidence tending to show that the insured accidentally fell, and it alone was sufficient to cause death, but that even if he had cerebro-spinal meningitis when he died, it could have been caused by or resulted from the fall. Under all these circumstances, it was for the jury to say whether the fall was purely accidental and of itself alone resulted in death, or whether an accidental fall caused or brought on a disease resulting in death. The plaintiff having made a prima facie case covering both of these questions, the burden was on defendant to show that the death did not result from an accident.

[4, 5] But defendant takes the position that since its experts gave it as their opinion

that a person cannot be infected with the germ of epidemic cerebro-spinal meningitis through a wound, the plaintiff's prima facie case is overthrown. The logical result of this position is to say that plaintiff's evidence to the contrary is not worthy of belief. But as to what witnesses will be believed is for the jury to say. Of course if plaintiff's witnesses testified to matters directly contrary to well-known and clearly established laws of nature, then the court might say, as a matter of law, that their testimony should be disregarded. But the controversy herein is not over well-known and fully attested physical facts. The evidence clearly shows that the defense rests upon highly scientific theories which have not yet met the full approval of all scientific men. It shows that the means by which the germ of meningitis may enter the body is still shrouded in mystery. The greater trend of opinion is that they enter through the nose and throat, but this is only mere opinion. Three experts for the defense testified they could enter through an abrasion of the skin. For this court to reverse the case on the ground that the evidence is insufficient, is to decide as matter of law the very thing about which scientists differ and concerning which it is admitted mankind has not yet attained a full and complete knowledge. In such situation the authorities all hold that the question of fact at issue must be left to the jury. *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, loc. cit. 266, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560; *Beile v. Travelers' Protective Ass'n*, 155 Mo. App. 629, loc. cit. 634, 135 S. W. 497; *Driskell v. United States, etc., Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880; *Whiteaker v. Chicago, etc., R. Co.*, 252 Mo. 438, loc. cit. 452, 160 S. W. 1009.

[8, 7] In passing on this question of the demurrer to plaintiff's evidence we have purposely left out of consideration, until now, defendant's contention that the policy should be so construed as to create only a limited liability for the accidental death of insured. That is, that the policy means that even though insured's fall was purely accidental and that the fall caused or brought on a meningitis, which in turn caused his death, nevertheless plaintiff could not recover. But even this construction would not justify the sustaining of a demurrer to the evidence, since, as we have hereinbefore shown, there was evidence from which the jury could find that the fall was purely accidental, and that the fall alone produced the insured's death. However, defendant's construction of a limited liability must be considered, because, if that construction is correct, then defendant was entitled to have that construction applied to the facts by appropriate instructions; and this brings us to the complaint of defendant concerning the court's action in regard thereto.

The defendant asked two instructions, numbered 4 and 5, which, as asked, included

defendant's construction of the contract, namely, that plaintiff was not entitled to recover if deceased died of meningitis, even though the fall was the producing cause of the meningitis, and that fall was accidental. The court, however, by modification, eliminated this idea from the instructions. The two instructions, as asked, were as follows:

(4) "The court instructs the jury that even though you may believe from the evidence that the fall of Robert P. Greenlee was caused by accidental means alone, still if you believe that his death was caused in whole or in part, directly or indirectly, by epidemic cerebro-spinal meningitis, your verdict must be for the defendant."

(5) "The court instructs the jury that if you believe from the evidence in this case that the death of Robert P. Greenlee was caused in whole or in part directly or indirectly by epidemic cerebro-spinal meningitis, your verdict must be for the defendant."

The modification consisted in striking out the words "or indirectly," and the instructions were then given as modified. To correctly understand the propriety of this modification it is perhaps necessary to state the substance of the instructions that were given. The first one for plaintiff told the jury that if they believed and found from the evidence that insured accidentally fell and was injured on the head, "and that from the effects of such accidental injury the said Robert P. Greenlee did thereafter, on the 13th day of April, 1912, die, as the direct result and effect of said injury," then their verdict should be for plaintiff. The next instruction was to the effect that if the jury believed from the evidence that said fall was the sole, direct, and independent cause of insured's death, "and that said deceased would not have died at the time, under the circumstances and in the manner he did die if he had not experienced said fall and if said fall was not in any way produced or caused by meningitis, then your verdict must be for the plaintiff, and the burden of proving this rests upon said plaintiff, and if she fails to prove by the greater weight of all the credible evidence in the case that death did so and in such manner result, then your verdict must be for the defendant."

On behalf of defendant the court, in instruction No. 1, told the jury that:

"If you believe from the evidence that the fall of Robert P. Greenlee was caused by vertigo, dizziness, or convulsion, resulting from epidemic cerebro-spinal meningitis, your verdict must be for defendant."

In No. 3 the jury were told that:

"The burden is on the plaintiff to prove that the injury to and the death of Robert P. Greenlee were both directly caused by accidental means alone, independently of all other causes, and unless plaintiff has established by a preponderance or greater weight of the credible testimony that both the injury to and the death of Robert P. Greenlee were directly caused by accidental means alone, independently of all other causes, your verdict must be for defendant."

Instructions numbered 4 and 5 were given as hereinbefore set out, except that they were modified by striking out the words "or indirectly" in each of them.

In instruction No. 6 the jury were told that:

"Even though you may believe from the evidence that the fall of Robert P. Greenlee was caused by accidental means alone, still before you can find for the plaintiff, you must believe from the evidence that the fall was the direct and proximate cause of the death of said Robert P. Greenlee."

It will be seen, therefore, that the only effect of the modification of instructions Nos. 4 and 5 by striking out the words "or indirectly" was to take away the idea that plaintiff could not recover even if the jury found that the meningitis, claimed to have been the cause of his death, was produced by the injury he received in his accidental fall. This presents, therefore, the question whether such construction of the contract insisted upon by defendant is correct. In other words, does the policy, when rightly construed, mean that the liability does not extend to nor include the results of disease contracted by and through, or caused by, an accidental physical injury?

Unless the language of the policy is so plain and explicit as to afford no room for construction, it should, if possible, be construed most favorably to the insured and against the insurer. In 4 Cooley's Briefs on the Law of Insurance, page 3200, it is said:

"If a disease resulting in death is the effect of an accident, so as to be a mere link in the chain of causation between the accident and the death, the death is attributable, not to the disease, but to the accident alone."

We are of the opinion that the construction contended for by defendant is not correct. We do not think the qualifying words in this policy are in reality any greater than those in the case of *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560, or in *Belle v. Travelers' Protective Association*, 155 Mo. App. 629, 135 S. W. 497. And in those cases the construction contended for here was denied. The case of *Goodes v. Order of United Commercial Travelers*, 174 Mo. App. 330, 156 S. W. 995, is a case very much like the one at bar both on the facts and on the construction to be placed on the contract. There the policy said the liability did not extend to "any death, disability * * * happening directly or indirectly in consequence of disease or caused wholly or in part by bodily infirmities or disease." These words of limitation are fully as broad and comprehensive as the limiting words of the policy in the case at bar, and yet the construction contended for was not adopted. See, also, the following cases: *Driskell v. United States, etc., Accident Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *National Benefit Ass'n v. Grauman*, 107 Ind. 288, 7 N. E. 233; *Isitt v. Railway Passengers' Ass'n*, L. R. 22 Q. B. 504.

In the case of *Carr v. Pacific Mut. Life*

Ins. Co., 100 Mo. App. 602, 75 S. W. 180, cited by defendant, the injury was held to be the direct result of the sickness. The insured was in bed in a hospital unconscious from fever, and had to be restrained at times from doing violence to himself. His nurse left the room for a moment, and when she returned he had gone through the window to the ground. There was no evidence of accident in the case. Besides, the *Fetter Case* is superior in authority to it if it announces a different rule.

Complaint is also made of the refusal of defendant's instructions 7 and 9. They were, however, properly refused for the reason that they told the jury to find for defendant, even if they found insured accidentally fell and through his fall contracted meningitis and died therefrom. The authorities are to the effect that where an accident causes a disease, which disease in turn results in death, the accident is, in law, the proximate cause of the death, and not the disease. Therefore if the jury found that the accidental fall caused the disease and the disease produced death, the jury could not change a matter of law and find as a fact that, under such circumstances, the disease was the "efficient, predominant, and proximate cause of death."

Under the instructions which were given all the issues were fairly submitted to the jury. Before the jury could find for plaintiff, they were required to find that the fall was not in any way produced or caused by meningitis. The instructions also submitted to the jury the questions whether the insured died from the effects of an accidental injury, whether that accidental injury was the sole, direct, and independent cause of his death, and whether he would have died had he not received such fall. We think the case was fairly tried, and that we are without authority to disturb the verdict.

The judgment is therefore affirmed. All concur.

JOBLIN v. ILLINOIS SURETY CO.

(No. 14213.)

(St. Louis Court of Appeals. Missouri. Jan. 4, 1916. On Motion for Rehearing, Feb. 8, 1916.)

1. TRIAL \S 404—FINDINGS BY TRIAL COURT—EFFECT OF.

In an action tried to the court, a finding or memorandum not made at the request of either party does not fall within Rev. St. 1909, § 1972, requiring the court upon trial of a question of fact to state on request of either party its findings of fact separately from conclusions of law, and so does not have the effect of a special verdict, but is to be treated as a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. \S 404.]

2. APPEAL AND ERROR \S 1011—REVIEW—FINDINGS.

Where no error has been made in the application of the law, a finding of fact by the

trial court on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ¶ 1011.]

3. CONTRACTS ¶306—BUILDING CONTRACTS—CERTIFICATE OF ARCHITECT.

Where a building contract which authorized the owner, on three days' notice after the architect had certified the contractors' failure to perform the work, to complete the building and to deduct any expenses incurred from any money then due the contractor, the expense to be certified by the architect, the owner cannot hold the contractors and their sureties liable for expenses incurred where the same were not certified by the architect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. ¶306.]

4. APPEAL AND ERROR ¶171—CHANGE OF THEORY OF CASE ON APPEAL.

Where, in an action against the surety on a building contract, the case was tried below on the theory that the surety was not liable because the architect had not certified the value of the work and material furnished by the contractor, plaintiff cannot on appeal contend that the pleadings did not raise that issue, being bound by the theory presented in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063-1063, 1066, 1087, 1161-1165; Dec. Dig. ¶171.]

On Motion for Rehearing.

5. CONTRACTS ¶306—BUILDING CONTRACTS—CONSTRUCTION.

Where a building contract authorized the owner or architect to take over the work on three days' notice after certification of the contractors' default by the architect, the architect acting for the owner is not entitled to take over the work without a new notice having agreed after serving the first notice of the contractors' default to allow the contractors to complete the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. ¶306.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by Alfred H. Joblin against the Illinois Surety Company. From a judgment for defendant, plaintiff appeals. Affirmed.

McDonald & Taylor, Joseph A. Wright, Jacob Chasnoff, and Arnold Just, all of St. Louis, for appellant. Percy Werner, of St. Louis, for respondent.

REYNOLDS, P. J. Action on contract and bond for the erection of a building to be occupied as a residence by plaintiff, who seeks to recover \$1728.28 as excess necessarily paid out by him over the contract price to mechanics and materialmen in order to complete the building, the contractor, Banner Land & Building Company, as it is alleged, having abandoned the work before its completion. The action was originally brought against the contractor as well as against the Illinois Surety Company, surety on the bond, but was dismissed as to the contractor, no service of process having been made upon it and it not appearing to the action. The trial was before the court, a jury having been waived, and at its conclu-

sion the court found in favor of defendant and entered up judgment accordingly, from which plaintiff appealed.

At the close of the case defendant offered a demurrer and it is stated in the abstract prepared by appellant that the court sustained this demurrer. That statement is obviously incorrect. The demurrer was offered but no action of the court upon it anywhere appears. Moreover, a memorandum filed by the court in announcing its decision, as well as the judgment itself, which appears in the short transcript filed with us, negatives the idea that the case went off on demurrer. The judgment recites the appearance of plaintiff and the Illinois Surety Company by their respective attorneys, the waiver of a jury, and then recites that the parties submit the cause to the court "upon the pleadings, the evidence and the proof adduced, and the court having heard and duly considered the same, and being fully advised in the premises, doth find the issues in favor of the defendant Illinois Surety Company, wherefore, it is considered and adjudged," etc. Obviously, this is not a judgment upon a demurrer. In fact we do not understand that beyond this recital in the abstract learned counsel for appellant so contend.

[1] In rendering his decision in the case the learned trial judge filed a memorandum which has been brought up by appellant. As this finding or memorandum was not made at the request of either party, and does not therefore fall within the provisions of section 1072, Revised Statutes 1900, it has not the effect of a finding under that statute, that is, does not have the effect of a special verdict, as do such findings, *South St. Joseph Land Co. v. Bretz*, 125 Mo. 418, loc. cit. 423, 28 S. W. 656, and is to be treated as a general verdict. See *Lesan Advertising Co. v. Castleman* (Sup.) 177 S. W. 597. As was said by our Supreme Court in *Mead v. Spalding*, 94 Mo. 48, 6 S. W. 384, while such opinion cannot be made to take the place of instructions, or a finding of facts given as an instruction, "the opinion of the trial court may be cited and used in the consideration of the case presented by the record, and in that respect is often of great value to us; but it is no part of the record upon which the case must be determined in this court." That the appellate courts have availed themselves of such memorandum without having been bound by it as part of the record, appears in very many cases.

[2] In the case at bar no declarations of law were asked unless the demurrer to the evidence which we have before referred to as not having been passed upon may be considered as such; no declarations of law as such were given. It is clear that this case was determined by the trial court largely on the weight of evidence, the evidence being

conflicting. Where that is the case, if no error has been made in the application of law, the finding of the trial court is conclusive upon our court. *Jordan v. Davis*, and other cases post.

[3] We cannot state the case better on its facts or on its law than stated by the learned trial judge and hence avail ourselves of the memorandum filed by him, not, as before said, as conclusive upon us, or as part of the record proper, but as a correct and succinct statement of facts and of the law. For a better understanding, however, of one of the principal points of controversy in the case, it is well to say that article III of the contract and bond, in substance, provides that no alterations shall be made in the work, nor extra work done, except upon written order of the architects, and article V, in substance, provides:

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly-skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty after three days' written notice to the contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due, or thereafter to become due to the contractor, under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under the contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials thereof. * * * The expense incurred by the owner herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive and binding upon the parties."

The architects here referred to are Mariner & La Beaume, and the member of that firm who seems to have had charge of this particular work was Mr. Mariner. This by way of explanation.

We use so much of the memorandum of the court above referred to as we think material and necessary, as follows:

"On the 12th day of August, 1907, plaintiff A. H. Joblin entered into a contract with the defendant, the Banner Land & Building Company, for the erection of a certain dwelling house, for the faithful performance of which contract the Banner Land & Building Company and its co-defendant, the Illinois Surety Company, entered into a bond in the sum of \$2849.00. The contract and bond were in the usual form and provided for the work being done under the supervision of Mariner & La Beaume, architects, and for the making of alterations and payments under the contract on the certificates of such architects.

"The work progressed under the contract in the usual way until some time in the latter part of November, or the first of December, when the evidence discloses, the plaintiff visited the work and found no work being done and so reported to the architect, Mr. Mariner.

"The architects then, under date of December 9th, 1907, gave to the defendant Banner Land & Building Company a notice, as provided in the contract, that owing to the fact that no work had been done on the building for some time past, they begged to call attention to article V of the contract and to notify said defendant that unless this work was started within three days from date that they would take other means to complete the contract.

"So far, there is no controversy in the evidence. The evidence discloses that then the architect sought to locate Mr. Morris, the president of the Banner Land & Building Company, but found him out of the city. At the same time the agent of the defendant Illinois Surety Company, having received notice of the existing condition, took the matter up in a general conference between Mr. Mariner, the architect, Mr. Atwood and Mr. Hopkins, representing the defendant Illinois Surety Company. As to what was then done, the witnesses differ. Mr. Mariner testifies that he took the matter up with Mr. Atwood and informed him that Mr. Morris, the president of the Banner Land & Building Company, was out of town and asked him how to proceed with the least possible delay, and states that from that time on he proceeded to do the work on the day basis; and on consultation with Mr. Atwood employed William Morris to superintend the work; that thereafter all payments were made after approval by Mr. Atwood, agent of the Illinois Surety Company; and that thereafter he (Mr. Mariner) discharged Morris and employed one Murphy to complete the work.

"In brief, Mr. Mariner's testimony is to the effect that at or about December 9th, and after the giving of the notice under date of December 9th, above referred to, he as the representative of the owner and with the consent of the defendant Illinois Surety Company, proceeded with the completion of the work on behalf of the plaintiff, and that the connection of the Banner Land & Building Company with the work from that time on ceased.

"On the other hand, Mr. Atwood testified that on receipt of a copy of the notice of December 9th, he took the matter up with his Chicago office, and as a result thereof Mr. Hopkins, representing the defendant Surety Company, came to St. Louis, and that he and Mr. Hopkins and Mr. Mariner took the matter up and it was agreed that the work should be continued by the Banner Land & Building Company under the direction of its superintendent, Mr. William Morris, and that the payments should be made with the O. K. of Mr. Mariner and himself, Mr. Atwood; that thereafter he continued to O. K. such payments as were made on account of the work and labor done and material furnished by the Banner Land & Building Company, and so continued up to January 20th, 1908, when, according to his testimony, a man named Murphy came into his office with an order for some \$650.00 for completing the work; and that he then, for the first time, learned that the work was not being completed by the Banner Land & Building Company.

"In addition to this, there is the testimony of Mr. William Morris to the same effect as that of Mr. Atwood, that he, as superintendent of the Banner Land & Building Company, was continuing the work and did so continue it until he was prevented from further doing so by Mr. Mariner; and furthermore, the defendant's contention on this point is supported by the action of the parties at the time, as evidenced by their letters. In a word, if the position of Mr. Mariner and of the plaintiff that the connection of the Banner Land & Building Company with the work was terminated at or about December 9th, when the notice above was given, why was it necessary for the architects to again, under date of December 20th, give to the Banner Land & Building Company a notice to proceed to com-

plete the brick work within three days or that they would relet the contract?

"The determination of the question of fact as to whether or not the defendant Banner Land & Building Company renounced the contract or abandoned the work or whether, on the other hand, they were so slow in the completion of the work that the architects, under the provision of the contract, gave them the three days' notice provided for in the contract and took the further steps therein provided for the completion of the work by other parties, is, in the opinion of the court, determinative of the case; and for that reason the evidence on this point has been given most careful consideration, and as a result of that consideration, the court has concluded that the Banner Land & Building Company did not renounce the contract or abandon the work.

"And this conclusion is supported by the action of the parties themselves, for, if the Banner Land & Building Company renounced the contract, then it was not necessary that the architects should give to them any notice, but the plaintiff would have had the right to proceed to complete the work without any notice. But instead of so doing, the parties themselves at all times proceeded under the theory that the contract had not been renounced and that the conditions existed which are covered by article V of the contract in question.

"And if the conditions covered by article V did exist, then, even though we should presume, which the court does not find, that all steps, as provided by that article, were properly taken by the architects before completion of the work, nevertheless, the failure of the plaintiffs to allege and prove that the expense incurred by the owner for finishing the work had been audited and certified by the architect is fatal to his right to recover. See *American Bonding Co. v. Gibson County*, 127 Fed. 671 [62 C. C. A. 397].

"In that case the provisions of the contract were the same as those of article V of the contract here in question, and there all steps were properly taken, as provided by the contract in said article V. The plaintiff brought suit against the bonding company to recover the cost of completing the work. The plaintiff there, as here, neither alleged nor proved that the architects had audited and certified the expense and damage incurred by the county through the default of the contractors, and for lack of this certificate the defendants insisted the suit was prematurely brought and no recovery could be had; and it was held that the obtaining of this certificate of the architects was a condition precedent to the plaintiff's right of action, and that the petition must allege and the fact must be proven that at the time of the bringing of the suit the expense, damage, etc., had been audited and certified by the architects, or that the architects had legally refused to do so, though properly requested."

We may add here that this same case of *American Bonding & Trust Co. v. Gibson County* was again before the United States Circuit Court of Appeals of the Sixth Circuit and followed on the above point. See 145 Fed. 871, 76 C. C. A. 155, 7 Ann. Cas. 522.

Continuing, the learned circuit judge refers to *Heidbrink v. Schaffner*, 147 Mo. App. 632, 127 S. W. 418, as a case particularly relied upon by the plaintiff below and as one in which a construction of an article similar to article V was involved, and distinguishes that case from the one at bar, in that there the contractor had absolutely renounced the contract, hence it was held that no notice or certificate was necessary.

Continuing the learned trial judge said:

"How different, however, is the case at bar. As above set out, not only does the evidence here fail to show any renunciation of the contract, but the parties, particularly the architects, here at all times, at least up to the time of issuing a certificate authorizing the plaintiff to take over and complete the work, attempted to proceed under the provisions of article V of the contract, and this fact is shown in the plaintiff's own case. And furthermore, the court, as above set out, has found from the evidence that there was no renunciation of the contract, or even abandonment thereof, and that the work was continued up to December 21st, 1907, when, as Mr. Mariner says, he discharged Mr. William Morris, who was conducting the work for the Banner Land & Building Company, and turned the work over to Mr. Murphy."

Accordingly the court found for the defendant, judgment following.

We have read all of the evidence as set out in the abstract filed with great care and find no reason to hold that the conclusion arrived at by the learned trial court is not supported by substantial evidence, and we think that in the determination of the cause that court has correctly applied the principles of law here applicable. We accordingly adopt it as our own.

[4] Learned counsel for appellant argues that defendant did not plead want of certificate from the architects, citing among other authorities *Nodaway Drainage District No. 1 v. Illinois Surety Co.*, 252 Mo. 543, loc. cit. 558 and 563, 160 S. W. 999. It is true that the answer does not plead the lack of the certificate called for in paragraph 5 of the contract. But the case was tried on the theory that this paragraph was before the court and that defendant relied upon the absence of the certificate. Thus when plaintiff offered to prove the value of the work and material it was agreed that the witnesses, if present, would testify as to the correctness of these items, counsel for defendant, however, reading this article V at length, made specific objection to the competency of the evidence on the ground that under article V "an audited and certified statement of the architect is the only method of proving" the liability of the defendant for these items. Without passing on the objection the court admitted the evidence. No objection was made by counsel for plaintiff, that the absence of a certificate had not been pleaded. The case was tried on the theory that the question as to the necessity of the certificate was in issue. In fact, unless that was so, the citation of counsel for plaintiff to the trial court of *Heidbrink v. Schaffner*, supra, which the trial judge states was a cause upon which counsel for defendant "place great stress," would have been useless, as the question of the necessity of a certificate was there the principal point in decision. Parties are held to the theory on appeal upon which they tried the case.

So too, it is argued on the authority of *Lackland v. Renshaw et al.*, 256 Mo. 133, 165 S. W. 314, that this being a hired surety and the doctrine *strictissimi juris* not applying

that no harm resulted from the absence of the certificate. In the face of the finding of the trial court for the defendant on the evidence, we do not think the Lackland Case controlling or applicable here.

Appellant's learned counsel attack the conclusions of law as set out in the memorandum filed as if they were before us for review. While we adopt them, we are not to deal with them as before us for review. As before remarked, we cannot treat them as part of the record or as determinative of any question of law in them; we use them only as expressing our view of the facts and the law. In a case such as this, in which the trial was before the court, a jury having been waived, the evidence heard, no declarations of law asked, and a finding for defendant and judgment accordingly entered, the case stands as upon a general verdict in favor of the defendant. Treating the memorandum as surplusage, and as not before our court, the judgment itself is nothing more nor less than a general finding and judgment in favor of the defendant on disputed, controverted evidence in the case. See *Patterson v. Patterson*, 200 Mo. 335, loc. cit. 340, 98 S. W. 613, as also *Lesan Advertising Co. v. Castleman*, supra, and to what is said in that case in the dissenting opinion, 165 Mo. App. 575, loc. cit. 603, 148 S. W. 433, approved by the Supreme Court. In brief, it is such a finding and judgment as cannot be reviewed on appeal, "unless declarations of law are asked and refused, in order that the appellate court may see upon what theory the case was tried. Unless this is done the finding of the court is inconvertible here." *Jordan v. Davis*, 172 Mo. 599, loc. cit. 608, 72 S. W. 686, and cases there cited; *Chrisman v. Scholl*, 177 Mo. App. 58, loc. cit. 60, 164 S. W. 131.

So our court held in *Olive Street Bank v. Phillips*, 179 Mo. App. 488, 162 S. W. 721, where at page 494 in the official report it is said:

"As the cause was tried below before the court without a jury, a jury having been waived, and no declarations of law were asked by either party and none given, if there is any substantial evidence upon which to base the judgment below, and if the latter can be held to be correct upon any theory whatsoever, it is our duty to sustain it."

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

On Motion for Rehearing.

NORTONI, J. On motion for rehearing it is earnestly argued the court did not sufficiently consider the principal point presented in the appeal which is to the effect that notwithstanding the finding of the court on the facts the judgment should be for plaintiff. It is said in this connection that article V, authorized the architect to terminate all relations with the contractor, take the work

out of his hands, and complete it otherwise. Also that in any view of the evidence it appears the architect discharged the contractor—Banner Land & Building Company—on December 21st and completed the building through Murphy by the day's work. In this the architect acted for plaintiff, but under the contract provisions conferring authority on the part of defendant with respect of the matter as well. Therefore it is said that as the architect terminated the relations of the contractor and took the building out of its hands on December 21st the mere fact that the architect failed to issue certificates of audit for the bills accrued thereafter is of no consequence in view of the recent decision of the Supreme Court in the case of *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314, for that it appears all of the moneys expended went into the completion of the building and no substantial loss was entailed on the surety as a result of the failure of the architect to audit the bills and issue certificates in the precise form required by the contract. But it is clear this argument predicates upon the fact that the architect dispensed with the contractor and took charge of the work on December 21st under the authority of the contract. Manifestly such does not appear with the case in its present posture before us. In any view—and so much is conceded—the court found all of the facts against plaintiff.

[8] It is not conceded that the architect discharged the contractor and took charge of the work on December 21st, as the contract requires. Article V of the contract authorizes the owner, for failure on the part of the contractor to properly prosecute the work, to provide labor and materials and complete the same. But this provision appears to be operative only after three days' written notice to the contractor. On December 9th the architect, acting for the owner, gave the contractor proper notice calling attention to article V of the contract and reciting substantially that unless the work was taken up on or before the 12th of December, the architect would take charge of it under the contract. But the evidence is—and manifestly in view of the finding of the court for defendant the court so found the fact to be—that the owner did not act on this notice and in accordance with it. On the contrary the architect, Mr. Mariner, Mr. Atwood, the surety company agent, and Mr. Hopkins, the vice president of defendant surety company, met and agreed the work should proceed in charge of the contractor under the supervision of William Morris. This agreement manifestly operated to dispense with the notice theretofore given on December 9th by the architect, and, according to the finding of facts, the contractor remained in charge of the work until December 21st, through its superintendent William Morris. Finally, on December 21st, the architect peremptorily discharged the contractor and settled accounts

with William Morris, its superintendent. Thereupon one Murphy was placed in charge of the work, it is said under arrangement for compensation by the day, and as the representative of plaintiff owner to complete the building. It is true the architect had authority under article V of the contract to dispense with the contractor, but he could only do so on giving three days' notice, and, moreover, the architect is required by article V to certify that the "refusal, neglect, or failure" on the part of the contractor "is sufficient ground for such action"; that is, of dispensing with the contractor's services and taking charge of the work to be completed under the direction of the owner. No notice whatever was given by the architect in respect of this matter, and no certificate of any sort was made by him concerning the ground of his action in discharging the contractor on December 21st. Moreover, it appears that on the very day before, the architect treated the contractor as still in charge of the work, for he served a written notice on it—Banner Land & Building Company—to complete the brickwork within three days thereafter. The court evidently found the fact to be that the architect never terminated the contractor's relation as such with the building, and that he merely took charge of the work on December 21st without heeding whatever the contract requirement in respect of that matter. As we read and interpret article V of the building contract, it was a condition precedent to the right of the owner to discharge the contractor and take charge of the work, to give three days' written notice of his intention to do so through the architect. This provision touching three days' notice refers as well, in our view, to the right of the owner through the architect to dispense with the contractor and take charge of the work for the purpose of completing the building as it does to the subject-matter immediately following that provision concerning his right to provide labor and materials with respect to which the contractor is in default. In this view it appears the architect was a mere interloper when he dispensed with the contractor and discharged it and its superintendent, William Morris, on December 21st and took charge of the building for plaintiff owner to complete it by day labor. Such being true, of course, the question concerning the sufficiency of certificates of audit in respect of expenditures after that date is of no avail, for that in no view of the case can the surety be held for work done by the owner after December 21st through employing men by the day in completing the building when the owner was without right whatever in dispensing with the contractor and taking possession of the building. It is manifest that the architect bungled the matter in failing to dispense with the contractor and in taking over the work for plaintiff owner without heeding the

provisions of article V of the contract touching that matter.

The motion for a rehearing should be overruled. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

HARTMAN v. CHICAGO, B. & Q. R. CO. (No. 11740.)

(Kansas City Court of Appeals. Missouri.
Dec. 6, 1915. Rehearing Denied
Jan. 17, 1916.)

1. STATUTES ⇨279—PLEADING—JUDICIAL NOTICE—INJURIES TO SERVANT—FEDERAL LIABILITY ACT.

A servant suing for injuries need not refer in his petition to the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), if the facts alleged bring the action within it, since state as well as federal courts are presumed to be cognizant of its enactment, and to know that it supersedes the state law upon that subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 878; Dec. Dig. ⇨279.]

2. ESTOPPEL ⇨92—CONTRACTS—MUTUAL RIGHTS OF PARTIES.

A party to a contract cannot accept its benefits and reject its burdens.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 260-263; Dec. Dig. ⇨92.]

3. CONTRACTS ⇨152—CONSTRUCTION—POWERS OF COURT.

The contract made by the parties must stand and the court cannot make contracts in opposition to their written terms by construing the words against their plain meaning.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⇨152.]

4. CONTRACTS ⇨318—FORFEITURES—ENFORCEMENT.

Courts look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for, and will not enforce them unless compelled by the plain letter of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. ⇨318.]

5. APPEAL AND ERROR ⇨845—SCOPE OF REVIEW—AGREED FACTS.

Where the facts have been agreed upon, and a statement filed in the case, the court on appeal must regard the agreed facts as the true ones.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3342-3345; Dec. Dig. ⇨845.]

6. MASTER AND SERVANT ⇨100—CONTRACTS AVOIDING NEGLIGENCE—VALIDITY.

An employer cannot make a valid contract with his employe for relief against his own negligence; such a contract being opposed to common morality and humanity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. ⇨100.]

7. MASTER AND SERVANT ⇨100—INJURIES TO SERVANT—INDEMNITY—CONTRACTS.

Where a master maintained a relief department whereby a servant upon payment of a small premium was to receive certain benefits in case of injury or sickness, whether resulting from the master's negligence or not, the contract

further providing that suit against the master should waive the benefits under the contract, and that acceptance of benefits under the contract should waive the right of action against the master, the contract was void in so far as it sought to provide in advance for the release of the master from the legal consequences of his future wrongs, regardless of whether there was a consideration from the master to the servant for the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. ☞ 100.]

8. MASTER AND SERVANT ☞ 100—INJURIES TO SERVANT—INDEMNITY—CONTRACTS.

In such case the employé may recover both for the master's negligence and under his contract of membership, such recovery not being double indemnity, since he has at law the right against the master, and under his contract, in the nature of an insurance contract, a right to compensation, and a wrongdoer cannot excuse himself from liability on the ground that his victim is fully insured.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. ☞ 100.]

9. MASTER AND SERVANT ☞ 100—INJURIES TO SERVANT—LIABILITY OF MASTER—WAIVER—VALIDITY.

Such a contract is void as to the forfeiture provisions, for the further reason that it gives the employé no option, but requires him to forfeit one of two rights which he has at law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. ☞ 100.]

10. MASTER AND SERVANT ☞ 100—INJURIES TO SERVANT—LIABILITY OF MASTER—WAIVER—VALIDITY.

Such a contract is void under Federal Employers' Liability Act, § 5, providing that any contract, rule, regulation, or device whose purpose and intent enables the common carrier to exempt itself from any liability under the act shall be void.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. ☞ 100.]

11. MASTER AND SERVANT ☞ 78—RIGHT TO RECOVER BENEFITS—WAIVER.

Although the rules of an employers' benefit association require claim to be made within a certain time, in a certain manner, failure to make such a claim is waived by the association when it acknowledges the claim and tenders monthly benefits thereunder.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ☞ 78.]

Appeal from Circuit court, Linn County; Fred Lamb, Judge.

Action by Johnathan Hartman against the Chicago, Burlington & Quincy Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 261 Mo. 279, 168 S. W. 1143.

Bailey & Hart, of Brookfield, J. C. Carr, of Cameron, and M. G. Roberts, of St. Joseph, for appellant. Burns, Burns & Burns, of Brookfield, for respondent.

JOHNSON, J. On April 18, 1910, plaintiff, who had been employed by defendant as a locomotive fireman and engineer for ten years or more, accidentally fell from an engine on which he was serving as fireman, and which

was drawing a train employed in interstate commerce, and sustained personal injuries, the nature and extent of which are a subject of serious dispute between the parties. Plaintiff contends that the injuries totally and permanently disabled him, while defendant insists that they were slight and temporary. The court, sitting as a jury, resolved this issue in favor of plaintiff, and for the purposes of the present inquiry we shall accept that solution as a finality. From September, 1900, to the date of his injury plaintiff was a member in good standing of the relief department of defendant, and this suit, which was filed August 22, 1914, is for the recovery from defendant of \$2,433.35 as disability benefits plaintiff alleges are due him from that department under the terms and conditions of his contract for such benefits.

The answer alleges a forfeiture, resulting from the facts that plaintiff failed to comply with certain provisions of his contract relating to the presentation and prosecution of such claims, and elected, under a choice of remedies offered by the relief contract, to prosecute an action in tort against defendant for damages resulting from his injury, thereby surrendering his claim for indemnity. The reply denied this new matter, and interposed affirmative defenses thereto, the nature of which will appear in our review of the case. It suffices to say that the questions of law we shall discuss and determine are properly raised by the pleadings. The trial court decided these questions for plaintiff, rendered judgment accordingly, and defendant appealed.

The case was tried on an agreed statement of facts which left open and unsettled the single issue of "the extent of plaintiff's injuries and the duration of disability arising therefrom." The agreed statement is as follows:

"Hartman was injured on the 18th day of April, 1910, by falling from a locomotive on which he was engaged as a fireman and while said Hartman was employed by the defendant in interstate commerce; that prior to his said injuries the defendant Hartman became a member of the relief department of the defendant by the execution and delivery of applications for membership, true copies of which are attached to defendant's answer as Exhibits A and B; that Exhibit C attached to the defendant's answer is a correct copy of the regulations of said relief department effective at the time of plaintiff's said injury, and the said exhibits are considered in evidence and constitute the contract which exists between plaintiff and the defendant in relation to his membership in said relief department; that said relief department was operated in accordance with said regulations, and that plaintiff and defendant had contributed to the expense of operating said relief department as required by said contract, and that the plaintiff was at the time of his injury a member thereof in good standing; that when plaintiff was injured he was taken to the hospital by the defendant, and there treated by its surgeons for a period of about three weeks; that such benefits as defendant admits plaintiff might have elected to receive from said relief fund on account of said injury were duly tendered to him

by the defendant and refused, and plaintiff elected to prosecute an action at law against the defendant for damages on account of said injuries, and for that purpose did on July 13, 1910, file a suit against the defendant in the circuit court of Livingston county, Mo., to recover \$50,000 for said injuries, which suit the plaintiff prosecuted to a final judgment in the Supreme Court of Missouri; that the opinion handed down by the Supreme Court of Missouri July 14, 1914, in said case may be offered in evidence by the plaintiff herein subject to the objections of the defendant herein; that in said suit for damages the plaintiff alleged he was permanently disabled, and the defendant denied such injury and disability at all times; that plaintiff never made any demand upon defendant or its relief department for benefits on account of said disability until and by means of the filing of this suit, and did not report to the medical examiner of the defendant's relief department at any time after he left the care of the defendant's surgeons about three or four weeks after his injury."

[1] The action for damages prosecuted by plaintiff for his injury was based on negligence of defendant, and was successfully maintained in the trial court, where he recovered a judgment for \$18,000, but on appeal to the Supreme Court that judgment was reversed outright, on the ground that the proof did not disclose a causal relation between the alleged negligence and the injury. *Hartman v. Railroad*, 261 Mo. 279, 168 S. W. 1143. The agreed statement, while conceding that plaintiff was employed in interstate commerce at the time of his injury, does not disclose that his action for damages asserted a cause falling under the operation of the Employers' Liability Act, nor does the reported opinion filed in the Supreme Court contain a direct statement of that fact, but from the facts of the case, as stated therein, the inference, we think, should be drawn that the pleaded cause was under that act. The pleader was not required to refer to the federal act, and the allegation and proof of facts, which showed that the injuries were received while plaintiff was employed by the defendant railroad company in interstate commerce, would be sufficient to bring the action within the purview of the act, since state as well as federal courts are "presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject." *Railway Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Molter v. Railroad*, 180 Mo. App. 84, 168 S. W. 250.

[2-4] Membership in the relief department was restricted to employes of defendant, and provision was made in the regulations of that department for the creation and maintenance of a "relief fund" for the payment of sick, disability, and death benefits; such fund to consist of "voluntary contributions from members thereof, income derived from invest-

ments and from interest paid by the company, and money advanced by the company when necessary to pay benefits as they become due." Defendant had general charge of the department, guaranteed the fulfillment of its obligations "as determined by these regulations," and took charge of all moneys and securities belonging to the relief fund. The direct management of the department devolved upon "an advisory committee" composed of appointees of defendant and of others elected by the membership; the former class being in the majority. Defendant had complete control over the department and over the advisory committee. Employes were encouraged, but not compelled, to become members, and, when they did, were required to make written application and pay dues as in fraternal associations. The right of a member injured in the service of defendant to receive disability benefits or of his beneficiary to receive death benefits did not depend upon the question of whether the injury was due to negligence or mere accident. In either case the right to benefits followed the injury, provided the member complied with certain rules and regulations put into operation by the fact of his injury. By the terms of rule 55 he was required to give immediate notice to his timekeeper and to report to the medical examiner under penalty of a forfeiture of his right if he avoided the medical examiner or neglected to report or keep appointments "as herein provided."

Rule 62 provided that:

"Any claim for disability benefits, to be valid, must be made within sixty days from the time when such benefits accrued."

And rule 64 contained provisions which are the main reliance of defendant, and are as follows:

"In case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their relief departments.

"The acceptance by the members of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury. * * * And, further, if any suit shall be brought against the company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

"The payment by the company, or any company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the relief fund arising from or growing out of such injury or death."

During his membership in the relief department plaintiff contributed \$235.50 as dues, and, on the hypothesis that total and permanent disability resulted from his injury, he would be entitled to recover the full amount of his demand unless he forfeited his right to disability benefits by failing to comply with rules 55 and 62, or by his election under rule 64 to resort to an action in tort against defendant.

Should the fact that plaintiff began and prosecuted to a final and unfavorable decision in the Supreme Court an action for damages against defendant, founded on the Employers' Liability Act, preclude him from asserting a right to disability benefits under his contract with the relief department of his employer? His right to such indemnity depends solely upon that contract, which, in clear and explicit language, declares that it shall cease if the member does the precise thing that plaintiff did; i. e., prosecute against defendant an action for damages arising from his injury. The rules are fundamental that a party will not be allowed to accept the benefits and reject the burdens of his contracts—to play fast and loose—and that courts are not, and should not be, invested with the paternal function of making contracts for people in opposition to, or in derogation of, those they have chosen to make for themselves. But the provisions we are asked to interpret and enforce do not relate to the creation of a contractual right of plaintiff, but to its enforcement, and merely pertain to the forfeiture of a right which, under the contract, sprang complete from the accidental injury and consequent disability. Courts look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for, as in the present case, and will not enforce them unless compelled by the plain letter of the contract. *Brittenham v. W. O. W.*, 180 Mo. App. 523, 167 S. W. 587; *Mathews v. Modern Woodmen*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483; *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384.

There are two principal grounds upon which plaintiff argues that the forfeiture under rule 64 should not be enforced; i. e., that it is wholly without consideration from defendant, and that it is immoral and opposed to a sound public policy, for the reason that it is nothing more nor less than an attempt by defendant to enforce an agreement to release it in advance from the consequences of its own future negligence. If the nature of the obligations and duties defendant had assumed towards the relief department and its members were to be ascertained by an analysis of the printed regulations which constituted the contract, we would be inclined to hold that defendant was not required to contribute anything to the benefit or expense funds of that department; the extent of its pecuniary duty being to

make "advances," which means loans, in case the funds accumulated from the dues of the members at any time should be insufficient to discharge the obligations that were due and payable. The plan of the department seems to contemplate that it must be self-sustaining, i. e., supported entirely by the contributions of beneficiary members, and that defendant should be required to sustain no other relationship towards it than that of manager and banker. But in the agreed statement the parties placed a different construction on the contract, and stipulated that defendant, under its terms, "had contributed to the expense of operating said relief department."

[5] We are bound to accept the facts agreed upon as the true facts of the case, and must proceed with our consideration of the questions in hand from the hypothesis that the relief department was a voluntary association composed of defendant and its employes who chose to become members; that it was organized and conducted, not for profit, but for the main purpose of providing and administering funds for the payment of disability and death benefits; that necessary funds for benefits and expenses were derived mainly from dues paid by the beneficiary members, but in part by contributions from defendant, and that defendant, through its officers and agents, with the aid of an advisory committee, administered the department for the benefit of its members.

But the contract plan did not require defendant to assume and discharge these duties and burdens without any pecuniary consideration. It provided a substantial and, indeed, profitable quid pro quo in the form of provisions the inevitable (and, of course, contemplated) result of which was to discourage injured employes who were members of the relief department from instituting and prosecuting damage suits against defendant. Under these provisions, if an injured member accepted any relief benefits, ipso facto he released defendant from liability for damages in cases where the injury was caused by negligence of defendant, and, on the other hand, if he brought suit against defendant for damages, ipso facto he forfeited his right to benefits which he had paid for in contributions deducted from his pay checks. If the facts and circumstances of his injury were such as to justify a reasonable inference that it was caused by negligence of defendant, he was compelled to choose between two hard alternatives—was given a sort of "Hobson's choice," which, when exercised, necessarily would result in his deprivation of a substantial right; on the one hand, the right to prosecute an apparently meritorious action in court for the redress of a wrong; and, on the other, the right to an indemnity he had paid for. But it cannot be said that his agreement to make

such election and to abide by its consequences was unsupported by a consideration. The promise of defendant to administer and give financial backing and stability to the voluntary association and to contribute to its expense fund was a consideration for the promise of the members when injured and entitled to benefits to accept them on the conditions imposed, which were for the benefit of defendant, and the real question for our solution is not that of a sufficient consideration for the forfeiture, but that of whether or not the promise of the member to elect was void for the reason that, in substance, it amounted to an agreement to release defendant from liability for the consequences of its own positive wrong, i. e., negligence, and therefore nonenforceable, as being opposed to a sound public policy.

[8] The rule is well settled that an employer cannot make a valid contract with his employé against his own negligence, and that in whatsoever guise it may appear, or howsoever cunningly designed or phrased, such contract will be denounced and rejected by the courts as opposed to the dictates of common morality and humanity.

Contracts of similar import to the one before us have been before the courts of other jurisdictions, and we shall refer to a few leading cases in which they have been construed. In *Johnson v. Railroad*, 163 Pa. 127, 29 Atl. 854, the precise question at issue was whether the acceptance of benefits by the injured employé should be allowed to operate under the beneficiary agreement as a release of the claim for damages against the company. Speaking of the stipulation for an election by the injured employé, the court say:

"But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

A similar conclusion was reached by the Supreme Court of New Jersey in *Beck v. Railroad*, 63 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 211. The court observes, "The law will not tolerate a contract between parties by which one agrees that the other may commit a tort to his injury with impunity and without liability to answer for damages," but

holds that the contract in question did not come within that rule, for the reason that the member was not debarred thereby from bringing an action for damages, and that the exclusion of such right could arise only by his exercise of a fair option the contract afforded him. The propositions that the contract was ultra vires and lacked a sufficient consideration were decided in the negative, and, further, it was held that such contract was "not of insurance but of beneficial relief."

A clear statement of the principal rule followed in the cases just reviewed appears in the following excerpt from the decision in *Railroad v. Moore*, 152 Ind. loc. cit. 353, 53 N. E. 293, 44 L. R. A. 638:

"If disabled without fault of the company, the living or death benefit may be drawn from the fund without question. If by the fault of the company, he may, after injury, elect whether he will accept the benefits from the fund or pursue his remedy at law against the company. And that, when he signs the contract, the only obligation assumed is that, if injured by the fault of the company, he will not seek double compensation, by pursuing both the relief fund and the company. It further shows, in effect, that when disability comes, and all the facts and conditions are known to him, he is at perfect liberty then to choose between the relief fund and the treasury of the company, whether he will accept the sure and immediate benefits from the fund, or take his chances in the courts against the company, and that an adoption of one course shall be held to be an abandonment of the other. This is the essence of the contract pleaded. It bears no semblance to an absolute contract for the release of the company from liability under the provisions of the statute."

Numerous other authorities which announce the same doctrine are cited in appellant's brief. In the case of the present defendant against *Miller* (76 Fed. 439, 22 C. C. A. 264) the Circuit Court of Appeals of the Eighth Circuit had under consideration a damage suit prosecuted by the injured employé in which a demurrer to defendant's answer which pleaded a release growing out of the acceptance by the plaintiff of relief benefits after his injury had been sustained. In the majority opinion written by Thayer, J., the judgment was affirmed on the ground that defendant had failed to allege the department was not sustained entirely by the accumulations of "sums deducted from the wages of those who were members," and that it was supported in part by defendant. It is said:

"In a case of this character, where the contract invoked as a defense lies close to the line dividing agreements that are lawful from those which are unlawful, it is proper to require the defendant to set out the arrangement which existed between itself and its employés, in the form of a relief department, with such fullness and certainty that the court may be able to say from an examination of the same that the arrangement is fair and reasonable, and that it is neither objectionable on grounds of public policy nor voidable for want of a valuable consideration."

In a concurring opinion Judge Caldwell explicitly stated that such contracts should be declared nonenforceable "in so far as they attempt to release a railroad company from

liability for injuries inflicted on its employes through its negligence," and ventured the prediction that such contracts "must ultimately be so declared by all courts."

The Supreme Court of Nebraska, in *Walters* against the present defendant (74 Neb. 551, 104 N. W. 1066), sustained the forfeiture stipulation upon the conclusion that the plaintiff was as much at liberty to choose whether she would sue the railway company or the relief department as she would have been in any other imaginable case, but the consequences of such choice are to be determined, not by the general rules of law, but by the terms of the contract by which the deceased had bound himself and her. But in the later case of the same defendant against *Healy* (76 Neb. 783, 107 N. W. 1005, 111 N. W. 598, 10 L. R. A. [N. S.] 198, 124 Am. St. Rep. 830) that court changed its view of the law applicable to such contracts, overruled the *Walters* Case, and held that:

"The policy of our law is to furnish every citizen with speedy redress for any injury that he may receive in person or property, and a contract which * * * imposes a penalty upon seeking such redress is contrary to that policy."

It is deemed unnecessary further to review authorities relating to this subject. The great majority of the courts, among them courts of the highest reputation for judicial probity and wisdom, follow the rule defined in the *Pennsylvania* and *New Jersey* cases that, since, when the right of the employé to sue his employer for damages inures, the contract places him under no legal compulsion to release his cause, but leaves him free to prosecute it in the courts if he chooses, his employer cannot be said to have contracted for immunity from the consequences of his own future wrongs.

[7] With all due respect for a rule so strongly fortified by the approval of such high authority, we find ourselves unable to give it our sanction, and feel constrained to approve the antithetical doctrine of the concurring opinion of Judge Caldwell in the *Miller* Case, *supra*, and of the *Nebraska* court in the *Healy* Case that, to the extent that the relief contract seeks to provide in advance for the release of the defendant from the legal consequences of its future wrongs, it will be held unconscionable, and therefore nonenforceable, regardless of whether or not it has the support of a consideration moving from the defendant to the plaintiff. It would be just as reprehensible in law for an employer to pay for the contractual privilege of wrongfully injuring his servant in the future as to stipulate for such privilege without a consideration, and it is difficult to perceive any just reason on which the doctrine of the majority opinion in the *Miller* Case may rest, so far as the question of public policy is concerned.

Whether defendant has given anything of value to its employes for the privilege the contract seeks to bestow upon it or is guilty

of having tried to acquire such a valuable right at the sole expense of its employes is immaterial. With respect to the forfeiture, the contract can have but one meaning, *viz.*, that the employé member has agreed in advance that his right to a relief benefit for a disability resulting from an injury negligently inflicted by his employer shall be turned into an instrument to coerce him into releasing his claim for damages.

[8] Some of the courts fall into the palpable error of concluding that it would be wrong to allow the employé to receive the benefit without impairment of his claim for damages, since the effect would be to give him double indemnity for the same injury. Would he be receiving double indemnity for the same wrong? His relief contract upon which he has paid the assessed dues, if not a contract of insurance, is in the nature of insurance. If he had it in another company, his receipt of the indemnity it afforded would have no effect upon his claim against the wrongdoer who injured him. His right to insurance and his right to damages for a tort bear no relation to each other. A wrongdoer cannot excuse himself from liability on the ground that his victim is fully insured.

[9] The contract in relation to the forfeiture did not give, and was not intended to give, plaintiff any fair option. It said to him, "If you dare bring suit against defendant for damages, you lose your right to disability benefits of the value [as found by the court] of almost \$2,500," and, on the other hand, "If you accept any of the benefits, you lose your right to sue the defendant for damages." It would be a strange option that would allow the possessor of two rights to exercise one only, on pain of forfeiting the other. The mere fact that a stipulation so one-sided was inserted in the contract conclusively demonstrates that it was put there for the sole purpose, and with the confident expectation, that in the vast majority of negligent injuries the employé would accept the sure, certain, and, of course, vastly smaller relief the contract afforded, in preference to venturing upon the uncertain sea of litigation, and, perchance, losing his all. No epigrammatic phrasing or clever euphemism can disguise the hard, ugly fact that this was a contract for immunity from the legal consequences of future torts. It is idle to confuse the subject with the argument that defendant's position is improved by the fact that the relief contract also provides benefits for disabilities resulting from causes other than the negligence of defendant. The forfeiture deals only with negligence cases, is a separable covenant, and the question of its validity has nothing to do with other benefits. What right has defendant to say to plaintiff, "Because you had acquired the right to other benefits for which you paid the price demanded, I am entitled to contract with you in advance for immunity

from responsibility for my own future negligence."

[10] But, if we should be wrong in our conclusion respecting the general law concerning contracts of this character, we think as to an injury sustained by a railroad employé while engaged in the service of interstate commerce the rule we have stated was intended to be expressed by Congress in section 5 of the Employers' Liability Act, approved April 22, 1908. 35 Stat. at Large, 65; U. S. Comp. St. 1913, § 8661. That section provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from, any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought."

In clear and unmistakable terms it declares that to the extent that any contract, rule, regulation, or device made for that purpose by the carrier shall enable it to exempt itself from any liability created by this act such contract, rule, regulation, or device shall be void. That Congress had in mind just such contracts as that under consideration and intended that they should fall within the scope of the denunciation is shown in the context, which gives to the carrier the right to set off against the plaintiff's claim any relief, benefit, or indemnity it may have paid "on account of the injury." In other words, contract or no contract, the fact that defendant has paid relief benefits will not be allowed to work a forfeiture of the plaintiff's right to maintain his action for damages subject to the right of defendant to set off benefits already paid. It was not necessary to restate in the proviso the rule distinctly stated in the principal enactment that a contract devised with the intent of enabling the carrier "to exempt itself from any liability created by this act shall, to that extent, be void, regardless of its terms." We conclude that plaintiff did not lose his right to benefits by bringing an action for damages and prosecuting it to an unsuccessful end.

[11] The defense that plaintiff has forfeited his right to benefits because of his failure to comply with rules 55 and 62 is not tenable in view of the agreed fact that, before the expiration of the period for presenting his claim for relief, defendant acknowledged his claim and tendered him monthly benefits for two months. This, of course, was a waiver of formal compliance with rules relating to notice and presentment of claim.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

BRODERICK v. LUCAS' EX'R. (No. 14235.)
(St. Louis Court of Appeals. Missouri. Jan. 4, 1916.)

1. TRIAL \Leftrightarrow 404—FINDINGS BY COURT—EFFECT.

Under Rev. St. 1909, § 1972, providing that upon the trial of a question of fact by the court it shall not be necessary for the court to state its findings, except generally, unless one of the parties request it, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law, where the facts found by the court on request of one of the parties were either established by affirmative evidence, or were facts naturally and properly to be inferred from the testimony, the finding had the effect of a special verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. \Leftrightarrow 404.]

2. PRINCIPAL AND SURETY \Leftrightarrow 194—LIABILITY OF COSURETES AS TO EACH OTHER.

Where parties owning as partners most of the stock in a corporation signed its notes as comakers for its accommodation, they were cosureties for the corporation, and as between themselves each was liable to pay one-half of the amount owing, and when each paid \$50,000, with interest on the notes, they were merely discharging their proper proportion of the liability imposed upon them, and neither by such payment acquired any rights against the other.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605-623; Dec. Dig. \Leftrightarrow 194.]

3. PRINCIPAL AND SURETY \Leftrightarrow 192—ACCOMMODATION PARTIES—COSURETIES—RIGHTS AND LIABILITIES AS TO EACH OTHER.

Plaintiff and L., as partners, owned five-sixths of the stock in a corporation, and for its accommodation had as comakers signed its notes for \$450,000. For the purpose of paying such notes the corporation borrowed \$350,000 from a bank, and plaintiff and L. each paid \$50,000, with interest. The corporation executed a note to the bank for \$350,000, and two notes to C. for \$50,000 each, and plaintiff and L. each indorsed such notes as joint makers. The corporation also deposited bonds with a trust company as collateral security for the payment of all three notes. The notes paid C. were executed pursuant to an arrangement under which C. transferred one of such notes to plaintiff, and one to L., it being understood that, if the bonds securing the note held by either plaintiff or L. should not realize enough to pay the note, the other party should contribute one-half of the deficiency. After maturity of plaintiff's note one-ninth of the bonds were delivered to him, and a pretended sale was made by him to a person who purchased in his behalf. Subsequently the corporation's property was sold under a mortgage securing the bonds, and plaintiff received on his bonds over \$54,000. Held that, while plaintiff and L. became liable as comakers to such persons as might become bona fide holders for value of the notes, their liability, if any, as to each other was that of coguarantors, or cosureties, and was secondary to that of the corporation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 578-590; Dec. Dig. \Leftrightarrow 192.]

4. PRINCIPAL AND SURETY \Leftrightarrow 193—ACCOMMODATION PARTIES—COSURETIES—RIGHTS AND LIABILITIES AS TO EACH OTHER.

The bonds were pledged to secure not only such persons as might become payees of the note, but also for the benefit of plaintiff and L., and when L. obtained possession of the bonds securing his note, he held them in trust to ap-

ply the proceeds towards the payment of the note, to the end that L. might be discharged from liability thereon.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 591-604; Dec. Dig. ☞ 193.]

5. PRINCIPAL AND SURETY ☞ 193—ACCOMMODATION PARTIES—COSURETIES—RIGHTS AND LIABILITIES AS TO EACH OTHER.

The pretended sale of the bonds constituted no sale whatever, and the bonds still remained subject to the trust in favor of L. as one of the persons secondarily liable, if liable at all, on the note, and the bonds remained security for the payment of the note until the time plaintiff received the payment thereon from the trustee under the mortgage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 591-604; Dec. Dig. ☞ 193.]

6. PRINCIPAL AND SURETY ☞ 200—ACTIONS FOR CONTRIBUTION—EVIDENCE.

In an action by plaintiff to recover the amount due on his note after applying thereon the amount for which the bonds were sold at such pretended sale, the exclusion of evidence as to what had become of L.'s one-ninth of the bonds offered to show that he had suffered no loss on the sale of the bonds was not reversible error, the fact of the sale, and the fact that the trustee had received a large sum of money as the proceeds being in evidence, and it appearing that plaintiff and L. had each realized more than the face of the bonds.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 641-650; Dec. Dig. ☞ 200.]

7. PRINCIPAL AND SURETY ☞ 193—ACCOMMODATION PARTIES—COSURETIES—RIGHTS AND LIABILITIES AS TO EACH OTHER.

A provision in plaintiff's note that upon nonpayment at maturity the holder might sell the collateral at public or private sale and purchase it for his own use and benefit, did not affect the relative rights of plaintiff and L. as cosureties and trustees for each other to the extent realized on the security, or authorize plaintiff to apply the proceeds of the sale to his own use, free from any claim of his cosurety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 591-604; Dec. Dig. ☞ 193.]

Appeal from St. Louis Circuit Court, William A. Taylor, Judge.

"Not to be officially published."

Action by John J. Broderick against John B. C. Lucas' executor. Judgment for defendant, and plaintiff appeals. Affirmed.

R. E. Collins and Edward D'Arcy, both of St. Louis, for appellant, cited Harrison v. Phillips, 46 Mo. 520; Urbahn v. Martin, 19 Tex. Civ. App. 93, 46 S. W. 291; Tabor v. Cockrell (Tex. App.) 16 S. W. 786; Cramer v. Redman, 10 Wyo. 328, 68 Pac. 1003; Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563; San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 494, 41 Pac. 487; Long v. Barnett, 3 Iredell Eq. (38 N. C.) 631; Phillips v. Preston, 5 How. 278, 12 L. Ed. 152; Chouteau v. Allen, 70 Mo. 290, loc. cit. 335; First Nat. Bk. v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520; Semple v. Turner, 65 Mo. 696; Schneider v. Schiffman, 20 Mo. 571; Dibert v. D'Arcy, 248 Mo. 617, 154 S. W. 1116; Gould v. Fuller, 18 Me. 364;

Armory v. Delamire, 1 Smith Lead. Cas. (11th Ed.) 679-713; Pomeroy v. Benton, 77 Mo. loc. cit. 86; and Barker v. Lewis, 152 Mo. App. 706, 131 S. W. 924.

Stewart, Bryaan & Williams and Benj. H. Charles, all of St. Louis, for respondent, cited Pollard v. Pitman, 37 Ind. App. 475, 77 N. E. 293; Fairies v. Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; Singleton v. Townsend, 45 Mo. loc. cit. 380; Burton v. Rutherford, 49 Mo. 255; Williams v. Gerber, 75 Mo. App. 18, 30; Burrus v. Cook, 215 Mo. 496, 114 S. W. 1065; Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Burrus v. Cook, 215 Mo. loc. cit. 509, 114 S. W. 1065; McCune v. Belt, 45 Mo. 174; and Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573.

REYNOLDS, P. J. Action on a note for \$50,000, given by the St. Louis, St. Charles & Western Railroad Company, to the order of Robert E. Collins, with interest at 6 per cent per annum, which note was indorsed by J. B. C. Lucas and John J. Broderick, and further indorsed to the order of John J. Broderick by Robert E. Collins "without recourse." Averring that the total consideration for the \$50,000 note had been furnished by plaintiff and that it was used in paying off an indebtedness in that amount due by the railroad company, and that the railroad company had not paid the note at maturity, it is further averred that plaintiff, then being the owner and holder of the note by indorsement and delivery, caused the bonds, collateral to the note, to be advertised and sold under the terms of the collateral note, and at that sale these bonds realized the sum of only \$42,000, to which it is stated the note was entitled as a credit as of date June 15th, 1904. Averring that there remains due on the interest on the note the sum of \$1775, together with the sum of \$8000 on the principal, and that by reason of the premises John B. C. Lucas was and is indebted to plaintiff for one-half of that, that is \$4887.50, together with interest thereon at the rate of 6 per cent per annum from June 15th, 1904, and, averring the death of John B. C. Lucas, and that by his last will and testament he had appointed William R. Faribault his executor, the will having been duly probated and Faribault duly qualified as executor and now acting under the will, judgment is prayed against the estate of Lucas and against Faribault, as executor, in the sum of \$4887.50, with interest thereon at the rate of 6 per cent per annum from June 15th, 1904.

The answer, after a general denial, sets up two special defenses. First, that Broderick and Lucas, as co-makers with the railroad company of an original \$450,000 in notes, given to the Commonwealth Trust Company,

were each liable to the full amount thereof to that company, but that as between themselves they were each liable for only one-half, and that when each paid \$51,125 on the notes to the Commonwealth Trust Company each was discharged from his proportionate liability and neither acquired any right as against the other; that when Lucas and Broderick wrote their respective names on the back of the note in suit, while they created a liability to such persons as might have become bona fide holders for value of the note, they did not incur any such liability to one another.

The second affirmative defense is that if Lucas was ever in any way liable as maker to the holder upon the note referred to in the petition, still it was a liability merely as co-surety with Broderick and his liability to Broderick was merely that of a co-surety with Broderick, and that the liability of each was secondary to that of the railroad company, and that the bonds which were pledged as collateral security for the note, being the property of the railroad company, were so pledged as security, not only for the protection of those who might become the holders of the note but also for the benefit of Lucas, the person secondarily liable on the notes, if liable at all.

This second defense further sets up that the pretended sale by Broderick of the bonds, on June 15th, 1904, for \$42,000, was in fact no sale but that the bonds still remain in the possession of Broderick, subject to a trust for the benefit of Lucas as his co-surety, and that the pretended sale had no effect to change the relation of Broderick as trustee, with respect of the bonds for the benefit of himself and his co-surety, and that after the pretended sale the bonds remained in the hands of Broderick as such trustee for himself and his co-surety, Lucas, and that Broderick continued to retain that relation toward Lucas as to them and so received the payment of \$54,594.15 as the proceeds of the sale under the deed of trust securing the bonds. Praying for an accounting and that the note be adjudged to be paid by the sum so received by Broderick, there was a prayer for general relief.

To these special defenses a demurrer was interposed by plaintiff, which was overruled by the court before whom the cause was then pending.

A reply being filed generally denying the allegations of new matter and the allegations of the special defenses, the cause was tried to the court, a jury being waived, and at the request of counsel for plaintiff the trial court entered up a finding of facts and its conclusions of law, section 1972, Revised Statutes 1909, the latter concluding with a decree in favor of defendant on the issue joined that plaintiff was not entitled to the relief prayed for.

The court further found that defendant was not entitled to the affirmative relief prayed for in his answer and plaintiff was

dismissed as to that. To the finding of facts and conclusions of law plaintiff duly excepted and, filing his motion for a new trial and that being overruled, has duly appealed to our court.

Here the learned counsel for appellant make 10 assignments of error. First and second, as to error in admitting competent, relevant testimony, as it is said. Third, error in including in the finding of facts matters and things concerning which no testimony was offered or given on the trial. Fourth, the trial court erred in adopting as the finding of facts by the court a document prepared by counsel for respondent in place of writing out and making the court's own finding. Fifth, that the trial court erred in finding as a fact that Broderick and Lucas agreed with each other to retain equal interests in the stock of the Wellston, Creve Coeur & St. Charles Railroad Company, or that they agreed as between themselves to forward the railroad enterprise as co-partners, there being no evidence, as it is alleged, to sustain such finding. Sixth, that the court erred in finding as a fact that Broderick and Lucas undertook the construction of the railroad between Wellston and St. Charles, there being no evidence, as it is alleged, to sustain that finding. Seventh, that the trial court erred in finding as a conclusion of law that the sale by Broderick of bonds on June 15th, 1904, constituted no sale whatever but that the bonds still remained in the possession of Broderick subject to the trust in favor of Lucas as one of the persons secondarily liable, if liable at all on the note, and that the sale had no effect to change the relation of Broderick with respect of bonds, or to change the relation of Lucas with respect to them, and that the bonds remained as security in the hands of Broderick for the payment of the notes and that they so continued to remain until the time when Broderick received the payment of \$54,594.19 on account of the bonds from the trustee in the mortgage securing the bond. Eighth, ninth and tenth, that the court erred in finding as a conclusion of law that plaintiff was not entitled to recover, and in entering judgment for respondent awarding costs against appellant, and that the finding was for the wrong party.

While these ten assignments of error are made, the only ones argued are under the first, averring improper exclusion of certain testimony offered by plaintiff, and on the points practically covered by the seventh, eighth, ninth and tenth assignments.

[1] On consideration of the evidence in the case we find no reason to differ from the finding of facts made by the learned trial judge. The facts found by him are either established by affirmative evidence in the case or are facts naturally and properly to be inferred from the testimony, and that finding has the effect of a special verdict.

We can do no better, therefore, than to

set out that finding as made by the learned trial judge, which with a few verbal changes, is as follows:

"Since the institution of this suit John B. O. Lucas has departed this life, leaving a will wherein and whereby William R. Faribault was duly appointed executor; that will was duly probated in the Probate Court in the city of St. Louis, Missouri, and thereafter, on the 16th day of September, 1908, William R. Faribault duly qualified as such executor and he is now duly qualified and acting executor of said Lucas. After William R. Faribault had qualified as executor he was duly and properly substituted as the defendant in this cause instead of Lucas, and the cause was properly revived.

"In or about the year 1897 there was in existence a railroad company known as the Wellston, Creve Cœur Lake & St. Charles Railroad Company, which had been organized in or prior to the year 1897 to construct a line of railroad. Thereafter, the above named John J. Broderick and J. B. C. Lucas conceived the idea of purchasing the corporate and other franchises of the Wellston, Creve Cœur Lake & St. Charles R. R. Co., and to carry out the above idea they purchased all the outstanding stock of the railroad company in equal interest and thereupon agreed to and with each other to retain such equal interest therein and forward their enterprise as co-partners as between themselves, and secured for the service of that company (all the stock of which they owned between themselves as co-partners as aforesaid) the services of one James D. Houseman, said Broderick and Lucas provided for the salary of Houseman as the General Manager of the railroad and promised him a one-sixth interest in the stock, which they owned as aforesaid.

"Thereupon Broderick and Lucas undertook the construction of a railroad between the town of Wellston in St. Louis County, and the town of St. Charles, in St. Charles County of the state of Missouri. Finding that their company did not have sufficient corporate powers to enable them to proceed with advantage, Broderick and Lucas caused to be organized under the laws of the state of Missouri a new railroad company known as the 'St. Louis, St. Charles and Western Railroad Company' and caused the Wellston, O. C. L. & St. C. R. R. Co., to convey all its assets of every kind and character together with all franchises and rights-of-way to the St. L., St. C. & W. R. R. Co. (the last mentioned company being hereinafter referred to as the 'Railroad Company').

"Thereafter the Railroad Company executed its certain 600 First Mortgage Five Per Cent Gold Bonds numbered from 1 consecutively to 600, both inclusive, each for the sum of one thousand (\$1,000) dollars, and bearing date February 5, 1902, payable thirty years after their dates, and to secure the payment of the bonds and the interest to mature thereon, that Railroad Company executed and delivered to the Colonial Trust Company a First Mortgage Deed of Trust of even date with the bonds, whereby the Railroad Company conveyed to the Colonial Trust Company aforesaid, as trustee, all the property and effects of every kind belonging to the Railroad Company. Only 500 of the 600 thousand dollar bonds were actually issued by the Railroad Company.

"That thereafter the Railroad Company executed and delivered unto the Colonial Trust Company its (the Railroad Company's) note or notes in the sum of \$450,000, which note or notes were indorsed as joint makers by Broderick and Lucas before delivery and were dated the _____ day of _____, 19____. These indorsements were purely for the accommodation of the Railroad Company. That at that time Broderick and Lucas owned, as partners, the entire stock issued by the Railroad Company excepting one-sixth thereof, which had been transferred by them to Houseman.

"That thereafter and prior to the 11th day of November, 1908, the Colonial Trust Company had transferred all of its assets and business to the Commonwealth Trust Company (a Trust Company organized under the laws of the State of Missouri in relation to trust companies) and among other assets transferred were the note, or notes, so owing by the Railroad Company to the Colonial Trust Company. (The foregoing facts all appear in the intervening petition filed by plaintiff Broderick in the case Illinois State Trust Company v. St. Charles & Western R. R. Co. which was pending in the U. S. Circuit Court.)

"That on the 11th day of October, the Railroad Company was indebted to the Commonwealth Trust Company in the sum of \$450,000 on account of the note or notes; and at the same time the note or notes were past due and the Trust Company declined to renew the loan or further carry the same and demanded payment thereof and it became necessary to pay the indebtedness of the note or notes together with interest thereon; but the Railroad Company was unable to pay the same or any part thereof. Thereupon Broderick and Lucas each paid the sum of \$51,125 on account of that indebtedness, making a total thus paid by them on the indebtedness, of \$102,250; of which sum of \$102,250, \$100,000 was paid on account of the principal of the note or notes of \$450,000 then held by the Commonwealth Trust Company, and \$2,250 on account of the interest owing thereon.

"And the Railroad Company then, to-wit: On the 11th day of November, 1908, borrowed from the National Bank of Commerce in St. Louis, the sum of \$350,000 and with the proceeds of such loan last mentioned, paid the residue of the sum then owing to the Commonwealth Trust Company. As evidence of the loan so made by the Railroad Company from the National Bank of Commerce in St. Louis the Railroad Company executed its notes in the sum of \$350,000, payable to the order of that bank and indorsed before delivery by Broderick and Lucas.

"Broderick and Lucas caused the Railroad Company to execute its two notes dated November 12th, 1903, each of these notes being for the sum of \$50,000, and being made payable to the order of one Robert E. Collins six months after its date, and Broderick and Lucas without any consideration moving to them or either of them, each wrote his name as joint makers on the back of each of these notes; that is to say, the note made to the National Bank of Commerce, and the two notes payable to Collins; and the Railroad Company pledged as collateral security to secure the payment of all of the notes the entire \$500,000 in face value of bonds issued by the Railroad Company, as aforesaid, which bonds were held by the Commonwealth Trust Company in trust as collateral to secure the payment of all of the notes; and the Commonwealth Trust Company by its receipt dated November 11, 1903, and designated as Participation Receipt, set forth that this indebtedness of this Railroad Company secured by the bonds was represented by two notes of \$50,000 each, payable to the order of Robert E. Collins, and one note for \$350,000, payable to the order of the National Bank of Commerce in St. Louis, and set forth that these notes participated in the above mentioned collateral proportionately; that is to say an undivided one-ninth interest in the collateral was held by the Commonwealth Trust Company for the benefit of the legal holders of each of the above mentioned notes described as executed to the order of Robert E. Collins; and an undivided seven-ninths of the collateral was held for the benefit of the legal holder of the above mentioned note for \$350,000.

"The two notes above mentioned and described as executed to the order of Robert E. Collins, each for the sum of \$50,000, were so executed in

pursuance of an arrangement and agreement between the Railroad Company and Collins and Broderick and Lucas, and upon the understanding that Collins would in behalf of the Railroad Company deliver one of the notes to Broderick and one of them to Lucas.

"And upon the understanding that if the bonds securing the note held by Broderick should not realize enough to pay the note in full, Lucas should contribute one-half of any deficiency between the amount realized from such bonds and the amount owing on the note held by Broderick; and if the bonds securing the note held by Lucas should not realize enough to pay the last mentioned note in full, Broderick should contribute one-half any such deficiency between the amount realized for such bonds, and the note delivered to Lucas.

"Thereafter in pursuance of such agreement and understanding Collins indorsed each of the two notes in blank, without recourse and delivered one of the notes, being the note referred to in plaintiff's amended petition, to Broderick and the other of the notes to Lucas, these notes differing from each other only in the numbers on the bonds securing them.

"Thereafter on or about the 11th day of June, 1904, after maturity of the note for \$50,000 so held by Broderick as aforesaid, one-ninth of the bonds which were then held by the Commonwealth Trust Company and pledged as aforesaid were delivered by that Trust Company to Collins as attorney for Broderick, which bonds so delivered to Broderick were fifty-five in number, and were numbered from 56 to 110, both inclusive, and aggregating in face value of principal thereof \$55,000.

"Broderick on the 9th, 10th, 11th, 12th, 13th, 14th and 15th days of June, in the year 1904, caused a notice to be published in the St. Louis Daily Record, a newspaper published in the city of St. Louis, to the effect that he was the legal owner and holder of these notes and that by virtue of the power granted in and by the note, he would proceed to make sale to the highest bidder for cash of all the bonds (i. e. the bonds numbered from 56 to 110, both inclusive), and coupons attached thereto, and apply the proceeds arising therefrom to the payment of the note held by him and the interest thereon. Thereafter, to-wit, on June 15, 1904, in pretended pursuance of the notice Broderick did offer the bonds for sale at the east front door of the court house in the city of St. Louis. That at that sale one J. D. Houseman, pretended to bid for the bonds the sum of \$42,000, and Broderick, in pretended acceptance of that pretended bid of Houseman, signed a paper, purporting to be a bill of sale of these bonds to Houseman under the pretended sale. That bill of sale was never delivered to Houseman or to anyone else. Broderick thereafter credited as of the 15th day of June, 1905, the note so held by him with the payment of the sum of \$42,000.

"Houseman in making his bid was acting for and on behalf of Broderick, and Houseman never, either at sale or any other time, paid any sum whatever for the bonds so offered for sale, nor was there ever any sum of money paid by anyone on account of that pretended sale. Broderick never delivered the bonds to Houseman, but retained the bonds in his possession, and the bonds so continued in his possession until and including the 24th day of July, 1905, when as the holder of the bonds, he participated in the proceeds realized from the sale under the deed of trust securing the bonds.

"There was a default under the terms of the deed of trust, executed by the Railroad Company to secure the bonds; and the Colonial Trust Company as trustee under the deed of trust caused the property therein described to be sold on the 24th day of July, 1905, under the terms thereof at public sale, and the trustee received as the proceeds of that sale a large sum of money. For the purpose of receiving the

share of the proceeds of that sale applicable to these bonds held by him, Broderick on, to-wit, the 22nd day of July, 1905 (and prior to the sale), deposited with the Commonwealth Trust Company as trustee the bonds numbered as aforesaid from 56 to 110, both inclusive.

"After payment of the costs of the sale and all proper expenses connected therewith, the proceeds of the sale applicable to the payment of the bonds so held by Broderick amounted to \$54,594.19, and the same was paid to Broderick by the trustee on account of the bonds so held by Broderick, being the same bonds and no other which are mentioned and referred to in the Participation Receipt Exhibit 'C,' and also referred to herein as the bill of sale signed by Broderick as aforesaid.

"Said sum was so paid to and received by Broderick by a Secretary's check issued by the Commonwealth Trust Company and payable to the order of J. J. Broderick. Broderick has never accounted to Lucas, nor to defendant or to anyone representing Lucas, for the aforementioned sum of \$54,594.19."

[2-5] On these facts so found the trial court made conclusions of law, which, with some verbal changes, we also adopt, and it is as follows:

"The court finds as a matter of law plaintiff and Lucas each was liable as co-maker to the payee or holder of the notes for \$150,000, which were held by the Commonwealth Trust Company on November 11, 1903, to pay the full amount thereof.

"The court further finds that whereas Broderick and Lucas were each liable as co-makers for the full amount of the notes of \$450,000 to the holders of these notes, they were in reality co-sureties for the Railroad Company and yet as between themselves, each was liable to pay one-half of the amount owing on the note, and when for the purpose of paying \$100,000 on account of the principal of the notes, Broderick and Lucas each paid \$50,125, Broderick and Lucas each were merely discharging their proper proportion of the liability imposed upon him as surety of the Railroad Company. Neither Broderick nor Lucas by such payment acquired any rights against the other, but they each reduced proportionately his respective liability to the holder of the notes for \$450,000.

"The court further finds that when Lucas and Broderick wrote their respective names on the back of the note sued on in this case, they incurred a liability as co-makers to such persons as might, without notice of the real facts, become bona fide holders for value of that note, and if they incurred any liability at all with respect to one another, it was merely as co-guarantors or co-sureties of the Railroad Company, the principal in that note, and the liability of each of them, i. e., Broderick and Lucas, was secondary to that of the Railroad Company.

"And the bonds which were pledged as collateral security for the notes being the property of the Railroad Company were pledged as security, not only to secure the persons who might become payees of the note, but were also pledged as security for the benefit of Lucas as a person secondarily liable on the note, if he was liable at all on the note; that all these facts were known to Broderick, and Broderick when he came into possession of the bonds securing these notes and at all times when he was in possession, held them in trust to apply the proceeds of sale thereof, towards the payment of the note, to the end that Lucas might be discharged from liability on the note, if any such liability ever existed.

"The court further finds that the pretended sale by Broderick of these bonds on the 15th day of June, 1904, constituted no sale whatsoever, but these bonds still remained in the possession of Broderick subject to the trust in favor of

Lucas, as one of the persons secondarily liable, if liable at all, on the note, and that the pretended purchase by Houseman had no effect to change the relation of Broderick with respect to the bonds, or change the relation of Lucas with respect to these bonds; that these bonds still remained as security in the hands of Broderick for the payment of that note, and that they so continued to remain until the time when Broderick received the payment of \$54,594.19 on account of the bonds from the trustee in the mortgage securing the bonds.

"The court in conclusion finds that the plaintiff is not entitled to recover on the note against the defendant, and the judgment should be entered for the defendant. The court accordingly directs judgment to be entered for the defendant in this case, and that the plaintiff pay the costs of this case."

[6] We find no reversible error in the admission of evidence. The evidence specified as improperly excluded was offered in an attempt to prove what had become of Lucas' one-ninth of the 500 bonds. This was offered in order to show that Lucas had suffered no loss on the sale of the bonds. As the fact of that sale was in evidence, as also the fact that the trustee had received a large sum of money as the proceeds, we do not see any error in the court refusing to go into the details of the sale. It did appear that Lucas and Broderick each realized from that sale more than the face of their bonds, as we understand the evidence.

Nor do we find that the objections to the conclusions of law are well taken; to the contrary we hold them, under the facts in evidence in this case, correct.

[7] There is a clause in the collateral note here involved, to the effect that in the event of the non-payment of the note at maturity, the holder is invested with full power and authority to sell, etc., the collateral (here bonds), "or to cause the same to be done, at public or private sale, with or without notice or demand of any sort * * * and the holder of this note is authorized to purchase said collaterals when sold for his own use and benefit." The words we have italicized are particularly relied upon by appellant as authorizing him to apply the proceeds of that sale to his own use, free from any claim of his co-surety. We do not so interpret them. They give the right of purchase of the bonds (the collateral) but surely do not pretend to affect the relative rights of the parties as co-sureties. They in no manner affect the relations between the parties, standing as co-indorsers or co-sureties, each for the other, and constituting the one trustee for the other to the extent realized on the security. This is a well settled rule. Thus in *McCune v. Belt et al.*, 45 Mo. 174, loc. cit. 179, it is said:

"If the plaintiff and defendants were co-sureties, the property turned out to one should inure to the benefit of all, for 'it is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties.'"

Learned counsel for the respective parties have set out the authorities upon which they rely very fully, and as these will appear in connection with the report of the case, we do not think it necessary to either repeat, review, or comment upon them here.

As we understand the case and its facts, the court arrived at its conclusion on the application of well settled and known principles of law. Its judgment should be and is affirmed.

NORTONI and ALLEN, JJ., concur.

STATE v. TAYLOR. (No. 18980.)

(Supreme Court of Missouri, Division No. 2.
Jan. 6, 1916.)

1. HOMICIDE \S 141 — OFFENSES — INFORMATION.

An information charging that accused, with force and arms, upon another feloniously, willfully, on purpose, and of his malice aforethought did make an assault with a deadly weapon, to wit, a pistol, and by his malice aforethought did shoot another, intending to kill and murder, against the peace and dignity of the state, is broad enough to support a conviction for assault with malice aforethought with intent to kill, denounced by Rev. St. 1909, \S 4481, or an assault with intent to kill or do great bodily harm, but without malice or a felonious wounding, denounced by sections 4482, 4483.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 237-249; Dec. Dig. \S 141.]

2. HOMICIDE \S 141 — OFFENSES.

Where an information charged assault with malice aforethought with intent to kill, as well as an assault to kill without malice and a felonious wounding, accused cannot, in view of Rev. St. 1909, \S 4904, authorizing the conviction of a lesser offense, the commission of which is necessarily included in that charged against him, successfully claim that, because the information charges a felonious wounding, it should be construed as charging that offense only.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 237-249; Dec. Dig. \S 141.]

3. HOMICIDE \S 268 — EVIDENCE — ADMISSIBILITY.

In a prosecution for assault with intent to kill, evidence of accused's identity held sufficient to go to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 562; Dec. Dig. \S 268.]

4. CRIMINAL LAW \S 304 — JUDICIAL NOTICE.

The court may take judicial notice that a pistol is a dangerous and deadly weapon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 700-717, 2951½; Dec. Dig. \S 304.]

5. HOMICIDE \S 310 — PROSECUTION — INSTRUCTIONS.

In a prosecution for assault with intent to kill with malice, where accused shot the prosecuting witness, an instruction charging that, unless accused did on purpose and of his malice aforethought, with the intent to kill and murder, shoot the prosecuting witness, he could not be convicted as charged, is not erroneous, as precluding the jury from convicting of lesser degrees of assault included in the information, for the court might well have charged that the jury could presume an intent to kill with malice from the mere shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 657-661; Dec. Dig. \S 310.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Will Taylor was convicted of assault with malice aforethought with intent to kill, and he appeals. Affirmed.

Convicted of an assault with malice aforethought with intent to kill, and sentenced to five years in the penitentiary, defendant has appealed.

About 8 o'clock on the night of April 23, 1914, two negroes, a man and a woman, were standing near each other on the street crossing near the corner of the courthouse square in the city of Caruthersville. J. M. Clark, a dairyman, in his milk wagon, passed over that crossing. He testified that it was dark, but that there was a street light, and that he could see pretty well. His account of the difficulty is as follows:

"A. Well, he was standing on the crossing as I went to drive by. I drove up and he kind of stepped back, but before the wagon wheel could get to him he stepped back up. It seemed like he was going to hold the crossing on me, and I asked him to get out of the way; and I had a clipping of a stove and struck at him in the face like and he stepped back and pulled a gun out of a paper sack and shot me."

He testified that the ball struck a rib and glanced out. On his cross-examination the following occurred:

"Q. You wanted to pass right where he was standing? A. Yes, sir. Q. And asked him to get out of the way? A. Yes, sir. Q. And he didn't do it? A. Yes; he got out of the way. Q. Why did you strike him? A. He stepped back up toward the wagon. I would have run over his toes with the wheel if I hadn't struck him. Q. You struck him to keep from running over his toes? A. I told him to get back."

Defendant was a comparative stranger there. It is conceded that he and a "brown woman" had been in Caruthersville on the morning of that day. Defendant testified that he left about 2 o'clock that afternoon, going to Hayti, and thence, on the next day, to Blytheville. The evidence for the state tended to show that he was in Caruthersville until the following day, and that while there he was usually in company of a negro woman. A short while after, defendant was brought back from Arkansas, and put in jail. Clark went to see him in jail, but failed at that time to identify him. On the stand he testified that defendant's features resembled the man who shot him. Frank McAllister and George Hale were standing within 60 feet of the difficulty. McAllister's eyes were poor, and he could not identify defendant. Hale, on the stand, positively identified him as the man who did the shooting.

The body of the information is as follows:

"That on or about the 23d day of April, 1914, one Will Taylor, at and in the county of Pemiscot and state of Missouri, with force and arms, in and upon one J. M. Clark feloniously, willfully, on purpose, and of his malice aforethought did make an assault, and the said Will Taylor, with a certain weapon, to wit, a pistol, loaded with gunpowder and leaden bullets, then and there feloniously, willfully, on purpose, and of his malice aforethought, did shoot off, at and against the said J. M. Clark, then and there giv-

ing to the said J. M. Clark, in and upon the right side, stomach, the body of him, the said J. M. Clark, with the pistol aforesaid, and the gunpowder and leaden bullets aforesaid, one wound, with the intent then and there, him, the said J. M. Clark, feloniously, willfully, on purpose, and of his malice aforethought, to kill and murder, against the peace and dignity of the state."

Among the instructions the court gave the following:

"The court instructs the jury that if you believe and find from the evidence in this cause beyond a reasonable doubt that at the county of Pemiscot, in the state of Missouri, at any time within three years next before the 8th day of June, 1914, the date of filing the information herein, the defendant Will Taylor did, on purpose and of his malice aforethought, with a pistol shoot one J. M. Clark, in and upon the side and stomach of said Clark, with the intent the said Clark, on purpose and of his malice aforethought, to kill and murder, you will find defendant guilty as charged, and unless you do so find you will acquit the defendant. And you are instructed that if you find and believe defendant, at the time and place, shot said Clark with said pistol, but not with malice aforethought, you will find defendant guilty of assault with intent to kill, or to do great bodily harm, and unless you do so find you will acquit him of such charge. If you find defendant guilty of assault to kill with malice aforethought, you will assess his punishment by imprisonment in the penitentiary for a term not less than two nor more than ten years; and if you find defendant guilty of assault to kill, or do great bodily harm, but without malice aforethought, you will assess his punishment by imprisonment in the penitentiary for a term not less than two nor more than five years or in the county jail not less than six months nor more than one year or by a fine not less than \$100 nor more than \$1,000 and imprisonment in the county jail not less than three months or by a fine not less than \$100."

N. C. Hawkins, of Caruthersville, for appellant. John T. Barker, Atty. Gen., and S. P. Howell, Asst. Atty. Gen., for the State.

ROY, C. (after stating the facts as above).

[1] I. The information is broad enough to support a conviction for any one of three different offenses: An assault with malice aforethought with intent to kill, under section 4481, R. S.; an assault with intent to kill or to do some great bodily harm, but without malice, under section 4482; and a felonious wounding, under section 4483.

[2] Appellant contends that, because the information charges a felonious wounding, it should be construed as charging an offense solely under the last-mentioned section. It was held in *State v. Burk*, 89 Mo. 635, 2 S. W. 10, that an indicted person must take notice of every offense of which he may be convicted under the indictment. Appellant cites *State v. Melton*, 102 Mo. 683, 15 S. W. 139. There the charge was an assault with intent to kill without any charge of wounding. There was an instruction as to a felonious wounding and a conviction of that offense. It was held that, as there was no charge of a wounding in the indictment, the instruction was improper. That case has no application here. Charging a felonious wounding in con-

nection with the charge of an assault with malice aforethought with intent to kill has often been done with at least the tacit approval of this court. *State v. Schloss*, 93 Mo. 361, 6 S. W. 244; *State v. Bond*, 191 Mo. 555, 90 S. W. 830; *State v. Prendible*, 165 Mo. 329, 65 S. W. 559; *State v. Barton*, 142 Mo. 450, 44 S. W. 239; *State v. Prosser*, 137 Mo. 624, 38 S. W. 1106. In *State v. Johnson*, 129 Mo. 26, 31 S. W. 339, the indictment was in the form here used. It was held that, under the evidence in that case, the trial court properly refused to instruct on a felonious wounding. That is radically different from the contention of appellant here, when he insists that the information must be regarded as a charge of felonious wounding and nothing more.

Section 4904, R. S., originated in the revision of 1879 as section 1655. It provides that in such cases as here the defendant may be convicted of a lesser offense "the commission of which is necessarily included in that charged against him." *State v. Webster*, 77 Mo. 566, was tried before that change in the law, but decided on appeal after the change. It was there said that the enactment of the section was a legislative declaration that such things could not be done prior to its adoption. The efficacy of that statute was recognized in *State v. King*, 78 Mo. loc. cit. 559, and has been enforced ever since then.

[3] II. The evidence identifying the defendant as the man who did the shooting is abundantly sufficient to take the case to the jury on that point.

[4, 5] III. Attention is called to the instruction set out in the statement. At the close of that part of it pertaining to an assault with malice aforethought with intent to kill is the following: "And unless you do so find, you will acquit the defendant." Appellant contends that those words precluded the jury from finding defendant guilty of an assault to kill or do some great bodily harm without malice, or of a felonious wounding, and that, for that reason, it was prejudicial. We do not think this criticism is well taken. It is true that the jury by the latter part of this instruction were told to find the intent to kill or to do great bodily harm from the fact that defendant shot Clark with a pistol. Wherein is this wrong? Defendant fired a pistol, which we judicially know to be a dangerous and deadly weapon, point-blank at Clark, and shot him in the side, and but for the accidental fact that the ball struck a rib and glanced would very probably have killed him. Under these circumstances there would have been no error in telling the jury in plain words that they might presume an intent to kill or to do great bodily harm from the fact of defendant's shooting and striking Clark. *State v. Weeden*, 133 Mo. loc. cit. 76, 34 S. W. 473. If such an instruction as was given in the Weeden Case would not have

been error, then the mere statement of a legal conclusion by way of inference could not hurt, and may well have helped, the defendant. Especially is this true in a case like this, in which the defense was an alibi. Cases could arise wherein, the facts and the defense made being considered, such failure of the court to instruct the jury as to finding intent affirmatively would be bald error. If the assumption of intent to kill with malice aforethought, dealt with in the first clause, had been in question, there might be a different point presented; but even then, upon the facts here, the point would have been taken care of in the instruction as to such malice. Here, in the first clause, the matter of intent is left to the jury. So we need not look to see what the condition would have been otherwise.

Finding no error properly saved, sufficient to call for our interference, it results that the case must be affirmed. Let this be done.

WILLIAMS, C., concurs.

PER CURIAM. The opinion of ROY, C., is modified and adopted as the opinion of the court. All concur.

WHITTELSEY et al. v. CONNIFF et al.
(No. 17077.)

(Supreme Court of Missouri, Division No. 2.
Jan. 6, 1916.)

1. CONSTITUTIONAL LAW §211—EQUAL PROTECTION OF LAW—SALE OF INFANTS' LAND.

When the Legislature *parens patriæ* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells it for the purpose of his education and support, it does not deny to him the equal protection of the laws, but gives him the benefit of laws specially designed for his protection.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. §211.]

2. CONSTITUTIONAL LAW §278—DUE PROCESS OF LAW.

In such case the minor's property is not taken from him without due process of law, but is used for his benefit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. §278.]

3. GUARDIAN AND WARD §10—CURATOR—CHOICE—NONRESIDENT MINOR.

Under Gen. St. 1865, c. 116, § 3, providing that the court shall appoint guardians to minors under the age of 14 and permit those over that age to choose guardians for themselves, subject to the court's approval, section 11, making a similar provision for the appointment of a curator, section 12, providing for the appointment of curators for nonresident minors without providing any choice by the minor, and section 13, providing that a minor having a curator appointed by the court may, after reaching 14 years, choose another curator before the court in the county of his residence, there was no choice of a curator given to a nonresident minor either under or over the age of 14.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. §10.]

4. GUARDIAN AND WARD §87—APPLICATION FOR ORDER OF SALE—NOTICE.

Notice of a curator's application for an order to sell the land of his minor ward is unnecessary, because the curator represents the ward.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 345; Dec. Dig. §87.]

5. GUARDIAN AND WARD §107—CURATOR—SUBSEQUENT APPOINTMENT — COLLATERAL ATTACK.

Where no express formal order discharging a curator was ever made, a sale by a curator thereafter duly appointed, valid in all other respects, could not be collaterally assailed in a suit to quiet title as against defendant claiming under such sale.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 392, 393; Dec. Dig. §107.]

Appeal from Circuit Court, Jefferson County; E. M. Dearing, Judge.

Suit to quiet title by Groome Whittelsey and others against James Conniff and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is a suit under section 2535 of our Revised Statutes to quiet title to lot 8, containing 146 acres, and lot 9, containing 90 acres, all in subdivision 10 of United States survey 1897, except 95 acres described in the petition, all in Jefferson county.

Plaintiffs are the children of Charles G. Whittelsey, a lawyer of St. Louis, who died in March, 1875, the owner of all of said lots 8 and 9, and also the owner of lands in the city of St. Louis and in St. Louis county outside of said city. His will was duly admitted to probate, by which he devised all his property to his wife, Anna G. for life, with remainder to his heirs. He left surviving him six children, who were also the children of said Anna G., and were all minors.

In July, 1875, while the widow and children were residing in St. Louis, Richard H. Spencer was duly appointed curator of said minors. The only personal assets he ever received of said minors was \$324.52 each on a policy of insurance on their father's life. About June 27, 1878, Spencer tendered to the court his resignation as such curator, having duly published a notice of his intention to do so, and his resignation was by entry of record accepted by the court. There was no formal order of his discharge as such. His statements and vouchers show that he paid all the money in his hands to the mother of the minors for their education and support, all of which payments were approved by the court. Immediately after the appointment of Spencer as such curator the mother and children removed their residence to Elkton, Md., where they resided until 1881, when they moved back to St. Louis. Lillian and Lucy died in 1886. The mother and Edith died in 1910.

On October 17, 1878, the widow executed a power of attorney to Phil V. Taylor, of St. Louis, to sell her interest in all of said lands; and on January 18, 1879, Alice G.

Whittelsey, one of the children, who had then become of age, executed a similar power of attorney to Taylor. On June 18, 1879, said Taylor filed in the probate court of St. Louis an application for the appointment of John F. O'Rourke as curator for the five children of Whittelsey who were still minors. That application stated that said minors Lucy and Iva were over 14 years of age, and that Edith, Lillian, and Groome were under 14 years of age; that they resided out of this state, and owned real estate in the city of St. Louis and in the counties of St. Louis and Jefferson. O'Rourke was thereupon appointed such curator, and gave bond in \$1,500 in the estate of each of said minors. On June 24, 1879, the curator filed a petition for an order to sell said lands for the education and support of said minors, stating therein that the personal estate of said minors had been exhausted in their education and support. The court ordered that the land be sold at private sale. On October 4, 1879, that order was renewed. There is no showing on the record of the probate court or otherwise there was ever published or served on said minors any notice either of the application for the appointment of such curator, or of the petition for the order of sale of the land. Lot 8 was appraised at 75 cents an acre, and lot 9 at 25 cents an acre—in all \$132. That appraisement was of the full value, and not merely of the minors' interests therein. The minors' interests in those lots were sold under that order, and the sale was reported to and approved by the court on January 10, 1880. That report contained the following:

"And Mrs. Ellen McNamee became the purchaser of so much of the land above described as being in the county of Jefferson, having made the highest offer that could be obtained for the same, at the price of \$76.70, the same being over the appraised value of said minors' interest in said parcels of land, the tenant for life being 46 years of age, and the appraised value of the whole estate in said lands being \$132."

On October 20, 1879, Phil V. Taylor under his powers of attorney executed two deeds to said Ellen J. McNamee, by one of which he conveyed the interest of the widow, Anna G. Whittelsey, in the Jefferson county land in consideration of \$97.80, and by the other he conveyed the interest of Alice G. Whittelsey for the consideration of \$25.35. On August 19, 1880, Ellen J. McNamee conveyed the 236 acres to defendant McCourt for a consideration of \$600. On June 17, 1886, McCourt sold to James E. Shorb 95 acres of the land for a consideration of \$125; it being the part excepted in the petition. On November 1, 1888, McCourt conveyed to defendant Conniff 40 acres of the land in controversy for a consideration of \$125. There is very little oral evidence as to the character of the land; but it does clearly appear that it lies on the Merrimac river and overflows, that at the time of the curator's sale

it was in woods and unfenced, and that very little of it was cleared at the time of the trial.

W. D. Isenberg, of Los Angeles, Cal., and Crews & Cantwell, of St. Louis, for appellants. James Booth, of Pacific, for respondent McCourt.

ROY, C. (after stating the facts as above). [1, 2] I. Appellants say that the sale of a minor's land by a curator who was appointed without any notice to the minor of the application for such appointment is a violation of constitutional law in two respects: First, that it violates the federal Constitution by denying to him the equal protection of the laws; second, that it violates the state Constitution by taking his property without due process of law. There is one answer to be made to both those propositions: When the Legislature, as *parens patriæ*, takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for the purposes of his education and support, it does not deny to him the equal protection of the laws, but gives him the benefit of laws especially designed for his protection; it does not take from him his property, but used it for his benefit.

In 1820 Chief Justice Parker, in *Rice v. Parkman*, 16 Mass. 326, said:

"No one imagines that, under this general authority, the Legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the Legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property, which might otherwise be wholly useless during that period of life, when it might be most beneficially employed. If this be not true, then the general laws under which so many estates of minors, persons non compos mentis, and others have been sold and converted into money are unauthorized by the Constitution, and void; for the courts derive their authority from the Legislature, and, it not being of a judicial nature, if the Legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost."

In *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570, the court said:

"But, as I have frequently had occasion to observe, an act of the Legislature which would have the effect to divest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefited thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our state Constitution, and not within the

powers delegated to the Legislature by the people of this state. It is clearly, however, within the powers of the Legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs."

Cooley's Const. Lim. (7th Ed.) pp. 141, 144, refers with approval to both those cases.

In *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148, this court said:

"The view which we have taken of the subject is expressly based upon the idea that the act in question directs only the management of the property of the infants, changing its form and directing its use for their own benefit. Had the act undertaken to appropriate their property to the use of any other person, it would have been void, because 'retrospective in its operation' by destroying rights previously vested by law."

Nothing was expressly said in any of those cases on the subject of notice to the minor of the application for the appointment of the curator.

The following authorities hold that no such notice is necessary unless the statute requires it: 21 Cyc. p. 29; *Kurtz v. St. Paul*, 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657; *Kurtz v. Duluth*, 52 Minn. 140, 53 N. W. 1132; *Shroyer v. Richmond*, 16 Ohio St. 455; *Mahan v. Steele*, 109 Ky. 31, 58 S. W. 446; *Packard v. Ulrich*, 106 Md. 246, 67 Atl. 246, 12 L. R. A. (N. S.) 895; *Wallace v. Tinney*, 145 Iowa, 478, 122 N. W. 936, 139 Am. St. Rep. 448. In the latter case it was said:

"But we do not think that either the statute or any rule of constitutional law requires the giving of notice of an application for the appointment of a guardian of the property of a nonresident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. Some of them perhaps go so far as to hold that notice must be given if the appointment is to be of a guardian for the property. But we are constrained to take a different view."

We observe that it is said in that case that some of the cases perhaps go so far as to hold that notice is necessary. A diligent search has failed to discover any case so holding, except those cases where the statute so required.

Those proceedings in the St. Louis probate court were had before Judge Woerner, who in his *American Law of Administration*, (page 88) says that no notice to a minor is necessary unless called for by the statute.

Prior to our Constitution of 1865 the Legislature at every session passed numerous special bills for the sale of minors' lands. Few of them required any notice of any kind to the ward. Many of them failed even to require a bond to secure the interests of the minor. In *Gannett v. Leonard*, 47 Mo. 205, it was held that such an act which did not require a bond was improvident legislation but that it was not void. It further said:

"The power must be executed according to the statute; but the statute furnishes the rule by which we must judge of the legality of the transaction; and the dishonesty or subsequent misfortunes of the trustee, from which his beneficiaries suffer, should not be visited upon innocent purchasers when the statute has been followed."

In *Garth v. Arnold*, 115 Fed. 468, 53 C. C. A. 200, Judge Thayer said:

"Concerning this question it is only necessary to say that it may be conceded to be well settled in the state of Missouri that prior to the adoption of its Constitution of 1865, it was competent for the General Assembly, acting as *parens patrie*, to authorize by special laws the sale of lands belonging to minors and persons *non compos mentis*. The power in question had been repeatedly exercised and upheld. Indeed, the doctrine was so well established by local decisions, and so many titles had been acquired on the faith thereof, as to constitute it a rule of property. *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148; *Gannett v. Leonard*, 47 Mo. 205; *Shipp v. Klinger*, 54 Mo. 238; *Cargile v. Fernald*, 63 Mo. 304; *Clusky v. Burns*, 120 Mo. 567, 25 S. W. 585. In one of these cases (*Shipp v. Klinger*) the Supreme Court of the state declined to go into the question of the right of the Legislature to exercise such a power, or to consider it as open for further discussion."

The Constitution of 1865 (article 4, § 27) provided that the Legislature should not by special law authorize the sale of a minor's land, but did not limit its power to provide for such sale by general law. It is thus seen that, when the statute is complied with, the sale is valid.

[3] The probate proceedings now under examination took place under the General Statutes of 1865. Section 3 of chapter 116 thereof provides that the court "shall appoint guardians to such minors under the age of fourteen years, and admit those over that age to choose guardians for themselves, subject to the approval of the court." Section 11 makes a similar provision for the appointment of a curator different from the guardian. Section 12 provides for the appointment of curators for nonresident minors, without any provision for a choice by the minor. Section 13 provides that a minor having a guardian or curator appointed by the court, may, upon attaining the age of 14 years, choose another guardian or curator before the court in the county of his residence. We think it clear that there is no choice of a curator given by that chapter to a nonresident minor. It may be, and probably is, the case that the statute giving the right of choice to a resident minor over 14 years of age impliedly requires that he shall have notice in order that he may make such choice. We are not now deciding that point, but we do hold that in that chapter there is no provision that a nonresident minor either under or over the age of 14 years shall have such choice, or that he shall have any notice of the application for the appointment of his curator.

Appellants in their brief characterize

O'Rourke as an "interloper." In that connection we have noticed that he was appointed at the suggestion of Phil V. Taylor, who was then the attorney in fact of the mother and adult sister for the sale of their interest in the same land, and who sold those interests to the same person who purchased from the curator, and at prices in harmony with the consideration paid the curator. The interests of the minors were as well cared for as were those of the adults acting in their own right.

[4] II. Appellants say that the sale is void because no notice was given of the application for an order to sell the land. They cite section 29 of chapter 112 of the General Statutes of 1865. We will not quote that section. It says nothing about how the order of sale shall be procured, but provides only that the sale shall be advertised and conducted as in case of sales made by executors and administrators for the payment of debts. In *Pattee v. Thomas*, 58 Mo. 163, and in *Ancell v. Bridge Co.*, 223 Mo. 209, 122 S. W. 709, it was held that no such notice was necessary because the curator represents the ward, and that the latter was in court through such curator.

[5] III. The fact that no express formal order of discharge of Spencer as curator was ever made does not render void the subsequent appointment of O'Rourke. It is not necessary for us to hold that the acceptance of his resignation was for all purposes equivalent to a discharge.

In *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483, a curator was appointed in Lincoln county, the place of the minor's residence. Subsequently both curator and ward removed to Howell county, where the same curator was again appointed as such by the probate court of that county; no discharge or resignation of the curator having ever been made or entered in Lincoln county. There was a sale of land of the ward situate in Lincoln county under proceedings in the probate court of Howell county. It was contended that those proceedings were *coram non jure* and void because of the pre-existing curatorship. It was held that such original curatorship might have been sufficient cause in a direct proceeding to rescind the appointment in Howell county, but that such fact could not be shown in a collateral proceeding to annul the judgment of a court of competent jurisdiction. O'Rourke was a duly appointed curator, and the sale made by him, valid in all other respects, cannot be thus collaterally assailed.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. FARIS, P. J., and WALKER, J., concur. REVELLE, J., not sitting.

BISHOP v. NEWMAN'S EX'R.

(Court of Appeals of Kentucky. Feb. 2, 1916.)

1. TRIAL \S 347—SPECIAL VERDICT.

Since the repeal of Civ. Code Prac. \S 327, subsec. 2, by the amendment of May 15, 1886, special verdicts are not authorized by law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 821; Dec. Dig. \S 347.]

2. EXECUTORS AND ADMINISTRATORS \S 450—SUIT FOR MONEY BELONGING TO ESTATE—DEFENSE—BURDEN OF PROOF.

Where, in an executor's petition to recover money belonging to the estate which the petition alleged to have come into defendant's hands, defendant admitted the receipt of such money, but alleged that she had expended it under the directions and for the benefit of the testatrix, the burden was on defendant to show that she had expended the money as alleged.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 1858-1876; Dec. Dig. \S 450.]

3. APPEAL AND ERROR \S 206, 260—REVIEW—WITNESSES—LIMITING NUMBER.

The action of the court in limiting the number of witnesses to three on one point was not presented for review on appeal where no objection was made or exception taken below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1273, 1283-1289, 1503-1515; Dec. Dig. \S 206, 260.]

4. EXECUTORS AND ADMINISTRATORS \S 449—SUIT TO RECOVER MONEY OF ESTATE—CARE AND NURSING CONTRACT—EVIDENCE.

Where defendant's answer and counterclaim to plaintiff executor's petition to recover money belonging to the estate alleged to have come into defendant's hands alleged that the testatrix while old and feeble lived with defendant who waited upon, nursed, and attended her, for which services testatrix agreed to pay defendant a reasonable compensation, the contract set up was express, and was not supported by evidence tending to show an implied contract arising from the acceptance and rendering of such services under the expectation of paying and being paid by the parties respectively.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 1850-1854; Dec. Dig. \S 449.]

5. WORK AND LABOR \S 7—PARENT AND CHILD—CARE AND NURSING—COMPENSATION—PRESUMPTION.

Where a daughter and mother reside together, the daughter can recover for services, care, and nursing rendered to the mother only on proof of contract for payment therefor, no contract to pay for such services being implied from the rendition of such services or from statements of the mother of a desire or purpose to compensate the daughter, since, under the duty of a child to care for an aged or infirm parent, such services are presumed to be gratuitous.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. \S 11½-22; Dec. Dig. \S 7.]

6. JUDGMENT \S 251—CONFORMITY TO ISSUES.

Where, in an action by the executor to recover money of the estate alleged to have come into defendant's hands, the issue whether a devise to defendant in the will was in payment for care and nursing rendered to executrix by defendant was raised by plaintiff's reply to defendant's counterclaim for such services, and such issue was disposed of by a failure of proof on defendant's part on the counterclaim, it was error for the court to adjudge that a gift by the testatrix to defendant of part of the money sought to be recovered was an ademption

of the devise, since the validity of the devise was not in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 437; Dec. Dig. \S 251.]

Appeal from Circuit Court, Daviess County.

Action by W. L. Tyler, executor of the will of Frances B. Newman, deceased, against Mrs. Monroe Bishop. From a judgment overruling her motion for a new trial, defendant appeals. Reversed.

Louis I. Igleheart and Little & Slack, all of Owensboro, for appellant. W. T. Ellis and Birkhead & Wilson, all of Owensboro, for appellee.

HURT, J. This suit was instituted by the appellee, W. L. Tyler, executor of the will of Frances B. Newman, deceased, against the appellant, Mrs. Monroe Bishop, to recover from her the sum of \$1,300, which, it was alleged, was placed in her hands by the decedent to be safely kept by her, and was in appellant's hands at the death of decedent, and that she now refused to account for it, and had converted it all to her own use and benefit, that the appellant was now indebted to the estate of the testatrix in the sum of \$1,300 by reason of converting the money to her own use and refusing to account for it, and prayed a judgment against her for said sum. By an amended petition it was alleged that \$1,000 of the money came to the testatrix from the Trice estate, and that \$300 of it came from other sources to the testatrix, and that appellant had the money in her hands at the death of testatrix, and wrongfully converted it to her own use.

The appellant, by her answer, denied that the testatrix had received from any one more than \$1,000, which sum she received from the Trice estate, or that the testatrix had placed any part of either the \$1,000 or the additional \$300 in her hands for safe-keeping, or that at the death of testatrix any part of the \$1,300 was in the hands of appellant, or that she had converted any part of it to her own use, or that she was indebted to the estate of testatrix in the sum of \$1,300 or any other sum, or that she had ever promised to pay to the testatrix any part of the money. The appellant further stated in her answer that testatrix, prior to her death, expended \$474.55 of the \$1,000 which she received from the Trice estate, and filed an itemized statement, which she alleged were the things for which testatrix had expended the money, and the amount for each item, and that she had paid for the various items by the direction of the testatrix, and "that the remainder of the \$1,000 was given to her by the testatrix." In a second paragraph the appellant alleged that the testatrix was old and feeble and lived with her, and during the last ten years of her life was a confirmed invalid, needing constant care and attention, and during that

period of the time the appellant waited upon her, cared for and nursed her, with much care and attention and labor, and for which services the testatrix promised and agreed to pay her a reasonable compensation for the services, that the services were reasonably worth the sum of \$50 a month, amounting to the sum of \$6,000, and that she had never been paid any part of it, but alleged her willingness to credit the same by the sum of \$525.45, which was given to her by her mother, as alleged in paragraph 1 of her answer, and by the sum of \$500, which was devised to her in the will of the testatrix, and prayed, as a counterclaim, to recover the sum of \$6,000, subject to credits above, against the appellee. By reply the appellee denied that the testatrix had expended during her lifetime \$474.55, or any part of \$1,000 which she received from the Trice estate, and denied that she purchased the articles or paid the amounts for them or any part of those amounts of the itemized account, which was filed with the answer, and denied that testatrix had ever promised or agreed to pay appellant for the personal attentions rendered her during the last ten years of her lifetime, and denied that any part of the sum claimed as a counterclaim by appellant had been paid or satisfied, or that anything had been paid to her, except as stated in another paragraph of the reply. That paragraph alleged that the appellant was devised in the will of the testatrix the sum of \$500 as compensation for her care and attention during the time the testatrix lived with the appellant, and that appellant had procured the will to be probated and accepted the devise under the will in full satisfaction of any sum that was owing to her for services, care, and attention, and was therefore estopped from making any further claim against the testatrix's estate on account of the care and attention and personal services rendered to the testatrix by the appellant, and pleaded the devise in the will as a full payment for all the services rendered by the appellant. The affirmative allegations of the reply were controverted, by agreement, upon the record.

A trial by jury, was had, and at the conclusion of all the evidence the court, over the objection of all parties, gave to the jury three instructions, by the first of which the jury was instructed peremptorily to find that appellant had received, during the life of the testatrix, or immediately after her death, of moneys belonging to the testatrix, the sum of \$525. By the second instruction the jury was directed to find how much money the testatrix paid out during her lifetime out of money in her hands, and to state the amount and what amount the appellant expended before the death of testatrix and out of money belonging to her for the testatrix. The third instruction directed the jury, if they believed that there was an express agreement on the part of testatrix to pay appellant for services

in nursing and attentions to her during the last five years of the life of the testatrix, then to find what would be a reasonable compensation for the services of appellant during that time, and to so state in their verdict, but, if they did not believe that there was an express agreement on the part of testatrix to pay for the services, then to find nothing on that account, and so state in their verdict.

The appellee asked the court to instruct the jury that, although it might believe from the evidence that there was an express contract between the testatrix and the appellant that the testatrix was to pay for the care and attention rendered to her, the jury was not authorized to find any sum on that account in addition to the \$500 devised to the appellant by the will of the testatrix. This instruction was objected to, and the objection sustained, and properly so, for reasons hereinafter indicated.

The appellant asked the court to instruct the jury that, if it believed from the evidence that the testatrix needed care and attention during the last five years of her life, and that appellant rendered the necessary care and attention to her, and that the testatrix promised that appellant should be paid for her services, to find in favor of the appellant the reasonable value of the services, but to deduct from it such sum as appellant received from the decedent during her lifetime, and the further sum of \$500 devised to appellant by the will. This instruction was also refused, and properly so, as will be hereinafter indicated.

The jury returned a verdict, in which it found that appellant received during the lifetime of the decedent, or immediately after her death, the sum of \$525; and in accordance with instruction No. 2 it found that the decedent paid out \$105, and that the appellant paid out before and after the death of decedent \$475 out of money belonging to the decedent. In response to instruction No. 3 the jury found that the services rendered by the appellant to decedent during the last five years of the decedent's life were worth \$525. After the verdicts had been returned by the jury the court, over the objection of the appellant, transferred the case to the equity docket, and thereupon rendered a judgment to the effect that \$525 belonging to the estate of testatrix went into the hands of the appellant, and that appellant rendered services to the testatrix to the value of \$525, and that the appellant should retain in her hands the \$525 which she had, but that it should be in satisfaction of her claims against the estate of the testatrix, and in full satisfaction of the \$500 devised to her by the will of the decedent.

The appellant filed grounds for a new trial and entered her motion to set aside the verdict of the jury and judgment of the court, upon the grounds: First, that the court had misinstructed the jury; second, the court refused to properly instruct the jury; third,

because the jury erred in the assessment of the amount of the appellant's recovery; fourth, because the verdict of the jury was not sustained by sufficient evidence, and contrary to law; fifth, because the court denied the motion of appellant, at the conclusion of all the evidence, to instruct the jury peremptorily to find a verdict in her favor for the sums sued for in the petition; sixth, because the court erred in limiting the number of witnesses which she was allowed to introduce to three. The motion for a new trial being overruled, the appellant has appealed to this court.

[1] It is insisted that the action of the court in requiring special verdicts was unauthorized, and that is evident. The statute which authorized special verdicts was repealed on May 15, 1886, and since that time in an ordinary action there has been no law to authorize such verdicts. Amendment to subsection 2, § 327, Civil Code (Carroll) 1913.

For the purpose of ascertaining the rights of the parties, and to determine what should have been the action of the court, it will be necessary to examine the evidence offered up on the trial.

[2] To sustain the averments of the petition which were traversed there does not seem to have been any evidence. There was evidence which tended to show that testatrix had come into possession of certain sums of money during her lifetime, but there is a total failure of evidence tending to show that any sums of money of which the testatrix was the owner were ever deposited with appellant for safe-keeping, or was in her custody at the death of testatrix, or that she ever converted any of it to her use, or that any of it, in fact, ever went into her hands. But for the admissions in her answer the court should have directed the jury to find for appellant as to the cause of action set out in the petition.

The appellant, however, in her answer, alleged:

"That decedent, prior to her death, expended \$474.55 of said \$1,000 which she received from the Trice estate, as shown by an itemized statement filed herewith and made a part hereof, marked 'Exhibit No. 1,' and that all of said items were paid for her under her directions by this defendant, and all of said expenditures were necessary for her benefit."

Construing this averment most strongly against the pleader, it is an admission by appellant that she had in her custody the \$474.55 of the \$1,000 mentioned in the petition, and that she had expended it under the directions of testatrix and for her benefit. The burden rests upon the appellant, after admitting the custody of this money of which the testatrix was the owner, to show that it was expended as alleged. The averment that decedent expended it or that it was expended for decedent for the articles alleged is denied by the reply. The court should have by an appropriate instruction directed the jury to find for appellee the \$474.55, or such part

of it, if any, as it did not believe from the evidence was expended by appellant for decedent by the consent or direction of the decedent. The appellant also in her answer alleged:

"And the remainder of said \$1,000 was given and delivered to her by said decedent prior to her death in part compensation for the services to her by this defendant during her last illness, or as a gift."

This averment, while not so clear and explicit as it might have been, and while the court should have had its meaning made definite, it appears to be an allegation to the effect that \$525.45 of the \$1,000 was a gift made to appellant by the testatrix on account of the care and personal services to testatrix in her last illness. This averment of a gift to appellant of the \$525.45 was not denied in the reply, and hence there was no issue made thereon. It was a material allegation and constituting a complete defense to the recovery sought to the extent of \$525.45 of the sum sued for in the petition, and, not being denied, for the purposes of the action must be taken as true, and the court should have so adjudged.

The evidence offered by appellant to support her counterclaim proved that she was the daughter of the testatrix, and they lived in the same house. The testatrix was very feeble for ten years preceding her death, and had need of a great deal of care and personal attention; that appellant was a very kind and dutiful daughter, and patiently, and without murmuring, devoted herself to nursing and caring for her mother, and that her services were easily worth the amount claimed; that on one occasion testatrix said:

"She [testatrix] wanted her [appellant] paid for what she done for her. 'If I give her all of it, it won't pay her. I know she has stood by me through thick and thin.'"

To another the testatrix, during the same week in which she had her will written, said:

"She [testatrix] had willed Mrs. Bishop \$500 for part pay for her, and said money would not pay it, because she had been a dutiful child."

Before the will was written—

"she [testatrix] said that she had nothing to pay her [appellant] with but her prayers. She said that she had nothing to give, but would pray for her. I asked her if she thought it worth more or less [the amount devised in the will], and she said they were all good to her; they, [her children] were dutiful and kind to her."

To another testatrix said:

"She [testatrix] wanted her [appellant] paid." "I don't know how many times she said that to me, but she was talking to me a number of times about her financial affairs before she got this money and afterwards, and she always said she wanted Mrs. Bishop paid."

None of these declarations of the testatrix seem to have been made in the presence or to the appellant. This was the entire evidence offered in the effort to prove a contract between appellant and testatrix by which an agreement was made under which the appellant was to be paid for her services to tes-

tatrix. The services alleged in the counterclaim were waiting upon, caring for, and nursing her for the last ten years of her life. There was no plea of the statute of limitation, but the court, without objection, confined the proof to services rendered during the last five years of the life of testatrix. This action of the court was not excepted to and was not prejudicial, as will hereafter appear.

[3] Complaint is made by appellant that the court erred to her prejudice in refusing to allow her to introduce three witnesses which she had in court, upon the ground of exercising the discretion of the court in limiting the number of witnesses to three to any one point. There was no objection or exception taken to this action by the court, and hence is not here for review. Besides, the avowal as to what the witnesses would testify is that they would testify to the same facts as were proven by the other witnesses who were examined by appellant.

[4] The answer and counterclaim alleged an express contract between appellant and decedent for the payment for the services rendered. It has no allegations of an implied contract to the effect that the services were rendered by appellant under an expectation at the time of charging testatrix for same and of receiving pay therefor, and that testatrix received the services with the expectation of paying therefor. In this case nothing less than proof of an express contract will support the allegations of the answer. *Price v. Price's Ex'r*, 101 Ky. 28, 39 S. W. 429, 19 Ky. Law Rep. 211; *Newton's Ex'r v. Field*, 98 Ky. 186, 32 S. W. 623, 17 Ky. Law Rep. 769.

[5] Where a mother and her daughter reside in the same house, and live as members of the same family, the services rendered by the daughter for the mother in the way of care, nursing, and personal attentions are presumed to be gratuitous, and the law does not raise any contract to pay for the services. The daughter, before she can recover, must show by evidence, that the services were rendered under a contract, by which the services were to be paid for. *Perry v. Perry*, 2 Duv. 312; *Conover v. Conover*, 1 R. 398; *Reynolds' Adm'r v. Reynolds*, 92 Ky. 556, 18 S. W. 517, 13 Ky. Law Rep. 793; *Frailey's Adm'r v. Thompson et al.*, 49 S. W. 13, 20 Ky. Law Rep. 1179; *Wayman v. Wayman*, 22 S. W. 557, 15 Ky. Law Rep. 374; *Heck v. Heck*, 10 Ky. Law Rep. 281; *Jones v. Weaver*, 6 Ky. Law Rep. 665; *Conway v. Conway*, 130 Ky. 218, 113 S. W. 94; *Terry v. Warder*, 78 S. W. 154, 25 Ky. Law Rep. 1486; *Green's Ex'r v. Green*, 119 Ky. 103, 82 S. W. 1011, 26 Ky. Law Rep. 1007; *Wallace v. Denney*, 90 S. W. 1046, 28 Ky. Law Rep. 978; *Foley v. Dillon*, 105 S. W. 461, 32 Ky. Law Rep. 222; *Engleman v. Engleman*, 1 Dana, 438. A contract to pay for such services will not be implied from the fact that the services were rendered;

nor will proof of the statements by the parent to other persons indicating her gratitude to the daughter, or statements indicating the purpose of the parent to make compensation, or to the effect that the daughter ought to be paid for her services, or should be paid, or her desire that the daughter should be paid, are not sufficient to prove that a contract for the payment for the services has been made and exists. The reason for the rule requiring clear proof of the existence of a contract to pay children for services of the character above described before recovery can be had for them is based upon the presumption that they are gratuitous; that the parties reside together for their mutual advantage; that it is the duty of the child to care for his aged and infirm parent, and, if a more liberal rule should be allowed, it would result, after the death of a parent, in a contest between his children as to which one had rendered more services for the parent, and therefore should receive a larger portion of his estate. In this case there was no proof of any contract, except the declarations of the testatrix set out above herein, and the fact that the services were rendered, which are insufficient to support the claim of a contract for the payment of them. Hence there was no evidence which authorized the court to submit to the jury the issue as to whether or not a contract existed between appellant and testatrix for the payment of compensation for the services claimed in the counterclaim, and the verdict of the jury upon that issue was without any evidence to support it.

[6] The paragraph of the reply which alleged that testatrix had executed a will by which she had devised \$500 to appellant for compensation to appellant for her care and attentions to her during the time she had lived with appellant, and that appellant had procured the will to be probated and had accepted the devise in satisfaction of any sum which testatrix owed her for care and attention to her, and, by reason of procuring the will to be probated, which devised to her the \$500 in satisfaction of her services claimed in her counterclaim, she is estopped from making any further claim against the estate of testatrix for such services, was controverted upon the record. There was not any evidence offered which tended to prove that appellant had procured the will to be probated or had accepted any of its provisions. The extent of the proof was that she was in the courtroom when the will was probated, but the evidence failed to show that she was a party to the proceeding, or even so much as knew what was being done.

The paragraph of the reply, supra, however, was only pleaded as a defense to appellant's claim for services asserted in her counterclaim, and, appellant having entirely failed to manifest her right to recover anything under such counterclaim, the paragraph of the reply pleading the devise in the

will as a defense to the claim for compensation under the alleged contract had no further duty to perform and had no further place in the action. The appellant was not seeking to recover in the action the devise made to her under the will, and the devise in the will could not be used as a defense to appellant's claim of the gift to her of the \$525.45, and was not so offered or used. There is nothing in the record to indicate whether the gift of the \$525.45 was made before or after the execution of the will. If the gift was made before the execution of the will, its execution and probate could have no effect upon the validity of the gift; and, if the gift was made after the execution of the will, the effect which the gift and its acceptance will have upon appellant's right to have paid to her the devise under the will is a question not now before us and is not determined. It cannot now be known whether appellant will seek to recover the \$500 devised to her in the will or not. Hence the court was in error when it adjudged that the gift was an ademption of the devise in the will.

The action was an ordinary one, and the issues were all legal, and not equitable, ones. There was but one question for the jury, and that was as indicated above. There was no reason to transfer the cause to the equity docket.

For the reasons indicated, the judgment is reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

BARNES v. UNION CENT. LIFE INS. CO. (Court of Appeals of Kentucky. Feb. 2, 1916.)

1. COURTS — 14 — JURISDICTION — NONRESIDENT PLAINTIFF—FOREIGN INSURANCE COMPANY.

A nonresident may bring an action in Kentucky against a foreign insurance corporation doing business in the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 39; Dec. Dig. § 14.]

2. CORPORATIONS — 666 — ACTIONS AGAINST—STATUTE—CONSTRUCTION.

Civ. Code Prac. § 71, providing that actions against banks or insurance companies may be brought in the county or their principal office, or where the transaction with their agent was had, applies to foreign, as well as domestic, corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2601, 2602; Dec. Dig. § 666.]

3. CORPORATIONS — 666 — FOREIGN CORPORATIONS — NONRESIDENT PLAINTIFF — FOREIGN CAUSE OF ACTION—SERVICE ON INSURANCE COMMISSIONER—JURISDICTION.

Plaintiff, a nonresident of the state, brought an action in a circuit court against a foreign insurance company on a policy executed in Virginia, by serving summons on the insurance commissioner, defendant not having its principal office or place of business in the state. Civ. Code Prac. § 78, provides that actions not otherwise provided for may be brought in any county where defendant resides or is summoned. Section 71, localizing actions, is limited to cor-

porations having a principal office or place of business in the state, or to transactions occurring in the state. Ky. St. § 631, provides that foreign insurance companies shall agree to service of process on the insurance commissioner as a condition precedent to doing business in the state. *Held*, that the court had jurisdiction under the provisions of Civ. Code, § 78.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2601, 2602; Dec. Dig. § 666.]

Appeal from Circuit Court, Franklin County.

Action by Jennie F. Barnes against the Union Central Life Insurance Company. From a judgment sustaining a demurrer to her petition, plaintiff appeals. Reversed.

O'Rear & Williams, of Frankfort, for appellant. T. L. Edelen, of Frankfort, for appellee.

SETTLE, J. This action was brought by the appellant, Jennie F. Barnes, widow of Clinton J. Barnes, deceased, to recover of the appellee, Union Central Life Insurance Company, \$5,000, claimed to be due on a policy of insurance on the decedent's life, issued by it, payable to her. It is alleged in the petition that appellee was incorporated under the laws of Ohio; that the contract of insurance, evidenced by the policy, was made in Virginia, in which state appellee was then doing business and the decedent then, and until his death, resided; and that appellee is now, and was at the time of the institution of the action, doing business in Kentucky. Though not so alleged in the petition, it seems to be admitted by the appellant that she is a nonresident of Kentucky. The summons issued upon the filing of the petition was served by the sheriff of Franklin county on appellee by delivering to M. C. Clay, insurance commissioner for the state of Kentucky, a true copy thereof. Appellee by counsel appeared in the Franklin circuit court, and entered a motion to quash the summons and return, which motion was overruled, to which it excepted. It then filed a special demurrer to the petition, on the ground that the petition showed that the court had no jurisdiction of the case. The demurrer was overruled, to which appellee excepted. It thereupon, without waiving its objection to jurisdiction, filed an answer, alleging, by way of plea to the jurisdiction—"that this defendant is an incorporated insurance company; that Franklin county is not the county in which its principal office or place of business is situated; nor did the transaction sued on in the plaintiff's petition arise out of a transaction with an agent of such corporation in Franklin county. The defendant's principal office or place of business is situated in the city of Cincinnati, Ohio, and the contract sued on took place in the state of Virginia, and not in the state of Kentucky."

Appellant filed a demurrer to the answer, which was, by the court, carried back to the petition and sustained. Appellant excepted to this ruling, and, upon her declining to plead further, the court dismissed her petition.

From the judgment manifesting the above rulings she has appealed.

Appellee's demurrer to the jurisdiction of the circuit court admits the allegation of the petition that it was, at the time of the institution of this action and is now, doing business in this state, and its plea in abatement fails to deny that this is so. It is insisted for appellee, and such was the conclusion of the circuit court, that section 71, Civil Code, fixes the venue of an action, against an incorporated insurance company, either in the county in which its principal office or place of business is situated, or in the county where the transaction arose, if such transaction was with an agent, and that, as appellee has not a chief office or place of business in Franklin county, and the transaction out of which appellant's action arose did not take place with an agent of appellee in that county, the circuit court thereof has no jurisdiction of appellee or of the action. On the other hand, it is insisted for appellant: (1) That an action on a contract of insurance made in another state can be maintained by the beneficiary in this state against a foreign insurance company doing business in this state; (2) that such action is not localized by section 71, Civil Code, but is transitory, and therefore maintainable under section 78 of the Civil Code; (3) that, if it could properly be held that such action is localized by section 71 of the Code, and must, by reason thereof, be brought in the county in which is situated the principal office or place of business of such foreign insurance company, and the latter has no known or principal office or place of business in this state, then the insurance commissioner is, by statute, made its chief officer in this state, and the county in which his official domicile or residence is required by the statute to be maintained is in law the county in which is situated the foreign insurance company's principal office and place of business. It is shown by the uncontroverted affidavit of B. G. Williams, one of appellant's attorneys, that appellee has no principal office or place of business in this state, unless the insurance commissioner is its principal officer, and Franklin county, the county of his official residence, is its principal place of business; and it is not alleged by appellee's plea in abatement either that it has or has not a principal office or place of business in this state, but only alleged that Franklin county is not the county in which its principal office or place of business is situated, and that its principal office or place of business is situated in the city of Cincinnati, Ohio.

[1] As to the proposition first advanced by appellant's counsel, it is sufficient to say that the mere nonresidence of appellant does not prevent her from maintaining an action in this state against a foreign insurance company doing business in the state. Such right of a nonresident was declared in *N. W. Mu-*

tual Life Ins. Co. v. Lowery, 14 Ky. Law Rep. 600, 20 S. W. 607, and *Cleary v. Union Central Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881, although in neither of these cases was the question involved that is here raised. In the first case it was held that, notwithstanding the statute of limitations of the state of Alabama, where the contract of insurance was made, did not bar the action, the laches of the plaintiff in delaying for more than 10 years to bring the action in this state should be regarded as equivalent to a waiver or abandonment of her claim; consequently a judgment in her favor could not be rendered without permitting her to take advantage of her own gross negligence, to the prejudice of other policy holders of the insurance company. In the second case it was held that, as the foreign insurance company was a resident of Wisconsin and the contract of insurance was made in Ohio, and the action was barred by the statute of limitations of the latter state, it could not be maintained in this state. But in *N. W. Mutual Life Ins. Co. v. Lowery*, supra, we in the opinion said:

"It has been more than once held by this court that an action may be maintained in this state on policies of life insurance by service of process on an agent here, although the principal office of the company may be in another state."

As already stated, it is admitted by the pleadings that, when this action was instituted, appellee was authorized to do, and was doing, business in this state. Section 571, Kentucky Statutes, provides:

"All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the secretary of state a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

[2] It will be observed that foreign insurance companies are excluded from the operation of the statute supra, but this is because they come under the provisions of section 631, Kentucky Statutes, which declares:

"Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commission-

er of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state."

Section 71 of the Code provides:

"Excepting the actions mentioned in sections 62 to 66, both inclusive, and in sections 70 and 75, an action against an incorporated bank or insurance company may be brought in the county in which its principal office or place of business is situated; or, if it arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place."

This section applies to foreign, as well as domestic, insurance companies that have in this state a principal office or place of business, for we so held in *Employers' Indemnity Co. v. Duncan*, 159 Ky. 460, 167 S. W. 414. In the opinion it is said:

"It is argued that as the defendant company is a foreign corporation, section 71 has no application to it. The section, however, does not appear to limit its application to either domestic or foreign banks or insurance companies. It applies to all, whether domestic or foreign, that have in this state a principal office or place of business. If the bank or insurance company, whether domestic or foreign, has not in this state any principal office or place of business, then of course the action must be brought in the county in which the transaction arose that is the basis of the action if the contract was made in this state. * * *"

[3] But suppose the contract is not made in this state and the foreign insurance company has not a principal office or place of business in this state, which is the state of case here presented, will such a situation altogether prevent the bringing of the action in this state by the nonresident plaintiff? or is the venue fixed by section 78 of the Code, applying to transitory actions, which provides:

"An action which is not required by the foregoing sections of this article to be brought in some other county may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned."

The only preceding section that could interfere with the application of section 78 would be section 71, the localizing effect of which is applicable only in cases where the transaction took place in some county in the state, or where the defendant has a principal office or place of business in the state. It is patent that appellant could not have brought this action in any of the counties of this state designated in section 71 to localize the action, therefore it would seem that it may be brought in any county in which "the defendant * * * is summoned," as provided by section 78.

In *C. & O. Ry. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990, 16 Ky. Law Rep. 373, the action was for an injury received by the plaintiff in the state of West Virginia. He was a citizen of Shelby county, Ky., and brought this action, in Jefferson county, to recover damages for the injuries sustained. Objection was made by the railroad company to the jurisdiction of the court, it being its contention that the venue of the action was fixed by section 73 of the Code, which provides that:

"An action against a common carrier, * * * for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant * * * resides; or in which the plaintiff or his property is injured; or in which he resides, if he resides in a county into which the carrier passes"

—and further, that as the defendant did not reside in Jefferson county and the plaintiff did not suffer his injury in that county, and defendant did not pass into or through that county, jurisdiction in the Jefferson court was wanting. Section 51, subsec. 3, of the Civil Code, then as now, provides that:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this state; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

Service of summons in the case supra was had upon the chief agent of the railroad company in Jefferson county. Section 78 of the Code, applicable to transitory actions, with its present provisions, was then in force. The railroad company's chief office and place of business was not in this state. In the opinion it is said:

"Applying this section [73] to the case at hand, the Jefferson court of common pleas had no jurisdiction, because Jefferson county was not the county of the defendant's residence, or that in which the plaintiff was injured, or that in which he resided and into which the carrier passed. Moreover, if this section is to control, the plaintiff is wholly without remedy so far as the courts of his state are concerned. The corporation has established itself in business within the jurisdiction of the courts of the state, but, because the injury was inflicted beyond her territorial limits, the plaintiff is not allowed to sue in any of her courts; and, so long as the carrier fails to run its road through Shelby county, or fails to establish its chief office or place of business in Kentucky, the complainant is without remedy so far as this statute gives him relief, even though the managing agents of the carrier might be found doing business in every county in the state. We do not believe this construction of the law to be sound. No attempt was made to localize actions where the jurisdictional facts contemplated in the statute were wholly wanting. In the very nature of things it would seem impossible to localize an action for a personal injury inflicted by a nonresident beyond the limits of the state. The existence of the localizing facts can be only accidental, and in most cases would be wanting, as they are here. It seems to us the law was intended to apply only in cases where the defendant, or one of them, resides in the state, or when the plaintiff, is injured in the state, or resides in a county in the state into which the carrier passes. In the absence of these jurisdictional facts in any given case, we must conclude,

not that the plaintiff is without remedy, but that the localizing statute is not applicable. The state of fact which would limit or confine the plaintiff to certain designated counties in the institution of his action does not exist in the case at hand. It was impossible for the plaintiff to bring this action in any of the counties designated in the section relied on to localize the action; hence section 78 of the Code applies, and this provides that 'an action which is not required by the foregoing sections of this article to be brought in some other county may be brought in the county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned.' It seems to us that the application of this section to this case is entirely free from objection. The nonresident common carrier is thus put on the same footing with other nonresident litigants. When found doing business in the state, it is presumably with the consent of the state, and that consent must be assumed to have been on the condition that it subject itself to the same legal environments that encompass other litigants, and it may therefore be sued as other litigants when properly summoned."

The conclusion expressed in the opinion supra seems to us to control the decision of the question of jurisdiction involved in the instant case. Application of the provisions of section 71 of the Code, as contended by appellee, would make it impossible for appellant, or even a resident plaintiff, to bring this action in any of the counties to which that section would confine the venue. Under section 78, however, the right of a nonresident to maintain a transitory action in this state, on a contract made in another state, is the same as that of a citizen thereof. Its only requirement applicable here is that the action shall be brought in the county in which the defendant resides or is summoned, and it makes no distinction between a resident and nonresident plaintiff, or a resident and a nonresident defendant. *Bishop v. Jackson*, 91 S. W. 263, 28 Ky. Law Rep. 1136. As by section 631, Kentucky Statutes, foreign insurance companies are required to file with the commissioner a "resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company," and compliance by appellee with this requirement of the statute was a condition precedent to its right to do business in this state, its admission that it has no principal office or place of business in this state, and that the transaction out of which the action arose did not take place with its agent in any county of the state, together with the service upon the commissioner, its designated agent, of summons on the petition in our opinion, brings the case within the provisions of section 78, Civil Code. Therefore the circuit court should have taken jurisdiction of the case.

This conclusion renders unnecessary consideration of the third proposition urged by

appellant; hence it is not passed on. For reasons indicated the judgment is reversed and cause remanded, with direction to the circuit court to overrule appellee's demurrer to the petition, sustain appellant's demurrer to appellee's answer, and for further proceedings consistent with the opinion.

CITY OF LOUISVILLE v. METROPOLITAN REALTY CO.

(Court of Appeals of Kentucky. Feb. 1, 1916.)

1. MUNICIPAL CORPORATIONS — INJURIES TO PERSONS ON SIDEWALKS — LIABILITY OF ABUTTING OWNER.

Where an abutting landowner constructed a metal drainpipe in a groove in the sidewalk for the purpose of carrying surface water away from his land, he has the primary duty of maintaining the pipe in a safe condition, so that travelers will not be injured, notwithstanding an abutting owner, having laid a sidewalk in accordance with city regulations, is not bound to keep it in repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. ¶ 808.]

2. INDEMNITY — RECOVERY OVER BY CITY.

Where judgment was recovered against a city by a pedestrian injured through a defect in a pipe laid in a groove in a sidewalk, the city, having paid the judgment, may recover against the abutting landowner who was primarily bound to keep the pipe in repair.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. ¶ 13.]

3. MUNICIPAL CORPORATIONS — SIDEWALKS — DUTY OF REPAIR.

In such case the landowner, having used the drainpipe for many years, is primarily bound to keep it in repair, though the landowner did not lay it in the first place.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. ¶ 808.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by the City of Louisville against the Metropolitan Realty Company. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

W. J. O'Conner and Pendleton Beckley, both of Louisville, for appellant. Kohn, Bingham, Sloss & Spindle, of Louisville, for appellee.

THOMAS, J. On the 26th day of January, 1913, one Louis Roehrig, while traveling afoot on the north side of Main street between Twenty-Fifth and Twenty-Sixth street, in the city of Louisville, sustained injuries by reason of defects in the sidewalk, for which he afterwards brought suit against the city and recovered a judgment against it for \$500, which was paid by the city, and at the time of payment, the judgment, interest, and court costs amounted to \$563.95. This did not include any sum for attorney's fees, or for any other special service necessary in the defense of the suit. The appel-

lee, Metropolitan Realty Company, was the owner of the property abutting the street at the place where the injury occurred, and the city, claiming that it was the primary duty of such company to have kept the sidewalk in repair at that place, gave notice to it of the pendency of the suit by Roehrig, but it ignored this notice, and made no effort to defend that suit. The proof in that case showed the following facts: The plaintiff therein was using the sidewalk as a walkway and exercising ordinary care at the time, and there had been placed across the sidewalk running from the property of appellee a metal drainpipe, with some kind of a metal covering, the top of which covering was presumed to be upon the same surface as the remaining portion of the walk, but this covering had, from rust or other causes, gotten out of repair, and holes had appeared therein, and that Roehrig stepped, either into this drainpipe, or excavation which was so covered, or got his foot hung in some of the holes of the covering, by means of which he fell and sustained the injuries for which he sued. The drainpipe extended from the guttering at the curbing to the property of the appellee, and at the end it was connected with a downpipe, which conducted the water from the roof of the appellee's building. This drainpipe across the walk was used by no other persons, or for the benefit of no other property except that of appellee. Upon a trial of this case there was an agreed state of facts filed during the trial, which, without caption or signatures, is as follows:

"It is hereby stipulated and agreed by the parties hereto that the following state of facts existed upon the 26th day of January, 1913, and subsequent thereto, viz.: The defendant, the Metropolitan Realty Company, owned the real estate in front of which the plaintiff, Louis Roehrig, was injured, as claimed by him in action No. 77962, Louis Roehrig v. City of Louisville, and that the drainpipe in the public sidewalk in front of the property mentioned was connected with the downspouts attached to the house located on the said property and carried water from these downspouts alone, and did not connect with downspouts on any other property, or drain water from any other property, except from the property of the defendant, the Metropolitan Realty Company.

"It is further stipulated and agreed that the Metropolitan Realty Company has never paid the plaintiff, the city of Louisville, any sum whatever on account of the judgment or costs incurred in said action No. 77962, Louis Roehrig v. City of Louisville.

"It is further stipulated and agreed that the drainpipe in the public sidewalk in front of the property of the defendant, Metropolitan Realty Company, heretofore referred to, was in a defective condition, in that a hole or holes had come into the cover of said drainpipe, and had been there for many days, and that the said Louis Roehrig received the injuries complained of in the said case of Louis Roehrig v. City of Louisville because of the defect in the said drainpipe, by falling over the same, and that he obtained the judgment referred to in the petition of the city of Louisville in this case, and was paid the full amount of said judgment, as shown by the records of the city of Louisville.

"It is further agreed that the amount paid out by the city of Louisville on account of the ver-

dict and judgment obtained by the said Louis Roehrig, in said case of Louis Roehrig v. City of Louisville, referred to in the petition herein, was \$806.60."

There was also other testimony taken, showing about the time this building owned by appellee was constructed, and endeavoring to show by whom this drainpipe, as well as the walk at that place, was constructed, but as to who did this work, or procured it to be done, is not satisfactorily shown. However, in the view we take of this case, it is immaterial as to the purpose for which, or the persons by whom, this work was originally done. Upon a trial of the case the lower court gave a peremptory instruction to find for the defendant (appellee), which was accordingly done, and, the appellant's motion for a new trial having been overruled, it prosecutes this appeal.

[1] The action of the learned judge who tried this case in giving the peremptory instruction was based upon the idea that the abutting property owner, under the laws of this state, is not compelled to keep in repair sidewalks along by the side of his premises, and that the defective condition of the drainpipe involved in this case, and which produced the injury sued for, should have been repaired by the city, and not by the appellee as abutting property owner. As a general proposition, this rule of law is correct. When the sidewalk is constructed in the manner required by the city, no duty devolves upon an abutting property owner to keep the walk in repair. The material out of which the walk is constructed might be inferior, or blocks of stone or brick from which it is constructed may become loose and produce a rough and dangerous condition in the walk, but the property owner, unless he in some way for his own benefit or for the benefit of his property brought about these conditions, is not in the least liable for any accident or injury which may result to any member of the public in the use of such walk, unless required to repair them by some statute or ordinance. Moreover, if other persons, not for any use or benefit of the property owner or by his procurement, or for the use or benefit of his property, place obstructions upon the walk, either permanent or temporary, no duty devolves upon the property owner to remove such obstruction, and, of course, no liability to any one who may be injured by reason thereof. In such cases, it is the primary duty of the city to keep in repair the sidewalks therein, but a secondary duty devolves upon it to remove or repair any obstruction which may be placed or maintained thereon by any person, after it has reasonable notice, or after such time as ordinary care would have notified it of obstructions, but in such cases the producer of the obstruction is likewise primarily liable to the injured party, and would be liable over to the city for any sum which it might be compelled to pay on account of

the obstructions placed upon, made, or maintained on the sidewalk. Whenever the use of the walk which produces the obstruction constitutes a servitude on the walk for the private benefit and use of a third party, or his property, such third party, or property owner, is liable to the party injured for the original construction in the one instance, or the failure to repair in the other.

Abundant authority exists for this rule in text-writers upon the subject, as well as courts of last resort, but we need go no further for authority for the rule than the opinion of this court. In the case of *Stephens' Adm'r v. Deickman*, 158 Ky. 337, 164 S. W. 931, 51 L. R. A. (N. S.) 309, a very similar question was under consideration by this court, and one exceedingly analogous to that involved in the instant case. The property owner had, by means of a downpipe from the roof of his buildings, permitted quantities of water thus collected to be emptied from the pipe onto the sidewalk, and it was frozen into a ridge across the walk, which produced an obstruction to pedestrians, and the decedent, while in the exercise of ordinary care, stumbled over this ridge of ice and fell, from which she sustained injuries which afterwards resulted in her death. She brought suit against Deickman, the property owner from whose building the water had thus been cast upon the sidewalk, and which water, after being frozen, produced the obstruction. In the petition the facts above were stated, but the court sustained a demurrer filed to it by the property owner, but that judgment on appeal was reversed by this court. We quote the opinion as follows:

"As the question is one of first impression in this jurisdiction, appellant relies, by way of analogy, upon *Covington Sawmill & Mfg. Co. v. Drexilius*, 120 Ky. 493 [87 S. W. 266, 117 Am. St. Rep. 593], claiming that the principle there announced supports the petition in this case. In the *Drexilius* Case the Sawmill Company, without the permission of the city, and entirely for its own convenience, constructed a covered wooden sewer across a public alley; and the court held it was the company's duty to maintain the sewer in such a reasonably safe condition as would not interfere with the public's superior use of the alley for any purpose for which it might have been properly used, and that its failure to keep the sewer in such repair made it a nuisance. While not directly in point, the principle there announced that one who uses a public easement for his own purposes must keep it in a reasonably safe condition for the use of the public, is applicable to the case at bar. In the same way appellee relies upon *Webster v. C. & O. Ry. Co.* [105 S. W. 945], 32 Ky. Law Rep. 404, *Jaeger v. City of Newport*, 155 Ky. 110, 159 S. W. 671, and *Varney v. City of Covington*, 155 Ky. 662 [160 S. W. 173], in support of the proposition that the property owner is not liable. While those suits were against the municipality, it is insisted the principle which excepted the city from liability in those cases applies equally to the case of an abutting property owner. In the *Jaeger* Case the accident happened at the intersection of an alley with a street. There had been snow, and as the snow melted, the water ran down the alley and was frozen at the point where the sidewalk crossed the alley. The ice had accumulated until it was about even with the sidewalk—

perhaps six inches high, with a large ridge on it. When Mrs. Jaeger stepped on the ice she fell and was injured, although she fell before she reached the ridge of ice. In that case this court held the city was not liable; and it is argued that if the city was not liable under such circumstances, surely the property holder would not be liable, or bound to a greater degree of care than the city itself. In the course of the opinion, however, the court said: 'While, due to the operation of the statutes there in force, municipalities in the New England states are held to a stricter degree of liability, the decided weight of authority elsewhere, as well as the tendency of the more recent decisions, is to hold that a city is not ordinarily liable for mere slipperiness of its sidewalks, occasioned by snow and ice. Where, however, the sidewalk itself is defective, or the snow or ice amounts to an obstruction, or its natural condition has been changed by artificial means, liability may attach, or where it is customary to treat the removal of snow and ice as a regular part of highway management, a failure to do so may become wrong or negligent' (cases cited)."

This court in the same opinion also quoted with approval from the case of *Reedy v. St. Louis Brewing Association*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805, as follows:

"It is argued upon the authority of *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242; *St. Louis v. Connecticut Mut. L. Ins. Co.*, 107 Mo. 92, 17 S. W. 637 [28 Am. St. Rep. 402]; *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921 [75 Am. St. Rep. 462], and other cases cited, that the abutting owner is not responsible for the condition of the sidewalk in his front, but that the duty to look after that is on the city alone. It does not, however, impair the doctrine laid down in those cases to say that an individual may become liable, and jointly liable with the city, for an unsafe condition of the sidewalk. This liability does not arise from the fact that he is owner of property abutting the sidewalk, but from the fact that he is instrumental in causing the condition, either by his willful act or negligent omission to perform a duty which the law imposes on him. If he is allowed an extraordinary use of the sidewalk for his private convenience, as, for example, to place in it a manhole for the reception of coal (*Benjamin v. Metropolitan Street R. Co.*, 133 Mo. 274, 34 S. W. 590), a water meter (*Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210), or an excavation in close proximity to the sidewalk for a foundation for a new building (*Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528), the law imposes on him the exercise of reasonable care to guard the public from injury in such use. And it may be said that if the individual neglect to perform any duty that the law imposes on him in particular, and a dangerous condition of the sidewalk results, then a new duty on him in relation to that condition arises, and, of course, with greater force, it would be so if that condition was the result of his willful act."

Again in the same opinion we find the following language:

"It is said by this defendant that there is no law requiring it to have gutters and downspouts on its buildings at all. There is no statute on the subject that we are aware of, but the principle of the common law is that, whilst the owner of adjoining property is not responsible for the natural flow of water across his land onto the land of his neighbor, yet he is liable if he collects it in a quantity by artificial means and discharges it in a flood on his neighbor's land, and that principle underlies that feature of this case. Water accumulated on a large roof and directed to a single point may cause a nuisance for which the owner of the house would

be liable. If, therefore, the petition is to be construed into stating a case in which the brewing association was negligent in suffering water to be discharged on the sidewalk where it became frozen and formed a dangerous condition (and that seems to have been the construction put upon it by both parties and the trial court), then it showed a condition of the sidewalk for the continuance of which for an unnecessary period both defendants would be liable, the joint wrong being the neglect to remove the obstruction."

Further on in the opinion the court quoted from the case of *Tremblay v. Harmony Mills*, 171 N. Y. 599, 64 N. E. 501, this language:

"That the jury could have found that the discharge of water and drippings from the leader in winter weather, when the water so discharged was liable to freeze and form ice, rendered the sidewalk dangerous and constituted an obstruction, and that the defendant was negligent in not carrying his leader under the sidewalk to the carriageway seems to me quite plain. To exonerate the defendant from liability it must establish one of two propositions: First, that it had the lawful right to discharge the water which it had collected on the roof of its building upon the highway regardless of the effect of that action upon the highway; or, second, that because the municipality was liable to any one injured by the defective character of its highway, no action could be maintained against the abutting owner, though his act may have created the danger or defect. I think that neither proposition can be sustained."

See, also, *Brown v. White*, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321; *Cavanaugh v. Block*, 192 Mass. 63, 77 N. E. 1027, 6 L. R. A. (N. S.) 310, 116 Am. St. Rep. 220; *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503, 9 L. R. A. (N. S.) 598; *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. Rep. 506; *Maloney v. Hayes*, 206 Mass. 1, 91 N. E. 911, 28 L. R. A. (N. S.) 200; *Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884, 19 L. R. A. (N. S.) 236; and other cases found in that opinion.

In summing up its conclusion that the petition stated a cause of action against the appellee, *Delckman*, this court in the opinion, *supra*, says:

"From these authorities it follows that the property holder, in conducting the water from the roof of his house to the sidewalk, must use ordinary care not to cause an obstruction or nuisance, by which persons lawfully using the sidewalk, and in the exercise of ordinary care upon their part, may be injured; and, in case such an obstruction or nuisance should arise suddenly or unexpectedly, it is the landlord's duty to remove the obstruction or nuisance as soon as he has knowledge of its existence, or could have had such knowledge by the exercise of ordinary care."

Similar cases to the one being discussed in the *Delckman* Case, and somewhat analogous to the question involved herein, were considered by this court in the following cases: *Covington Sawmill & Mfg. Co. v. Drexilius*, 120 Ky. 493, 87 S. W. 266, 117 Am. St. Rep. 593; *Varney v. City of Covington*, 155 Ky. 662, 160 S. W. 173; *City of Harrodsburg v. Vanarsdall*, 148 Ky. 507, 147 S. W. 1, and others which might be cited.

Most of the cases just referred to and considered deal with the question as to the

rights of the property owner for the accumulation of ice upon the walk by the freezing of water thereon in collected quantities, thus producing an obstruction to the sidewalk, and, of course, they determined that it was unlawful for the property owner to throw water in such collected quantities upon the walk in such a manner as to produce a nuisance and an impairment of its use by the public, and they make such property owner primarily liable for any injury to any member of the public growing out of the nuisance thus produced. If the property owner has no right to turn this collected quantity of water through a downspout from his property upon the sidewalk, why, may we not ask, would not the law impose upon him the duty to protect the sidewalk from the flow of such water upon the surface of the walk by conducting it into the guttering or sewer pipe provided by the city for its final escape? In the opinion in the case of *Tremblay v. Harmony Mills*, *supra*, from which this court quoted with approval in the *Delckman* Case, it is said:

"And that the defect was neglect in not carrying his leader [drainpipe] under the sidewalk to the carriageway seems to me quite plain."

We are unable to find any authority holding that a drainage pipe, used exclusively for conveying water under the sidewalk, from a downpipe maintained by the property owner, across such sidewalk into the drainage furnished by the city, is not a continuance of the downpipe, and in the very nature of things it is necessarily appurtenant to the abutting property, being used exclusively for its use and benefit. The city is not particularly interested in conveying away the water collected from this private property into drainage pipes across the walk, for it serves no particular municipal purpose, but, on the contrary, the drainage pipes across the walk are maintained exclusively for the use of the abutting property owner. According to our view, there is no substantial difference between this character of use of the walk and that in case of holes, openings, etc., for the use of cellars, or other benefits to the abutting property, and the rule that those who maintain such obstructions must keep them in repair is so universal as to require the citation of no other authorities. The drainpipe of the character being considered is maintained to protect the abutting property owner from liabilities resulting from conditions which might arise from a failure to take care of the water, as is found in the *Delckman* Case, *supra*, and others similar to it. If to avoid the liability imposed by the doctrine announced in that case, and similar cases, he provides a means to convey the water across the walk, or appropriates one already provided, he must exercise ordinary care to keep it in reasonable repair so as not to interfere with travel on the walk by those entitled to use it. *East End Employment Co. v. Sipp*, 14 Ky. Law Rep. 924; *Blocker v.*

City of Owensboro, 129 Ky. 75, 110 S. W. 369.

The principle established in the case of Webster v. C. & O. Ry. Co., 105 S. W. 945, 32 Ky. Law Rep. 404, and other like cases has no bearing upon the question under consideration, as is shown in the Deickman Case, supra. In the Webster Case, the doctrine first discussed in this opinion was recognized, namely, that an abutting property owner is not liable for any injuries resulting from nonrepair of the sidewalk in front of his premises, which nonrepair he in no wise produced, nor was it created or maintained as a servitude upon the walk for the exclusive use or benefit of his property. It merely decides the general principle of law that the owner of abutting property does not have to keep the ordinary defects in the sidewalk repaired, and there is nothing in that case conflicting with the views herein expressed. So holding, this court in the Webster Case said:

"There is no good reason why a railroad company should be held to a higher degree of care or responsibility for defects in sidewalks or streets adjacent to its premises than other property owners. And there is no statute making a distinction between carriers and other persons in this respect."

The negligence complained of in that case did not consist of any acts, of omission or commission, relative to a thing provided for the exclusive use of the railroad company. The complaint was that the guttering next to the curbing of the sidewalk, where it crosses an alley or street going to the depot, was improperly maintained, and this court determined that under such circumstances it was not the duty of the abutting property owner to keep in repair the driveway to its depot at the place where it crossed the sidewalk. The public is as much interested in the constructing and maintaining of an open way to the depot within its limits as it is to have access by streets or alleys to any other public place within its limits. Because the abutting owner may, perchance, reap a benefit from the burden of the servitude on the street or sidewalk furnishes no legal reason why such owner should have cast on him the duty to repair the street or walk at such places. Not so, however, with regard to the drainpipe across the walk for individual or private purposes, as is involved in this case.

We have read with interest the able brief of the appellee, but the authorities therein cited do not, according to our view, bring this case within the general rule excusing abutting owners from the duty of repairing public ways adjacent to their premises.

[2] That the city has a right in such cases as this to recover from the property owner who is primarily liable any sum which it may be compelled to pay there can be no question. City of Louisville v. Davis, 157 Ky. 189, 162 S. W. 814, and many other cases.

[3] The learned judge who tried the case

justified his action in giving the peremptory instruction to find for the appellee on the ground that there was no proof that the property owner created or constructed this drainage pipe across the walk. We do not think this a deciding factor in this case. The pipe was evidently originally constructed for the use of this property, and the agreed stipulation of facts show that it not only was being used by the appellee at the time of the accident complained of but had been so used by it for many years previous. We are convinced that it was the duty of the appellee to have maintained in reasonable repair this drainage pipe, under the facts and circumstances developed by this record.

It results, therefore, that the court erred in giving the peremptory instruction to find for the appellee, and upon a return of the case, unless a different state of facts should be developed, the court should give a peremptory instruction to find for the appellant in the sum of \$660.60, with interest from the date of the filing of the suit.

Judgment reversed, with directions to proceed in accordance with this opinion.

ALLEN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 8, 1916.)

1. CRIMINAL LAW §126—CHANGE OF VENUE—LOCAL PREJUDICE—CONSTITUTIONAL AND STATUTORY PROVISIONS.

On the affidavits and evidence supporting a motion for change of venue on the ground of local prejudice, held, that it was error to refuse a change to defendant under Const. § 11, and Ky. St. § 1109, enacted in pursuance thereof, providing that, when a criminal prosecution is pending in any circuit court, the judge thereof shall, upon the application of the defendant or the commonwealth, order a change of venue, if it appears that either cannot have a fair trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 243; Dec. Dig. § 126.]

2. CRIMINAL LAW §1150—CHANGE OF VENUE—DISCRETION OF TRIAL COURT.

The discretion of the trial judge in granting or refusing an application for a change of venue on the ground of local prejudice will not be interfered with, unless it affirmatively appears that such discretion was abused, or that the ruling was prejudicial to the constitutional rights of the complaining party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044; Dec. Dig. § 1150.]

3. CRIMINAL LAW §590—CONTINUANCE—PREPARATION FOR TRIAL.

Defendant, accused of murder, moved for a continuance upon an affidavit alleging that he had been indicted on a Monday about the seventh day after the commission of the crime charged, that his trial was set for the following Thursday, that during such time he had been lodged in jail, without opportunity to see and consult with his counsel or his witnesses, or to discover all his witnesses, or what he might prove by them, that he had been advised that it was unsafe to leave the jail, and that he had been unable to prepare his case for trial. Held, that while there should be no unreasonable delays in the trial of criminal cases, and while both the commonwealth and accused were enti-

tled to a speedy trial, the motion should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. ¶ 590.]

4. CRIMINAL LAW ¶590 — CONTINUANCE — PREPARATION FOR TRIAL—TIME.

What is a reasonable opportunity to prepare for trial and what time should be given necessarily depend on the facts and circumstances of each case, and must be left largely to the discretion of the trial court, subject to review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. ¶ 590.]

5. HOMICIDE ¶203—DYING DECLARATIONS—SENSE OF IMPENDING DEATH.

Where deceased was shot at about 11 in the morning, and died at about 6 in the evening, and it appeared that no one held out to him the slightest hope of recovery, and that he was fully convinced that his wounds were fatal, his dying declaration was properly admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. ¶203.]

6. HOMICIDE ¶215, 338—DYING DECLARATION—PARTS ADMISSIBLE.

The statement in such declaration that the accused had "shot me for nothing" was inadmissible and prejudicial, as it was not the relation of any fact or circumstance connected with the homicide, but merely an expression of the deceased's opinion, and as only so much of a dying declaration as details such facts as it would be competent for the declarant to relate on the witness stand, if he had not been killed, is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456, 501; Dec. Dig. ¶215, 338.]

Appeal from Circuit Court, Breathitt County.

Elihu Allen was convicted of murder, and he appeals. Reversed, with directions.

Hazelrigg & Hazelrigg, of Frankfort, Ryland C. Musick and Kelly Kash, both of Jackson, and A. H. Stamper, of Campton, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. On August 7, 1915, Grover Blanton was shot and wounded by Elihu Allen, the appellant, and died from the effects of the wounds a few hours afterwards. On the same day Allen was placed in the jail of Breathitt county and remained there until his trial. On Monday, August 16th, the grand jury of the county returned an indictment against him, charging him with the murder of Blanton, and his trial was set for and commenced on Thursday, August 19th. On the trial he was convicted, and his punishment fixed at imprisonment for life.

Several grounds are relied on for reversal, but we think it necessary to consider only the grounds relating to the refusal of the court to grant a change of venue or a continuance, and rulings respecting the admission of a dying declaration.

[1] When the case was called for trial on Thursday morning, the day it was set down

for trial, the appellant moved the court to grant him a change of venue, and in support of this motion filed his own affidavit and three supporting affidavits. On the hearing of the motion the commonwealth filed the controverting affidavit of W. H. Blanton and introduced four witnesses, and thereupon the motion was overruled. Section 11 of the Constitution provides in part:

"The General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

And so much of section 1109 of the Kentucky Statutes, enacted to give effect to this constitutional direction, as provides for a change of venue on the motion of the accused, reads:

"When a criminal or penal prosecution is pending in any circuit court, the judge thereof shall, upon the application of the defendant or the commonwealth, order the trial to be had in some other adjacent county to which there is no valid objection, if it appears that the defendant or the commonwealth cannot have a fair trial in the county where the prosecution is pending."

The affidavit of the appellant set out:

"That on the 7th day of August, 1915, he was arrested by Gray Haddix, deputy sheriff of Breathitt county, and was incarcerated in the Breathitt county jail, and has there been confined, and is there still confined, since the time of said arrest. That there exists in Breathitt county a state of general public sentiment, opinion, and feeling against this petitioner, due to and by reason of this charge preferred against him, and by reason of and due to the social and political standing, the wide acquaintanceship, extended relationship, and family connections of the deceased man, Grover Blanton, in Breathitt county. * * *

"Your petitioner states that the deceased man, Grover Blanton, was a son of Judge W. H. Blanton, of Jackson, Ky., and a deputy sheriff of Breathitt county, acting under and by virtue of the authority of the present sheriff, M. A. Spencer, of Breathitt county; that he was a young man of a very large acquaintance and personal following, and for several years prior to his death had been connected with some of the large corporations of Breathitt county as a peace officer and as a deputy sheriff upon the works of such corporations; that for many years he had been prominent in politics and in business affairs of Breathitt county; that by blood and by marriage he was related to a large portion, and your affiant believes a majority, of the citizens of Breathitt county, and especially to a great number, if not a majority, of the men of Breathitt county qualified for jury service; that his father, Judge W. H. Blanton, is and for many years has been one of the most influential citizens, politicians, and lawyers of Breathitt county, and wields a greater and more powerful influence with the people of Breathitt county, and especially with the jurors of Breathitt county, than any other man in Jackson, or in Breathitt county; that as a politician and as an office seeker in said county Judge Blanton has been invincible, and has for many times held the offices of county attorney and county judge of said county, and that he could and would wield an undue and powerful influence with a jury of this county impaneled in this case; that the deceased man, Grover Blanton, has living in Breathitt county, in all sections of said county, five brothers and two

brothers-in-law, to wit, James Blanton, John Blanton, Tilden Blanton, Harrison Blanton, Benton Blanton, Sylvester Howard and Sam Cockrill, all of whom are in a position to and can and will exert and wield a powerful and undue influence prejudicial to this petitioner's interest in any trial of this defendant upon said charge that may be held in Breathitt county; that Blain Short, the captain of the local militia, is a close blood relative, and that as such officer he could and would wield a powerful and undue influence among the people of Breathitt county prejudicial to this defendant; that Sam Cockrill is a deputy sheriff of Breathitt county, and that as such an officer he is in a position such as would enable him to, and that he could, and this affiant believes that he would, exert his great and powerful undue influence prejudicial to this affiant; that as citizens and men of Breathitt county, said brothers-in-law and brothers and hundreds of other blood relatives by marriage, living in all parts and sections of Breathitt county, and in all and about every locality of said county from which jurors might be secured, or could be secured, they are in a position to, and that they could and would, wield a great influence among the masses of people of Breathitt county, and especially the jurors, and those who might be able to qualify as jurors, and that they could prevent, and this affiant believes that they would prevent, him from securing a fair and impartial trial based upon the law and evidence, if such trial was had in Breathitt county; that M. A. Spencer, sheriff of Breathitt county, is a close personal friend and political friend of the family of the deceased man, and that the said deceased and his brother-in-law, S. J. Cockrill, were both deputy sheriffs under said M. A. Spencer, and that said Spencer is deeply interested in, and would be naturally interested in, this prosecution; that he has deputy sheriffs under him in all parts of Breathitt county, and that he could, together with his many deputy sheriffs, and would, wield a powerful influence prejudicial to the rights of this petitioner on the trial of this charge, if held in Breathitt county, and to such an extent that it would be impossible for your petitioner to have a fair and impartial trial in Breathitt county on said charge, as is guaranteed to him by law.

"Your petitioner further represents and says that he is reliably informed and believes that there have been plans laid by the friends of the deceased man to take the life of this petitioner since his incarceration in the Breathitt county jail, and that he verily believes that he has been in great danger, and is still in great danger, from great bodily harm and death at the hands of the friends of the deceased man in Breathitt county; and that unless this honorable court takes some steps at once to guard and protect this petitioner that he will be killed and murdered here in Jackson at the hands of men worked up by passion and prejudice over the death of the deceased man, without a true knowledge of the true facts of said killing; and he therefore begs the protection of this honorable court, and of the said commonwealth, until a change of venue can be and is granted, and your petitioner carried to a place of greater safety."

The supporting affidavits complied with the statutory requirements, and no question is made as to the time or manner in which they were presented to the court.

M. S. Crain, a witness for the commonwealth, who was examined in open court before the judge, and whose evidence appears, together with that of the other witnesses for the commonwealth, in a bill of exceptions, on his examination in chief was asked and said:

"Q. What acquaintance have you in Breathitt county among the people? A. Well, I used to

know almost every man in it until these late developments, and the newcomers come since the railroad was built. Q. How long have you lived in Breathitt county? A. Twenty-three years. Q. You have intercourse in the transacting of your business with a great many people of the county? A. Yes, sir; from all over the county. Q. You know the Blanton family? A. Yes, sir. Q. You knew Grover Blanton? A. Yes, sir; knew him well. Q. You know the defendant, Allen? A. Well, I think I have seen him, but I am not personally acquainted with him. Q. Mr. Crain, tell the court whether or not in your opinion there is such a feeling or sentiment among the people of Breathitt county as would prevent the defendant, Allen, from having a fair trial in Breathitt county by a jury selected from the people of this county, qualified jurors? A. Well, if he is properly represented by able counsel, I know of no reason why he can't get a fair and impartial trial. Q. Do you know of any feeling or sentiment among the people and those who are qualified for jury service, such a feeling as would prevent him from getting a fair trial? A. No; other than the people, generally speaking, deplore the killing of the boy. He had lots of friends in Breathitt county. Q. How many people that would be qualified for jury service are there in this county? About how many; I don't expect you to say the exact number. A. Well, I judge about 3,500. Q. A large county and jury population also? A. Yes, sir. Q. Now, tell the court whether or not the Blanton family has such an influence among the people of the county, an undue influence among the people of the county, or would exert such an undue influence, as would prevent the obtaining of a fair jury, and the obtaining of a fair trial for the defendant? A. Well, the Blanton family is a large family in this county, and they have considerable influence; but there are large sections of this county where none of their relatives to amount to anything don't live. Q. And what do you think as to whether or not their influence would prevent this man, Allen, from obtaining a fair jury and a fair trial? A. Well, as I formerly stated, I think, if he is represented by able counsel, that he could get a fair and impartial trial here. Q. Well, what do you think about his being able to get a jury that would be fair and impartial? A. I think it could be got easily. Q. And fairly easy? A. Yes, sir. Q. Do you know of any reason to prevent this man from obtaining a fair trial in the county? A. Well, none other than what I have already given. The Blanton family is a large family, but it don't cover all the sections of the county."

On his cross-examination he was asked and said:

"Q. But isn't there a public sentiment against him in this county at this time in general? Isn't there in the town of Jackson? A. I don't think there is a general feeling against him. Q. How long have you known Judge Blanton, father of Grover Blanton? A. Well, I have known Judge Blanton I think I can safely say for 20 years. Q. Has he held various offices in this county? A. Yes, sir. Q. He has been county judge, elected by the people? A. He was county judge before I knew him. Q. Elected by the people, as you understand? A. That is what I have understood. Q. He has been elected county attorney of this county? A. Yes, sir. Q. Elected by the people? A. Yes, sir. Q. Served how long? A. He served four years. Q. As county attorney? A. Yes, sir. Q. That all the offices he ever held you know of? A. Well, Judge Blanton has always been one of the leading citizens; I don't know what other places he has held. Q. He is considered a strong, influential citizen of this county? A. Yes, sir. Q. Wields a great influence with the people and citizens of this county? A. He is considered

one of our ablest and best citizens, Judge Blanton is. Q. Do you know whether Judge Blanton's son-in-law, Sam Cockrill, is a deputy sheriff? A. I think Sam is acting in that capacity. Q. He waits on the court and does—A. He seems to be actively engaged under the sheriff. Q. He is a strong and influential man in the county, is he not? A. Yes, sir; he is a reasonably strong man. Q. All over the county? A. Well, I suppose he is very well known all over the county. Q. He does business all over the county as sheriff? A. I don't know about that. I see him actively engaged around town, doing business for the sheriff; other than that I can't say. Q. Do you believe, with the influence of Judge Blanton and his sons and sons-in-law, and with the influence and friendship of Matt Spencer and his deputies, that it would be probable to get a jury to try this case that would be unbiased in any way to give this man a fair trial? A. Well, I would suggest that there is over half of the citizens of this county that is not related to Judge Blanton, or any of the parties named in any way, who I think would try the case according to the law and the testimony adduced in the case."

The evidence of the other three witnesses introduced for the commonwealth was substantially the same as that of Crain, and the substance of this evidence is that, although Grover Blanton was a very popular young man and had a great many friends in the county, the accused, notwithstanding the influence of the widely extended, influential, and highly respected Blanton family and their connections, could have a fair trial if he was represented by able counsel.

Both the Constitution and the statute enacted pursuant thereto contemplate that cases might arise in which it would be necessary in the administration of justice to grant changes of venue. The underlying principle of these constitutional and statutory provisions is that both the commonwealth and the accused are entitled to a fair and impartial trial by a jury free from any personal or political influences that might bias them in deciding the case, or that might prejudice their minds for or against one of the parties. The allowance of a change of venue is no more for the benefit of the accused than it is for the benefit of the commonwealth. The commonwealth is entitled, as much so as the accused, to have a fair and impartial trial before a jury whose minds are open only to such impressions as may be produced by the facts and circumstances developed on the trial; and when it appears that either party cannot have, in the county where the crime under investigation was committed, this character of trial, the prosecution should be removed to some other convenient county, where a jury can be secured that will be entirely free from partiality or prejudice for or against either of the parties.

[2] The statute puts on the party making the application the burden of proof; and we have written in a number of cases that the discretion lodged in the trial judge in respect to granting or not granting a change of venue will not be interfered with, unless it affirmatively appears that the discretion was

abused, or, in other words, that the ruling was prejudicial to the substantial rights of the complaining party. *Mount v. Com.*, 120 Ky. 398, 86 S. W. 707, 27 Ky. Law Rep. 788; *Com. v. Carnes*, 125 Ky. 821, 102 S. W. 284, 31 Ky. Law Rep. 391, 464; *Flish v. Benton*, 138 Ky. 644, 128 S. W. 1067; *Mansfield v. Com.*, 163 Ky. 488, 174 S. W. 16. In considering this question the trial court had before it the evidence both for and against the motion, and was presumably familiar with the state of public sentiment in the county, and we have no reason to doubt that in overruling the motion believed that the accused could secure in Breathitt county a fair trial. But, after reading and considering very carefully all that the record contains on this subject, we are constrained to the opinion that the trial court, under the very exceptional circumstances attending this application, committed error in overruling the motion.

The impulses, inclinations, and feelings of human nature are about the same everywhere, and no matter how just and fair-minded strong men may be under ordinary conditions and in the customary affairs of life, they cannot help being moved and controlled by their passions and prejudices, when these attributes are so deeply touched and aroused as must have been the feelings of the Blanton family and their numerous friends and connections by the killing of Grover Blanton, and we cannot shut our eyes to the belief that the demand, surely pressed by the large and influential relationship of the deceased in both an official as well as personal capacity, that the slayer of Blanton must be punished, communicated itself to their numerous friends to such an extent as to make it practically impossible to secure a jury in the county that would not, at least in some measure, be responsive to this widely prevailing sentiment.

[3, 4] After the motion for a change of venue was overruled, the accused moved the court to grant a continuance, and in support of this motion filed an affidavit setting out in part that:

"The affiant further says that he was indicted on this charge on Monday, August 10th; that he has been incarcerated in the Breathitt county jail since that time; that he has had no chance or opportunity to see and consult with his counsel, or with his witnesses, and that he has been unable to prepare his case for trial in the short time from Monday until Thursday morning, nor to get his witnesses and to know the full facts that can be proven by each of them, nor to discover all the important witnesses in his behalf; that he has at no time been allowed to leave the jail for consultation with his lawyers, or with his witnesses, and that he has felt that it was unsafe, and that he has been repeatedly advised that it was unsafe, for him to attempt to leave the jail and visit the offices of his attorney in Jackson unless accompanied by a heavy guard, and that because of said facts he has not had any reasonable chance or opportunity to get ready for trial; that within a few minutes after the indictment was returned he was called into court

and his trial set for the morning of the third day thereafter; that the scene of the killing is about 9 miles from the courthouse, and that his witnesses live and reside in various sections of Breathitt county and about said scene, and from 8 to 16 miles from Jackson; and that it has been impossible to get in touch with all of them, or to in anywise prepare and conduct an intelligent, just, and reasonable defense in this case, such as that to which he is entitled under the law."

But his motion was overruled, and this he urges as a ground for reversal. There is a just and widespread sentiment throughout the state against unreasonable delay in the trial of criminal cases, and this feeling has sometimes caused trials, especially in cases attracting more than ordinary interest, to be pressed with more dispatch than is becoming in the orderly administration of justice, or than is consistent with the right to a fair trial in form as well as substance that every accused person should have. And it is sometimes unfortunately true that the haste with which trials are conducted is accelerated by the constraining urgency of an excited popular demand. We appreciate fully the importance as well as the necessity for a prompt hearing and disposal of criminal cases, and in no case have we hindered the early enforcement of the law by ordering a new trial because a continuance was not granted, unless it clearly appeared that the substantial rights of the accused were prejudiced by the ruling. But the speedy trial to which both the accused and the commonwealth are entitled does not mean that either shall be so hurried as not to afford full and fair opportunity to each to prepare the case.

It is not the purpose of the law to deprive any person of his life or liberty without giving him reasonable opportunity to establish his innocence, and the dignity and majesty of the law can be better vindicated by allowing this opportunity than by forcing the accused into a trial so soon after the commission of the offense with which he is charged as that he cannot in reason be prepared to answer with the care and preparation demanded by the nature of the charge against him. What is a reasonable opportunity to prepare for trial, and what time should be given, must necessarily depend on the facts and circumstances of each case, and consequently this matter must be left in a large measure to the discretion of the trial court, subject to review by this court.

It is not of course indispensable when a motion for a continuance is made that the case should be continued until the next term of the court, or for any certain time. All that is required is that the accused and his counsel shall have such time as the nature of the case and the circumstances surrounding it appears to be necessary to enable them to prepare for trial. A postponement for a few days may answer this purpose, or if need be a special term may be called, and with the numerous circuit districts in the

state there is no reason why the trial of any case should be unreasonably delayed.

But when a man stands charged with a capital offense, and may, in the discretion of the jury, be deprived of his life or his liberty forever, it is of the highest importance that he should have such time and opportunity to make his defense as the grave nature of the accusation and its consequences demand, and under the unusual conditions shown by the record we do not think that the appellant was given this time and opportunity. It is true he had employed counsel to defend him, and it does not appear that any witness whose evidence he desired was absent from the trial. But the mere presence of witnesses and the services of counsel is only a part of the preparation needed in important cases. The accused may in some cases have every witness that he needed in the courthouse and be represented by able counsel, and yet not have the time for preparation that he should be allowed in order to properly present his defense.

In the case we have, three days after the indictment and ten days after the commission of the crime charged, the accused was put upon his trial, and it might be said that there were only two days intervening between the finding of the indictment on Monday and the beginning of the trial on the following Thursday morning. During all this time he was lodged in jail, and we think did not have the time for preparation that the law in reason gives. This court has in many cases emphasized its purpose not to permit technical errors to interfere with the execution of judgments rendered after a fair trial, and has time and again said that it would not reverse cases unless it appeared that the substantial rights of the accused were prejudiced by some ruling of the trial court. But we have also condemned in equally emphatic terms the disposition sometimes brought to our attention of trial courts to hurry the accused into the trial of a capital case without giving him reasonable time for preparation; and in order that the trial courts in the state may have again brought to their attention the importance of allowing reasonable time for preparation we repeat here what was said in *Penman v. Com.*, 141 Ky. 660, 183 S. W. 540:

"Every person accused of crime, however guilty he may be, or whatever the nature of the crime charged against him, is entitled to a fair opportunity to prepare and present his defense. It is not the purpose of the law to deny any person accused of crime of the high privilege of establishing his innocence. And whenever it has appeared to this court that the accused was deprived of a reasonable opportunity to explain away his guilt, or was forced into trial without reasonable opportunity for preparation, we have not failed to grant a new trial; because, however desirable in the interest of justice a speedy trial may be, it is of much greater importance that the law of the land should be administered in an orderly and deliberate way, so that every person arraigned for crime may have in truth a fair trial."

And also the following from *Samuels v. Com.*, 154 Ky. 758, 159 S. W. 575:

"We recognize that it is important in the administration of the criminal law that a trial may be had as speedily after the transaction under investigation as a decent regard for the rights of the accused will permit, but it is more important that the trial should be fair than that it should be speedy. The peace and order of society demand that persons charged with crime should be brought to an early trial and, if guilty, convicted and punished; but, while this is so, the right of the accused to reasonable time and opportunity to prepare and present his defense and establish his innocence, if he can, should not be lost sight of, or the trial conducted in such haste as to deny the accused the right to be heard in his own behalf."

[5] As a further ground of reversal it is urged that the trial court committed error in permitting the dying declaration of the deceased to be admitted as evidence, on the ground that it was not sufficiently shown that the declaration was made under a sense of impending death and at a time when the deceased did not have any expectation or hope of recovery. *Biggs v. Com.*, 150 Ky. 675, 150 S. W. 803. The deceased was shot about 11 o'clock in the morning and died on the same day about 6 o'clock in the evening. The evidence clearly establishes that no person held out to him the slightest hope of recovery, and that he was fully convinced that his wounds were fatal. He did not say in words that he was going to die, or that he could not recover, nor did any one tell him that his wounds were fatal, or that he had only a short time to live; but he did say several times and to more than one person that "he was going to die," that "he was killed," that "they killed him," and, there being no facts or circumstances tending to controvert this certainty of impending death, his dying declaration was properly admitted. As was said in *Peoples v. Com.*, 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. Law Rep. 846:

"The law does not require, as a condition to the competency of the statement as a dying declaration, that the injured party shall, in express words, declare that he knows he is about to die, or that he shall make use of equivalent language. His recognition of impending dissolution may be shown in this way, but the law does not limit to this mode alone."

To the same effect are *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 833, 11 Ky. Law Rep. 505; *Arnett v. Com.*, 114 Ky. 593, 71 S. W. 635, 24 Ky. Law Rep. 1440; *Com. v. Hargis*, 124 Ky. 356, 99 S. W. 848, 80 Ky. Law Rep. 510; *Alsop v. Com.*, 164 Ky. 171, 175 S. W. 7.

[6] Only so much however, of a dying declaration as details such facts and circumstances as it would be competent for the declarant to relate on the witness stand if he had not been killed is admissible. In other words, what the declarant said or did, or the accused said or did, at the time is competent; but mere expressions of opinion by the declarant, that do not involve a statement of any fact or circumstance connected

with the transaction, are not competent. And so it was inadmissible and prejudicial to allow witnesses to testify that the declarant said the accused "shot me for nothing," as this was not the relation of any fact or circumstance connected with the homicide, but merely an expression of his opinion. In several cases this court has ruled evidence of this nature incompetent. *Collins v. Com.*, 12 Bush, 271; *Jones v. Com.*, 46 S. W. 217, 20 Ky. Law Rep. 355; *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397, 16 Ky. Law Rep. 843; *Cleveland v. Com.*, 101 S. W. 931, 31 Ky. Law Rep. 115.

For the errors noticed, the judgment is reversed, with directions to proceed in conformity with this opinion.

LOUISVILLE SOAP CO. v. LOUISVILLE COTTON OIL CO.

(Court of Appeals of Kentucky. Feb. 8, 1916.)

1. VENDOR AND PURCHASER \Leftrightarrow 177—SPECIFIC PROPERTY—MISTAKE IN QUANTITY—ACCEPTING DEED WITH KNOWLEDGE—MERGER.

Plaintiff offered to purchase defendant company's oil plant, being the entire property owned by that company on the west side of Floyd street, consisting of about 6 acres, one-third to be paid in cash, and the balance in installments. Defendant accepted the offer without saying anything about the quantity of land in the parcel. Plaintiff, after learning that the parcel contained only $3\frac{1}{2}$ acres, accepted without objection a deed accurately describing the property without specifying the quantity, and made the cash payment. *Held*, that plaintiff was not entitled to a credit on the deferred payments for the value of the shortage in the quantity of such land, since all previous negotiations between the parties were merged in such accepted deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 364; Dec. Dig. \Leftrightarrow 177.]

2. VENDOR AND PURCHASER \Leftrightarrow 166—SPECIFIC TRACT—ACCEPTING DEED WITH KNOWLEDGE OF SHORTAGE—MOTIVE—EFFECT.

The fact that plaintiff after defendant's acceptance of his offer to purchase contracted for a large quantity of supplies for which he required the plant as a storehouse which influenced him to conclude the purchase after learning of the shortage, was immaterial, since plaintiff's private motives for accepting the property could not affect the legal rights and obligations of the parties under the completed contract embodied in the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 330, 331; Dec. Dig. \Leftrightarrow 166.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by the Louisville Soap Company against the Louisville Cotton Oil Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Humphrey, Middleton & Humphrey, of Louisville, for appellant. O'Doherty & Yonts, of Louisville, for appellee.

THOMAS, J. [1, 2] On and prior to January 13, 1913, the appellee was the owner of

a parcel of land in the city of Louisville, upon which had been constructed many buildings and appurtenances, all of which were suitable for the use of the appellant in its business of manufacturing, and selling at wholesale, soap. The appellant desired to purchase this property, and on the day mentioned it submitted in writing to the James H. Button Company, a real estate agent who had the property listed for sale, a proposition to purchase same, which proposition, omitting heading and signature, is as follows:

"You are authorized to offer eighty thousand dollars (\$80,000.00) for the Louisville Cotton Oil plant on Floyd and Southern Railroad, being the entire property owned by that company on the west side of Floyd street, consisting of about six acres, more or less, together with all improvements thereon, including machinery, tools and appliances, motor trucks, wagons, office furniture and fixtures; in fact, all of the property of said Louisville Cotton Oil Company, with the exception of tank cars and material and exclusive appliances for repairing same, materials and products on hand finished and unfinished; payable twenty-five thousand dollars (\$25,000.00) cash upon delivery of deed, twenty-five thousand dollars (\$25,000.00) in one year; thirty thousand dollars (\$30,000.00) in two years, all with interest at six per cent., payable semiannually.

"You are to secure general warranty deed free of all incumbrances and possession on or before February 1, 1915. In the event we secure possession prior to February 1, 1915, we will assume all taxes for 1915.

"This offer for acceptance, and will not be recalled prior to January 14, 1915."

On the same day the appellee accepted this proposition by a writing thereon duly signed by it, which is in these words:

"The foregoing proposition was accepted by order of the board of directors at their meeting held the 13th day of January, 1915."

Between that time and the 20th of January it was discovered by the Kentucky Title Company, who had been employed by appellant to investigate the title to the property, that it contained, not 6 acres, but only 3.527 acres. This information in regard to the contents of the plot of ground was imparted to the appellant, and it immediately notified the real estate agent to whom it had addressed the proposition to purchase. Neither party seems to have paid any further attention to this discovery, and on January 20th a deed was duly executed and delivered to the appellant by the appellee conveying all of its property and plant on Floyd street and Southern Railway, being its entire property owned on the west side of Floyd street. The description of the property in the deed is by metes and bounds, and is very accurate, and there is no mention whatever in it as to the number of acres contained in the boundaries of land conveyed.

At the time of the acceptance of this deed no objection was made by appellant of any shortage in the quantity of the land being conveyed, although it had learned some days before of the existence of the shortage. After it had acquired knowledge of the shortage it paid the consideration for the pur-

chase by the payment of the \$25,000 cash at the time and executing its two notes, one for \$25,000, and payable one year from date, and the other for \$30,000, payable two years from date, all in exact accord with the written offer to purchase which it made on January 13th.

On the 16th day of March following a petition was filed in the Jefferson circuit court, chancery branch, division 1, setting up the facts herein recited, including the acceptance of the deed with knowledge of the shortage, and alleging that the amount of the shortage was something near $2\frac{1}{2}$ acres, and charging that the reasonable market value of this shortage would be \$7,419, and asking that it be given judgment against the appellee for this sum, and that it be credited on the deferred payments. A demurrer was filed by appellee to this petition, which was sustained by the court, and, the appellant declining to plead further, its petition was dismissed, and it prosecutes this appeal.

It may be stated before considering the real merits of the case that it was alleged in the petition that appellant, on the faith of procuring this property, after the acceptance of its propositions to purchase, had made contracts for large quantities of supplies to be used by it in the manufacture of soap, and that it needed the buildings upon this property in which to store the supplies, and that this was at least to some extent an inducement for it to accept the deed without protest.

We deem it necessary to devote but little of this opinion to the consideration of this contention. If the acceptance of this deed, under the circumstances shown, deprives the appellant of the relief which it seeks, its private reason for doing so could not change the rights of the parties in the eyes of the law, and most especially so of a reason of the character herein urged; because the present and pressing needs of the appellant to use the property for storage purposes could not convert its unqualified acceptance of the deed into a qualified one, nor could such needs be given the effect to nullify the rule of law, whatever that is, as to the rights of the parties arising from the facts. The question then for determination is, not so much as to the rights of the parties when by either fraud or mistake there is discovered to be a large shortage in the amount of land intended to be conveyed, but what are the rights of the parties to a sale of a specific piece of property, accurately described in the deed, and which description shows (or could have been ascertained by a slight calculation) that the shortage exists, and with full knowledge of this fact the deed is accepted by the vendee, and the consideration paid as agreed in the original proposition to purchase, with no fraud being practiced, or mistake made by any one, and the deed accepted without any suggestions of dissatisfaction and without protest. To our

minds this question is easy of solution. It is a well-established principle of law that, whensoever a contract is entered into and becomes binding upon the respective parties thereto, it merges into itself all preceding stipulations or propositions or counter propositions which may have been considered by the parties to the contract; and this doctrine applies to the execution of deeds of conveyances of land with equally as much force as to other classes of contracts. *Devlin on Deeds* (2d Ed.) § 850; *Elliott on Contracts*, vol. 3, § 2264; *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850, 31 L. R. A. (N. S.) 457, and notes thereto; *Marshall's Heirs v. McConnell's Heirs*, 1 Litt. 419; *McGuire v. Pieratt*, 7 Ky. Law Rep. 765; *Craig v. Walker*, 7 S. W. 540, 9 Ky. Law Rep. 903; *Weller et al., Trustees, v. Fidelity Trust & Safety Vault Co.*, 64 S. W. 843, 23 Ky. Law Rep. 1136; *Butt v. Riffe*, 78 Ky. 356; *Bird v. Bank of Williamstown*, 13 S. W. 430, 11 Ky. Law Rep. 868; *Jones v. Prewitt*, 123 Ky. 496, 108 S. W. 867, 33 Ky. Law Rep. 358; *Vicroy v. Vicroy*, 20 Ky. Law Rep. 47, 45 S. W. 75; *Fuson v. Chestnut*, 109 S. W. 1192, 33 Ky. Law Rep. 249; and other cases which might be cited.

In the case of *Marshall's Heirs v. McConnell's Heirs*, supra, the facts were that McConnell had executed a bond to convey a tract of land containing 500 acres to Marshall. Both of these parties died before the conveyance was made, and the heirs of Marshall brought suit against the heirs of McConnell to compel the conveyance, which was subsequently done, and afterwards a controversy arose between the parties in which some of them sought to ignore the deed and to assert rights under the previously executed bond, which was denied to them by this court in the following language:

"The damages which might have been recovered in the suit brought for a breach of the condition of the bond were satisfied by the deeds received by Marshall; the office of the bond had become extinct, and no action could thereafter be maintained upon it."

In the *McGuire Case* the opinion is not reported in full, but the abstract states the rule to be as follows:

"A vendee cannot resist recovery on the purchase-money notes upon the ground that the vendor sold and bound himself by title bond to convey a greater quantity of land than was afterwards found to be inside the boundary of the tract; he having surrendered the title bond and accepted a deed knowing of the deficiency."

In the *Craig Case*, supra, damages were sought for trespass to land. Craig had purchased the land by title bond only from the heirs of one Maddox, who himself had purchased the land by title bond only from one Dawson. In order to obtain a deed, Craig filed suit against the heirs of Maddox for that purpose, which resulted in the master commissioner executing to him a deed, but before it was made a survey of the land was ordered, and a portion of it was not included

in the deed, because it was found that, although it had been in possession by Craig, it was not owned by Maddox. Craig accepted the deed with full knowledge that this part of the land had been excluded, although it was covered by the title bond under which he held it, and it was upon this excluded land that the trespass had been committed for which he filed his suit. It will be seen that the land in controversy there was not included by the deed, but was covered by the title bond. He was not allowed to recover, and, denying him such right, this court said:

"He received the deed and held and claimed only the land conveyed by it for some time, with the knowledge of the fact that the survey and deed excluded the land in controversy. * * * The deed has remained all the time in full force, with the appellant claiming under it. The deed merged the title bond, and the appellant's right of property is limited within the boundary of the deed, and that the fact that the appellant held the actual possession of the land within the boundary of the deed would not extend either an actual or constructive possession beyond the deed boundary."

In the case of *Weller et al., Trustees, v. Fidelity Trust & Safety Vault Co.*, supra, the question was whether the purchaser, when sued upon the purchase notes, could be allowed a rebate because of the existence of an easement on the property at the time of the acceptance of the deed, which easement covered a strip of the lot in controversy 15 feet wide and for its entire length, and constituted a part of one of the streets of the city. It appeared, however, that the existence of this easement was known by the purchaser at the time of the acceptance of the deed, and this court, in denying any credit by reason thereof on the purchase-money notes, said:

"The street was an open and notorious highway upon the land at the time of the purchase. The occupancy and use of the strip as part of the street is not a breach of the warranty. It was only open and visible, but the vendees were acquainted with all the facts, and knew that it was a public street of the city of Louisville. It is said in *Butt v. Riffe*, 78 Ky. 356: 'It is no eviction for which the grantor can be made liable when the land is taken for public use; and the purchaser, when a public highway is on the land at the date of his purchase, must be held to know of its existence, and to have made his bargain with a knowledge of the inconvenience resulting from it.' The same doctrine was enunciated in *Bird v. Bank of Williamstown*, etc., 13 S. W. 430, 11 Ky. Law Rep. 868."

In the case of *Jones v. Prewitt*, supra, an effort was made to force the vendee by an action for a specific performance to accept a conveyance of the land and to specifically perform the contract. This was resisted because of the existence across the land of a right of way for the construction of a railroad, of which the vendee had full knowledge at the time of entering into the contract for the purchase of the land. This court disallowed plaintiff any relief, and refused specific performance upon grounds not pertinent to the question in this case. Upon the point here being considered, this court, however, said:

"If Jones, after entering into the contract, had, after the land was surveyed and the quantity ascertained, accepted a deed in which he obligated himself to pay for the whole number of acres, with knowledge of the incumbrance, it might reasonably be said that in entering into the contract he consented to pay for the land included in the right of way; and we conclude that the fact that the vendees in the case cited had accepted deeds was a potent factor in inducing the court to hold that they could not have an abatement of the purchase price. Whatever the reason for the opinions, we are not disposed to extend the doctrine laid down in these cases so as to embrace an executory contract like the one before us."

In the case of *Fuson v. Chestnut*, supra, without setting forth the facts by which the question was presented, this court, in touching upon the question here involved, says:

"It appears, however, that although, by the terms of the title bond, the purchase price was to be paid when the title was perfected, James M. Hays thereafter accepted a special warranty deed from Chestnut and wife to the land in question, and this deed contained no provision in regard to perfecting the title. The effect of the special warranty was simply to warrant the title against D. T. Chestnut and those claiming under him. We are therefore of opinion that the title bond was merged into the deed, and the latter now constitutes the sole agreement between Chestnut and Hays."

In the case of *Vicroy v. Vicroy* a similar question was involved. A suit had been filed to recover purchase-money notes, and a defense was made to the effect that a deed which a wife executed to her husband created a cloud upon the title, but, inasmuch as the wife could not convey land direct to her husband, this court determined that such deed constituted no cloud, and that the existence of the deed presented no defense, but it also stated in addition:

"That the vendee had notice of the existence of this deed at the time he accepted his deed, and this fact would prevent him relying upon the existence of that old deed as a defense in a suit to collect the purchase money."

We do not regard the authorities cited by appellant as conflicting with those hereinbefore considered. One of the leading cases upon which he relies is that of *Rust v. Carpenter*, 158 Ky. 672, 166 S. W. 180. That suit was brought to recover the amount of an unpaid purchase note, and the defense was that the note had been executed as part purchase for a farm supposed to contain 60 acres, more or less. It was alleged as a defense that the vendor represented and warranted that there were that number of acres in the tract, and that the appellant believed it and relied upon it, but that it was subsequently discovered that there were only $41\frac{3}{4}$ acres in the farm. The court allowed an abatement for this deficiency, but it said nothing in the opinion militating against the views hereinbefore expressed relative to the facts of this instant case. On the contrary, it based its opinion solely upon the fact, not only that there had been deceit and fraud practiced by the vendor, but also that the vendee was ignorant as to the number of acres in the tract at the time he accepted the

deed and executed the notes, and this court, in allowing relief to the vendee because of the deficiency, said:

"Relief against the same [deficiency] will be granted if at the time the parties are ignorant of the deficiency, or the vendee is deceived by the misrepresentations of the vendor as to the quantity."

The case of *Jenkins v. Jenkins*, 153 Ky. 163, 154 S. W. 937, also relied upon by appellant is likewise not in point. There the land was bought by the acre, and, although a portion of it was not owned by the vendor at the time, still the vendee had a right to presume that the vendor would acquire title to that piece of land, and thus be enabled to comply with his contract, agreeing to convey the entire body, including this small tract, and, if he should not do so, to respond in damages for his failure.

There was no particular piece of land or any quantity of land in the instant case which the appellant intended to buy, or expected that it was buying, and which it failed to obtain by the deed made to it by appellee. The offer of purchase was for the plot of land which the appellee owned west of Floyd street, and for no other land, and it must be remembered that the only place in which there is any attempt to state the number of acres in this plot of ground is found in the offer of appellant to purchase same. Nowhere does it appear that appellee ever represented any particular number of acres to be contained in the plot. Moreover, in the *Jenkins* Case the vendee undertook to convey all of the land within certain boundaries, but it turned out that he did not own all of the land within the boundaries. Not so in the instant case. The appellee owned all of the land within the boundaries set forth in the deed, but which, however, did not include the number of acres stated in the offer to purchase, but the title to all of the land embraced in the boundaries was owned by the appellee, and it conveyed all that land to the appellant. It obtained by the deed the specific piece of property about which all of the negotiations had taken place, and, with full knowledge of the number of acres which it contained, it accepted the deed without protest, and the terms of the purchase were fully complied with by it.

We are convinced, not only from the authorities supra, but from the general principles of the law, that the appellant should be required to pay the purchase price without any abatement on account of the alleged shortage. To hold otherwise would force the appellee to accept less for the plot of ground sold than it was willing to take. The price which it had fixed for this particular piece of ground was \$80,000, regardless of the number of acres that it contained, and to force it to accept a reduction from the price agreed on for this piece of property, amounting nearly to \$7,500, would be nothing short of the court making a contract for

it radically different from what it was willing to take, and a contract different from what it did actually make.

The appellant is in no attitude to insist upon the relief which it seeks, and the judgment is affirmed.

O'BANION v. CUNNINGHAM.

(Court of Appeals of Kentucky. Feb. 8, 1916.)

1. EASEMENTS ¶24—WAY—DEED.

Defendant, owning lands to which a passway over land to which plaintiff had legal title was appurtenant, and who had also acquired by quitclaim deed the right to use the passway, acquired a mere easement over plaintiff's land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. ¶24.]

2. ADVERSE POSSESSION ¶60—WAY—ADVERSE HOLDING.

One having an easement over the land of another cannot change the character of his right to an adverse holding of the land itself, unless he either gives the true owner actual notice, or his acts and declarations of a hostile claim are so open and notorious as to leave no doubt in the mind of the true owner; and the fact that one having an easement of way inclosed it, occasionally locked the gate and would not permit others to use it, and often allowed his stock to pasture on the way, was not sufficient to apprise the owner of the land that the owner of the easement was asserting a hostile title to the land itself.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. ¶60.]

3. EASEMENTS ¶81—WAY—FORFEITURE—OBSTRUCTION.

A right of way is not forfeited by a use not contemplated by the grant, unless such use cannot be separated from that allowed by the grant; so that an obstruction thereof by the owner of the easement, which could be easily separated from its lawful use while it would be enjoined, did not work a forfeiture.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 83; Dec. Dig. ¶81.]

Appeal from Circuit Court, Owen County.

Action by J. H. Cunningham against G. W. O'Banion. Judgment for plaintiff, and defendant appeals, and plaintiff prosecutes a cross-appeal. Affirmed on both original and cross-appeals.

J. H. Settle, of Owenton, for appellant.
Botts & Perry, of Owenton, for appellee.

CLAY, C. Plaintiff, J. H. Cunningham, brought this suit against defendant, G. W. O'Banion, to enjoin the obstruction of a passway, to recover damages for its obstruction, to declare the passway forfeited, and to quiet his title to the land over which the passway runs. On final hearing plaintiff's title was quieted, and he was awarded damages in the sum of \$50, and the defendant was perpetually enjoined from using the land in question except as a passway, and was further enjoined from obstructing the passway in any manner. From this judgment plaintiff appeals, and defendant, claim-

ing that he did not secure all the relief he was entitled to, prosecutes a cross-appeal.

The facts are as follows: On August 17, 1872, one J. W. Johnson, a remote grantor of both plaintiff and defendant, conveyed to Joe C. Revill a small tract of land now owned by plaintiff. The deed contained the following reservation:

"The object of this deed is to convey only eight undivided ninths of said tract, reserving through the upper end a passway of 20 feet wide."

After the purchase by Revill, he acquired the other one-ninth interest, and thus became the owner in fee. Thereafter, and on April 3, 1884, Revill conveyed the same land to Kittie B. Todd with the following reservation:

"There being reserved in said deed of Johnson and wife a passway of 20 feet wide through the upper end of said land, the same passway is also reserved in this deed."

On February 2, 1910, Kittie B. Todd conveyed the land in question to plaintiff. The deed contains no reservation, but mentions the fact that the property conveyed is the same property which she acquired from Revill, by deed dated April 3, 1884, and recorded in Deed Book 31 in the Owen county clerk's office.

At the time of the conveyance from Johnson to Revill, Johnson was the owner of other lands in the neighborhood of the land conveyed and of the tract now owned by plaintiff. By various conveyances, which it is not necessary to set out, defendant, O'Banion, acquired what is known as the "Ice-House Lot" in the rear of plaintiff's lot, the passway in question; and also another lot immediately adjoining the passway for practically its entire length. On April 3, 1884, Johnson quitclaimed to John S. Ransdell, one of the parties through whom defendant claims all his right, title, and interest in and to the passway in question.

[1] It will appear from the foregoing statement that the legal title to the land over which the passway runs is in plaintiff. Defendant not only owns lands to which the passway is appurtenant, but has acquired by quitclaim deed the right to use the passway.

Defendant insists that his plea of adverse possession and champerty should have been sustained. As bearing on the character of his holding, he also insists that Johnson, who owned only an undivided eight-ninths in the tract of land now owned by plaintiff, could not create a valid easement therein. It is unnecessary to determine whether, under the circumstances of this case, defendant can avail himself of the latter contention even if sound. It is sufficient to say that Revill, who purchased eight-ninths of the tract from Johnson, afterwards purchased the remaining one-ninth from the other owner, and he, while the owner of the entire tract, reserved the same passway in the deed which he made to his grantee.

[2] Neither the plea of adverse possession nor of champerty is available under the facts of this case. By the purchase of the lands, to which the passway was appurtenant, and by their deeds conveying the passway, defendant and his grantors acquired a mere easement over the land in question. Clearly, where a party has an easement over the land of another, he cannot change the character of his right to an adverse holding of the land itself, unless he either gives the true owner actual notice or his acts and declarations of a hostile claim are so open and notorious as to leave no doubt in the mind of the true owner. The fact, therefore, that the passway was inclosed, that the owner of the easement occasionally locked the gate and would not permit others to enjoy the passway, and that his stock would frequently enter the passway and pasture there, is not sufficient to apprise the owner of the land that the owner of the easement was asserting a hostile title to the land itself.

The chancellor, therefore, properly held that defendant had a mere right of way over the land in question, and had no right to use it for any other purpose.

[3] On the cross-appeal it is insisted that plaintiff is entitled either to a perpetual injunction, or to a forfeiture of the easement. A right of way is not forfeited by a use not contemplated by the grant, unless such use is so interwoven with that allowed by the grant that the one cannot be separated from the other. *McNeal v. Talbott*, 7 Ky. Law Rep. 612. Here the obstruction of the passway by defendant can easily be separated from its lawful use. Furthermore, the injunction is perpetual. By its terms defendant is perpetually enjoined from using the land in question other than as a passway, "and from maintaining or continuing any obstruction on said passway in any way or manner." The effect of the judgment is not only to enjoin defendant from obstructing the passway in future, but to require him to remove all obstructions which he placed in the passway.

Judgment affirmed on both original and cross-appeals.

LOUISVILLE WATER CO. v. LALLY.

(Court of Appeals of Kentucky. Feb. 8, 1916.)
EVIDENCE \S 588 — SUFFICIENCY — SCINTILLA RULE—PHYSICAL FACTS.

In an action against a water company for damages to plaintiff's house by flooding, where the evidence could supply the required scintilla only upon the theory inherently impossible and at variance with physical and mechanical laws that the defendant turned the water into the pipes with such force as to open the faucet by unscrewing it at a washstand, the defendant's motion for a directed verdict should have been sustained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2437; Dec. Dig. \S 588.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by H. E. Lally against the Louisville Water Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. J. Carroll, of Louisville, for appellant. O'Neal & O'Neal and C. H. Searcy, all of Louisville, for appellee.

CLARKE, J. Appellee lived at 225 Shawnee Drive, Louisville, Ky., on the 28th of July, 1914, and owned the property. About 5 o'clock in the afternoon he, his wife, and three children were leaving the house to spend the evening with his brother, when, through one of the children wanting a drink, it was found the water had been turned off from his house, and none could be drawn from the faucets. They left their home and returned about half past 10 o'clock that evening, when they discovered that the water from the faucet at the washstand in the bathroom on the second floor had overflowed the basin, and flooded a considerable portion of the house, damaging the walls, floors, and furnishings.

Appellee instituted this action against appellant, and recovered a judgment for \$694 for the damage sustained by reason of the flooding of his house, and appellant, having been denied a new trial, is appealing.

Appellee's petition as amended alleges that the flooding of his house was caused by the gross negligence and carelessness of appellant in suddenly turning on and into the pipes of his home a large and tremendous volume of water of extreme velocity, in such way and manner as to forcibly cause same to run through the faucet and piping in said residence, thereby causing and permitting said water to flood the premises.

The evidence shows that the water was turned back into the pipes supplying appellee's house and other houses in the neighborhood within a short time after he left his home. The only evidence that can be construed to indicate that there was any negligence in the way in which the water was turned on again into these pipes by appellant is given by two ladies living in the same square with appellee, who testify that when the water was turned on upon this occasion the pipes and faucets in their homes were caused to shake and to make such an unusually loud noise as to frighten them. None of the pipes or faucets in any of these residences were broken or bursted, or damaged in any way. Appellee testifies that the faucet from which the damaging water flowed was in perfect condition, both before and after the accident; that no pipe or fixture or fastening in his home was hurt or damaged by the turning on of the water. There is no explanation in any of the proof from which it can be conceived how the faucet that caused this damage could have been turned on by the force, volume, or velocity

of the water returning into the pipes, not even from the testimony of the two ladies, to whom we referred above, that the water had been turned into the pipes by appellant with such unnecessary and unusual force as to cause the pipes to rattle and give forth a loud noise. Appellee testifies that, when he went up to examine the cause of the flooding of the house, he found the faucet of the washbasin open to such an extent that it required two or three turns to close it; that the faucet was one of those screw faucets that turn, comparatively new, and that it was not hurt.

Counsel for appellee have not favored us with a brief; neither the pleadings nor the proof afford any reasonable explanation of how that faucet could have been turned on by the return of the water into the pipes when turned on by appellant, and we are unable to imagine how that could have done it. The only explanation, consistent with physical and mechanical laws with which we are familiar, that we are able to imagine is that appellee, or some member of his family, left the faucet turned on, and that the waste pipe from the basin was obstructed in some way, which prevented the water from escaping through the waste pipe as fast as it came through the faucet, and that the overflow was caused in this way. We have been unable to discover the scintilla of evidence of negligence upon the part of appellant that would justify the court in overruling its motion for a peremptory instruction at the close of appellee's testimony. The evidence in this case can supply the necessary scintilla only by the indulgence in the theory that the force with which appellant turned the water into the pipes opened the faucet by unscrewing it at the washstand, and that would be to suppose a circumstance inherently impossible and absolutely at variance with well-established and universally recognized physical and mechanical laws. Water may be turned into pipes with sufficient force to burst them or tear off fixtures such as the faucet, but not so as to unscrew the faucet.

This court, in the case of *L. & N. R. Co. v. Chambers*, 185 Ky. 705, 178 S. W. 1041, after stating the "scintilla rule" prevailing in this state, said:

"These rules cannot apply where the only evidence upon which such adverse party rests his right to succeed consists of a statement of alleged facts, inherently impossible and absolutely at variance with well-established and universally recognized physical laws."

If a statement of alleged facts inherently impossible and absolutely at variance with well-established and universally recognized physical laws will not supply the required scintilla of evidence, a theory inherently impossible based upon a statement of alleged facts certainly cannot supply it.

If this case should be tried again, instruction No. 3 should not be given, as it complete-

ly destroys the effect of instruction No. 4, which correctly presented the defense of contributory negligence.

It results, therefore, that appellant's motion for a directed verdict should have been sustained, and the judgment herein is reversed and remanded for proceedings consistent herewith.

SCHUPP v. MUELLER.

(Court of Appeals of Kentucky. Feb. 8, 1916.)

1. DEEDS \S 124—ESTATES CONVEYED—FEE.

A deed conveying to husband and wife, their heirs and assigns, with right of survivorship so long as such survivor remained unmarried, and in case of marriage such interest to at once vest in the heirs of the decedent, without any dower right on the part of the survivor, provided that no sale take place before death, gave the grantees a fee-simple title, with the right to sell before the death of either of them free from the limitation.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. \S 124.]

2. DEEDS \S 134—CONDITION—SALE—CONSIDERATION.

Such provision did not require that the sale be for a valuable consideration, so that a sale by the grantees to their grantor for a recited valuable consideration, and such grantor's reconveyance for a recited valuable consideration by ordinary deed free from any limitations or conditions, in fact, a sale for a valuable consideration, even if regarded as a sale to avoid the limitation, released the property from the limitations.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 448, 449; Dec. Dig. \S 134.]

Appeal from Circuit Court, Campbell County.

Action by Clara M. Mueller against John Schupp. Judgment for plaintiff, and defendant appeals on an agreed case. Affirmed.

Frank V. Benton, of Newport, for appellant. H. Gunkel, Jr., of Newport, for appellee.

CARROLL, J. This is an agreed case to determine whether the appellee can convey by a good title certain real estate that she sold by executory contract to the appellant. It appears that in May, 1909, Mary Reinfelder, for a valuable consideration paid to her by John H. and Clara M. Mueller, conveyed to them the property here in question. The deed recites that:

"The grantor 'does hereby bargain, sell, and convey to the said John H. and Clara M. Mueller, their heirs and assigns forever, subject, however, in case of death of one of the grantees, to the right on the part of the survivor to use and enjoy the interest of the decedent so long as such survivor shall remain unmarried, and in case of such marriage such interest to at once vest in the heirs of the decedent without any dower right on the part of the survivor: Provided always that no sale has taken place before death.'"

In 1914 John H. and Clara M. Mueller, for a recited valuable consideration, recon-

veyed this property to Mary Reinfelder with covenants of general warranty; and thereupon Mary Reinfelder, for a recited valuable consideration, reconveyed the same to them with covenants of general warranty by an ordinary deed free from any limitations or conditions. After this John H. Mueller died, leaving a will in which he devised to his wife all his real property in fee simple, which will was duly probated. Afterwards Clara M. Mueller sold the property by executory contract to the appellant, and the appellant refused to accept a deed in compliance with the contract on the ground that Clara M. Mueller owned in fee simple only one half of the property, having a defeasible fee in the other half.

The argument in behalf of the appellant is that the reconveyance by the Muellers to Mary Reinfelder and the conveyance back by her to them did not change the status of the title as it was fixed in the deed first made by her to them, and that, when John H. Mueller died, Clara M. Mueller took under his will his half interest in the estate, subject to be defeated and vest at once in his heirs upon her marriage.

[1] The lower court decided that Clara M. Mueller, in view of the conveyance and the will mentioned, had a fee-simple title to the property, and consequently could convey to John Schupp a good title. It will be observed that in the deed first made by Mary Reinfelder the limitation on the estate was followed by the words, "Provided always that no sale has taken place before death," and we think this provision in the deed gave to the Muellers the right to sell the land before the death of either of them free from the limitations imposed on the title; in other words, gave them the right to convey a fee-simple title.

[2] It is said, however, by counsel for Schupp that this proviso contemplated a bona fide sale for a valuable consideration, and, as it is manifest that the reconveyance by the Muellers to Mary Reinfelder was merely for the purpose of getting rid of the limitation, it was ineffectual for that purpose. We do not, however, find in the proviso anything that would warrant us in saying that the sale must be for a valuable consideration or that would limit the right to a sale for a valuable consideration. It is obvious that, if the grantees did sell it for a valuable consideration, the limitations in the deed would be defeated, and the purchaser would take the land free from the limitation. It is likewise obvious that the Muellers could do what they pleased with the money received from the sale, and consequently defeat entirely the contingent claim of the remaindermen. So that whether they sold the land for a valuable consideration or merely sold it for the purpose of getting rid of the limitations does not really affect the rights of the contingent remaindermen. Evidently this provision was put in the first deed in order

that the Muellers, if they were so inclined, might remove the limitations by a sale, and, as the deed does not specify the character of sale or what disposition should be made of the proceeds, we regard it as entirely immaterial whether they sold it for a valuable consideration or not. It is the fact that a sale was made that releases the property from the limitation, and not the price received for it or the circumstances surrounding the transaction.

The judgment is affirmed.

LOUISVILLE & N. R. CO. v. MINK.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. MASTER AND SERVANT \S 265—ACTIONS FOR INJURIES—EVIDENCE—RES IPSA LOQUITUR.

Where a telephone cable crossing a railroad track at some distance above the track sagged so as to strike and injure a brakeman by reason of one of the hangers supporting it becoming detached from the post to which it was fastened, the doctrine of *res ipsa loquitur* did not apply in an action by the brakeman against the railroad company, in the absence of any showing that the railroad company had the control or management of the cable, posts, etc., or that it was in any way responsible for the existence of the arrangement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. \S 265.]

2. MASTER AND SERVANT \S 125—LIABILITY FOR INJURIES—DUTY TO DISCOVER DANGEROUS CONDITIONS.

Where a telephone cable suspended above a railroad track sagged low enough to strike a brakeman on top of a train by reason of one of its supporting hangers becoming detached from a post, the railroad company's duty of inspection demanded that it should discover this menace to its employes as soon as could be done by the use of ordinary care, and, if the cable had been down before striking the brakeman for a sufficient time for it in the exercise of ordinary care to discover it, it was liable for the brakeman's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. \S 125.]

3. MASTER AND SERVANT \S 278—ACTIONS FOR INJURIES—FAILURE OF PROOF.

In an action for such brakeman's injuries there was a failure of proof where there was no evidence as to when the cable sagged, and it might reasonably have been concluded from the evidence that it did so at the very instant it struck the brakeman; as the evidence was equally consistent with the existence or nonexistence of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. \S 278.]

Appeal from Circuit Court, Whitley County.

Action by Albert M. Mink against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hiram H. Tye, of Williamsburg, and Benjamin D. Warfield, of Louisville, for appellant. Sawyer A. Smith, of Barbourville, and J. B. Wall, of Corbin, for appellee.

CLARKE, J. [1] On August 16, 1914, appellee, as brakeman on one of appellant's freight trains, was standing on top of a box car as the train was passing through the city of Middlesboro on its way from Norton, Va., to Corbin, Ky., and was injured. The telephone company in Middlesboro, in order to carry its telephone wires across appellant's railroad track, maintains a cable some 2 or 3 inches in diameter across the track and from 22 to 25 feet above the track, in which place and position it was held by posts on either side of the track, to the top of which the cable was attached by iron hangers fastened to the posts with wooden screws. At the time of the accident complained of one of the iron hangers supporting this cable had become or became detached, which permitted the cable to sag low enough so that it struck appellee on the neck as the train passed under the cable, and knocked him down on the running board of the car upon which he was standing. He was not knocked off of the car, but claims he was seriously and permanently injured by the blow. There is nothing in the evidence to show how long before this accident the cable had sagged to the position where it became a menace to appellant's employes upon the top of its trains passing under the cable, or by what authority it was placed over appellant's railroad tracks. Appellee contented himself with proving how and when he was injured, and the extent of his injury, but he did not introduce any evidence tending to show whose duty it was to maintain the cable or by whose negligence or act the cable had been caused or permitted to sag into the dangerous position in which it was at the time, nor does he introduce any proof whatever to show when this sagging occurred, or that appellant knew, or by the exercise of any care might have known, of the condition of the cable in time to have prevented the accident. At the close of appellee's testimony appellant moved the court to direct the jury to return a verdict in its favor. The court overruled the motion, and that the court erred in so doing is assigned by appellant as one of the grounds for a reversal.

It is appellee's contention that the doctrine of *res ipsa loquitur* is applicable, and that the mere fact that the accident occurred as it did was sufficient to create a *prima facie* case of negligence upon appellant's part.

It is appellant's contention that, as this cable was not proven, and, as a matter of fact, was not under its control or management, it was not responsible for its dangerous position, and is not liable unless it knew of the dangerous condition, or it had existed for a sufficient time before the accident for appellant to have known, by the exercise of ordinary care, of said condition; that the rule of *res ipsa loquitur* is not applicable to this case. Unless said doctrine is applicable to this case, appellee did not make

out a case against appellant, and a motion for a directed verdict should have prevailed.

In *Thomas on Kentucky Words and Phrases*, 412, the doctrine of *res ipsa loquitur* is thus defined:

"Where the thing which causes the injury is shown to be under the management or control of the defendant or its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care"—citing *Shinn Glove Co. v. Sanders*, 147 Ky. 349, 144 S. W. 11; *City of Corbin v. Benton*, 151 Ky. 486, 152 S. W. 241, 43 L. R. A. (N. S.) 591; *T. & P. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151; *Montbriand v. C. St. P. M. & O. Ry. Co.* (C. C.) 191 Fed. 983.

Quite a number of cases are cited by counsel on either side on this question, those cited by appellee being as follows: *Shinn Glove Co. v. Sanders*, 147 Ky. 349, 144 S. W. 11; *Vissman v. Southern Ry. Co.*, 89 S. W. 502, 28 Ky. Law Rep. 429, 2 L. R. A. (N. S.) 469; *Paducah Traction Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185; *Reliance Textile & Dye Works v. Williams*, 136 Ky. 577, 122 S. W. 207, 124 S. W. 850; and *Shearman & Redfield on Negligence*, § 59.

In all of these cases the apparatus or thing whose defective condition caused the accident was under the control and management of the party held liable. In no case cited was the thing or apparatus from the defective condition of which the accident resulted under the management and control of another. It is always an element of this rule that the party against whom it is applied must have been in the control and management of the defective instrument causing the accident.

In *Vissman v. Southern Ry. Co.*, 89 S. W. 503, 2 L. R. A. (N. S.) 469, cited for appellee, this court said:

"Mere proof of accident or injury to the servant does not raise the presumption of negligence on the part of the master. In order to recover damages against the master for the injury, the servant must produce some evidence conducing to show that it was caused by the negligence of the master or some one having authority to represent him. * * * While this court has repeatedly announced and yet holds to the rule that it is the duty of the master to use ordinary care to provide the servant with reasonably safe tools, material, and place for the work required of him, it has never been carried to the extent of holding him liable for defects in tools, material, or place of work that no sort of inspection on his part could have discovered; for he is not bound to make the tools, material, or place of work absolutely safe, or to insure those engaged in his service against the ordinary risks incident to the nature of the employment."

[2, 3] In the case at bar the cable that caused the injury to appellee and the posts, etc., that supported it were not shown to be under the control and management of appellant, nor was it shown that appellant was in any way responsible for the existence of said arrangement, and the doctrine of *res ipsa loquitur* has no application to the facts

in this case. The cable became a menace to appellant's employes the moment it came within the space occupied by appellant in the movement of its trains, and from then on appellant's duty of inspection demanded that appellant should have discovered it as soon as it could have been done by the use of ordinary care, and, if said cable had been down, as it was when it struck appellee, or even loose from its support, for a sufficient time for appellant, in the exercise of ordinary care, to have discovered it, appellant would be liable, but it is here that appellee's evidence failed. There is absolutely no evidence when the cable sagged, and from the evidence in the case it might reasonably be concluded to have done so at the very instant it struck appellee. If this were true then, of course, appellant could not by the exercise of ordinary care have discovered it. The case as made out by appellee, then, was one where the evidence was equally consistent with the existence or nonexistence of negligence causing the injury to the plaintiff, and he must fail. *Caldwell's Adm'r v. C. & O.*, 155 Ky. 609, 160 S. W. 158; *L. & N. R. Co. v. Chambers*, 165 Ky. 736, 178 S. W. 1101; *C. & O. v. Adkins*, 167 Ky. 329, 180 S. W. 617; *Woodburn v. Union Light, Heat & Power Co.*, 164 Ky. 33, 174 S. W. 730.

It therefore results that the trial court erred in overruling appellant's motion for a directed verdict in its favor.

Wherefore the judgment is reversed, and the cause remanded for proceedings consistent herewith.

JOHNSON et al. v. MYER et al.

(Court of Appeals of Kentucky. Feb. 11, 1916.)

TENANCY IN COMMON — ADVERSE POSSESSION.

Where one of several children who were entitled to land in common entered and held possession, but did nothing to show that his holding was adverse to the other heirs, neither his possession nor that of his own heirs will ripen into adverse title, for the possession of one joint owner is that of another, and while one cotenant may oust another cotenant, there must be some act or declaration inconsistent with the right of the excluded tenant of which he must be apprised.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.]

Appeal from Circuit Court, Logan County.

Action by Alice Myer and another against R. U. Johnson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Browder & Browder, of Russellville, for appellants. George S. Hardy, of Russellville, for appellees.

MILLER, C. J. William Johnson, of Logan county, died intestate in 1850, the owner of 110 acres of land. He left surviving him four children, Judith, who married James

Buchanan, William Archer Johnson, James Johnson, and Martha Johnson. Martha Johnson subsequently died, unmarried, and without issue. James disappeared about the same time, and has never been heard of since. The record fails to show when Judith married Buchanan, where they subsequently lived, or when she died. The petition only shows that they are now dead, leaving two children, the plaintiffs Alice Myer and John Buchanan surviving them. However, after the death of William Johnson in 1850, his son William Archer Johnson and his family continued to live upon the farm until the death of William Archer Johnson in 1899, at the age of 75. He left surviving him a widow and four children, R. U. Johnson, Henry Johnson, John Johnson, and Eldon Johnson. Eldon Johnson died several years ago, leaving two children, Cecil Johnson and Samuel Johnson. In 1912 Henry and John Johnson sold and conveyed their undivided interests in the farm to their brother R. U. Johnson, who continued to live upon the farm, with his mother, after the death of his father, William Archer Johnson, in 1899.

R. U. Johnson's mother died in 1912, and, on April 25, 1914, this action was brought by Alice Myer and John Buchanan, the surviving children and heirs at law of Judith Buchanan, against R. U. Johnson, Cecil Johnson, Samuel Johnson, and the unknown heirs of James Johnson, for a sale of the farm upon the ground of its indivisibility, and a division of the proceeds of sale. The defendants traversed the plaintiff's claim of ownership, and relied upon the 7-year statute, the 15-year statute, and the 30-year statute of limitation, in bar of plaintiff's right to maintain the action. The chancellor overruled the plea of limitation, sustained plaintiff's claim of ownership, and directed a sale of the land and a division of the proceeds. From that judgment, the defendants prosecute this appeal.

Whether the plea of limitation will avail appellants anything depends upon the character of their possession. If it was amicable, limitation did not run; it must have been hostile in order to put the statute in motion. The appellants contend that before his death, William Johnson had some sort of understanding or agreement with his son William Archer Johnson by which the latter was to have the farm in controversy, and that pursuant to that agreement William Archer Johnson took possession of the farm and held it from 1850 until his death in 1899, adversely to the claim of all persons, including the plaintiffs. But the proof does not sustain this allegation. Indeed, there is no competent testimony which shows anything more than the fact that William Archer Johnson occupied the land after the death of his father, until his own death in 1899, and that his son R. U. Johnson has since occupied the

land. The record wholly fails to show any agreement of any kind between William Archer Johnson and his father, or any claim upon the part of William Archer Johnson or his son R. U. Johnson, which was adverse or hostile to the claim or right of Judith Buchanan or her children. There is no attempt to show that either William Archer Johnson or R. U. Johnson ever stated to any one, much less to Judith Buchanan or her children, that he was holding the land adversely to them. On the contrary, being joint owners, William Archer Johnson and R. U. Johnson were legally within their rights in residing upon the land. Their possession was not of itself hostile to that of the plaintiffs, and carried with it no notice of adverse or hostile possession.

It is well settled that where one joint owner is in possession of the whole tract, the presumption is that he is keeping possession not only for himself, but for his cotenant, according to their respective rights. In such a case an ouster will not be presumed from the mere fact of sole possession, which is the extent of the proof in this case. The rule is stated as follows in *Gossom v. Donaldson*, 18 B. Mon. 239, 68 Am. Dec. 723:

"The entry on land of one joint owner inures to the benefit of all the owners, the legal presumption being that the entry was made according to the right of the party making it, and for the purpose merely of taking possession of his undivided interest. In such a case the possession is not adverse to the other joint owners, and will only become so by a denial of their right or some act or declaration inconsistent therewith, of which they are apprised."

The doctrine thus announced has been expressly approved by this court in *Culver v. Culver*, 74 S. W. 1076, 25 Ky. Law Rep. 296; *Pope v. Brassfield*, 110 Ky. 135, 61 S. W. 5, 22 Ky. Law Rep. 1618; *Rose v. Ware*, 115 Ky. 434, 74 S. W. 188, 24 Ky. Law Rep. 2321, and in other cases. See 1 Cyc. 1146.

That one cotenant may oust another cotenant by some act or declaration inconsistent with the latter's title, there can be no doubt; but, in order to thus effect an ouster, there must be some act or declaration inconsistent with the right of the excluded cotenant, of which he must be apprised. Or, as was said in *Frazier v. Morris*, 161 Ky. 76, 170 S. W. 498:

"Where a possession is in its origin amicable, it will not become adverse so as to set the statute to running unless the property is in fact held adversely and in such a manner as to apprise the other party, or a person of ordinary prudence, that the holding is adverse. *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152, and cases therein cited."

The competent testimony in this case wholly fails to show any claim of ownership to the entire tract by William Archer Johnson or his son, the appellant; there is no attempt to show anything more than mere possession upon their part which, under the rule above announced, will be presumed to have been for the benefit of all the joint owners.

Neither William Archer Johnson nor his children ever pretended to have bought the interest of the appellees; they had no deed for the interest of the appellees therein, and never claimed to have acquired that interest in any way except by prescription, which was made for the first time in answer to the petition.

Judgment affirmed.

NOLIN MILLING CO. v. WHITE GROCERY CO.

(Court of Appeals of Kentucky. Feb. 11, 1916.)

1. APPEAL AND ERROR ⇨185—REVIEW—JURISDICTION.

The contention that the court below had no jurisdiction will not be considered on appeal, where the objection to its jurisdiction was not properly made in the lower court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. ⇨185.]

2. VENUE ⇨7—BREACH OF CONTRACT—STATUTE.

Under the express provision of Civ. Code Prac. § 72, the circuit court of A. county had jurisdiction of an action for damages for breach of a contract of sale to be performed in that county.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 13-16; Dec. Dig. ⇨7.]

3. SALES ⇨22—OFFER TO BUY AND ACCEPTANCE—CONTRACT WITH SALESMEN.

Plaintiff, who had formerly done business with defendant and knew from defendant's bill-heads, order blanks, etc., that sales made by its salesmen were subject to defendant's acceptance, instead of signing the printed form of order blank ordinarily used by salesmen, received the salesman's signed writing, to the effect that 600 barrels of flour at a certain price had been sold plaintiff on specified terms, and the salesman, without forwarding defendant a copy of the writing, merely reported the order, whereupon defendant immediately telegraphed its rejection of the order. *Held*, in an action for damages from the defendant's breach of its contract of sale, that the writing evidenced a mere offer to purchase, subject to defendant's acceptance, and that, as it had declined the offer, there could be no recovery.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. ⇨22.]

4. PRINCIPAL AND AGENT ⇨150 — ACTS OF AGENT—LIABILITY OF PRINCIPAL.

A principal is bound by such acts of his agent as are performed within the apparent scope of the agent's authority, even though they may go beyond his real authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 556-563; Dec. Dig. ⇨150.]

5. PRINCIPAL AND AGENT ⇨103—AUTHORITY OF AGENT—TRAVELING SALESMEN.

A traveling salesman, without express authority to make a contract of sale binding upon his principal, can merely solicit and transmit orders which do not become complete contracts of sale until accepted by his principal, and which orders may be withdrawn by the purchaser at any time before final acceptance.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. ⇨103.]

6. TRIAL \Leftrightarrow 136—CONSTRUCTION OF WRITING—QUESTION FOR JURY.

Ordinarily the construction of a writing is for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 818, 820, 821, 323-327; Dec. Dig. \Leftrightarrow 136.]

7. EVIDENCE \Leftrightarrow 448, 457—PAROL EVIDENCE—CONTRACT OF SALE.

Where the meaning of a written contract is ambiguous and doubtful, or is to be interpreted in the light of a trade usage giving its words a peculiar meaning, parol evidence is admissible to explain the writing that its meaning may be submitted to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084, 2104, 2107, 2108; Dec. Dig. \Leftrightarrow 448, 457.]

8. PRINCIPAL AND AGENT \Leftrightarrow 148—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

A principal is never bound where the person dealing with his agent knows, or has reason to know, that the agent is exceeding his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 534-552; Dec. Dig. \Leftrightarrow 148.]

Appeal from Circuit Court, Whitley County.

Action by the White Grocery Company against Nolin Milling Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

L. A. Faurest, of Elizabethtown, and H. H. Tye, of Williamsburg, for appellant. J. B. Snyder and H. O. Gillis, both of Williamsburg, for appellee.

SETTLE, J. The appellee, White Grocery Company, a corporation engaged in the grocery business at Williamsburg, Ky., recovered in the Whitley circuit court a verdict and judgment for \$1,300 damages against the appellant, Nolin Milling Company, a corporation engaged in the milling business at Nolin, Ky., alleged to have resulted from the violation by the latter of a contract whereby it sold to appellee, as further alleged, 600 barrels of flour at \$4 per barrel, none of which was delivered. Appellant was refused a new trial; hence this appeal.

[1, 2] Appellant's first complaint is that the Whitley circuit court had no jurisdiction of the case. This contention will not be considered because the objection to jurisdiction was not properly made in that court. Moreover, the question of jurisdiction depends upon whether the contract sued on was made by the parties. If there was such a contract, as it was to be performed in Whitley county, that fact gave the circuit court of that county jurisdiction of the action. Civil Code, § 72. On the other hand, if, as contended by appellant, there was no contract, the peremptory instruction asked by it should have been given by the court.

[3] It is conceded that the alleged contract for the sale of the flour was made between J. B. White, appellee's president and general manager, and appellant's traveling

salesman, Charles Chandler, July 28, 1914, and that Chandler at the time delivered to White the following writing:

"Sold White Grocery Co. Williamsburg, Ky. & Jellico, Tenn. 600 Bbls. E. L. $\frac{1}{2}$ at \$4.00. Net cash for Aug. Sept. Oct. & Nov. delivery 5¢ carrying charges after Nov. 30th.

"Draw through First Nat. Bank, Williamsburg, Ky.

"[Signed] Nolin Milling Co.,

"By Charles Chandler."

It seems to be admitted that "5¢ carrying charges" means that the White Grocery Company was to pay five cents per month on each delayed consignment of flour until received. The letters "E. L." meaning Electric Light, indicate the name of the grade of flour appellee claims to have purchased. It is insisted for appellee that this writing evidences an absolute sale to it of the flour therein described, but contended by appellant that it evidenced a mere offer to purchase subject to its acceptance, or conditional sale of the flour subject to its approval, that Chandler was merely a traveling salesman in its employ, having authority to take orders for the sale of its flour, and that such orders, if accepted by it, became contracts binding upon it as well as the purchaser, but that until so accepted they were not obligatory upon either party. It appears that Chandler did not forward or deliver to appellant a copy of the writing in question, but merely reported the order to it, and that upon receiving the order on the morning of July 29, 1914, appellant immediately sent appellee the following telegram, showing its rejection of the order:

"Nolin, Ky., July 29.

"White Grocery Co., Williamsburg, Ky. Extreme conditions forbids our confirmation of flour sold by Chandler. Nolin Mfg. Co."

On the same day and immediately after sending the telegram, appellant wrote appellee the following letter:

"Nolin, Ky., 7/29/14.

"White Grocery Co., Williamsburg, Ky.—Dear Sirs: We have your order given to our Mr. Charlie Chandler to hand to-day, and regret that this sale was made just at this time when we have an unusual condition confronting us, and that we are compelled to reject the order. With the war news putting wheat up on the Chicago market to amount of 8 to 10¢ per bushel, you can readily see why we cannot accept sale of 600 barrels flour at such a low price. We have been anxious to get your firm started with us for a long time, and regret that we got this order just as this excitement came on in wheat, and have to decline the business. Of course, we suppose, you understand that we have the legal right of rejection on sales made by our traveling representative, and we wired you promptly to this effect. We shall hope you will be willing to give us some business when conditions adjust themselves.

"Yours truly, Nolin Milling Co. J. F. A."

Other letters passed between the parties, those written by appellee insisting upon the shipment of the flour under the writing given him by Chandler, and those written by appellant continuing to assert its right to reject

the order. That Chandler was a mere drummer or traveling salesman for appellant is established beyond doubt by all the evidence, and the evidence of appellant establishes with equal certainty the fact that the only authority he had as a traveling salesman was to take orders for the purchase of its flour, subject to its approval or rejection. This is not contradicted by any evidence introduced in behalf of appellee, unless such evidence be furnished by the writing given White, its president and manager, by Chandler. The former does not testify to anything occurring at the time the writing was given or previously that showed the latter's authority to go beyond the mere soliciting and taking of orders for appellant's flour. It also appears from appellant's evidence, and is uncontradicted, that all billheads, price quotations, order blanks, and letter heads used by it and its drummers have plainly printed on them the following words: "All sales made by agents or brokers subject to our acceptance." So every one who had dealings with appellant or its drummers, either by correspondence or by receiving quotations, or bills for merchandise sold, were thereby notified that its traveling salesmen had no authority to make a binding contract for it, but that all orders which were taken by such traveling salesmen must be accepted by appellant before they become binding upon it. It also appears from the testimony of White, appellee's president and manager, that at intervals during the seven years previous to the transaction he had with Chandler out of which this action arose, he purchased flour from appellant through Chandler and otherwise in the usual course of business, and during the same time had correspondence with appellant, and paid the bills he made with it, in view of which he must have had notice of the statement referred to, contained in its billheads, price quotations, order blanks, and letter heads, showing what authority was possessed by Chandler and its other traveling salesmen in the matter of selling its flour.

Chandler did not testify in the case, and it does not appear whether any effort was made, either by appellant or appellee, to procure his testimony, or that he was in appellant's employ at the time of the trial. In the absence of Chandler's testimony we are unadvised as to what caused him to give White the writing instead of the printed form of order he was accustomed to use in such transactions. Perhaps his supply of the printed order blanks, customarily used by him for taking such orders, had been exhausted; but, whatever may have been the reason for the use of the writing, in our opinion there is nothing in its language indicating that the sale it was intended to evidence was of any other character than such as he was authorized and accustomed to make; that is, a sale of the flour described therein, subject to the approval or rejection of appellant. Notwith-

standing his statement of the circumstances under which the writing was given him by Chandler and his insistence that it evidences an absolute sale, White, who admitted previous similar purchases through Chandler, did not, in testifying, explicitly say that his purchase of the flour was not understood by him to be conditioned upon appellant's approval of the sale and acceptance of the writing as an order from him for the flour.

[4, 5] No doctrine is better settled than that a principal is bound by such acts of his agent as are performed within the apparent scope of the latter's authority, even though they may go beyond his real authority. It is not here claimed, however, that Chandler had express authority to make a contract binding upon appellant, but contended that he had implied authority to do so, and that what he did in the transaction with White, appellee's president and manager, was within the apparent scope of his authority. In our opinion, the facts of this case fall to show such implied authority, in reaching which conclusion we are controlled by numerous decisions of this court. In *Charles Brown Grocery Co. v. Becket, etc.*, 57 S. W. 458, 22 Ky. Law Rep. 393, the limitations upon the authority of a drummer or traveling salesman are clearly defined. In the opinion it is said:

"The general rule in regard to the authority of commercial travelers is thus stated in the *American and English Encyclopedia of Law*, vol. 6, p. 227 (2d Ed.): 'In the absence of special authority to bind his principal the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal.' It has been held that when the purchaser completes his transactions with the drummer, no binding contract has been made, nor any sale, absolute or conditional; the purchaser may countermand his order at any time before the goods are shipped, or the house may refuse to accept the order; that it is a mere proposal to be accepted or not as the house may see fit, and may be withdrawn by the purchaser at any time before its final acceptance. *McKindly v. Dunham*, 55 Wis. 515 [13 N. W. 485, 42 Am. Rep. 740]; *Bensberg v. Harris*, 46 Mo. App. 404."

In *John Matthews' Apparatus Co. v. Renz & Henry*, 61 S. W. 9, 22 Ky. Law Rep. 1528, the question involved was whether an order given by a merchant to a drummer for the purchase of soda water apparatus, in which it was agreed that two old soda fountains would be taken in exchange for the new, was a binding contract without the approval of the drummer's employer. The intending purchaser having brought an action to recover damages against the latter for its failure to deliver the articles claimed to have been purchased, it was held that the order was in no sense a closed transaction, and that in the absence of special authority to bind his principal the drummer could merely solicit and transmit the order, and the contract of sale did not become complete in the absence of an

acceptance of the order by the drummer's employer. In the opinion it is said:

"We consider that the main and only necessary question for us to determine is whether the transaction in question was a contract, or merely an offer or order, which either party was at liberty to decline before final acceptance. The indisputable facts are that Russell, the traveling salesman of appellant, was a 'drummer,' a term that has come to have a fixed and proper place in our language, as well as in our law; that this transaction was the usual taking of an order by the drummer, and transmitting it to his 'house' for action, approval or rejection. The custom of so doing business is of such long standing, so extensive and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has. In *Charles Brown Grocery Co. v. Becket* [57 S. W. 458] 22 Ky. Law Rep. 394, we recognized in this state what appears to be the general rule in most or all of the states, quoting it in this language: 'In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal.' Any other construction of these transactions would tend to so materially hamper and cripple this important means of conducting mercantile business as to well-nigh destroy its effectiveness now so generally understood, employed, and recognized."

In *Seven Hills Chautauqua Co. v. Chase Bros. Co., etc.*, 81 S. W. 238, 26 Ky. Law Rep. 334, a drummer of the appellee entered with appellant into the following writing for the sale of certain trees:

"For and in consideration of \$125 Chase Bros. Co., Rochester, N. Y., party of the first part, agrees to sell, with the provisions set forth below, to the Seven Hills Chautauqua Co., party of the second part, five hundred Carolina poplar trees F. O. B. Owensboro, Ky., described as follows: Trees to be uniform in size, first grade, not less than twelve feet long, nor three inches in diameter at base, and to be three years of age. Party of first part agrees that all trees dying shall be replaced by live trees at the end of twelve months. The party of the second part, Seven Hills Chautauqua Co., agrees to pay party of the first part \$100.00, the amount named as consideration, upon the delivery of said trees in accordance with the terms of the above contract. The party of the first part, Chase Bros. Co., agrees that party of the second part, the Seven Hills Chautauqua Co., shall retain \$25.00 of the consideration above named for seven months, as guaranty of the fulfillment of the terms of this contract.

"October 30, 1902.

"Chase Bros. Co.,

"By C. V. Barnes, Agent.

"Seven Hills Chautauqua Co.,

"By W. G. Archer, Super."

Appellee, upon receiving this writing from its drummer, refused to approve the contract contained therein, and immediately gave notice thereof and returned the writing to appellant. The appellant brought an action against it to recover damages for its alleged violation of the contract. The answer of appellee denied the authority of the drummer to sign its name to the contract or to agree for it to ship or deliver the trees therein contracted for, alleging that these facts were known to appellant, and that the limit of the drummer's authority was to solicit and transmit the order or contract to it for its accept-

ance or rejection, which was also known to the appellant. It was held that appellee was not bound by the contract made by its drummer. The opinion cites the cases of *Charles Brown Grocery Co. v. Becket, etc.*, and *John Matthews' Apparatus Co. v. Renz & Henry*, supra, and quotes with approval the rule announced therein, viz.:

"In the absence of special authority to bind a principal, a drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by the principal."

In *Courtney Shoe Co. v. Curd & Son*, 142 Ky. 219, 134 S. W. 146, 38 L. R. A. (N. S.) 903, it appears that a traveling salesman for the Courtney Shoe Company took two orders for shoes from Curd & Son which were mailed to the Courtney Shoe Company by him. The Courtney Shoe Company then wrote Curd & Son a postal card, saying that the order was at hand and would receive prompt and careful attention, also thanking them for it. On the same day the house rejected the order and sent it to the drummer to return to the customer, on the ground that he had no authority to make the sale. The drummer returned the letter to the house, asking the house to send it to Curd & Son. This the house did, eight days after the order was received. Curd & Son insisted that their order had been accepted, but we held that there was no acceptance of the order, and that the house was not liable in damages for refusing to fill it. The opinion cited with approval the cases of *Charles Brown Grocery Co. v. Becket*, 57 S. W. 458, 22 Ky. Law Rep. 393; *Matthews' Apparatus Co. v. Renz & Henry*, 61 S. W. 9, 22 Ky. Law Rep. 1528; *Seven Hills Chautauqua Co. v. Chase Bros. Co., etc.*, 81 S. W. 238, 26 Ky. Law Rep. 334.

[8-8] Ordinarily the rule is that the construction of a writing is for the court. If its meaning is ambiguous and by reason thereof doubtful, or it is to be interpreted in the light of a usage of trade which gives its words a peculiar instead of a popular meaning, parol evidence may be admitted to show its meaning; and it is only when parol evidence is admissible to explain a writing that its meaning may be submitted to the decision of the jury. There is no ambiguity in the writing given by appellant's drummer, Chandler, to appellee. Its language is altogether consistent with the theory that it was merely intended as an order for the flour appellee wished to purchase, or to evidence a conditional sale; that is, a sale if approved by appellant when the order for the flour reached it, or within a reasonable time thereafter. This interpretation of it is imperatively required, in view of the total absence of any evidence tending to show that Chandler had authority to make a sale of the flour without the approval of appellant. Furthermore, it is apparent from the evidence as to previous purchases of flour made by White, appellee's president and manager, from ap-

pellant through Chandler, that White knew that the authority of the latter as a drummer in appellant's employ went no further than to solicit orders for flour or to make sales thereof subject to its approval. The principal is never bound where the person dealing with the agent knows, or has reason to know, that the agent is exceeding his authority. In dealing with a drummer one cannot assume that he has implied authority to make an absolute sale of the article or commodity he handles, and that in the absence of special authority to do so, he can do no more than merely solicit and transmit the order and leave to his principal the right to accept or reject it; the approval of the latter being necessary to complete the sale. Appellee has not shown that appellant's drummer, Chandler, had special authority to bind his principal, and, in the absence of such showing, the writing given its president and manager by Chandler is no more evidence of a completed contract than would be a mere order for the flour, written in the form customarily employed by drummers in such transactions; and in no event can it be considered as anything more than a tentative sale, which could not become binding unless accepted or approved by appellant, which was never done. This being true, the trial court should, as requested by appellant, have given the peremptory instruction directing a verdict for it. The above conclusion renders unnecessary consideration of the remaining grounds urged by appellant for a reversal.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial and such further proceedings as may be consistent with the opinion.

FIRST NAT. BANK OF LEXINGTON et al. v. BOWMAN.

(Court of Appeals of Kentucky. Feb. 11, 1916.)

1. CORPORATIONS \S 136 — STOCK — SALES — RECORDATION OF CERTIFICATE.

Under Ky. St. \S 545, which merely provides that shares of stock shall be transferred on the books of the corporation in such manner as the by-laws may direct, and which supplanted an earlier statute providing that transfers of stock should not be valid until entered upon the books of the company, a sale of corporate stock which had been previously pledged by the seller is valid as to his creditors, there being no actual fraud, though not transferred on the books of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 483-485; Dec. Dig. \S 136.]

2. FRAUDULENT CONVEYANCES \S 135—SALES —CONTRACTS.

While, under Ky. St. \S 1908, an absolute sale of personal property is fraudulent per se as to creditors of the seller unless possession of the property is delivered, a sale of the equity in corporate stock which the seller had already pledged is not, where there was no actual fraud, invalid as to his creditors, though actual possession of the certificates was not delivered, as

the seller could not deliver the certificates; they being in possession of the pledgee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 427; Dec. Dig. \S 135.]

Appeal from Circuit Court, Fayette County.

Actions by the First National Bank of Lexington and by the Fayette National Bank against Charles P. Rodgers were consolidated, and therein Henrietta P. Bowman intervened. From a judgment for intervenor, plaintiffs appeal. Affirmed.

Shelby, Northcutt & Shelby and Chas. Kerr, all of Lexington, for appellants. Forman & Forman, of Lexington, for appellee.

CLAY, C. Charles P. Rodgers was the owner of 52 shares of stock in the Third National Bank of Lexington. This stock was pledged to secure indebtedness which did not equal the market value of the stock. The First National Bank and the Fayette National Bank sued Rodgers on certain indebtedness due them and attached the stock. The actions were consolidated, and Mrs. Henrietta P. Bowman intervened and asserted ownership of the stock by purchase made prior to the attachments. On final hearing, her claim was sustained, and the banks appeal.

It appears that on August 20, 1910, Rodgers, for an agreed consideration of \$7,500, purchased from Mrs. Bowman an interest in some lands situated in Mexico. As part payment therefor he transferred and assigned to her his equity in the stock in question, which, after the payment of the debts for which it was pledged, was estimated to be worth \$1,315, together with a claim for past salary against the American Trading Company, amounting to \$279.60. At the time of the assignment the stock was in the possession of the pledgees, and no transfer thereof was made on the books of the corporation. We have carefully considered the evidence bearing on the transaction in question, and find nothing in the record to justify the conclusion, either that the transaction itself was not bona fide, or that the transfer was made by Rodgers for the purpose of defrauding his creditors, and that Mr. Bowman, who acted as agent for his wife, knew of such purpose when the transfer was made.

There being no actual fraud, the rights of the parties depend on whether the transfer itself is valid as to the attaching creditors, whose debts accrued prior to the transfer. The sale of the stock to Mrs. Bowman is attacked on two grounds: (1) No transfer of the stock was made on the books of the corporation; (2) the sale was unaccompanied by a delivery of the certificates or by a record of the transfer, as required by section 1908, Kentucky Statutes.

[1] 1. Our statute formerly provided that: "Transfers of stock shall not be valid, except as between the parties thereto, until the

same are regularly entered upon the books of the company," etc. Gen. St. 1883, c. 56, § 11.

Even while this statute was in force, this court held that a transfer of stock, by a separate writing, to a bona fide purchaser for value without notice, was valid as to creditors. *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145, 10 Ky. Law Rep. 59. The court based its conclusion on the ground that the statute was enacted for the protection of the corporation and purchasers, and not for the protection of the creditors of the stockholders. In discussing the question the court said:

"But the section supra does not operate as a registration law in the interest of the creditors of the stockholder, for the reason that the books of the company are not required to be kept open for the inspection of the public. The books are required to be kept open to the stockholders only; outsiders have no right to demand an inspection of the books; therefore the section in question was not intended for the protection of creditors. As to the creditor, the stock of the stockholder is as though the stockholder held it in his pocket on some private individual, in which case a bona fide transfer for value is good against the transferor's creditors. So in the case at bar, the recording of the transfer of stock on the books of the company not being required for the benefit of the stockholder's creditors, but for the benefit of the company and purchasers, the transfer of the stock, without the transfer being entered upon the books of the company, limited the passage of the legal title strictly to the vendor and vendee as between the vendee and the company and a subsequent purchaser for value, without notice of the prior purchase at the time he had his transfer recorded on the books of the company; but as between such purchaser and the creditors of the stockholder the purchaser acquires a perfect legal title. *New York & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30; *Lowell on Transfer of Stock*, §§ 93, 95, 96."

In the case of *American Wire Nail Company v. Bayless*, etc., 91 Ky. 94, 15 S. W. 10, 12 Ky. Law Rep. 694, the court adhered to the rule that a transfer upon the company's books is merely to protect the company and others who might propose to purchase the stock. To the same effect is *Bushnell v. Hall*, 9 Ky. Law Rep. 684. The present statute on the subject merely provides that the shares of stock shall be transferred on the books of the corporation in such manner as the by-laws thereof may direct, and that every person becoming a stockholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of prior stockholders. Section 545, Kentucky Statutes. It will thus be seen that the present statute is not so restrictive of the right of transfer as the former statute. It does not attempt to deal with the validity of assignments between purchasers and creditors. There is certainly no reason, therefore, for departing from the doctrine above announced. It has been adhered to since the enactment of section 545, supra. *Husband v. Linehan*, 168 Ky. 304, 181 S. W. 1089. Indeed, the prevailing rule in nearly every jurisdiction where the question is not controlled by statute is that a purchaser of the stock of a corporation for valuable consideration is, in the absence

of fraud, protected against subsequent attachment or execution against his vendor, although he failed to have his assignment recorded on the books of the corporation. *Frank J. Everitt v. Farmers' & Merchants' Bank of Elm Creek et al.*, 82 Neb. 191, 117 N. W. 401, 20 L. R. A. (N. S.) 996; *Finney's Appeal*, 59 Pa. 398; *Beckwith v. Burrough*, 13 R. I. 294; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 276; *Prince Invest. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 628; *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438, 15 South. 235; *Blouin v. Hart*, 30 Da. Ann. 714; *Sargent v. Essex Marine R. Corp.* 9 Pick. (Mass.) 202; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938; *Mapleton Bank v. Standrod*, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656. As *Mrs. Bowman* purchased the stock for value and without notice of any fraudulent intention on the part of the vendor prior to the attachment in question, we conclude that her claim to the stock is prior to that of the attaching creditors, although the stock was not transferred on the books of the corporation.

[2] 2. But it is insisted that the sale is invalid because the certificates of stock were not delivered to *Mrs. Bowman*. While it is true that in interpreting section 1908, Kentucky Statutes, we have held that an absolute sale of personal property is fraudulent per se as to purchasers from and creditors of the seller, unless the possession of the property accompanies and follows the title (*Vanmeter v. Estill*, 78 Ky. 456), yet this conclusion is based on the theory that the seller himself retains possession of the property and thereby enjoys a delusive credit. For that reason it is also held that the statute does not apply where the property which is the subject of the transfer is in the lawful possession of a third party, and by reason thereof the seller is unable to deliver possession. *Bourbon Bank v. Porter's Executors*, 57 S. W. 609, 22 Ky. Law Rep. 432; *H. A. Thierman Co. v. Laupheimer*, 55 S. W. 925, 21 Ky. Law Rep. 1631; *Kenton v. Ratcliffe*, 105 Ky. 376, 49 S. W. 14, 20 Ky. Law Rep. 1239; *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 47 S. W. 602, 20 Ky. Law Rep. 778, 42 L. R. A. 353, 84 Am. St. Rep. 468; *Frankfort Chair Co. v. Buchanan*, 51 S. W. 179, 21 Ky. Law Rep. 269. Here the certificates of stock were pledged to third parties to secure certain indebtedness of the seller, and were in possession of the pledgees. That being true, the sale was not invalid because the certificates of stock were not delivered to the purchaser. The case of *Burnes v. Davless County Bank & Trust Co.*, 135 Ky. 358, 122 S. W. 182, 25 L. R. A. (N. S.) 525, 135 Am. St. Rep. 467, does not announce a contrary doctrine. There the notes which

the bank attempted to pledge to secure certain depositors were not delivered to the depositors, nor were they in possession of a third party. On the contrary, the bank itself retained possession of the notes, and because of this fact the pledge was held invalid as to the creditors.

Judgment affirmed.

ALGEE v. ALGEE.

(Court of Appeals of Kentucky. Feb. 9, 1916.)

1. JUDGMENT \S 342—JUDGMENT ON MERITS—VACATION.

Where a defense is made, and, after trial, a judgment is rendered on the merits, the court, after the expiration of the term at which the judgment is rendered loses control of it, except in actions brought pursuant to Civ. Code Prac. \S 344, 518, relating to discovery of grounds for a new trial after the term and to modifications of judgment after term, unless the motion for a new trial or to set it aside is made within the time prescribed by statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 668-671; Dec. Dig. \S 342.]

2. JUDGMENT \S 153—DEFAULT JUDGMENT—VACATION.

Where a judgment was rendered by default, a motion to set it aside made during the term at which it was rendered suspended the judgment, and the court, after the term, had power to sustain the motion and set the judgment aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 300-304; Dec. Dig. \S 153.]

3. APPEAL AND ERROR \S 957—JUDGMENT \S 139—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT JUDGMENT.

In the matter of setting aside default judgments, trial courts have a wide discretion which will not be interfered with, except in case of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3823; Dec. Dig. \S 957; Judgment, Cent. Dig. \S 265-268; Dec. Dig. \S 139.]

4. DIVORCE \S 254—VACATION OF JUDGMENT—TERMS—HARMLESS ERROR.

Where a wife, who made no claim for alimony, obtained a default judgment granting a divorce and adjudging her the owner of certain property described in her petition, but which belonged to the husband under Civ. Code Prac. \S 425, an order setting the judgment aside on condition that she might amend her pleadings and present her claim for alimony, was not prejudicial to her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 718-721; Dec. Dig. \S 254.]

Appeal from Circuit Court, McCracken County.

Action for divorce by Mary Algee against John B. Algee. After a default judgment, adjudging plaintiff to be the owner of certain property, the cause was reinstated on the docket and consolidated with an action by John B. Algee against Mary Algee to recover the property. Judgment for John B. Algee, and Mary Algee appeals. Affirmed.

Oliver & Oliver, of Paducah, for appellant. Samuel H. Crossland, of Paducah, for appellee.

CLAY, C. On May 5, 1911, Mary Algee sued her husband, John B. Algee, for divorce. After setting out her grounds for divorce, she alleged that she was the owner of and in possession of certain real estate and personal property, which she asked to be adjudged to her and her title thereto quieted as against the defendant. On the same day the petition was filed, summons was issued and properly served on the defendant. On May 11, 1911, plaintiff took the depositions of certain parties to support her grounds for divorce. The May term of the McCracken circuit court began on May 15, 1911. Defendant neither answered nor otherwise appeared in the action. On Wednesday, May 17th, the cause was submitted. On May 19th a default judgment was rendered, granting plaintiff a divorce, adjudging that she was the owner of the property described in the petition, and striking the action from the docket. On June 24, 1911, and during the same term of court, the defendant appeared in open court and entered a motion to set aside the judgment. At the same time he tendered his answer, which was ordered lodged. No action on the motion was taken at that term. Subsequently the papers in the case were lost.

On June 30, 1911, defendant, John B. Algee, brought an independent action against plaintiff pursuant to section 425 of the Civil Code, for the purpose of having restored to him the property in controversy. To this action Mary Algee filed an answer, pleading the judgment of May 19, 1911, as a bar to the right of her husband to recover.

On June 29, 1912, the case of Mary Algee against John B. Algee was reinstated upon the docket, and was later consolidated with the case of John B. Algee against Mary Algee. Proof was then taken on the ownership of the property, and it conclusively appeared that the property was bought and paid for by the husband, and was conveyed to the wife solely in consideration and by reason of the marriage. On final hearing the chancellor set aside that portion of the judgment of May 19, 1911, awarding the wife the property in question, and adjudged the husband to be the owner of the property and ordered it to be surrendered to the husband. Mary Algee was given the right to amend her pleadings and present her claim for alimony, and for this purpose the cause was continued. Mary Algee appeals.

[1] The first point made is, that the court had no power to set aside the judgment of May 19, 1911, after the expiration of the term at which it was rendered. The rule deducible from the authorities is as follows: Where defense is made and, after trial, a judgment is rendered on the merits, the court, after the expiration of the term at which the judgment is rendered, loses control of the judgment, except in actions brought pursu-

ant to sections 344 and 518, Civil Code, unless the motion for a new trial, or to set aside the judgment, is made within the time prescribed by the statute.

[2] On the other hand, where judgment is rendered by default, a motion to set aside the judgment made at any time during the term at which it is rendered, suspends the judgment, and the court has power after the term to sustain the motion and set the judgment aside. *Williams v. Williams*, 107 Ky. 490, 54 S. W. 716, 21 Ky. Law Rep. 1208; *Riglesberger v. Bailey*, 102 Ky. 608, 44 S. W. 118, 19 Ky. Law Rep. 1660; *Pennsylvania Fire Insurance Co. v. Young*, 78 S. W. 127, 25 Ky. Law Rep. 1350; *Petty v. Wilbur Stock Food Co.*, 128 Ky. 130, 107 S. W. 699, 32 Ky. Law Rep. 957; *Aulbach's Ex'r v. Read*, 77 S. W. 204, 25 Ky. Law Rep. 1132; *Kremer v. Leathers*, 70 S. W. 843, 24 Ky. Law Rep. 1151; *Trapp v. Aldrich, Receiver*, 67 S. W. 834, 23 Ky. Law Rep. 2430. In the case under consideration, John B. Algee neither pleaded nor otherwise appeared. So far as the property was concerned, there was no trial and no decision or judgment on the merits. On the contrary, judgment was rendered by default, and as the motion to set aside the judgment was made during the term at which it was rendered, it follows that the court had the power, after the expiration of the term, to set aside the judgment.

[3] In the matter of setting aside default judgments, trial courts have a wide discretion, which will not be interfered with, except in case of abuse. A careful examination of the facts convinces us that there was no abuse of discretion in this case.

[4] It is further insisted that the court should not have set aside the judgment because the value of the property involved does not exceed the amount of alimony to which the wife is justly entitled. As the pleadings stood, no claim for alimony was presented. The husband was clearly entitled to the property. Section 425, Civil Code. And as the relief was granted on the condition that the wife should be permitted to amend her pleadings and present her claim for alimony, we conclude that she was in no wise prejudiced by the order setting the judgment aside.

Judgment affirmed.

SCHAUBERGER v. MOREL'S ADM'R.

(Court of Appeals of Kentucky. Feb. 9, 1916.)

1. DIVORCE — RESTORATION OF PROPERTY — INSURANCE POLICIES.

Under Ky. St. § 2121, providing that upon final judgment of divorce from the bond of matrimony the parties shall be restored such property not disposed of at the commencement of the action as either obtained from or through the other before or during the marriage in consideration thereof, and Civ. Code Prac. § 425,

requiring every such judgment to contain an order restoring such property, where a husband procured a life insurance policy on his own life naming his wife as beneficiary, but reserving to himself the right to change the beneficiary, and the parties were afterwards divorced by a judgment of a court of competent jurisdiction, the wife was thereby divested of all interest in the policy, and could not claim the proceeds upon the husband's death, though all of the premiums thereon were paid by her.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. ¶249.]

2. DIVORCE — RESTORATION OF PROPERTY — INSURANCE POLICIES.

In such case the wife was entitled to reimbursement from the proceeds of the policy for the amount of the premiums paid by her with interest; the benefit thereof having been obtained by the husband in consideration of and by reason of the marriage.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. ¶249.]

3. DIVORCE — RESTORATION OF PROPERTY — PROCEEDINGS TO COMPEL RESTORATION.

A judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage in consideration or by reason thereof, whether the return of the property is ordered by the judgment or in a subsequent proceeding, and, if no order of restoration or only a formal order is made when the divorce is granted, any question thereafter arising as to what property shall be restored may be settled by subsequent proceedings.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. ¶249.]

Appeal from Circuit Court, Jefferson County. Chancery Branch, Second Division.

Action by Edward J. Morel's administrator against the Metropolitan Life Insurance Company, which interpleaded and filed a cross-petition against Arrahvola Schauburger. From a judgment in favor of the administrator, Schauburger appeals. Affirmed.

Robt. L. Page, and L. D. Greene, both of Louisville, for appellant. L. S. Leopold, of Louisville, for appellee.

SETTLE, J. April 12, 1907, the Metropolitan Life Insurance Company issued a policy to Edward J. Morel insuring his life for \$1,000. When the policy was issued the appellant, Arrahvola Schauburger, then Arrahvola Morel, was the wife of Edward J. Morel, and was named in the policy as the beneficiary, but it was provided therein that, in the event of the death of the beneficiary before that of the insured, the amount due thereunder should, at the latter's death, be payable to his executor or administrator, and by a further provision of the policy the insured was given the right to change the beneficiary. In June, 1911, the appellant, Arrahvola Schauburger, then Arrahvola Morel, instituted an action in the Jefferson circuit court, chancery branch, First division, against Edward J. Morel, in which she

sought a divorce a vinculo from the latter, and on August 23, 1911, such divorce was granted her by judgment of the court, which also restored to each of the parties such property not disposed of at the commencement of the action as either might have obtained, directly or indirectly, from or through the other during marriage or by reason thereof. On the 28th day of January, 1914, Edward J. Morel died in Jefferson county, the place of his residence, intestate, and shortly thereafter the appellee, Emile L. Morel, was appointed by the Jefferson circuit court and duly qualified as the administrator of the decedent's estate. On the 28th day of August, 1914, he, as such administrator, brought this action in the Jefferson circuit court, chancery branch, Second division, against the Metropolitan Life Insurance Company, to compel the payment to him, by it, of the amount of the policy in question, alleging that by the terms of the policy the same was due and should be paid to him as the administrator of the decedent's estate.

The Metropolitan Life Insurance Company, by answer, which it made a counterclaim and cross-petition against the appellant, Arrahvola Schauburger, admitted its indebtedness upon the policy to the amount of \$994, which sum represented the face value of the policy, less an indebtedness of \$6 due thereon from the insured, that the above amount of \$994 it was willing to pay to whomsoever the court might adjudge entitled thereto, but alleging that it was claimed both by the appellee, as administrator of the decedent, and the appellant, Arrahvola Schauburger, and that the latter had threatened to bring suit against it for same, for which reasons the answer was made a counterclaim against appellee and cross-petition against appellant; it being asked that the latter be made a party to the action and required to assert whatever right she might have to the proceeds of the policy. The answer, counterclaim, and cross-petition expressed the willingness of the Metropolitan Life Insurance Company to pay into court the amount due upon the policy, that it might be relieved of further liability therefor, and shortly thereafter, with the consent of the parties, and by order of the court, the amount due on the policy was by it paid into court.

On December 19, 1914, the appellant, Arrahvola Schauburger, entered her appearance in the action, both to the petition and cross-petition, by the filing of a pleading styled an answer and counterclaim to the appellee administrator's petition and a cross-petition against him, and also an answer and counterclaim to the cross-petition of the Metropolitan Life Insurance Company, in which it was denied that appellee, as administrator of the estate of Edward J. Morel, or otherwise, was entitled to the proceeds of the policy in question or any part thereof, and, in substance, alleged her right thereto as the beneficiary

named in the policy, which was issued upon the life of the decedent while he was her husband, in consideration of the premium of \$22.20 required at the time to be paid therefor and an annual premium of a like amount, to be paid each year thereafter by the insured to the insurance company, that she, with money belonging to her, paid the first premium of \$22.20 and each subsequent annual premium that became due thereon in the years 1908, 1909, and 1910, but that she borrowed of the insurance company on the policy \$6, which was applied in part payment of the last premium, paid in April, 1910, and that all of the premiums referred to, aggregating \$88.80, were paid by her prior to the institution of her action against the decedent for a divorce. It was further alleged in the answer, counterclaim, and cross-petition that by the terms of the policy issued by the Metropolitan Life Insurance Company upon the life of the decedent it was provided that, after four annual premiums had been paid, after default of any subsequent premium the policy would be automatically extended and kept in force for a period of four years, that before August 23, 1911, the day upon which she was divorced from the decedent, she became vested with an absolute right in and to the proceeds of the policy contingent upon the death of the decedent within the four years next following the payment of the last premium that was made, covered by the extended insurance, and that the decedent's death occurred within that time and without his having made any change in the beneficiary of the policy. By reason of the foregoing alleged facts appellant asked that she be adjudged entitled to the \$994 proceeds of the policy paid into court by the Metropolitan Life Insurance Company, but that, if the court should be of opinion that she was not entitled to the \$994, she recover, to be paid out of the fund, the aggregate amount of the annual premiums paid by her on the policy, with interest on each from the time it was paid.

The answer and reply filed by appellee to the counterclaim and cross-petition of appellant traversed the averments thereof and pleaded as a bar to the claim asserted by her to the proceeds of the policy, the judgment of the Jefferson circuit court divorcing her from the decedent, and alleged that, as it was thereby adjudged that each of the parties to the action for divorce should restore to the other such property not disposed of at the commencement of the action as either might have obtained directly or indirectly from or through the other during marriage or in consideration thereof, such judgment divested appellant of all interest in the policy in question.

Following the taking of proof by the parties and submission of the case the court rendered the following judgment:

"This action having been heard and submitted in chief, and the court being sufficiently advised, it is considered, ordered, and adjudged that by virtue of the divorce granted to the defendant and cross-plaintiff, Arrahvola Schauburger, from plaintiff's decedent, Edward J. Morel, on the 23d day of August, 1911, the said defendant and cross-plaintiff was divested of all her right, title, and interests, except as hereinafter set out, in the proceeds of the policy of insurance issued by the defendant Metropolitan Life Insurance Company upon the life of plaintiff's decedent on the 12th day of April, 1907, and that upon the death of plaintiff's decedent, the assured, which occurred on or about the 28th day of January, 1914, the proceeds of said policy, except as hereinafter set out, became the property of the estate of the plaintiff's decedent, Edward J. Morel, deceased.

"The records herein showing that the defendant Arrahvola Schauburger did on the 24th day of April, 1907, and on the 12th day of April, 1908, on the 12th day of April, 1909, and on the 12th day of April, 1910, pay the annual premium of \$22.20 upon each occasion, said sum being the amount then due by way of premium upon said policy, making a total of \$88.80 paid by defendant Arrahvola Morel Schauburger, it is ordered and adjudged that of the proceeds of said policy of life insurance paid into court herein the defendant and cross-plaintiff, Arrahvola Schauburger, be and she is awarded said sums so paid for premiums, with interest thereon at the rate of 6 per cent. per annum from the date of each payment until paid, and that the balance of the proceeds of said policy of insurance be awarded to and are the property of the estate of the decedent, Edward J. Morel.

"It is further considered and adjudged that each of the parties, plaintiff and defendant and cross-plaintiff, Arrahvola Schauburger, shall pay out of the sum awarded him his own costs, and the costs of the defendant Metropolitan Life Insurance Company shall be assessed against the plaintiff and defendant Arrahvola Schauburger, and that each of those parties shall pay one-half of said costs.

"Leave to withdraw said sums is hereby granted to said parties. To all of which the defendant Arrahvola Schauburger excepts and objects, and prays an appeal to the Court of Appeals, which is granted."

Appellant's dissatisfaction with the judgment led to this appeal.

[1-3] It is now a settled rule of law in this jurisdiction that, if a husband procures a life insurance policy on himself, naming his wife as beneficiary, but with the right reserved to himself to change the beneficiary, and the parties are thereafter divorced by a judgment of a court of competent jurisdiction, the wife is thereby divested of all interest in the policy of insurance, and cannot at the death of the husband claim the proceeds. In other words, the wife's interest in the policy on the husband's life is divested by the judgment of divorce, and this is true though the premiums thereon may have been paid by the wife, but in the latter case she will be entitled to be reimbursed out of the proceeds of the policy the amount of the premiums paid by her thereon. The judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage in consideration or by reason thereof, and this is true whether the return of the property is ordered by the judg-

ment of divorce or in a subsequent proceeding. If the order of restoration be, as is often the case, merely formal, or none is made when the divorce is granted, any question thereafter arising as to what property shall be restored by either party to the other may be settled by subsequent proceedings.

In *Sea, Adm'r, v. Conrad*, 155 Ky. 51, 159 S. W. 622, 47 L. R. A. (N. S.) 1074, Ann. Cas. 1915C, 318, the question involved in the instant case was fully considered and decided. In that case the husband procured a policy of insurance for \$5,000 on his life, in which the wife was made the beneficiary. The policy was what is known as a ten-year term policy; that is, in consideration of ten annual premiums the insurance company, by the terms of the policy, agreed to pay the sum of \$5,000 to the insured's wife within 60 days after due notice and satisfactory proof of his death. The policy gave the insured the right to change the beneficiary, but such change was never made by him. After the payment of the tenth annual premium the insured was divorced from his wife. His death later followed, and in a contest between the former wife and the administrator of his estate it was held that the judgment of divorce divested her of all right to or interest in the proceeds of the policy, notwithstanding her retention of the possession of the policy from the time it was issued until his death. In the opinion it is said:

"There can be no doubt of the fact that appellee was, by the terms of the policy issued upon the life of Henry Conrad, named therein as the beneficiary, because she was his wife, and by reason thereof had an insurable interest in his life. It is patent, therefore, that whatever interest or right she then had or took under the policy was acquired in consideration or by reason of her marriage to Henry Conrad. The interest or right she thus acquired was destroyed by the judgment of divorce, which operated, by virtue of its terms and the provisions of the Code, to divest her of it. It is not material that there was never an actual return of the policy by her to her former husband, or that its return was never demanded by him. The mere physical retention of the policy by her, whether intentional or otherwise, did not confer upon her any right to it, and the fact that she never demanded or received the dividends that accrued and were paid upon it, and that they were demanded and received by Henry Conrad as long as he lived, shows that each of them understood that she no longer had any interest in the policy. The policy was merely evidence of the contract with the company, upon which its liability could not be enforced until the death of Henry Conrad. Had he at any time after his divorce from appellee instituted proceedings for that purpose, he might have compelled the delivery to him of the policy, but his failure to do so, whether it arose from a disinclination to have further litigation with his former wife, or other cause, in view of his continued collection of the dividends thereon, is not to be taken as evidencing his recognition of her right to it; nor is his administrator, by reason thereof, now estopped to claim its proceeds.

"While appellee at no time subsequent to the divorce and before Henry Conrad's death had an insurable interest in his life, it is unnecessary to determine whether that fact, of itself, was sufficient to divest her of any interest in the policy of insurance; it is sufficient to place our de-

cision, as we do, on the ground that she was divested of such interest by the judgment of divorce, and the effect section 425 of the Code compels us to give it."

It is true that in the instant case the insured did not, as in the case *supra*, receive a dividend or dividends on the policy after the payment of the last annual premium thereon, but that fact does not affect the question under consideration. In the case *supra* the payment to the insured of the dividends earned by the policy after his divorce from the wife was not a controlling fact in the decision of the case, but was mentioned in the opinion only for the purpose of showing by way of argument that, notwithstanding the former wife's retention of the policy after the divorce and until his death, she and the insured understood that she no longer had any interest in the policy. The opinion distinctly rests the decision upon the conclusions that an insurance policy is property, and that any interest she may have had in the proceeds of the policy was divested by the judgment of divorce, although it had not expressly directed, as did the judgment in the instant case, the restoration to the divorced parties of the title to such property as either may have obtained from or through the other during marriage, in consideration or by reason thereof. This is shown by the following further excerpt from the opinion in the case *supra*:

"We are of opinion that the question here involved is controlled by the provisions of section 425, Civil Code, and section 2121, Kentucky Statutes. Though not in all respects identical in language, these sections are identical in meaning; hence in this connection it will be sufficient to quote either. Section 425, Civil Code provides: 'Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during the marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of the marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing.' It is manifestly the meaning of the Code that the judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage 'in consideration or by reason thereof'; and this is true whether the return of the property is ordered by the judgment of divorce or in a subsequent proceeding. If the order of restoration be, as is often the case, merely formal, or none is made when the divorce is granted, any question as to what property shall be restored by either party to the other may be settled by subsequent proceedings. *Williams v. Gooch*, 3 Metc. 487; *Smith v. Smith* [56 S. W. 968], 22 Ky. Law Rep. 255; *Bennett v. Bennett*, 96 Ky. 545 [26 S. W. 392, 16 Ky. Law Rep. 72]; *Johnson v. Johnson*, 96 Ky. 391 [29 S. W. 322, 16 Ky. Law Rep. 660]."

The instant case does, however, present one feature not found in *Sea, Adm'r, v. Con-*

rad, which is this, that here the former wife named as beneficiary in the policy paid all the premiums that were received by the insurance company on the policy; but this fact no more had the effect to give her a right to the proceeds of the policy than did the failure of the insured to change the beneficiary. It did and does, however, give her the equitable right to be reimbursed out of the proceeds of the policy the amount of the premiums so paid by her, with interest on each from the time it was paid. Such right is expressly recognized by the opinion in *Sea, Adm'r, v. Conrad, supra*, and the several cases therein cited, and was accorded her by the judgment of the chancellor in this case. Indeed, the judgment of divorce, in divesting her of any interest which she may have had in the proceeds of the policy on the life of her former husband, compels him or his estate to restore to her the money which she paid to enable him to carry the policy, because the benefit thereof was obtained by him, as was the interest in the proceeds of the policy of which she was the beneficiary as long as they were husband and wife, in consideration and by reason of the marriage.

In *Guthrie's Adm'r v. Guthrie*, 155 Ky. 146, 159 S. W. 710, the insured died a resident of Shelby county, Ky., leaving, among other property, a policy on his life of \$1,000 in the Northwestern Mutual Life Insurance Company. By the terms of the policy the insurance was payable to "Mary B. Guthrie, beneficiary, wife of James M. Guthrie." The parties were divorced in Chicago, Ill., on December 20, 1909. James Guthrie died May 16, 1912. The opinion expressly reaffirms the doctrine announced in *Sea, Adm'r, v. Conrad, supra*, but held that it was not applicable in that case, because the divorce was obtained in Illinois, and the record did not show that it was the duty of the court in Illinois to restore the property after a decree of divorce. So, in refusing to divest the wife of the interest in the policy in the *Guthrie Case*, we said:

"The appellants, however, insist that the divorce granted by the circuit court of Cook county, Ill., and which admittedly had jurisdiction of the parties, like a Kentucky divorce decree of itself, operates to bar the right of the divorced wife, and is one of the conditions that divest her of any interest in the policy of insurance; that is, the Illinois decree should have the same effect as a divorce granted in Kentucky. The difficulty is that appellant makes no allegation that there are or were in force at the time of the divorce in Illinois any laws of similar import to the Kentucky Statutes and Code above referred to. Since the Illinois court had jurisdiction of the parties and the subject-matter, and the record not disclosing that it was the duty of that court under the laws of Illinois to restore any property obtained through the other marriage, or in consideration, or by reason thereof, and in view of the further fact that James M. Guthrie never attempted to change the beneficiary named in the policy, we are constrained to hold that Mary B. Guthrie, named as beneficiary is entitled to the proceeds, and the judgment of the lower court is therefore affirmed."

As we fully concur in the conclusions reached by the circuit court in this case, the judgment is affirmed.

GREENE, Auditor, v. GILBERT, Superintendent of Public Instruction.

(Court of Appeals of Kentucky. Feb. 9, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS — APPROPRIATIONS — OFFICERS — EXPENSES OF AUDITOR.

Const. § 184, provides that a bond of the commonwealth issued in favor of the board of education and certain stock in the bank of Kentucky shall be held inviolate for common school purposes, and that the interest and dividends therefrom shall be appropriated only to the common schools. Ky. St. § 4370, designates what shall constitute the common school fund, and section 4371 provides that the items specified shall constitute the annual resources of such fund and be paid into the treasury and not appropriated, except for the expenses of the state department of education and in aid of common schools. Section 4385 provides that the salary of the superintendent of public instruction shall be \$2,500 per annum, that he may appoint three clerks at salaries of \$1,500, \$1,000 and \$850, payable out of the common school fund. Section 4535f authorizes the superintendent to act as special state inspector of all schools, and provides that for such special duty he shall receive the salary of \$1,500, payable out of the state school fund; that he may appoint two assistants at salaries of \$1,000 per annum, and shall be allowed not to exceed \$2,000 per annum for additional clerk hire for that department, the salaries to be paid out of the common school fund. *Held*, that section 4371 is not an appropriation of money, but a limitation upon the purposes to which the resources of the school fund may be put, and the superintendent cannot exceed the appropriations contained in sections 4535f and 4385 in employing clerical assistance.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 216; Dec. Dig. ¶¶ 98.]

2. STATES — OFFICERS AND EMPLOYEES — COMPENSATION — STATUTORY PROVISIONS.

Where the salary of a clerical position in the service of the state is definitely fixed by law, that is conclusive of the salary to be paid.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 37, 62; Dec. Dig. ¶¶ 59.]

3. STATUTES — CONSTRUCTION — AIDS TO CONSTRUCTION — EXECUTIVE INTERPRETATION.

The doctrine of contemporaneous construction of statutes by public officials charged with the duty of acting thereunder applies only where a statute is really uncertain, ambiguous, and difficult of understanding, and not where the meaning is plain, easily understood, and hardly susceptible of misconstruction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ¶¶ 219.]

Appeal from Circuit Court, Franklin County.

Mandamus by V. O. Gilbert, Superintendent of Public Instruction, against R. L. Greene, Auditor. From a judgment granting the mandamus, defendant appeals. Reversed, with directions.

M. M. Logan, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for appellant. A. L. Gilbert, of Mayfield, for appellee.

TURNER, J. Appellant is the auditor of public accounts of this state, and the appellee the superintendent of public instruction, and the term of each began on the first Monday in January of this year. On the 28th of January the appellee made out and presented to the auditor the salary list of the superintendent's office for the month of January, 1916, as follows:

C. L. Timberlake, salary, Jan. 4-31....	\$ 58.50
Elizabeth Simpson, to stenographer, Jan. 4-31	90.00
W. D. Embry, to stenographer, Jan. 4-31	90.00
Mrs. Bettie Harris, to stenographer, Jan. 4-31	67.50
A. L. Gilbert, to stenographer, Jan. 4-31	90.00
Virginia Watts, to stenographer, Jan. 4-31	90.00
Nancy Cross, to stenographer, Jan. 4-31	112.50
Paul Meagher, to stenographer, Jan. 4-31	112.50
Narcie Matthews, salary (inspection clerk), Jan. 4-31	75.00
Ross Pogue, salary (inspection clerk), Jan. 4-31	75.00
Corbett Stephenson, salary (inspection clerk), Jan. 4-31	75.00
M. F. Pogue, salary (inspection clerk), Jan. 4-31	75.00
Lucy Pattie, salary, Jan. 4-31	75.00
H. Marion, salary, Jan. 4-31	75.00
C. M. Chaplin, Jr., salary, Jan. 4-31....	112.50
V. O. Gilbert, salary as Supt., Jan. 4-31	300.00

The auditor refused to draw his warrants for the first eight items contained in this list upon the ground that there was no authority of law for the same, and the superintendent has filed this action, asking for a mandamus to require the payment thereof. In the circuit court the defendant filed a demurrer to the petition, which was overruled, and, upon his declining to plead further the mandamus was granted as prayed for, and the auditor has appealed.

[1] Section 4385, Kentucky Statutes, is a part of an act dealing with the office of superintendent of public instruction, and provides as follows:

"His salary shall be two thousand five hundred dollars per annum; besides which he shall be entitled to all office fixtures, stationery, books, postage, fuel and lights needed to carry on the work of his office. He shall have power to appoint three clerks, namely: A chief clerk, whose salary shall be fifteen hundred dollars per annum; a first clerk, whose salary shall be one thousand dollars per annum, and a second clerk, whose salary shall be eight hundred and fifty dollars per annum. Said salaries to be paid monthly out of the common school fund."

Section 4535f, Kentucky Statutes, is an act of 1912 dealing with the inspection and examination of schools in this state, and the first subsection thereof is as follows:

"That the state superintendent of public instruction be and is hereby authorized to act as special state inspector and examiner of all schools in cities, towns and counties in the commonwealth, receiving funds directly or indirectly from the state or said cities, towns and counties. The state superintendent of public instruction before entering upon this special duty shall take

an oath before some one qualified to administer the oath to faithfully and diligently perform the duties of this office, and shall execute bond with good and sufficient security, to be approved by the Governor, in a sum not to exceed ten thousand dollars, which bond shall be filed with the secretary of state.

"The superintendent of public instruction shall receive annually, for such special duty, the salary of fifteen hundred dollars, payable monthly out of the state school fund.

"He shall have power to appoint two assistants at salaries of one thousand dollars per annum, and all necessary contingent and traveling expenses for himself and his assistants, when on business pertaining to these official duties. He shall be allowed not to exceed two thousand dollars per annum for additional clerk hire for this department, in connection with the state department of education, that the state department may be made more efficient in the conduct, supervision, management and inspection of the schools and school revenues of the commonwealth. These salaries and necessary expenses thus incurred shall be paid by the treasurer and charged to the common school fund, and the superintendent is hereby authorized to make monthly requisitions on the auditor for such salaries and expenses and that he render an itemized account of the same."

It will be observed that in the first section quoted the salary of the superintendent is fixed at \$2,500, there is provided for his office certain fixtures, stationery, etc., and he is authorized to appoint three clerks at salaries of \$1,500, \$1,000, and \$850; and in section 4535f the superintendent himself is authorized to act as special inspector and examiner of schools, and for such work is allowed a salary of \$1,500 per annum, and is authorized to appoint two assistant inspectors at salaries of \$1,000, and is allowed \$2,000 per annum for additional clerk hire for joint use in the department of inspection and the state department of education. These salaries and expenses are payable monthly out of the state school fund.

The two sections quoted constitute the only authority to which we have been referred, or which we have been able to find, authorizing the employment by the superintendent of persons in his office.

The two sections quoted authorize an annual expenditure by the superintendent, including his own salary as superintendent and as state inspector of schools, of \$11,350, and therefore there is no authority of law for a monthly pay roll in excess of \$945.83, unless it is elsewhere given.

It is contended by the appellee that under the provisions of section 4371 of the Kentucky statutes he is authorized to pay any and all expenses of his office out of the common school fund, and that therefore it is the duty of the auditor to issue his warrants for these amounts as they are necessary expenditures in an efficient conduct of his office.

Section 4370 designates in six subdivisions what shall constitute the common school fund of this state; and then it is provided in the very next section, 4371, as follows, to wit:

"The foregoing shall constitute the annual resources of the school fund of Kentucky, and shall be paid into the treasury, and shall not be drawn out or appropriated, except to pay the

expenses of the state department of education of whatever character or kind, and in aid of common schools, as provided in this chapter."

It is under this last section that the appellee claims the right to exceed the appropriations provided for in the first two sections quoted, in the management and conduct of his office. The contention is, as we gather it, that because the Legislature in that section provided that the resources of the school fund should not be drawn out or appropriated, "except to pay the expenses of the state department of education of whatever character or kind, and in aid of common schools, as provided in this chapter," that this was equivalent to an appropriation by the Legislature of as much money out of the school fund to pay the expenses of the state department of education as the superintendent of public instruction might deem necessary for that purpose, and that none of the fiscal officers of the state has the right to question his unlimited authority in that regard.

Section 4371 not only falls far short of being an appropriation of any money, but even a casual reading of it in connection with section 4370 conclusively shows that instead of being an appropriation of money it is solely a limitation upon the purposes to which the resources of the school fund may be put. Manifestly it was passed by the Legislature to comply with the provisions of section 184 of the Constitution that the school fund should be held inviolate for the purpose of sustaining a system of common schools, and appropriated to no other purpose.

Under the provisions of the section of the Constitution referred to it was questioned whether the expenses of the department of education, as provided in section 4371, might be properly paid out of the school fund, and a test suit raising that question was brought, and this court held, in *Supt. of Public Instruction v. Auditor*, 97 Ky. 180, 30 S. W. 404, 17 Ky. Law Rep. 46, that such expenses might be paid out of that fund.

The contention that the opinion in that case upholds the view of the appellee here is not well founded; that opinion only holds that the expenses of the department of education may properly be paid out of the school fund, when appropriated by the Legislature, but it nowhere intimates or suggests that section 4371 is an appropriation of any sum whatever out of that fund.

If appellee's construction of section 4371, which is a part of an act of 1893, is correct, and the superintendent is given therein the authority to use so much of the school fund as may be deemed necessary by him in the payment of the expenses of his office, why did the General Assembly deem it necessary to pass the act of 1912, giving to him two assistant inspectors and a specific sum for additional clerical assistance? The act of 1912 would clearly seem to be a legislative interpretation of section 4371 directly contrary to that contended for by the superintendent, if

any such interpretation was needed. In any event, the court would require the clearest and most explicit language before it would be justified in holding any act to give to an administrative official unlimited and unrestricted right to the use of a fund for any purpose; and particularly where it is declared in the Constitution that such fund is to be held inviolate for specific purposes, and even the right of the Legislature to appropriate the same to any other purpose is withheld.

[2] An inspection of the salary list in the record discloses that some of the assistants and clerks provided for in sections 4385 and 4535f, and whose salaries are fixed in those sections are not being paid the amount of salary provided by law, and we have deemed it not improper to say that where the salary of a clerical position is definitely fixed by law, that is conclusive of the salary to be paid.

[3] But, finally, resort is had to the doctrine of contemporaneous construction, and it is insisted that even though technically section 4371 may not be construed to give the superintendent unlimited authority in the employment in his department of clerical assistants, yet that inasmuch as it has been given that interpretation by all public officials charged with the duty of acting under it, that the court should now give it the same construction. But this doctrine applies only where a statute is really uncertain, ambiguous, and difficult of understanding, and does not apply, as in this case, where the meaning is plain, easily understood, and hardly susceptible of misconstruction. *Bosworth, Auditor, v. Marshall, County Attorney*, 165 Ky. 32, 176 S. W. 348.

The General Assembly alone has the power to appropriate public money, and if the necessity for this clerical assistance exists, the application for the money to procure it must be made to the proper branch of the government.

The judgment is reversed, with directions to sustain the demurrer and dismiss the petition.

CONNECTICUT FIRE INS. CO. v. HARDIN.

(Court of Appeals of Kentucky. Feb. 9, 1916.)

CONTINUANCE \S 51—ABSENCE OF WITNESSES—STATUTE.

Where defendant, having already received a continuance for the absence of witnesses, asked another, not filing with its affidavit any statement of its attorneys that the testimony was important or that its proper effect could not be obtained without oral examination in court, failing to show diligence in attempting to obtain the testimony of one of the witnesses, the court's action, with plaintiff's consent, in denying the motion for continuance and permitting defendant to read its affidavit as the absent witnesses' testimony under Civ. Code Prac. \S 315, was not an abuse of its sound discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. \S 69, 79, 85, 87, 88, 118, 128, 130, 132; Dec. Dig. \S 51.]

Appeal from Circuit Court, Boyd County. Suit by J. S. Hardin against the Connecticut Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. T. Everett, of Catlettsburg, L. F. Zerfoss, of Ashland, and J. M. Lassing, of Newport, for appellant. John L. Smith and Geo. B. Martin, both of Catlettsburg, for appellee.

HURT, J. This suit was filed on the 10th day of April, 1914, and summons was served on the insurance commissioner on the 4th day of May, 1914. No steps looking to a trial were had at the June term of the circuit court, but on November 12, 1914, the appellant filed its answer. The case was set for trial for the 27th day of November. When it was called for trial, the appellee announced ready for trial, but the appellant announced that it was not ready, and moved the court to continue the case on account of the absence and illness of one of its witnesses, Harry G. Marcum. At this calling the appellant was not required to present any grounds for a continuance by affidavit, but the case was continued upon its motion and its statement that it was not ready for trial because of the absence of Marcum. The continuance of the case was had after the issues had all been made up, and the continuance was to the March term of the circuit court. On the 27th day of February the appellant caused a subpoena to be issued to Boyd county for Harry G. Marcum and Maude Marcum, two of its witnesses, and probably others. Maude Marcum was not in the county at the time the subpoena was issued, having left the county and departed out of the state on the 10th day of January, previous thereto, but the subpoena was served upon Harry G. Marcum. When the case was called for trial on March 17th, the appellee again announced ready for trial, when the appellant asked for another continuance of the case on account of the absence of one of its attorneys, and the court thereupon set the case over until the 24th day of March for trial. At the calling of the case for trial on the 24th, the appellee again announced ready for trial, when the appellant announced not ready, and moved the court to continue the case until the next term of the court on account of the absence of Harry G. Marcum and Maude Marcum, and in support of its motion filed its affidavit, setting out a statement of the facts which it could prove by the two absent witnesses, and other facts upon which it based its motion for a continuance. On the 17th day of March, at the continuance of the case at that time, Harry G. Marcum did not appear, and the appellant procured an attachment to be issued for him, which was returned without being executed upon the witness. On the 24th day of March,

when the continuance was again asked, the court required the appellee to consent that the affidavit should be read as the deposition of the two witnesses, Harry G. Marcum and Maude Marcum, or else a continuance of the case would be granted. The appellee consented to the reading of the affidavit as the deposition of the two witnesses, and thereupon the court overruled the appellant's motion for a continuance, and, a trial being had, it resulted in a verdict of the jury in favor of the appellee, and a judgment of the court was rendered accordingly. The appellant's motion and grounds for a new trial being overruled, it seeks a reversal of the judgment upon the sole ground that the court erred to its prejudice in overruling its motion for a continuance. The appellant did not file with its affidavit any statement of its attorneys that the testimony of the two witnesses was important, or that the just and proper effect of their testimony could not, in a reasonable degree, be obtained without an oral examination of them in court. The affidavit on file fails to show any diligence in obtaining the testimony of Maude Marcum, as she had been absent from the state and county before a subpoena was issued for her to that county for 47 days, and the affidavit does not disclose any want of knowledge upon the part of the appellant as to her whereabouts.

Section 315, Civil Code, provides that when a motion to postpone a trial on account of the absence of a witness is made, and the party moving for the continuance has filed his affidavit, showing the materiality of the evidence expected to be obtained from such witness, and that due diligence has been used to obtain it, and the facts which the party could prove by such witness, and then if the adverse party will consent that on the trial the affidavit shall be read as the deposition of the absent witness, "the trial shall not be postponed on account of his absence." The motion for a continuance is always addressed to the sound discretion of the trial court; and, unless such discretion has been abused, the action of the court will not be disturbed. *McClurg v. Igleheart*, 33 S. W. 80, 17 Ky. Law Rep. 913. It has oftentimes been held that the refusal to grant a continuance on account of the absence of a witness, when a statement of the facts which the absent witness would prove is admitted in evidence, is not an abuse of the discretion of the trial court. *Hutton v. First National Bank*, 45 S. W. 688, 20 Ky. Law Rep. 225; *M. & L. R. R. Co. v. Herrick*, 13 Bush, 122; *L. H. & St. L. Ry. Co. v. Wilson's Ex'r*, 156 Ky. 657, 161 S. W. 517; *Independent Life Insurance Co. v. Williamson*, 152 Ky. 821, 154 S. W. 409; *Louisville Ry. Co. v. Bryant*, 142 Ky. 159, 184 S. W. 182, and many others.

An examination of the record and grounds for a continuance fails to lead to the con-

clusion that the trial court abused its discretion in denying the continuance, and the judgment is affirmed.

IMPERIAL JELlico COAL CO. v. BRYANT.

BRYANT v. BANK COAL CO.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. JURY §116—SELECTION OF ADDITIONAL JURORS—BYSTANDERS—STATUTORY PROVISIONS.

Ky. St. 1909, § 2247, provides that at the time of selecting the petit jurors from the list of names drawn for that purpose, if there shall fail to attend or shall be excused such a number as will not leave the number of jurors required, the judge shall draw double the number of names to supply their places, provided that when the number of vacancies does not exceed three, the judge may direct the sheriff to summon bystanders, and that if in any civil proceeding the panel shall be exhausted by challenge the judge may supply jurors by drawing from the drum or wheel case or may direct the sheriff to summon not exceeding three bystanders to fill such vacancies. *Held*, that where seven bystanders were summoned at one and the same time by the sheriff, it was reversible error to overrule a challenge to the panel; an exception having been properly saved.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. §116.]

2. MINES AND MINERALS §118—DANGEROUS CONDITION OF MINE—LIABILITY TO LESSEE'S EMPLOYEES.

A lessor of a mine was not liable for injuries to the lessee's employé caused by the defective condition of a stump left to support the roof of the mine, unless at the time of the lease it knew of the defective condition, but withheld this information from the lessee, and unless such condition was latent and could not have been discovered by the exercise of ordinary care.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 240; Dec. Dig. §118.]

3. APPEAL AND ERROR §216—RESERVATION OF GROUNDS OF REVIEW—REQUESTING INSTRUCTIONS.

On appeal from a judgment for defendant in a mine employé's action for injuries, plaintiff was in no position to take advantage of the failure of defendant to furnish a sufficient number of caps and props of a proper kind to be used in propping the roof, as required by statute, where no instruction presenting this matter to the jury was requested.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §216; Trial, Cent. Dig. §§ 627-641.]

4. APPEAL AND ERROR §200—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF OBJECTIONS.

A party, not objecting to an improperly selected jury panel, was not entitled to a reversal because thereof.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §200.]

Appeal from Circuit Court, Whitley County.

Action by Marion Bryant against the Imperial Jellico Coal Company and another. From a judgment for plaintiff against the defendant named and in favor of the defendant Bank Coal Company, plaintiff and the Im-

perial Jellico Coal Company appeal. Affirmed in part, and reversed and remanded in part, with directions.

Rose & Pope, of Williamsburg, for appellant and appellee Bryant. Tye, Siler & Gatliff, of Williamsburg, for appellant Imperial Jellico Coal Co., and for appellee, Bank Coal Co.

CLARKE, J. On January 9, 1914, Marion Bryant was injured by slate falling from the roof of the mine owned by the Imperial Jellico Coal Company, but being operated under a lease by the Bank Coal Company, in which said Bryant was engaged in removing the stumps and pillars left to support the roof when the mine was developed, which work is known as "robbing" the mine. Thereafter he instituted this suit in the Whitley circuit court, seeking to recover for his injuries from both of said companies, alleging that the accident resulted from the negligence of said companies, and each of them, in failing to furnish him a safe place in which to do said work, and in failing to furnish him the necessary and proper kind of props to support the roof of the mine as required by law. The two companies filed a joint answer, denying the allegations of negligence in his petition, and pleading contributory negligence. The affirmative allegations of said answer were traversed of record, and a trial by a jury resulted in a verdict and judgment for him against the Imperial Jellico Coal Company for \$1,000, and a verdict and judgment against him in favor of the Bank Coal Company. The Imperial Jellico Coal Company is appealing from the judgment against it, and he is appealing from the judgment in favor of the Bank Coal Company. The two appeals will be considered together, as they result from the same judgment.

Appellant Imperial Jellico Coal Company is relying upon the following grounds for a reversal of the judgment against it: (1) That the court erred in not sustaining the challenge of the jury panel, tendered it by the trial court, upon which panel there were conceded to be seven bystanders who had been summoned at one and the same time by the sheriff; (2) that the trial court erred in overruling its motion for a peremptory instruction at the close of all the evidence.

[1] 1. As the jury thus selected is a violation of section 2247 of the Kentucky Statutes, and furnishes grounds for a reversal when the exception is saved, as held by this court in the case of *L. & N. R. Co. v. King*, 161 Ky. 325, 170 S. W. 938, the judgment against the Imperial Jellico Coal Company will have to be reversed.

To decide the question raised by the other ground assigned as a reason for reversal of the judgment, against said company would necessitate an expression of opinion upon the evidence; and, in view of the fact that another trial may be necessary, we deem it advisable only to make such reference to

said other alleged error as may conduce to a correct trial upon the return of the case, without expressing an opinion about the evidence.

[2] 2. Counsel for appellant company, in arguing its right to a peremptory instruction, urges that the allegations of the petition do not constitute a cause of action against it, because it does not allege that it had actual knowledge of the defective condition of the stump upon which the plaintiff was working when injured, at the time it leased the mine to the Bank Coal Company. As the Imperial Jellico Coal Company, under the allegations of the petition, was the owner and lessor of the mine at the time of the accident, and appellee at that time was the employé, not of it, but the Bank Coal Company, it was liable only if it knew of the defective condition of the stump at the time of the lease and such defective condition was latent and could not have been discovered by the exercise of ordinary care, and, having this information, withheld it from the lessee. The liability of appellant to appellee was not that of master to a servant, for that relationship did not exist between them. Its liability, if any, is based upon the implied fraud of withholding from the lessee knowledge in its possession of the latent defect. It owed neither the lessee nor any of its employés any duty of inspection, and was liable to appellee and its employés only if it exercised bad faith with reference to the matter that caused appellee's injury when it leased the mine to the lessee. *Franklin v. Tracy*, 117 Ky. 274, 77 S. W. 1113, 78 S. W. 1112, 25 Ky. Law Rep. 1409, 1909, 63 L. R. A. 649; *Holzhauser v. Sheeny*, 127 Ky. 32, 104 S. W. 1034, 31 Ky. Law Rep. 1238; *Heindirk v. Louisville Elevator Co.*, 122 Ky. 675, 92 S. W. 608, 29 Ky. Law Rep. 194, 5 L. R. A. (N. S.) 1103; *King v. Creekmore*, 117 Ky. 172, 77 S. W. 689, 25 Ky. Law Rep. 1292. Hence the petition did not state a cause of action against this appellant if it did not state that appellant knew of this latent defect, but stated rather that it knew, or could have known, of it by the exercise of ordinary care. If appellant actually knew of it, it would be liable, but if it did not know of it, but could have known of it by the exercise of ordinary care, it was not liable.

The same objection applies to the instructions given by the court, as they allowed a recovery if the jury believed from the evidence that appellant could have discovered the alleged latent defect by the exercise of ordinary care.

[3] 3. The sole objection of the plaintiff, Marion Bryant, to the verdict and judgment in favor of appellee, Bank Coal Company, presented by his counsel in brief, is that said company failed to furnish him with a sufficient number of caps and props of a proper kind to be used by him in bracing the roof of the mine, as provided by subsection 7, § 2739b, of the statute; that the failure con-

sisted not in the number furnished, but in the kind furnished; that a part of those furnished were not sawed square at the end, as required by statute. While it is true there was some evidence to the effect that some of the props were not sawed square at the ends, the proof does not show that Bryant needed to have selected, marked, or used any prop not properly squared at the ends, as there were still at the entrance of the mine a great number of these props, supplied by the company, of which some were shown to have been defective, but the proof does not show that there were not enough good props in the pile to have supplied Bryant's full need. We are therefore of the opinion that, even had he offered an instruction presenting this matter to the jury and the court had refused to give it, from the evidence in this case, we would have been unable to say that the refusal to give such an instruction was an error. However, the matter is not so presented to us. The appellant did not offer, and the court did not refuse, to give such an instruction; and, even if counsel's contention were correct, he is not in a position to take advantage of it upon this record. Louisville, H. & St. L. Ry. Co. v. Roberts, 144 Ky. 820, 139 S. W. 1078; East Tenn. Telephone Co. v. Cook, 155 Ky. 649, 160 S. W. 166.

[4] Nor can said appellant be granted a reversal because of the improperly selected jury panel since he did not object thereto.

Wherefore the judgment herein against appellant Imperial Jellico Coal Company is reversed, and the cause remanded, with directions to grant it a new trial. The judgment in favor of appellee, Bank Coal Company, is affirmed.

EDMONDS v. DAVID G. EVANS & CO.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. APPEAL AND ERROR ⇨70—FINALITY OF DETERMINATION.

Where defendant, without entering its appearance, moved the court to quash the return on the summons, and the court made an order sustaining the motion, plaintiff's appeal from such order will be dismissed, as it was not final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-378, 386, 411; Dec. Dig. ⇨70.]

2. APPEAL AND ERROR ⇨870—NECESSITY FOR FINALITY OF DETERMINATION.

Where, after quashing of the return on the summons, plaintiff advised the court that he proposed taking no further steps, and the latter entered judgment dismissing the action for want of jurisdiction of the person of the defendant, plaintiff could appeal upon the necessary exceptions, and thereby obtain a review of the propriety of the order quashing the return.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3460, 3461, 3487-3529; Dec. Dig. ⇨870.]

Appeal from Circuit Court, Breathitt County.

Action by W. T. Edmonds against David G. Evans & Company. From an order sustaining

defendant's motion to quash the return on the summons, plaintiff appeals. Appeal dismissed.

W. L. Doolan, of Louisville, and John E. Patrick, of Jackson, for appellant. Adams & Holliday and G. W. Fleenor, all of Jackson, for appellee.

CARROLL, J. [1] The appellant brought this suit in the Breathitt circuit court against the appellee company, a foreign corporation, and a summons issued against the company was executed by delivering a copy to one C. W. Strong, a traveling salesman or drummer for the company in Breathitt county. The appellee, without entering its appearance to the action, moved the court to quash the return on the summons, and this appeal is prosecuted from the order of the court sustaining this motion. This order was not final or appealable, and the appeal must be dismissed. Wearen v. Smith, 80 Ky. 216; Winn v. Carter Dry Goods Co., 102 Ky. 370, 43 S. W. 436.

[2] But in cases like this the plaintiff, when the summons is quashed, may bring an appeal to this court by pursuing the practice set out in Speckert v. Ray, Judge, 166 Ky. 622, 179 S. W. 592, where it was said, in answer to the argument that the plaintiff has no remedy when the summons is quashed:

"If, after the quashing of the return on the summons, she had advised the judge of the circuit court that she proposed taking no further step in the case, he doubtless would have entered judgment dismissing the action for want of jurisdiction of the person of the defendant, from which judgment, upon reserving the necessary exception, she could have taken an appeal to this court, and thereby obtained a review of the rulings of the circuit judge complained of."

And so in this case, if the court, after the return on the summons had been quashed and after being advised that the plaintiff did not intend to take any further steps in the case, had entered, as it might have done, a judgment dismissing the action for want of jurisdiction of the person of the defendant, an appeal could have been prosecuted from the order dismissing the case.

The appeal is dismissed.

BLUE GRASS COAL CORP. v. COMBS et al.

(Court of Appeals of Kentucky. Feb. 11, 1916.)

1. MINES AND MINERALS ⇨64—MINING CONTRACTS—MODIFICATION.

Evidence held to show that plaintiff, who succeeded to a mining lease which allowed the lessees to take timber from the surface of the ground, had notice of a change in contract made by the original lessees, and was also charged with knowledge of facts sufficient to put it on inquiry.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 181-184; Dec. Dig. ⇨64.]

2. CORPORATIONS ⚡428 — AGENT — KNOWLEDGE OF AGENT.

Where the manager of a mining corporation who knew that his principal, the lessee, had modified the contract with the lessor as to the taking of timber from the surface of the ground, continued in the service of plaintiff, who succeeded to the rights of the original lessee, plaintiff was charged with the manager's knowledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. ⚡428.]

3. MINES AND MINERALS ⚡62 — LEASES — TIMBER CONTRACTS.

Where a mining lease reserved to the lessors all timber that should girth 60 inches and more 3 feet above the ground to be used by the lessors for their own building and construction work on the property, and authorized the lessee to use other timber for mining purposes, fixing a five-year period in which the lessors could remove their timber, but providing that, in event the royalties should amount to \$400 per month, then the lessee should become entitled to all timber, was amended by second contract abrogating the time limit for removing the timber, as well as the provision, if the royalties should reach \$400 per month, the lessors should be entitled to no more timber, and providing that the lessee might at a price fixed purchase any such timber, and that the lessors should cease cutting timber over 60 inches was the absolute property of lessors, subject to the restrictions that it could be used only for the lessors' own building and construction work, and that it should be sold at the price fixed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

4. MINES AND MINERALS ⚡64 — MINING LEASE—ASSIGNEE—CONSTRUCTIVE NOTICE—EFFECT.

Plaintiff, which acquired mining property with knowledge of an amended mining lease regulating timber rights, is, where it acted under the amended lease, charged with knowledge of an earlier lease to which the amended one referred.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 181-184; Dec. Dig. ⚡64.]

5. MINES AND MINERALS ⚡62—LEASE—CONSTRUCTION.

Where a mining lease which clearly showed the mining operations should not be interfered with reserved to the lessors the use of such surface lands as were unnecessary for mining purposes, the lessors are entitled to those portions of the surface suitable for agriculture, and the lessee, though authorized to build houses on the premises for its employes, cannot invade such portions merely because by building the houses within the inclosures it would save some expense.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

6. MINES AND MINERALS ⚡62 — MINING LEASES—CONSTRUCTION.

Where a mining lease reserved to the lessors such portion of the surface as was unnecessary for mining operations so long as it did not work an interference therewith, the lessors are not entitled to pollute a stream from which the lessee drew water for its boilers used in operating the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

7. MINES AND MINERALS ⚡62 — MINING LEASE—CONSTRUCTION.

Where a mining lease which authorized the lessee to use in the mine surface timber de-

clared that the standing timber should be used only on the leased premises, the lessee is not entitled to use such timber in adjacent mining property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

8. MINES AND MINERALS ⚡62 — MINING LEASE—CONSTRUCTION.

Where a mining lease authorizing the lessee to build houses on the surface of the land to be occupied by the lessee's employes and authorized the lessees to use any of the premises and openings for the purpose of removing coal in adjacent land, the lessees might erect houses on the surface to be occupied by employes mining adjacent lands.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

9. MINES AND MINERALS ⚡62 — MINING LEASE—CONSTRUCTION.

Where a mining lease authorized the lessee to take from the surface such timber as might be necessary, but reserved to the lessor all timber girthing more than 60 inches, the lessee is, where timber is separated by inclosed tracts, entitled to a convenient right of way through such tracts, when it should become necessary to reach such timber.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175-180; Dec. Dig. ⚡62.]

Suit by the Blue Grass Coal Corporation against D. Y. and Mary Combs. On motions to dissolve injunctions against both defendants and plaintiff. Injunction against defendants modified, and motion to dissolve injunction against plaintiff overruled.

B. P. Wootton and Jesse Morgan, both of Hazard, for plaintiff. P. T. Wheeler and W. H. Miller, both of Hazard, for defendants.

TURNER, J. These are motions before me to dissolve two injunctions granted by the Perry circuit court growing out of the same controversy—one enjoining D. Y. and Mary Combs from exercising certain privileges which they claim upon the surface of certain tracts of coal lands in Perry county; and the other enjoining the Blue Grass Coal Corporation from cutting and removing certain timber from the said lands for use in its mining operations on adjoining lands.

In January, 1913, D. Y. Combs and his wife, being the owners of certain tracts of coal lands, entered into a contract of lease with W. M. Jones, W. R. Marsee, and C. R. Luttrell whereby they leased to the latter the coal mining privileges thereon. The lease provides:

"That for and in consideration of the covenants and agreement hereinafter contained the said lessors have leased, demised, and let, and do hereby lease, demise, and let, unto the said lessees, for the full term of fifty years from and after this date for the purpose of mining coal and holding possession thereof for said lessees, certain tracts and parcels of land. * * * The lessees shall have the exclusive right and privilege during the continuation of this lease of digging and mining coal within, upon, and under the boundaries described, of carrying away, selling and disposing of the same, and

of constructing, building, and using underneath said lands and upon the surface thereof such chutes, inclines, side tracks, railroad switches, railroads, tramways, miners' houses, storehouses, and any buildings, or installing any kind of machinery or any kind or character of construction deemed necessary by the parties of the second part for carrying on said coal mining operations on said leased premises and the delivering and shipping of said coal therefrom, with the right to enter and remain upon said tract for the aforesaid purpose at once and remain during the continuance of this lease. The lessees are granted and given the right to use for mining purposes or building purposes in any manner by them all the timber that will girth less than sixty inches three feet about the ground, and all the timber that girths sixty inches and more shall be the property of the lessors, to be used by them for their own building and construction work as they see fit, but for no other purpose: Provided same shall have been used within a period of five years next hereafter: And provided, further, that in the event the lessees mine and produce coal enough from the leased premises herein that the royalties herein provided for will amount to four hundred dollars per month and for which the lessees will become liable to the party of the first part for that amount of royalty, then in this event, and whatsoever it may happen, the timber that girths sixty inches and over shall belong to the parties of the second part, and the parties of the first part then and there release all right, title, and interest to same, and same shall be used by parties of the second part for mining purposes as needed by second parties.

"Lessors further covenant and agree that the lessees shall and may at all times during this lease quietly and peaceably enjoy the leased premises for the purpose aforesaid without any let or hindrance and free from any person or persons lawfully claiming the same or any part thereof: Provided, further, that the lessors retain unto themselves the right to enter upon said leased premises at any time for the purpose of inspecting or examining the leased premises or operations, and the right to use of said land for any purpose which is not inconsistent or harmful to the rights and privileges and usages of the land hereby demised and let. * * * The lessors further covenant and agree with the lessees that as a part of this lease and any renewal thereof the lessees are hereby given the right and privilege of using the said premises herein described and any opening, shafts, tipples, inclines, switches, or any other appliance as may be thereon for the purpose of mining and removing any other coal they may desire to remove on said lands adjacent to this land that lessees may hereafter acquire, and after lessees get to adjacent coal and begin to take out same then the lessors agree that they will accept proportionate royalties mined by said lessees from adjacent properties according to acres owned by each party, but for this privilege the second parties covenant and agree to pay to the parties of the first part the sum of two cents per ton for each and every ton thus acquired and brought through and over the leased premises herein, except the lands of John Eversole and Eversole and Cornett and Wm. Wells, which is to come through free, and which is to be paid for in the same manner and at the times the coal herein mentioned is designated to be paid for, and the railroad weights will govern as to the amounts."

This lease was duly recorded in the Perry county court, and in March, 1913, was assigned by the lessees to the Hazard-Dean Coal Company. That company proceeded shortly thereafter to open up mining operations on the lands, and in June, 1913, W. M. Jones, one of the officers of the company,

entered into a contract with D. Y. Combs, for the use and benefit of the company, whereby the latter was to furnish certain lumber and timbers to be used in the mining operations, at certain specified prices. Combs, in order to comply with this contract, bought and set up on the lands a sawmill and furnished a great deal of timber to the Hazard-Dean Coal Company under the terms of the contract.

In March, 1914, D. Y. Combs and his wife and the Hazard-Dean Coal Company entered into an amendatory contract of lease whereby they abrogated certain provisions in the original lease. That amendatory lease, in so far as it is material here, provides:

"That whereas, the parties of the first part did lease to the party of the second part a certain boundary of land which they owned on Messers branch, in Perry county, Ky., for the purpose of second party mining and carrying on mining operations thereon, and in said lease there are certain timber rights granted to the said second party, and also certain rights to timber for first party's use for their own building purposes to certain timber from certain dimensions and up, and there is a clause in said lease that provides that, in the event second party mine and ship sufficient coal in any one month for the royalty thereon to amount to as much as four hundred dollars to first party, then in that event all their rights to any of said timber would cease; but for certain considerations and agreements this day entered into by the parties hereto the said Hazard-Dean Coal Company agrees with first party that that certain clause herein referred to will not be enforced, but that, in the event first party cuts no more timber from said land herein leased at the present time and agreeing that all said timber may remain on said land, except that he already has cut which is to be used by first party for his own building purposes, that is, in constructing buildings for his own personal use and on his own premises, and not for any other, and by first party's agreeing that second party may have free access to all of said remaining standing timber on said land for the use and benefit of said lease to be used on said leased premises, and no other, and the said second party also to have at the same price they have heretofore been paying said first party for lumber of the grades and dimensions set out in a certain contract which now exists between first party and one W. M. Jones, of Barbourville, Ky., but said contract having heretofore been assigned to the Hazard-Dean Coal Company by the said Jones:

"Now we, the Hazard-Dean Coal Company, agree that the said D. Y. Combs to cut and remove for his own purposes as above stated, and for no other, timber from said lease tract in after years, and during the period of said lease, as he may need same for his own use in building for himself as heretofore stated.

"In case said company desire any more or all of said timber cut and manufactured into lumber for their use on said lease, the said first party binds themselves to cut, saw in the woods, and deliver to mill, and saw or cause to be sawed at their own expense, such lumber as second party may need for the sum of fifteen dollars per thousand, said lumber to be good sound lumber, cut to the specifications and dimensions furnished by second party to first party, at such times as they may desire same."

This amendatory contract, however, never was placed on the record; the copy thereof retained by Combs having been destroyed by fire shortly thereafter.

In April, 1915, the Hazard-Dean Coal Com-

pany conveyed and transferred all of its rights under the original lease to the Blue Grass Coal Corporation; there being no reference in the conveyance to the amendatory contract. The Blue Grass Coal Corporation instituted this action, and alleges in its petition that the royalties from the coal lands have already, in several months, amounted to more than four hundred dollars per month, and that by reason thereof, under the terms of the original contract, it became the absolute owner of all the timber on said tract of land; that the defendants are wrongfully and without right cutting and removing the same, and are without right through and by their tenants and employes building houses on the lands and occupying houses thereon; that by reason of such acts on the part of the defendants it has been hindered and delayed in its mining operations, and has been prevented from building houses, tipples, etc., thereon, and that the sawdust from defendant's said sawmill, by filling up the branches and creeks on said lands, has polluted the waters therein; that the defendants are daily trespassing on said lands, and that the said acts are continuing from day to day, and are of such constant and recurring nature that in an action at law there is no adequate remedy without a multiplicity of suits.

The defendants in their answer, after denying in the first paragraph many of the material allegations of the petition, in the second paragraph set up the contract of June, 1913, and alleged that the mill which he had erected on the tract of land to carry out the same was located on the lands on the 29th of April, 1915, when the plaintiff purchased from the Hazard-Dean Coal Company the said lease, and that the defendants were at that time operating the said mill in performance of the said contract, and that the plaintiff had full and complete knowledge of the said contract and the operation thereunder by the defendants, and that thereafter, with such knowledge, the plaintiff did order and direct the defendants to cut, saw, and furnish to it certain lumber, the terms of said contract. They also plead and rely upon the amendatory contract of lease of March 7, 1914, and allege that the plaintiff had full and complete knowledge of said amendatory contract and of its execution and existence and contents before it became the purchaser of the lease and at the time thereof.

They allege in their third paragraph that the plaintiff is cutting and removing, and threatening to continue to cut and remove, from said lands so leased, certain timbers to be used by it in its mining operations on other and different lands, and prayed that the plaintiff be enjoined from interfering with the use of the surface of said lands by the defendants, except in so far as it is actually and reasonably necessary to the plaintiff in its mining operations on said lands; that it be enjoined from building upon the surface of the said lands houses to be occupied by

persons engaged in mining coal from other lands, and from cutting and removing timber from lands of plaintiff to be used in mining operations on other lands.

Upon the filing of this action the clerk granted a temporary restraining order, called a temporary injunction, wherein the defendants and their employes are enjoined from cutting, sawing, or removing any timber, trees, or lumber from the tracts of land named, and from setting up and operating any sawmill thereon, and from building houses and occupying houses thereon, and from entering upon said lands or molesting in any way the plaintiff in the exercise of its rights in mining and transporting coal therefrom, and building houses, tramways, and other necessary work to the carrying on of its mining operations.

The lower court, after a full hearing, adjudged:

"That the temporary restraining order herein, which issued on the 13th day of November, 1915, be and the same is hereby made perpetual, and the defendants, D. Y. Combs and Mary Combs, all persons working by, through, or under them or for them, or under their authority, are here and now enjoined and restrained from cutting down, sawing up, or removing any timber trees from the said land set out and described in this petition and the temporary injunction herein, or from cutting up or sawing up, or in any way interfering with, said timber or trees, or timber that is now cut down on said land in the tree and which has been sawed into logs or other cuts. Defendants, D. Y. Combs and Mary Combs, are also enjoined and restrained from removing any of the lumber that has been cut or sawed at the mill since September, 1915. They are further enjoined and restrained from operating in any way the sawmill now on the premises or from setting up any other sawmill.

"Defendants and each of them are also enjoined and restrained from in any way molesting, interfering with, and hindering the plaintiff, or any of its agents or employes, from building houses on said land set out and described in the petition in this case, and also set out and described in the temporary injunction granted herein, or from in any way interfering with the plaintiffs or any of its tenants in occupying said houses, and from molesting in any way the plaintiff in the exercise of its rights of mining and the transporting coal from said premises hereinbefore referred to, or from building its houses, tramways, tipples, chutes, inclines, or from molesting or hindering in any way other work necessary or deemed by it necessary in the carrying on of its mining operations."

On the counterclaim of the defendants the court granted the following order of injunction, to wit:

"It is therefore ordered and adjudged by the court that the defendants, D. Y. Combs and Mary Combs, are now granted an injunction against the plaintiff, Blue Grass Coal Corporation, its agents, officers, and employes, and it, its said officers, agents and employes are now enjoined and restrained from cutting and removing any timber off the lands of the defendants described in the lease of date the 11th day of January, 1913, from D. Y. Combs and Mary Combs to W. M. Jones, W. R. Marsee, and C. R. Luttrell, for the purpose of using in any way in its mining operations in any way on the lands of J. B. Eversole, Clara E. Cornett, and Manon Cornett and W. M. Wells, and from using the same upon the lands of said parties,

and from using said timber in any way other than the lands of D. Y. Combs and Mary Combs."

Four questions are presented for adjudication:

First. Is the present lessee bound by the provisions of the amendatory contract of March, 1914, and, if so, what is the effect of that amendment?

Second. Is it bound by the terms of the timber contract of June, 1913, referred to in the amendatory contract of March, 1914, and under which Combs was operating on the premises when it took its assignment of the lease from the Hazard-Dean Coal Company in April, 1915?

Third. What are the rights of the parties with reference to the use of the surface of the lands?

Fourth. Has the lessee the right to take timber from the Combs' lands to be used in mining operations on other lands, and has it the right to build houses on the Combs' lands to be occupied by its employes who are engaged in mining operations on other lands?

[1] At the time the amendatory contract of March, 1914, was entered into the Hazard-Dean Coal Company was operating on the lands, and Marsee, one of the original lessees, was the president of that company. Under the terms of the original contract Combs had the right to remove within five years, for his own building and construction work, all the timber from the lands that girthed 60 inches or more 3 feet from the ground, provided only that if within that time the royalties on the coal mined therefrom did not amount to \$400 or more in any one month. At that time the royalties had not amounted to that much, and it was within the five-year period, so that he was within his rights in removing all such timber from the lands as he might need for his own building and construction work. Under these conditions Combs was proceeding to remove the large timber, and Marsee, realizing that this timber in after years would be needed in the mining operations on the property, and thinking that, when needed, it could probably be procured, by reason of its situation, more conveniently and cheaper, although it belonged to Combs, than it might be elsewhere procured, proposed to Combs to abrogate the \$400 clause in the original lease if he would then cease to cut the large timber and let it remain upon the property so that it would thereafter, when needed, be available for mining purposes. Under these conditions they entered into the contract of March 7, 1914, by which the \$400 clause in the original lease was abrogated, Combs agreeing to cease cutting timber at that time from the property, the company agreeing that he might do so, however, during the period of said lease as he may need same for his own use in building.

It is the contention of the plaintiff herein that it is not bound by the terms of this

amendatory contract of lease, and that, as the royalties have amounted to more than \$400 to the defendants in several months, it is, under the terms of the original lease, the absolute owner of all the timber on the lands.

The evidence of the president of the Blue Grass Coal Corporation, who is the same man who organized it, and of the general manager thereof, is that they had no knowledge or notice of the amendatory contract until after the assignment by the Hazard-Dean Coal Company to the plaintiff company.

On the other hand, the evidence shows that this amendatory contract was among the papers of the Hazard-Dean Coal Company, which was turned over to the Blue Grass Coal Corporation; that it was filed in this action by the plaintiff; that Marsee, one of the original lessees, and the president of the Hazard-Dean Coal Company, who executed this amendatory contract upon behalf of that company, is now a large stockholder in the plaintiff company, and had in the negotiations between the Hazard-Dean Coal Company and the plaintiff company before the assignment an understanding with Jennings, who was promoting the Blue Grass Coal Corporation, that Marsee should have as much stock in the new corporation as he desired up to a certain point; that Luttrell, who was one of the original lessees and the general manager of the Hazard-Dean Coal Company, had actual knowledge of this amendatory contract, and continued to be manager of the Blue Grass Coal Corporation for some time after it took possession of the leased premises. In addition to this, Combs testifies that he told Jennings before he bought out the Hazard-Dean Coal Company that the timber contract under the original lease had been changed, and the uncontradicted evidence of Combs and another witness is to the effect that shortly after the Blue Grass Coal Corporation took possession of the property Jennings recognized that all the timber girthing over 60 inches 3 feet from the ground was the property of Combs. Again it is undenied that, when Jennings went to examine the property before the transfer, and at the time of the transfer, Combs had his sawmill located on the lands and in operation, and that a large quantity of lumber was piled up thereon, and Marsee testifies that he told Jennings that the mill and lumber was the property of Combs. The weight of the evidence, when it is all considered, seems to show, not only that Jennings had notice of the amendatory contract, but that the facts were such as to put him upon inquiry.

[2] Not only so, but Luttrell was the general manager of the Hazard-Dean Coal Company, and had actual knowledge of the amendatory contract and its provisions, and continued to be the manager of the Blue Grass Coal Corporation for some time after

it took charge of the property, and under these circumstances his knowledge must be imputed to the latter company.

[3] The lease as amended therefore means that the large timber is the property of the defendants, with the restriction, however, that it is "to be used by them for their own building and construction work as they see fit, but for no other purpose." This restriction, as above indicated, was doubtless placed in the lease by the lessees, so that the mining operation might have convenient timber within its reach that it could purchase when needed, and with that end in view restricted the right of general sale.

[4] The timber contract of June, 1913, and the amendatory lease of March, 1914, are so intimately connected and intertwined with each other by reason of the reference in the latter to the provisions of the former that they are, in effect, one contract, and the plaintiff company, having knowledge of the latter contract and its provisions, must be deemed to have known of the former contract and its provisions; and especially is this true in the light of the uncontradicted evidence that it, after assuming control of the mining operations, ordered timber from Combs and paid him therefor under the terms of that contract, and in this situation it must be held to have assumed the obligations of the Hazard-Dean Coal Company under that contract.

Clearly it was in the minds of the parties to this lease that the mining thereon should be deemed or considered the chief or major operation, and that any other business conducted thereon should be subservient to it. The lessee is given the exclusive mining privilege, and the privilege of building chutes, tipples, and inclines, railways and tramways, to install any kind of machinery, and the right to use in its mining operations all timber of less than 60 inches in girth, and it is given the right to quietly and peaceably enjoy the leased premises without hindrance for these purposes.

[5] But the tract of land consists of about 370 acres, and, notwithstanding the broad powers granted the lessee, it is apparent the parties contemplated at the time the lease was drawn and executed that the lessees would not require in their mining operations the use of the whole surface; for in that lease the lessors, after enumerating at length the various privileges granted to the lessees, expressly reserved to themselves "the right to use of said land for any purpose which is not inconsistent or harmful to the rights and privileges and usages of the land hereby demised and let."

The evidence is that the land is very rough, there being very little level ground on it; that there are now about 44 or 45 houses on it occupied by the tenants of the company, besides some 6 or 7 houses which were on the property when it was originally leased,

and which are occupied by the tenants of the defendants engaged either in the timber operations thereon or the farming operations. It appears that there is about 100 acres of inclosed land on the premises, most of which is being, and has been for several years past, cultivated by the defendants in one way or another. The company is building, and is desirous of continuing to build, a number of new houses for its miners, with a view of extending the operations and increasing its output, and the chief controversy on this branch of the case grows out of its contention that it has a right, under the terms of the lease, to build its houses anywhere it may see proper on the premises, even though it interfere thereby with the sawmill and lumber yard and the inclosed farming lands.

On the other hand, the defendants say that it is not necessary for an efficient conduct of the mining operations that the plaintiff should build its houses either on the farming lands or upon the site of the sawmill or lumber yard; that there are plenty of available and suitable locations for houses without doing so.

The evidence shows that the plaintiff now has on its payroll about 140 men, and that the output is approximately 8,000 tons per month from the whole operation, including the adjoining lands. The company intends to extend its operation and at least double its output, and with that end in view it is already building miners' houses on the property. As already indicated, the company's right to the use of the surface, in so far as it is reasonably necessary to efficiently carry on its mining operations, is paramount to that of the defendants; but this does not mean that the company has the arbitrary right, when the necessity therefor does not appear, of occupying the farming lands or the inclosed fields. The rights of the parties to the use of the surface are reciprocal under the terms of the lease; that is to say the company, so far as its necessities in the mining operations go, is first entitled to the use of the surface, but in exercising this right it must encroach no further upon the rights reserved by the lessors than its necessities require. Its rights are confined to its necessities for the mining operation, rather than its mere desires or convenience. By this we mean to say that, as long as there is building space reasonably suitable for this purpose outside of the enclosed lands and field, it must first occupy such space before demanding the right to build on the farming lands. Any other interpretation of this contract would nullify entirely the express reservation in the lease of the right to the use of so much of the surface as is not inconsistent with or harmful to the mining operations. The fact that the company may build houses at one point upon the land cheaper than they may build at another place, or that the houses located at one place may be more convenient

than if located at another, does not authorize it, under the terms of the contract, to ignore the rights and privileges reserved by the lessors.

After an examination of all the evidence we have concluded that, even though the mining plant be extended to such an extent as to more than double the present output, it will be unnecessary, in such extension, to occupy any part of the farm lands. After an extended search we have been unable to find any case involving a mining lease embracing terms substantially similar to the ones here involved, and for that reason have not referred to any authority; but there will be found in 48 L. R. A. (N. S.) 883, a note to the case of Stonegap Colliery Company v. Kelly, wherein there is a general review of the authorities bearing on the rights of the parties in mining leases to the use of the surface. That note shows the general rule to be that the mine operator who does not own the surface has the implied and incidental right to such use of the surface as is reasonably necessary to the profitable and beneficial working of the minerals.

[6] The evidence is that the defendants' sawmill is located on the same creek from which the plaintiff gets a part of its water supply for use in its boilers, and that the water of this creek, because of the operation of the sawmill, at times is polluted with sawdust, and, when so polluted, is unfit for use in the boilers, and thereby interferes with the mining operations. As above indicated, the defendants have no right to make any such use of the surface of any of this property as will interfere with the efficient conduct of the mining operations, and clearly such pollution of the water required by the company is an interference with the efficient operation of the plant and hampers the company in the conduct of its affairs. In the light of this evidence the defendants should be required to remove their sawmill from its present location and place it at some point on said land, if they desire to keep it there, where its operation will not thus hinder the conduct of the company's business.

[7] In the amendatory contract it was provided that "second party (company) may have free access to all of said remaining standing timber on said land for the use and benefit of said lease to be used on said leased premises and no other," and in the original lease it was provided that "the lessees are granted and given the right to use for mining purposes or building purposes in any manner by them all the timber that will girth less than sixty inches." Under these provisions it seems fairly plain that it was not in the minds of the parties at the time either of the instruments were executed that the timber on the Combs' tract of land should be used and consumed by the lessees in mining operations on any other land, and the

action of the lower court in enjoining such use of it was therefore proper.

[8] The action of the lower court was likewise proper in declining to grant to the defendants an injunction against the plaintiff prohibiting it from building houses on the Combs' land to be occupied by its employees engaged in mining on other lands. The original lease provided:

"The lessors further covenant and agree with the lessees that as a part of this lease and any renewal thereof the lessees are hereby given the right and privilege of using the said premises herein described and any opening, shafts, tipples, inclines, switches, or any other appliance as may be thereon for the purpose of mining and removing any other coal they may desire to remove on lands adjacent to this land that lessees may hereafter acquire."

This provision of the lease contemplates the use of the premises as well as any appliance that may be thereon in getting out coal on adjacent lands and the building and occupying of miners' houses for such purpose.

[9] The evidence shows that in getting the timber from a certain remote part of the land it will be necessary for the company to go through some of the inclosed and cleared lands, but that at present there is sufficient timber near the coal operation for its purposes, and resort to the more remote timber will not be necessary for some time; but, whenever the company does need such remote timber, it will be entitled to a reasonable and convenient right of way or road over the cleared and inclosed lands in order to haul the said timber.

We have concluded, therefore, that the defendants are at present entitled to the possession of all the inclosed farming lands and the right to the use of same, and that it is not as yet necessary to be used in the mining operations; that the defendants should be required to remove their sawmill and lumber yard to some point on the premises, if there be such a place, where they will not interfere with or hinder the operation of the mining plant by pollution of the water needed for that purpose; that all the timber girthing 60 inches or more is the property of the defendants under the amendatory contract, but that they have no right to cut or use the same except for their own building and construction work; that the company may use the space now occupied by the sawmill and lumber yard for building purposes; that the defendants may occupy by themselves or their tenants any of the houses which were on the property at the time of the original lease; that the company may build upon the Combs' land at the places herein indicated houses to be occupied by their employees engaged in getting out coal on other lands; that the company has no right to use timber taken from the Combs' lands in its mining operations on other lands; that the defendants may operate their sawmill on the lands in question at some point thereon where it will not interfere or hinder the efficiency of

the mining operation, but only for the purpose herein indicated. Any timber already sawed into lumber from logs belonging to the defendants they may use in their own building and construction work or may sell it to the company, but may not dispose of the same in any other way. Any lumber already sawed from timber belonging to the company will be turned over to the company, and the sawing thereof paid for by the company under the terms of the contract herein referred to.

The injunction against the defendants is modified as herein indicated, and, according to the terms of an order this day transmitted to the clerk of the Perry circuit court, the motion to dissolve the injunction against the plaintiff is overruled.

The argument on these motions was heard by Chief Justice MILLER, and Judges CARROLL, THOMAS, and CLARKE, and this opinion is concurred in by them.

LOUISVILLE & N. R. CO. v. JOHNSON.

(Court of Appeals of Kentucky. Feb. 8, 1916.)

1. CARRIERS — 306 — CARRIAGE OF PASSENGERS — LEASE OF RAILROADS.

Where a railroad company leased its line to another carrier, which agreed to operate trains thereon, the original carrier, as to passengers who used the line, was liable for the negligence of its lessee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249-1251; Dec. Dig. — 306.]

2. JUDGMENT — 199 — JUDGMENT NON OBSTANTE VEREDICTO.

Where defendant moved for a peremptory instruction on the ground that plaintiff had not traversed a defense pleaded, it is not, verdict having gone for plaintiff, entitled to judgment notwithstanding the verdict, but is only entitled to a new trial by which the court may review its first error in denying a peremptory instruction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. — 199.]

3. CARRIERS — 280 — CARRIAGE OF PASSENGERS — DEGREE OF CARE.

A carrier owes its passengers the highest degree of care, and this duty exists until the relationship ceases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1106, 1109, 1117; Dec. Dig. — 280.]

4. CARRIERS — 247 — CARRIAGE OF PASSENGERS — CARE.

The relationship of carrier and passenger does not cease until the passenger has alighted from the train and left the premises by the means provided.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. — 247.]

5. CARRIERS — 303 — CARRIAGE OF PASSENGERS — DUTY OF CARE.

Where a passenger is able to move about in an ordinary manner, though suffering from infirmities, the carrier is not bound to specially notify him that stop has been made at his station, when he presents himself to alight, to aid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1218, 1224, 1226-1232, 1234-1235; Dec. Dig. — 303.]

6. CARRIERS — 346 — CARRIAGE OF PASSENGERS — ACTIONS — EVIDENCE — SUFFICIENCY.

In an action for injuries received by a passenger in alighting, evidence held to show that he did not attempt to alight until after the train had started from his station, and that he was injured when alighting over the protest of the brakeman, who had signaled for the train to stop.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. — 346.]

Appeal from Circuit Court, Franklin County. Action by J. A. Johnson against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Shelby, Northcutt & Shelby, of Lexington, and T. L. Edelen, of Frankfort, for appellant. O'Rear & Williams, of Frankfort, for appellee.

THOMAS, J. On November 8, 1913, the appellee, J. A. Johnson (whom we shall hereafter designate as plaintiff), at about 4:15 p. m., boarded a train at Winchester, Ky., to go to Frankfort, Ky., which train was that of the Chesapeake & Ohio Railway Company. In due time the train arrived at Frankfort, but, according to the testimony, something like five minutes later than its schedule time, and, while attempting to alight from the train at the latter place, the plaintiff fell, and in some manner one of his legs got caught under the train and was run over by the front trucks of one of the coaches and had to be amputated. There was an injury to the knee of the other leg which appears to have rendered it almost, if not, stiff, and there was a slight wound about the head which seems not to have been very serious, but more or less painful and annoying at the time. He was carried to a hospital in Frankfort, and, after remaining there for quite a while, he recovered sufficiently to be able to, with the assistance of an artificial limb, travel about to some extent. He filed this suit in the Franklin circuit court on December 13, 1913, against the appellant, Louisville & Nashville Railroad Company (whom we shall hereafter refer to as defendant), seeking to recover against it as damages for his injury the sum of \$25,500. Upon the first trial of the case there was a verdict and judgment against the defendant for the sum of \$15,000, but the trial court granted to the defendant a new trial and set aside that verdict, and upon a second trial there was a verdict and judgment in favor of plaintiff for the sum of \$6,000, and, defendant's motion for a new trial having been overruled, it prosecutes this appeal.

Before considering the merits of the case, there are two preliminary questions urged upon us by defendant which we deem necessary to dispose of. They are:

[1] (1) That the defendant was not operating the train upon which the plaintiff took passage, but that same was being operated

by the Chesapeake & Ohio Railway Company over a track of railroad from Lexington to Louisville owned by the defendant, but which had been long previously leased to the Chesapeake & Ohio Railway Company for the purpose of operating it between said points trains exclusively owned by it, and that the injury to plaintiff, if produced by any negligence at all, was that of the latter company as lessee of defendant, and for which the defendant is not at all liable.

(2) At the close of the plaintiff's testimony at the first trial the defendant moved the court to peremptorily instruct the jury to return a verdict in its behalf, which was overruled and exceptions taken, and the same motion was renewed at the close of all of the testimony which was heard upon that trial, with the same result, and after the returning of the verdict, and before a rendition of the judgment thereon, the defendant entered a motion for a judgment notwithstanding the verdict; this being based upon the fact that its answer contained, in addition to a general denial, a plea of contributory negligence on behalf of plaintiff, and which plea of contributory negligence was not denied either by pleading or being controverted of record.

Considering these questions in the order named, it appears that the Chesapeake & Ohio Railway Company owns a line of railroad from Lexington, Ky., eastward, and that the defendant owns a line of railroad from Lexington through Frankfort and running into the city of Louisville, and that this condition existed on the 23d day of March, 1895. On that day, in consideration of certain agreements and counter agreements, there was a written lease entered into between defendant and the Chesapeake & Ohio Railway Company by which, for the considerations stated, the latter company was given the privilege to operate its trains between Lexington and Louisville running through intermediate stations, including Frankfort, over the tracks of the defendant, and it is claimed in this case that, notwithstanding this lease, inasmuch as the injuries complained of were inflicted by the Chesapeake & Ohio Railway Company, this defendant is not liable.

It would serve no useful purpose to set out in this opinion any of the stipulations or conditions of that lease contract, because on a previous occasion it was before this court wherein a similar question was presented, and the contention now made by defendant was then denied by this court. *L. & N. R. R. Co. v. Breeden's Adm'r*, 111 Ky. 729, 64 S. W. 667, 23 Ky. Law Rep. 1021, 1763. It was therein determined that, although it might appear that both the lessor and lessee of a railroad track had authority to enter into such a contract, still the lessor company could not relieve itself by such a lease of the duties which it owed to the public to maintain and operate its railroad in such a way as the law demands of it, which is in a

reasonable, prudent, and careful manner, and without negligence resulting in the injury or hurt of any member of the public, and, if any member of the public shall through the negligence of the lessee sustain injuries from which damages result, the lessor would be liable for such damages to the injured party as much so as if the same had been the result of acts of it or any of its agents or servants. See, also, *McCabe's Adm'r v. Maysville & B. S. R. Co.*, etc., 112 Ky. 861, 66 S. W. 1054, 23 Ky. Law Rep. 2328; *Smice's Adm'r v. Maysville & B. S. R. Co.*, etc., 116 Ky. 253, 75 S. W. 278, 25 Ky. Law Rep. 436; *I. C. Ry. Co. v. Sheegog's Adm'r*, 126 Ky. 252, 103 S. W. 323, 31 Ky. Law Rep. 691.

It was furthermore determined in the *Breeden Case*, supra, that:

"The contract above quoted [which is the same herein involved] is nothing more than a traffic arrangement. The two companies jointly maintained the roadbed."

It is insisted, however, that inasmuch as the injured parties in the cases referred to were not at the time passengers upon the lessee's train, this rule should not apply herein, because the relationship of the plaintiff as passenger to the lessee was contractual, and is to be governed by the same rule applicable as between the employees of the lessee and it, and the effort is made to bring a passenger of the lessee in the same category with an employee of the lessee. This is wholly untenable. The very foundation of the rule which relieves the lessor of liability for injuries to the employees of the lessee is that such employees established their relationship to the lessee by a voluntary act on their part. Not so with the passenger. While in one sense he voluntarily becomes a passenger on that particular train, yet in a still further sense he is compelled to take that particular train if he wants to go to a point on that road at that particular time, and, because he assumes voluntarily the position of passenger towards the lessee carrier, he does not thereby and for the time being cease to be a member of the public to whom the lessor owes certain specified duties in carrying out the purposes of its charter. The contention of the defendant upon this point is unsound and cannot be upheld.

[2] Second. It is urged that the motion for a judgment non obstante veredicto at the close of the first trial should have prevailed, and that the trial court erred in granting a new trial, thereby giving an opportunity for the plaintiff to reply to the plea of contributory negligence, and we are asked to reverse the judgment and direct the lower court to enter a judgment for the defendant. This we cannot do. *C. & O. Ry. v. Thielemann*, 96 Ky. 509, 29 S. W. 357, 16 Ky. Law Rep. 611; *Blue Wing v. Buckner*, 12 B. Mon. 248; *L. & N. R. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179, 16 Ky. Law Rep. 14; *Mast v. Lehman*, 100 Ky. 466, 38 S. W. 1056, 18 Ky. Law Rep. 949; *L. & N. R. R. Co. v. Schweitzer's*

Adm'r, 14 Ky. Law Rep. 856; Schulte v. L. & N. Ry. Co., 128 Ky. 631, 108 S. W. 941, 31 Ky. Law Rep. 31; Louisville Ry. Co. v. Hibbitt, 139 Ky. 44, 129 S. W. 319, 139 Am. St. Rep. 464; L. & N. R. Ry. Co. v. Tuggles, 151 Ky. 412, 152 S. W. 270; Conn. Fire Ins. Co. v. Moore, 154 Ky. 20, 156 S. W. 867, Ann. Cas. 1914B, 1106.

The direct question of practice under consideration was presented to this court in the case of *Mast v. Lehman*, supra, and decided contrary to the present contention of the defendant; and this case is referred to with approval in this court's opinion in the case of *Conn. Fire Ins. Co. v. Moore*, supra, in which latter case this court upon the question said:

"It is the rule that, where a party asks for a peremptory instruction which should have been given, he is not thereafter entitled to a judgment notwithstanding the verdict, but only to a new trial for the error of the court in refusing the peremptory"—citing both the *Lehman* and *Hibbitt* Cases.

In the case of *Louisville Ry. Co. v. Hibbitt*, supra, almost the precise question of practice herein involved was before this court, and, denying the present contention, this court, quoting with approval from the *Lehman* Case, said:

"The motion for a peremptory instruction should have been sustained, and certainly the company ought not to suffer because of the error of the court committed over its objection and after it had done everything it could do to save its rights. This precise question was before us in *Mast v. Lehman*, supra, in which the petition was so fatally defective as not to entitle the plaintiff to a verdict. The court said: 'At the conclusion of the trial the defendant moved the court to peremptorily instruct the jury to find for the defendant. This motion of defendant should have been sustained by the court, and would have been sustained if the court had been aware of the true condition of the pleadings. It is true the plaintiffs objected to the instruction; but, in our opinion, such objection did not relieve the court of its obligation to properly instruct the jury as to the law of the case based upon the pleadings and the proof. If the court had sustained this motion, as it was clearly his duty to do, it would necessarily have brought to the attention of the plaintiffs the defense which had been so carefully concealed from the very beginning of the case. And before the submission of the case to the jury he would have had an opportunity to have offered an amendment curing the defects in his petition, which, in furtherance of justice, it would have been the duty of the court to have allowed to be filed.'"

See, also, the very recent case of *Lancaster Electric Light Co. v. Taylor*, 168 Ky. 179, 181 S. W. 967.

To hold in accordance with this rule does not say that the asking for a peremptory instruction is a waiver of the right to move for a judgment notwithstanding the verdict. The one is universally recognized as challenging the sufficiency of the evidence, while the other is a challenge directed to the sufficiency of the pleading; but, when a motion for a peremptory has been made, whether for an insufficiency of pleading or evidence, and which should have been given, but was

not, a subsequent motion for a non obstante judgment, if sustained, would place the right to a hearing by the adverse party beyond repair, and the court in furtherance of the general principle that it is preferable that cases should be disposed of on their merits, rather than upon technicalities, should in such cases as we are here dealing with reconsider his rule in denying the motion for a peremptory instruction and grant a new trial, rather than sustain the motion for a judgment notwithstanding the verdict. If the motion for a peremptory instruction had not been made in such cases, there would be no error which the trial court could correct by the granting of a new trial, and he would then be compelled to sustain the motion for a judgment notwithstanding the verdict. We are, however, confronted with no such conditions in this instant case. We therefore hold that there was no error in refusing the motion for a verdict made by the defendant under the facts presented. This brings us to a consideration of the merits of the case.

It appears that a year or more previous to this accident the plaintiff, on account of being exposed to the cold weather, had sustained injuries by frost bite whereby he lost some of his fingers to both hands and some of the toes to both of his feet, but he does not seem to have been otherwise seriously injured, and it is insisted that upon boarding the train upon the occasion involved at Winchester he explained to an agent and servant of the Chesapeake & Ohio Railway Company his crippled condition, and requested special aid in alighting from the train upon the arrival at his destination, which he says was promised to him, and which he claimed was not rendered. It is not clear, however, that the petition claims this failure to be a causal act resulting in the injury to plaintiff, but for the purpose of this case we will treat the allegations as being broad enough to cover this point. It is also claimed that the railroad company suffered other passengers to crowd upon the train when it arrived at Frankfort, and thereby prevented plaintiff from alighting, and that through its negligence and carelessness the train at the time plaintiff was about to alight was caused to make an unusual or unnecessary jerk, whereby he was thrown to the platform and injured; the entire part of the petition setting up the facts constituting plaintiff's grounds for recovery being as follows:

"Plaintiff says that of their gross negligence and carelessness the defendant, its agents, servants, and employees in charge of said train, failed and refused to give him the increased care or attention made necessary by his condition, or any care or attention, but, upon the contrary, when the train arrived at Frankfort, of their gross carelessness and negligence suffered new passengers to crowd upon the train and into the doorways and aisles of the coach before plaintiff could alight, and whilst plaintiff was on the platform of one of defendant's coaches preparatory to alighting, and whilst using due care for his own safety considering his condition, the

said defendant's said agents and employes, by their gross negligence and carelessness, caused an unusual and unnecessary jerk of the train, whereby the plaintiff was suddenly thrown from the platform and steps of said train under its wheels."

It will be observed that the failure of those in charge of the train to render to him the increased aid which he insists that his crippled condition demanded is not clearly charged as the producing cause of his injury.

The proof shows that, notwithstanding the crippled condition of the plaintiff, he was perfectly able to walk about and go wheresoever he pleased. He resided with his daughter about four miles from Winchester, and in going to town frequently walked part of the way, and sometimes all the way, and on the day that he made this trip he started from his home with a grip, or suit case, and, after walking perhaps one-half of the way, he rode into town in a vehicle with a traveler on the turnpike. He deposited his grip in a saloon where he drank a milk punch, and, after leaving the saloon and visiting some places in town, he returned and drank another milk punch, and later on, after engaging in other travel about the city, and about 11 o'clock, he returned to the saloon and drank a third milk punch. At this time he purchased two pints of whisky and put them in his grip, or suit case. He then went to the home of one Mr. Dougherty, where he had his dinner, and about 3:30 o'clock he left this place and went to the saloon, and took out one of the pints of whisky and put it in his pocket, and then went to the depot and purchased his ticket, and subsequently boarded the train. He took his seat on the left-hand side of the rear end of the smoking car; the next car following being the day coach, or ladies' car. He put his grip on the seat immediately in front of the one he was occupying, and there was sitting beside him a young man whose name does not seem to be known to any one testifying in the case, and who was not introduced as a witness. Other passengers, however, and indeed it is admitted by plaintiff, say that en route plaintiff offered to this fellow passenger a drink, and at the same time took one himself. Plaintiff claims that his companion passenger accepted the drink, while other passengers did not see this, but testified that the plaintiff's offer was refused. However this may be, within a comparatively short while a controversy arose between the plaintiff and this passenger, and the former became so loud and boisterous in his talk that it attracted the attention of other passengers in the car; the language used by him, as testified to by the witnesses, being by no means the most elegant. As a consequence of this he changed his place in the car, and by the time he got to Frankfort he was unable to locate his grip, or suit case, and according to the proof made no effort either to find it or to alight from the train until after all of the passengers had gotten off and all those desiring to take passage had

gotten on, and many, if not all of them, had secured seats in the respective coaches. About this time some one suggested to him that the train had arrived at Frankfort, whereupon he began a search for his grip, and after finding it, and after he got within three or four feet of the smoking car going out, the train made the usual start without any jerk unusual or otherwise, and by the time plaintiff got out upon the platform the train was cleverly started, and he, over the protests of the brakeman and that of a Mr. Wilson, who is a citizen of Frankfort, and whose testimony is both intelligent and convincing, undertook to jump off the car, which was then moving at a speed of from two to three miles per hour, and in so doing fell, and thereby sustained the injuries for which he sues.

There is no dispute but that at the usual place the station of Frankfort was announced in the usual way, and no testimony showing that the train did not stop upon this occasion the usual time, which was about three minutes. There is absolutely no proof that any unusual number of passengers crowded on to the car, and there was such an utter failure to produce evidence of any jerking start of the train that the plaintiff himself abandons this theory by failing to offer any instruction upon it.

[3, 4] The court, in submitting the case to the jury by its instruction (No. 1), did so solely upon the theory that the plaintiff was physically impaired by reason of being crippled, and that, if the defendant and its agents and servants knew this, it was their duty to render to him aid in alighting from the train beyond that ordinarily accorded other passengers, and that, if the jury believed that the agents and servants negligently failed to do this, and by reason thereof the plaintiff was injured, it would be the duty of the jury to return a verdict for the plaintiff. Other parts of the instruction set forth in apt terms the rule as to the measure of damages. There is no doubt in this state as to the rule fixing the degree of care which a carrier owes to its passengers. This is the highest degree of care, and this duty exists until the relationship of passenger and carrier ceases, and it has been time and again decided that such relationship did not cease until after the passenger had alighted from the train and had gotten off of the railroad premises by the means provided by the carrier for a departure from the station. *C., N. O. & T. P. Ry. Co. v. Vivion*, 41 S. W. 580, 19 Ky. Law Rep. 687.

[5] It is an equally well established rule that a physically disabled passenger shall receive such care as is commensurate with his infirmities, if such infirmities disable him from properly caring for his own safety, provided the carrier has knowledge of such infirmities. But we are unable to find any authority, either in this state or elsewhere, nor

have we been cited to one, where, when a passenger was able to walk and move around, as the plaintiff undoubtedly was in this case according to the testimony, the carrier should give him the extra care of going into the coach and specially calling his attention to the arrival of the train, and to assist him to the steps in order for him to alight, and to see that he presented himself for the purpose of making his exit before the arrival of the time for the train to depart, after it stopped a sufficient length of time to have enabled him to have done this of his own accord with safety. If, as contended in this case, the physical condition of plaintiff rendered it unsafe for him to attempt to alight from the train unassisted, and such was known by the agents and servants in charge of the train, it would have been their duty to have rendered such assistance as his physical necessities required after he had presented himself to the platform and steps for the purpose of alighting. But we have no such case here. The plaintiff neglected to present himself within the time which the law allowed him to do so, and no such assistance could be rendered him, and the only dereliction, if any, that the testimony shows on the part of the carrier, is that its agents and servants failed to go into the coach and find plaintiff's baggage and lead him to the steps and assist him off the train. This they were not required to do. To hold that a passenger in the physical condition of the plaintiff is due from the carrier such duties, would be violating all adjudicated rules upon the subject, both in this state and other jurisdictions, so far as we have been able to discover. As stated, numbers of passengers, including those already on the train, as well as those who boarded the train at Frankfort, testify as to the length of time which the train stopped, and that the train was going from two to three miles per hour when the plaintiff attempted to alight; that some of the passengers hollowed out, "Don't let that old man jump off the train!" and the witness Wilson admonished him not to do so, as did the brakeman, and the latter, in order to prevent the plaintiff from being injured, pulled the whistle cord to signal the engineer to stop, which was done within a moment's time, but in the meantime plaintiff had, by his own act, sustained the injuries in the manner hereinbefore stated. The brakeman urged him to wait till the train could be stopped.

[6] We think the evidence clearly shows that this unfortunate accident was the result of the acts of the plaintiff in not making an effort to alight from the train while it was standing, which, as we have seen, was of sufficient length to have amply enabled him to do so, and to have presented himself at the steps so that he could have been rendered what assistance, if any, he needed. If he had been injured while attempting to alight while

the train was standing without any extra aid, he might have been entitled to recover under the facts disclosed by the record, but no such conditions are shown to have existed in this case. His failure to make any efforts in this regard and his attempting to alight after the expiration of the stopping time of the train and while it was moving were beyond question the causes of the accident and of his resulting injuries, and were in no wise produced by any acts of commission or omission on the part of the carrier.

It results, therefore, that the peremptory instruction to find for the defendant should have been given, and, if the facts are substantially the same upon another trial, the motion should prevail.

Judgment reversed, with directions to proceed in accordance with this opinion.

CUMBERLAND R. CO. v. GIBSON-CARR COAL CO.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

RAILROADS—§138—SIDE TRACKS—CONSTRUCTION—CONTRACTS.

Plaintiff coal company, desiring a spur track to its mine, entered into a verbal contract with a railroad company whereby it was to build the track, reimbursement to be made by a rebate of \$2 per car on coal shipped from the mine. This contract was confirmed by letter of the railroad company. Thereafter the coal company sold its property, reserving the right to collect the freight rebates from the railroad company. *Held*, that plaintiff was entitled to collect the rebates; the oral contract which was confirmed by letter establishing the rights of the parties, though the railroad company, over objections of the grantee, and by threats of improper service, compelled it to enter into a different contract for payment of the rebates.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 436-439; Dec. Dig. § 138.]

Appeal from Circuit Court, Knox County.

Action by the Gibson-Carr Coal Company against the Cumberland Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Black, Black & Owens, of Barbourville, for appellant. J. M. Robison, of Barbourville, for appellee.

CARROLL, J. The Gibson-Carr Coal Company owned a body of coal land a few miles distant from the line of railroad owned and operated by the Cumberland Railroad Company, and in 1907 or 1908 the coal company entered into a verbal contract with the railroad company by which it was to build a railroad from its coal fields to connect with the line of road of the Cumberland Company. As a part of the contract the railroad company agreed that it would pay to the coal company the cost of the rails and fastenings used in the construction of the road, and would pay this item of the cost by allowing the coal company \$2 on each carload of coal

shipped from its mine over the road after the mining road had been put in operation.

About 1911 the road was finished by the coal company, and on October 20, 1911, it wrote to B. C. Millner, general manager for the railroad company, a letter, asking him to mail it a contract showing that the coal company was to purchase the rails and fastenings for the spur track and to be reimbursed for the cost of the same at the rate of \$2 on each carload of coal shipped from its mine; the refund to begin as soon as shipments of coal commenced. It further advised him that it was about to make a sale of its mine property.

On October 26, 1911, Millner, acting for the railroad company, in answer to this letter said:

"It is understood that you are to do the grading, furnish ties, rails, and fastenings, and lay the track all at your own expense. As soon as shipments begin we will refund to you the cost of rails and fastenings at the rate of two dollars per loaded car."

On July 9, 1912, the coal company sent to the railroad company an account showing the cost of the rails and fastenings, which amounted to \$1,773.06. On July 24, 1912, the railroad company answered this letter, acknowledging the receipt of the bill of cost of the rails and fastenings, and asking the coal company to let it know if it should make the contract for the operation of the road, involving, of course, the payment of this bill, in the name of the Dean-Jellico Coal Company, or in the name of the Gibson-Carr Coal Company. The reason why the railroad company inquired whether the contract should be made with the Dean-Jellico Coal Company or the Gibson-Carr Coal Company was that about this time the Gibson-Carr Coal Company had sold its mining property to the Dean-Jellico Coal Company.

On July 25, 1912, in answer to the letter of the railroad company, the Gibson-Carr Coal Company wrote:

"Relative to contract for rails and fastenings used in tracks, we beg to advise that we desire the contract made in favor of the Gibson-Carr Coal Company, as we paid for the material, and it was the agreement with the Dean-Jellico Coal Company that we were to have the rebate on the rails, etc. So please make this contract in favor of the Gibson-Carr Coal Company."

In answer to this letter the railroad company on July 26, 1912, wrote:

"We have already drawn these contracts in favor of the Dean-Jellico Coal Company, and would prefer to have them go that way if it is satisfactory to you. Let us hear from you about this."

In answer to this the coal company on July 30, 1912, wrote the railroad company:

"It is not satisfactory to us to have you make the contract in favor of the Dean-Jellico Coal Company, as we put up the money to pay for the steel, and want the money to come direct to us. We would be glad to have you make the contract in our favor, so that we will have some assurance of getting our money back on this material. Trusting you will change the contract and make it in our favor, we are. * * *

But, notwithstanding these directions, the railroad company in December, 1912, entered into a contract with the Dean-Jellico Coal Company, which was then the owner of the mining property, for the operation of the road and mine, and in this contract it agreed to refund to the Dean-Jellico Coal Company the cost of the rails and fastenings, the refund to be based on the tonnage of coal shipped over the road, and not to begin until two years after the contract was entered into.

It is further clearly shown that in the contract made between the Gibson-Carr Coal Company and the Dean-Jellico Coal Company the former reserved the right to collect from the railroad company the cost of the rails and fastenings according to the contract it had made with the railroad company. The railroad company refusing to pay for these rails and fastenings, this suit was brought by the Gibson-Carr Coal Company, and there was a judgment in its favor for \$1,773.06.

In the suit it brought against the railroad company the coal company made the Dean-Jellico Coal Company a party defendant, setting up its contract with the Dean-Jellico Coal Company, and asking that it answer and assert any claim that it might have to this refund. The Dean-Jellico Coal Company filed its answer, in which it said, in substance, that although the railroad company made a contract with it in regard to the refund on the coal shipped to pay for the cost of the rails and fastenings, it had no claim or right to any part of the refund, as it was understood and agreed at the time of its purchase from the Gibson-Carr Coal Company that this company was to have all of the refund on this account. It further said that the railroad company, by threats of extortion and discrimination, forced it to accept the contract prepared by the railroad company, although it had at no time any right to any part of the refund. It prayed to be dismissed with its costs, and that whatever money was due as a refund for the cost of the rails and fastenings should be adjudged to belong to the Gibson-Carr Coal Company. The averments of this answer were not controverted by the railroad company, and indeed there is little or no issue of fact in the case.

On this appeal the contention of the railroad company is that there should have been a directed verdict in its behalf on the ground that there was no contract between it and the Gibson-Carr Coal Company. But there was a contract clear and specific, as is shown by the letters we have noticed. These letters further show that the railroad company was fully advised that in its trade with the Dean-Jellico Coal Company the Gibson-Carr Coal Company reserved the right to be paid according to its contract the cost of the rails and fastenings, and it protested against the railroad company entering into

any contract respecting the same with the Dean-Jellico Coal Company.

It is further quite apparent that the railroad company desired to avoid this contract with the Gibson-Carr Coal Company by substituting in its place a more favorable contract with the Dean-Jellico Company, and that, over the protest of the Dean-Jellico Coal Company, it forced it to accept the contract, which it did not desire to enter into.

We find no merit whatever in the effort of the railroad company to evade the contract made with the Gibson-Carr Coal Company, and it is conclusively shown that the Dean-Jellico Coal Company shipped a sufficient number of cars of coal over the road to amount, under the contract with the Gibson-Carr Coal Company, to the sum due it on account of its payment for the rails and fastenings. It is further clearly shown that in the contract with the Dean-Jellico Coal Company the right to recover from the railroad company the cost of these rails and fastenings was reserved by the Gibson-Carr Coal Company. The Gibson-Carr Coal Company had the right to sell its mine to the Dean-Jellico Coal Company, and to recover from the railroad company under its contract whenever the Dean-Jellico Coal Company had shipped the required number of cars of coal.

There is some attempt to show that the Gibson-Carr Coal Company had knowledge of and consented to the contract made by the railroad company with the Dean-Jellico Coal Company, but this evidence is neither sufficient nor satisfactory to defeat the claim of the Gibson-Carr Coal Company or to establish that it consented that the railroad company and the Dean-Jellico Coal Company might enter into the contract made between them at the instance of the railroad company.

Some other minor errors are assigned, but they do not affect the substantial rights of the railroad company, and need not be noticed.

We think the claim of the Gibson-Carr Coal Company was clearly meritorious, and the judgment in its favor is affirmed.

GORDON v. GORDON'S ADM'R.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. CONTRACTS — 105 — ILLEGALITY.

Any agreement involving the doing of an act positively prohibited by common law or statute is illegal and void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 477, 478, 480-497; Dec. Dig. § 105.]

2. CONTRACTS — 106 — ILLEGALITY — "PUBLIC POLICY."

Many things which the law does not prohibit in the sense of attaching penalties to punish their commission cannot be admitted as the subject of a valid contract, as being so mischievous in their nature and tendency that to per-

mit them to be the subject-matter of a contract would be violative of "public policy"; the principle declaring that no one can lawfully do that which has a tendency to be injurious to the public welfare.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 477; Dec. Dig. § 106.]

For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

3. CONTRACTS — 108 — ILLEGALITY — PUBLIC POLICY.

A contract is against public policy if injurious to some established public interest, contravenes some public statute, is against good morals, or tends to interfere with the public welfare or safety.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. § 108.]

4. CONTRACTS — 129 — CONTRACT TO PROCURE PARDON — LEGALITY — STATUTE.

A contract whereby one agrees to use his personal influence with the pardoning authority to procure a pardon is void as against public policy, being in contravention of Ky. St. § 1370, denouncing as unlawful contracts to procure a pardon from the Governor, only in cases in which the party whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. § 129.]

5. CONTRACTS — 129 — CONTRACT TO PROCURE PAROLE — LEGALITY — STATUTES.

Ky. St. § 3828 requires that the board of prison commissioners base its action in paroling a prisoner upon his record while confined, his record previous to confinement, and upon his securing, before parole, a contract for employment for six months. Section 1370 denounces the offense of assisting in procuring the granting or refusal of a pardon by the Governor for fee or reward. *Held*, that a contract of a son with his father whereby the son agreed to prepare an application and to do what was necessary to secure the parole of his brother from prison in return for the father's promise to reimburse him for expenses incurred, necessary in view of the requirements of the paroling statute, was not void as in contravention of public policy, the case not coming within section 1370.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. § 129.]

6. PLEADING — 317 — BILL OF PARTICULARS.

In an action by a son against his father's estate for reimbursement for expenses in procuring his brother's parole from prison, plaintiff might have been required to file a bill of particulars showing his claim in detail.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.]

Appeal from Circuit Court, Boyle County.

Action by W. M. Gordon against J. L. Gordon's administrator. From a judgment for defendant, sustaining his demurrer to the petition, plaintiff appeals. Judgment reversed, with instructions.

Jay W. Harlan and Henry Jackson, both of Danville, for appellant. J. W. Rawlings, of Danville, for appellee.

MILLER, C. J. The appellant Wm. M. Gordon is a son of J. L. Gordon, who died in January, 1914. J. L. Gordon was the father of another son, George Gordon, who was confined in the state penitentiary, at

Frankfort, in 1909, under a judgment of the Boyle circuit court.

The petition alleges that in 1909 J. L. Gordon employed the appellant to prepare an application and to do what was necessary toward securing the parole of said George Gordon, and agreed and promised to reimburse and pay plaintiff for all the expense that he might incur in that work; that pursuant to said employment, the plaintiff prepared the application for the parole; and, in doing so made many trips to Frankfort, Danville, Harrodsburg, and over the entire county of Boyle, at his own expense.

The petition further alleges that by reason of the plaintiff being required to be absent from home in this work, he was forced to hire a man to work in his place on his farm; that the time consumed in this work and effort to get the parole was the greater part of five years; that he was required to pay for said substituted hand, at least \$1,000; and that his father agreed to pay the plaintiff his expenses, including the hire of the substituted hand.

The plaintiff also alleges that no unlawful means were used by him in said employment and none were contemplated at the time of the agreement, that said services so rendered were purely ministerial, that he did not use his personal influence with the paroling powers, and that it was never contemplated that he should do so.

It is further alleged that the agreement did not contemplate and did not include any reward or compensation to plaintiff whatever, but only included and provided for the plaintiff having returned to him his expenses, as above indicated; and that J. L. Gordon, by reason of his age and physical condition, was unable to personally make said trips in the preparation of said petition for a parole.

Upon the death of J. L. Gordon, his son J. T. Gordon qualified as his administrator; and, J. T. Gordon having subsequently died, George Gordon was appointed administrator of his father's estate.

In December, 1914, Wm. M. Gordon brought this action to recover his expenses aggregating \$1,000, and, the court having sustained a demurrer to his petition, upon the ground that the contract was against public policy and void, the plaintiff prosecutes this appeal.

By way of defense, the administrator relies upon section 1370 of the Kentucky Statutes, which reads as follows:

"If any person shall, for fee or reward, or the promise thereof, aid or assist in procuring the Governor to grant or refuse a pardon, remission or respite of any punishment or fine, he shall be fined not less than twenty nor more than five hundred dollars."

Appellant, however, denies the applicability of the statute, supra, or the doctrine that the contract relied on is against public policy, because, as he contends: (1) The work performed by the plaintiff was to secure a

parole, and not a pardon; (2) it was clerical or ministerial, and under the contract the plaintiff was not to be paid for his personal influence; and (3) the money sought to be recovered is not a reward, remuneration, or profit to the plaintiff for his personal services, but is only for money expended and pecuniary loss suffered by reason of expenses and time lost from his own business, by reason of the contract.

It is contended by appellant that there is a radical difference between a contract to procure a pardon from the Governor, which is denounced by the statute, and a contract to prepare an application to the board of prison commissioners, for a parole; that a contract to procure a parole is in no respect against public policy; and, that the reason which makes a contract to procure a pardon invalid has no application whatever to a contract to prepare and present an application for a parole.

Since the enactment of section 1370 of the Kentucky Statutes, the power of parole has been vested in the state board of prison commissioners, subject to the approval of the Governor. Ky. Sta. § 3828. By the terms of that statute the board of prison commissioners must base its action upon the record of the prisoner while confined; the record of his life previous to his confinement, which requires the ascertainment of the sentiment of the people where he formerly resided; and upon his securing, before his parol, a contract for some respectable employment for a period of six months after being liberated. Of course, much of this information can be furnished only through the efforts of some outside person in behalf of the man confined in the penitentiary. Moreover, the parole does not pardon the prisoner; he still remains in the legal control and custody of the board of prison commissioners. The pardoning power remains vested in the Governor. It will thus be seen that the action of the paroling board must be based upon the facts specified in the statute, and that many of those facts necessarily must be gathered from outside sources.

[1] There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common law or by statute, is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute, is illegal and void.

[2] There are also many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy, they cannot be admitted as the subject of a valid contract.

It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of

public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

[3] It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo R. R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355.

The rule must not be understood to mean that in order that a contract may be declared to be against public policy, it must be inimical to morality. Many contracts which are not immoral, are, nevertheless, void on the ground that they are against public policy. *Kohn v. Melcher (C. C.)* 43 Fed. 641, 10 L. R. A. 439.

In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint or liberty, and natural or legal right, or the obstruction of justice, or the violation of a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it.

In many jurisdictions, statutes have been passed similar to section 1370 of the Kentucky Statutes, denouncing as unlawful, contracts to procure a pardon from the Governor; and, if the contract in the case at bar employed the appellant, for a fee or reward, to procure a pardon from the Governor, it would be against the public policy of the state, and consequently void.

The reason for the rule, and the exceptions thereto, are stated in 9 Cyc. 493, as follows:

"The exercise of the pardoning power committed to the executive should be as free from any improper bias or influence as the trial of the convict before the court; consequently the law will not enforce a contract to pay money for soliciting petitions, signing petitions, using influence to obtain a pardon, or the remission of a forfeiture. But as in the case of lobbying contracts many courts have held that the reason for holding such agreements void fails when no unlawful means of attaining the desired object are contemplated by the contract itself or in fact employed; and such services, when performed at defendant's request, are a good consideration for a subsequent promise to pay. Such agreements would clearly seem to be lawful, where the services contracted for are publicly ren-

dered by advocates disclosing their true relation to the subject, and not by private individuals keeping secret the character in which they solicit; but where the compensation is contingent on success, this is a strong circumstance against the validity of the agreement."

In *McGill's Adm'r v. Burnett*, 7 J. J. Marsh. 640, a contract by which McGill's intestate agreed to pay Burnett \$100 in consideration of his services and labor to be performed in and about the management of a petition to the Governor, in case of a certain forfeiture, this court said the contract was, in effect, to pay the plaintiff for his management, whether fair or foul, in inducing the Governor to remit a forfeiture, and that such contracts tended to obstruct a correct administration of the government, and were void as against public policy. A similar ruling was made in *Brown v. Young*, 7 Ky. Law Rep. 664. See, also, *Averbeck v. Hall*, 14 Bush, 505, for a ruling similar in principle.

But, under the exception to the general rule, as above stated, the contract will not be held invalid when no unlawful means of attaining the desired object are contemplated by the contract itself, or in fact employed. Thus the general rule which makes contracts of this character void, does not apply in cases in which the party whose pardon is sought to be obtained has not been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish the offender, as where the trial of a prisoner by a military court is unauthorized by law, and forbidden by the Constitution, and its sentence is, consequently, a nullity.

Where, under such circumstances, a person undertakes by the use of his personal influence with the military commander to save the unfortunate man from the impending danger of threatened execution, or unauthorized and illegal imprisonment, his act cannot be regarded as an agreement to obstruct the proper administration of the government, or to defeat the ends of public justice. 6 R. C. L. 767.

[4] The reasons which sustain the general rule and the statute, *supra*, apply only in cases in which the party whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal, having the constitutional right to try and punish the offender. Thus in *Thompson v. Wharton*, 7 Bush, 563, 3 Am. Rep. 306, Solon Thompson was arrested in 1865 by the federal military authorities. In the following June he was tried by a military court upon the charge of being a guerrilla, and was convicted and sentenced to suffer death. Wharton, a Louisville lawyer, had been employed prior to the trial to defend Thompson for an agreed fee, and, on the day fixed for Thompson's execution, a new contract was made with Wharton; he agreeing, by proper proceedings before the commanding general, without whose approval the sentence of the military court could not be carried into execution, to prevent the infliction of the adjudged punish-

ment, and, if possible, to procure the discharge of Thompson, in consideration of a further fee of \$300, to be paid only in event of his success.

In March, 1866, Thompson was discharged from custody, and Wharton sued to collect his fee. Upon the trial the court was asked to instruct the jury that if they believed from the evidence that the sole consideration for the execution of the note sued on was the agreement of Wharton to use his personal influence with the commanding general to secure the pardon of Thompson, or to have his punishment commuted, the agreement was contrary to public policy, and void.

But the court, speaking through Judge Lindsay, cited *McGill's Adm'r v. Burnett*, supra, and held that the rule there announced did not apply, and should not control in cases where the conviction was unauthorized by law, and forbidden by the Constitution, as in *Thompson's Case*.

In the course of the opinion, Judge Lindsay said:

"Under these circumstances the appellee undertook, by the use of his personal influence with the military commander, to save the unfortunate man from the impending danger of threatened execution or unauthorized and illegal imprisonment. Such an act cannot be regarded as an agreement to obstruct the proper administration of the government, nor to defeat the ends of public justice. The object sought to be accomplished, as well as the means to be resorted to, were entirely defensible, whether regarded from a legal or moral standpoint; and, such being the case, it is difficult to perceive how the contract constituting the consideration of the note can be regarded as contravening public policy."

Again, in *Rau & Rieke v. Boyle & Boyle*, 5 Bush, 254, *Rau & Rieke*, who were confederate sympathizers, had purchased a quantity of tobacco in Western Kentucky, which had been seized by General Payne, the federal military commander, at Paducah, under pretense of military authority. While their tobacco was thus wrongfully withheld from them, *Rau & Rieke* made a written contract with John Boyle, by which the latter undertook to procure the release of the tobacco, Boyle to have one-half of it for his services.

By a subsequent contract with John and J. T. Boyle, *Rau & Rieke* were to buy tobacco and cotton on speculation and ship the same under a permit then held by Boyle from Major General Burbridge, of the United States Army, or under other permits which he might thereafter obtain, and the profits realized from said purchases were to be equally divided between *Rau & Rieke* and the Boyles. Boyle succeeded in procuring the release of the tobacco which had been seized by General Payne, and other tobacco was bought and shipped under the second contract above referred to. The Boyles were

Union men, and had held positions in the United States Army, which they resigned before John Boyle undertook this agency to get the tobacco released.

In answer to the suit of Boyle & Boyle upon the contracts, *Rau & Rieke* contended that their agreements with Boyle & Boyle were mere promises to pay them for their loyalty, and for the exercise of their influence with officers of the United States government, and consequently were illegal as against public policy. But the court overruled this defense, holding that since *Rau & Rieke* had been unlawfully deprived of their tobacco, and their only remedy seemed to be the use of moral means, the court could not say that the employment of Boyle & Boyle to effectuate the purpose was either contrary to law or against public policy.

It will thus be seen that the strict rule of the statute has not been applied by this court in similar cases when the reason for the rule has ceased to exist.

[5] Furthermore, the case before us does not come within the scope of the statute, and it has none of the features which would render it immoral, or against public policy. The contract sued on was for the procurement of a parole, not a pardon; it is for reimbursement of expenses incurred, not for a fee or compensation; and, the petition expressly states that the contract did not contemplate the use of any personal influence with any officers of the state in procuring the parole.

While we would uphold the integrity of the statute wherever it is applicable, under the authorities cited there is nothing in the contract before us which violates any rule of public policy. *Deering & Company v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 45 L. R. A. 410, *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329, *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1000, *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L. R. A. (N. S.) 212, 121 Am. St. Rep. 713, *Denison v. Crawford County*, 48 Iowa, 211, *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659, *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623, and *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320, contain interesting and valuable discussions of the question, and support the conclusion here reached.

[6] The plaintiff might have been required, upon motion, to file a bill of particulars, showing his claim in detail; but that defect in the petition did not go to the merits of the plaintiff's claim, and a bill of particulars may yet be required.

Judgment reversed, with instructions to overrule the demurrer to the petition, and for further proceedings.

NORMAN v. NORMAN.

(Court of Appeals of Kentucky. Feb. 9, 1916.)

1. GIFTS §49—VALIDITY—FRAUD AND UNDOE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show fraud and undue influence, inducing a conveyance by decedent of personalty to defendant as trustee for a grandson of decedent by way of gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. §49.]

2. DESCENT AND DISTRIBUTION §91—SETTING ASIDE GIFT—ACTIONS—PARTIES.

The donee of personal property is a necessary party to an action to set aside the gift after the death of the donor, without whom no judgment setting the gift aside can be rendered.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 359-381; Dec. Dig. 91.]

3. WORK AND LABOR §7—SUPPORT OF PARENT BY CHILD—PAYMENT.

In the absence of express contract by a father to pay for board and care furnished by his son, the law presumes such expenditures and care to be gratuitous.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. §7.]

Appeal from Circuit Court, Pike County.

Action by Jane Norman against F. M. Norman. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

J. S. Cline, of Pikeville, for appellant.
Roscoe Vanover, of Pikeville, for appellee.

SETTLE, J. This appeal brings to us for review a judgment of the Pike circuit court dismissing appellant's petition and awarding appellee his costs. It was alleged in the petition that Wm. Norman, the husband of the appellant, Jane Norman, died at 80 years of age, the owner of personal property of the value of \$2,000, which his son, the appellee, F. M. Norman, fraudulently obtained from him and converted to his own use; the fraud consisting, as alleged, in his inducing the decedent, without cause, to leave his wife, the appellant, and make his home with him, and thereafter procuring him to execute to his (appellee's) infant son a writing conveying and transferring to him his entire property, consisting wholly of personalty, without consideration. It was further alleged in the petition that appellant, as widow of the decedent, was entitled to receive out of this personal estate of the decedent and have set apart to her under the statute, in property and money, \$750, and in addition one-half of the surplus personal estate after the payment of the debts, of which there were none; that she had received nothing from the decedent's estate, because of the conversion of the whole of it by appellee.

Appellee's answer specifically denied the allegations of the petition, except the alleged fact that the decedent had shortly before his death conveyed his estate, consisting exclusively of personal property, to his (appellee's) infant son, the decedent's grandson,

but alleged that all the property the decedent owned and thus conveyed was \$198, which the appellee after his death took possession of as trustee of his son, and now holds as such for the latter's benefit. The answer further alleged that appellee supported and nursed the decedent and paid his physician's bills for two or three years before his death, for which, if the conveyance to the grandson were set aside, he (appellee) was entitled to compensation in a sum far greater than the value of the property given by the decedent to the grandson.

[1] We are unable to see how the court could have rendered any other judgment than that appealed from. There was no evidence, other than appellant's own unsupported testimony, conducing to prove that appellee caused the decedent to leave her. It is true one other witness testified that she on one occasion heard appellee tell the decedent not to return to appellant, and threaten to take his life if he did so; but this was contradicted by the great weight of the evidence, furnished by numerous witnesses, which was to the effect that the decedent voluntarily left the appellant 13 years before his death because of her lack of chastity, and adulterous relations with other men. The evidence further showed that during many of the 13 years of his separation from appellant the decedent made his home with appellee; that the latter was kind to him, but attempted to take no control of his property, or part in inducing him to make the conveyance of his property to his grandson; nor was there any proof of his having such ascendancy over the mind of the decedent as enabled him to dominate his will.

The writing by which the decedent conveyed his property to his grandson was drafted by and acknowledged before Jake Mount, a deputy county court clerk, whose deposition is in the record and from which it appears that he was told by appellee's wife, two days before the conveyance was made, that the decedent had requested her to ask him to come over and prepare the writing for him, and that when it was written neither the appellee nor his wife was present; that it was intelligently dictated by the decedent, and written by him as directed by the decedent; and that immediately thereafter it was acknowledged by the latter and subsequently put to record.

While the evidence tends to prove that some years before his death the decedent operated a small country store, the merchandise in which cost him \$325, he had quit this business two or three years before his death. The evidence also shows that four or five years prior to his death he received from the federal government a back pension of \$733, and at the same time obtained an increase of pension from \$4 to \$12 per month. It is fairly apparent from the evidence that

the back pension, as well as the proceeds of the small mercantile business, was spent or lost by his improvidence, and there is no evidence whatever tending to show that what he left to his grandson under the writing executed before his death amounted to more than \$198, and this sum appellee claims to be holding as trustee for his son, the donee in the writing executed by the decedent shortly before his death. The decedent's death occurred in 1903 or 1904, and this action was not brought by appellant until October 17, 1911, and no reason is apparent for the delay thus shown on the part of appellant.

[2] Moreover, although the principal object of the action was to set aside the conveyance made by the decedent to his infant grandson, whereby appellee claims to have received in trust and now holds for the latter such property as was left by the decedent, the grandson was not made a party to the action, and the object of the action could not be attained, namely, the setting aside of the conveyance of writing to the grandson, without making him a party thereto; this being a step preliminary and necessary to appellant's obtaining her right to that portion of the property claimed by her as the widow of the decedent.

[3] On the other hand, the court properly refused appellee compensation for the board, nursing, and expenditures he claimed to have performed and made for the decedent. In the absence of an express contract on the part of the decedent to pay therefor, the law presumes that the services thus performed and expenditures made by the son for the father were gratuitous.

Judgment affirmed.

BOULWARE-ALLEN SHOE CO.'S TRUSTEE v. MORRIS.

(Court of Appeals of Kentucky. Feb. 11, 1916.)

CORPORATIONS \Leftrightarrow 244—STOCKHOLDER'S LIABILITY—TRANSFER OF STOCK—STATUTE.

Where a stockholder in a solvent corporation, who had paid it for his stock one half in cash and the other half with a note, sold his stock to a buyer, who paid him one half in cash, and the rest by giving her note to the corporation in lieu of the seller's note, the mistake of the corporation in transferring to the buyer only half of the stock did not prevent the stockholder's being released from liability on the note which the company held against him for the unpaid part of the stock subscribed for to the company's trustee in bankruptcy under Ky. St. § 547, providing that the stockholders of a corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. \Leftrightarrow 244.]

Appeal from Circuit Court, McCracken County.

Action by the Boulware-Allen Shoe Company's trustee against N. K. Morris. From

a judgment for defendant dismissing the petition, plaintiff appeals. Affirmed.

Eaton & Boyd, of Paducah, for appellant.
Berry & Grassham, of Paducah, for appellee.

SETTLE, J. January 31, 1914, the appellee, N. K. Morris, J. P. Boulware, and W. G. Allen organized in the city of Paducah and caused to be incorporated under the laws of this state the "Boulware-Allen Shoe Company," with a capital stock of \$10,000, one half of which, \$5,000, was subscribed by the incorporators and the half of such half, \$2,500, paid in before the corporation began business. For the remaining \$2,500 of stock subscribed notes were executed by the stockholders for the amounts owing by them, respectively, payable to the corporation. The appellee subscribed for \$1,000 of the capital stock and paid \$500 thereof before the corporation began business. For the remaining \$500 he executed his note, payable to the corporation, due one day after date.

The corporation began a retail shoe business on the 12th day of March, 1914, having first secured a building, fixtures, and stock of goods. On the 29th day of June, 1914, the corporation found itself financially embarrassed, and, being unable to pay the debts which it had created, made a deed of assignment conveying all of its property and assets to a trustee for the benefit of its creditors, but shortly thereafter, upon petition of the creditors, it was adjudged a bankrupt by the District Court of the United States for the Western District of Kentucky. At a meeting of the creditors called by the referee in bankruptcy at Paducah, Ky., September 4, 1914, the appellant, A. Y. Martin, was duly elected trustee for the corporation, and then qualified as such. On the 22d day of March, 1915, as such trustee, he brought this action against the appellee, N. K. Morris, in the McCracken circuit court, seeking to recover of him \$500, balance alleged to be due the corporation upon the \$1,000 of capital stock for which he subscribed at the time of its organization. Appellant claimed authority to maintain the action under section 547, Kentucky Statutes, which provides:

"The stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for by them, and no stockholder shall be liable because of being a stockholder, for any sum more than to the amount of the unpaid part of stock held by such stockholder of any company, * * * and no transfer of stock shall operate as a release of any such liability existing at the time of such transfer: Provided, the action to enforce such liability shall be commenced within two years from the time of transfer."

The answer of the appellee traversed the allegations of the petition, and, in addition, set up as a further defence that he was not liable upon the note for \$500, executed by him to the Boulware-Allen Shoe Company,

because shortly after its execution, and before that company became involved, and while it was still solvent, he entered into an agreement with it and Mrs. J. P. Boulware whereby he sold to her his \$1,000 of stock in the company for the sum of \$1,000, \$500 of which she then paid him, and at the same time he surrendered to the Boulware-Allen Shoe Company the \$1,000 of stock that the company might transfer it to her, she executing to it her note for the remaining \$500 she was to pay therefor, which note the Boulware-Allen Shoe Company agreed to accept and did accept in lieu of the note for that amount it held against the appellee.

By an amended answer it was alleged that, when the arrangement between appellee, the Boulware-Allen Shoe Company, and Mrs. Boulware, set forth in his original answer, was made, notwithstanding the delivery by him of his stock to the Boulware-Allen Shoe Company to be transferred or reissued to Mrs. Boulware, her payment to him of the \$500 to reimburse him for what he had paid on the stock, and the execution by her to the Boulware-Allen Shoe Company of the note of \$500 the latter accepted in lieu of the note of that amount appellee gave it for one-half of the \$1,000 of stock for which he subscribed, by inadvertence or mistake on the part of the Boulware-Allen Shoe Company, it transferred to itself one half of \$500 worth of the stock appellee had previously owned, and the other half, of the value of \$500, to Mrs. Boulware, instead of transferring to her the entire stock, amounting to \$1,000, as agreed by the parties, but that this mistake of the Boulware-Allen Shoe Company was a matter that should have been adjusted between it and Mrs. Boulware, and did not prevent his release from liability on the note of \$500 he had given the Boulware-Allen Shoe Company.

Appellant's reply traversed the averments of appellee's answer, and alleged that the transaction made by him of his stock to Mrs. Boulware was without consideration, but did not charge any fraud in the transaction. Upon the issues thus made the case was tried by the court; a jury being waived by the parties. The trial resulted in a judgment dismissing appellant's petition and awarding appellee his costs. From that judgment, this appeal is prosecuted.

It appears from the findings of fact and conclusions of law made by the court that the Boulware-Allen Shoe Company was solvent at the time of the transaction resulting in the sale of appellee's stock therein to Mrs. Boulware. The following excerpt from the court's findings will show the reasons for the conclusions as to the solvency at that time of the shoe companies and with respect to the mistake of the Boulware-Allen

Shoe Company in transferring only half of the stock purchased by Mrs. Boulware to her, and also show the court's conclusion as to the law governing the case:

"The court finds further, as a matter of fact, that on the 13th day of April, 1914, the defendant, N. K. Morris, and Mrs. Irene Allen Boulware, entered into a contract, by the understanding and terms of which the said N. K. Morris was to sell to her the \$1,000 of stock in said Boulware-Allen Shoe Company for the sum of \$1,000, and that by mistake and oversight only \$500 of said stock was transferred direct by said N. K. Morris to Mrs. Boulware, and by mistake and oversight the other \$500 was transferred to the company by the said Morris, but for which Mrs. Boulware executed her note to the company, and the company surrendered to said Morris \$500 of his which it held, and that the real parties of this transfer were Mrs. Boulware and N. K. Morris, and that the company received the note of Mrs. Boulware in lieu of the note which it held of N. K. Morris.

"It further finds, as a matter of fact, that on this same date that this trade was made Mrs. Boulware had issued to her certificates of stock representing \$1,000 in said company, but which certificates of stock, although made out to her, were never signed.

"Now the court concludes, as a matter of law, that in view of the facts herein, showing that the company was solvent on the 13th day of April, 1914, that the trade made between Mrs. Boulware and N. K. Morris by which she took the place of the said Morris and bought his stock from him and executed her note to the company in lieu of the one held by Morris, and in view of the fact that the company was solvent on this date, that such transfer was in good faith and without fraud, and that the said Morris had a right to sell as did Mrs. Boulware to buy such stock, and that the company did not transcend its authority, in view of its solvent condition at that time, in accepting in lieu of the note held by it of N. K. Morris, surrendering such note to the said Morris, and taking the note of Mrs. Boulware in lieu thereof."

The evidence found in the record does not convincingly establish appellant's contention that the Boulware-Allen Shoe Company was insolvent when appellee sold his stock therein to Mrs. Boulware, nor does it show that such sale was without consideration; hence we find no cause for disagreeing with the trial court's finding that the Boulware-Allen Shoe Company was then solvent; and, if it was then solvent, the transaction between it, appellee, and Mrs. Boulware, resulted in no wrong or loss to the corporation on its creditors. The mistake of the corporation in transferring to Mrs. Boulware only half of the stock she purchased of appellee can in no way affect his release from liability upon the note which the company held against him for the unpaid part of the stock he subscribed for. It was a matter of which she might have complained and compelled the company to correct, but the mistake gives to the appellant, as trustee of the latter, no ground for attacking the validity of the transfer of the stock, so far as appellee is concerned.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. E. J. O'BRIEN & CO.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. CARRIERS \S 134—ACTION FOR DAMAGE TO GOODS—SUFFICIENCY OF EVIDENCE—VERDICT.

In an action for damages to shipments of tobacco, limited by the trial court to the damages resulting from an unreasonable delay between an intermediate point and destination, and to the difference between the market value of the damaged shipment when delivered and its market value when it should have been delivered, evidence held to sustain a verdict for plaintiff for \$1,000.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592, 607; Dec. Dig. \S 134.]

2. APPEAL AND ERROR \S 1066—HARMLESS ERROR—PREFATORY INSTRUCTION.

In an action against a carrier for damages to shipments of tobacco, an instruction that it was the duty of the defendant and its connecting carriers, after the tobacco had been damaged by flood at an intermediate point, and as soon as conditions there would permit, to promptly carry it to destination, and that defendant and its connecting carriers failed to perform such duty by reason of which the tobacco was further damaged, in so far as bearing on the question of promptness, merely prefatory and abstract, and not submitting the question itself, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. \S 1066.]

3. TRIAL \S 191—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where tobacco in transit was damaged and delayed by flood, and it appeared that even after the shipment was started from that point to destination the tracks were in bad condition, though it did not appear that such condition was the cause of the delay, that there was a through train to destination, and that the usual shipping time between the place of origin and delivery was about 5 days, and that there was a delay of 20 days from the intermediate point, the court did not err in assuming that the delay was unreasonable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. \S 191.]

4. TRIAL \S 191—INSTRUCTIONS—ASSUMPTION OF FACTS.

In such case, where the evidence showed that the longer tobacco was permitted to remain wet the greater the damage, and there was no evidence to the contrary, the court did not err in assuming that the tobacco was further damaged by the delay, and in leaving the extent of the damage to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. \S 191.]

5. EVIDENCE \S 378—DOCUMENTARY EVIDENCE—AUTHENTICATION—REPLY.

In an action for damages to shipments of tobacco, where it appeared that the shipper wrote a letter to the agent of the terminal carrier in the state advising him of the damage, the consignee's or agent's refusal to accept it, and presenting a claim for a certain amount, and that he later received a typewritten letter on a letter head of the terminal carrier, office of its freight claim adjuster, and signed by such adjuster, addressed to the shipper and relating to its claim, and denying responsibility because the damage was due to a flood, stating its sale for shipper's account and balance to his order, such letter was prima facie genuine and admis-

sible in evidence without proof of the handwriting or other proof of its authenticity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648-1655; Dec. Dig. \S 378.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division. Action by E. J. O'Brien & Co. against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Helm & Helm, T. K. Helm, and Charles H. Moorman, all of Louisville, for appellant. O'Doherty & Yonts and Thomas C. Mapother, all of Louisville, for appellee.

CLAY, C. In this action for damages for two shipments of tobacco from Frankfort, Ky., to Jersey City, N. J., plaintiff, E. J. O'Brien, doing business as E. J. O'Brien & Co., recovered of the defendant, Louisville & Nashville Railroad Company, a verdict and judgment for \$1,000. Defendant appeals.

Briefly stated, the facts are as follows: The tobacco, consisting of 32 hogsheads and valued at \$2,312.75, was delivered to the Louisville & Nashville Railroad for shipment on the afternoon of March 20, 1913. It reached Dayton, Ohio, on the afternoon of March 24th. The two cars containing the tobacco were then delivered to the Erie Railroad and placed in a through train due to leave the same day at 10:15 p. m. Owing to the high water and consequent washouts between Dayton and Marion, the train was held for about 3 hours, and subsequently released. The next morning between 8 and 9 o'clock the Lewistown reservoir broke, and the city of Dayton was enveloped by an unprecedented flood. The railroad yard was covered by water. Many of the cars were completely submerged. The water on others reached to a point three or four feet above the trucks. The road was unable to move any trains until April 4th. The cars in question went out on the first train. The tracks north of Dayton were washed out, and temporary repairs had to be made in order to get the train over after the water went down. It was about 3 weeks before normal conditions were restored. The cars in question did not reach Jersey City until April 20th. They were placed on a siding adjoining the Jarvis warehouses. Mr. Jarvis inspected the tobacco. At a distance of about three feet above the floor of the cars there was a dry muddy line extending the full length of the cars. He opened one of the cars and saw the same dry muddy line on the hogsheads. He then advised E. J. O'Brien & Co. of the condition of the tobacco and they instructed him to refuse delivery. Richard J. Whallen, plaintiff's manager and a tobacco expert of long experience, testified that although the tobacco was damaged by water, yet, if only half of the hogsheads were submerged and the tobacco was

promptly rehandled, there would be a salvage of from 50 to 75 per cent. On the other hand, the longer it was permitted to remain wet the greater would be the damage. Over the objection of the defendant, plaintiff introduced a letter which he received from H. C. Barlowe, freight claim adjuster of the Erie Railroad, in reply to one which he had addressed the Louisville agent of that road, stating that as his tobacco was refused the railroad was compelled to sell it, and that after paying the advertising and other expenses of sale the net amount realized was \$8.41.

[1] The trial court held, as a matter of law, that the unprecedented flood at Dayton was an act of God, and was the proximate cause of all the damage that accrued prior to the time the tobacco left Dayton, and authorized the jury to find only such damages as resulted from the unreasonable delay between Dayton and Jersey City. The court further held, as a matter of law, that there was an unreasonable delay and authorized the jury to find for plaintiff the difference between the market value of the damaged tobacco when delivered, and its market value when it should have been delivered at Jersey City.

Defendant insists that the evidence of damage after the tobacco left Dayton is entirely too speculative to justify the verdict. This contention is based on the ground that Whallen, who testified on the subject, did not know the extent of the damage by the flood or the condition of the tobacco when it reached Jersey City. It appears, however, that the water line reached to about the middle of the hogsheds, and there is no evidence to the contrary. His opinion of the extent of the salvage was based on this fact. He says that although about one-half of the tobacco was wet, there would have been a salvage of from 50 to 75 per cent. if the tobacco had been promptly delivered and rehandled. It is true that no one testifies to the exact condition of the tobacco when it was delivered at Jersey City. However, the letter of the freight claim adjuster of the Erie Railroad shows that the tobacco was advertised for sale and sold on the market, and after the expenses were paid the net proceeds amounted to \$8.41. In other words the tobacco was practically worthless. The uncontradicted evidence also shows that the market price of the tobacco, if it had been delivered in an undamaged condition at Jersey City, would have been \$2,312.75, plus the cost of transportation, amounting to \$181.47, or a total of \$2,494.22. On the basis of a salvage of 50 per cent., if the tobacco had been promptly delivered after the damage at Dayton, the evidence would have authorized a verdict of \$1,156.37. On the basis of a salvage of 75 per cent., the evidence would have authorized a verdict of \$1,734.57. As the tobacco was practically worthless when delivered, and as

the verdict of \$1,000 is less than the lowest sum fixed by the witness, or the sum of \$1,156.37, we conclude that the evidence was sufficient, not only to take the case to the jury, but to sustain the verdict.

[2, 3] The point is also made that the trial court erred in telling the jury that it was the duty of the defendant and its connecting carriers, after the tobacco had been damaged by the flood at Dayton, and as soon as the flood conditions at that place would permit, to remove the said tobacco from that place and promptly carry the same to Jersey City, and to deliver it, or offer to deliver it, to the plaintiff; and in further instructing the jury that it had been proven by undisputed evidence that the defendant and its connecting carriers failed to perform this duty, and by reason thereof the tobacco was caused to be further injured and damaged. It is first insisted that the instruction imposed on the defendant and its connecting carriers too high a degree of care. Whether this be true or not it is unnecessary to decide. The instruction, in so far as it bears on the question of promptness, is merely prefatory and abstract. The question itself was not submitted to the jury. That being true, defendant was not prejudiced by the instruction, unless the court itself erred in holding, as a matter of law, that there was an unnecessary delay in the shipments after they left Dayton, and that by reason thereof the tobacco was further damaged. It is true that defendant shows that, even after April 24th, when the shipments were started, its tracks were in bad condition by reason of the flood. Defendant, however, did not follow this statement up and actually show that such condition was the cause of the delay. It did not undertake to trace the cars and account for the delay at any particular point. The evidence shows that the usual time to transport such a shipment, even from Louisville, Ky., is about 5 days. Dayton is much nearer Jersey City. Prior to reaching Dayton several transfers must be made. From Dayton to Jersey City there is a through train. From that point on there was a delay of 20 days. In view of the defendant's failure to account for the delay, the court did not err in assuming that the delay was unreasonable.

[4] But it is argued that the court erred in assuming that the tobacco was injured by the further delay. On this point the evidence shows that the longer tobacco is permitted to remain wet the greater the damage. There is no evidence to the contrary. The court, therefore, had the right to assume that the tobacco was further damaged, and to leave the extent of the damage to the jury.

[5] Another ground urged for reversal is the admission of the letter of the freight claim adjuster of the Erie Railroad without preliminary proof of its genuineness. The facts attending the introduction of the letter are as follows: On April 25, 1913, plain-

tiff wrote a letter to S. W. Moore, Agent, Erie Railroad, Louisville, Ky., in which he advised him of the damage to the tobacco in question and of the refusal of the Jarvis warehouses to accept it, and presented a claim against the Erie Railroad for the sum of \$3,294.08. On July 10th, plaintiff received a typewritten letter on the letter head of the Erie Railroad Company, office of freight claim adjuster, purporting to be signed by H. C. Barlow, F. C. A. The subject of the letter is claim E-151958-L & D. The letter is addressed to Messrs. E. J. O'Brien & Co., Louisville, Ky. It begins as follows:

"We have your letter of April 25, 1913, addressed to Mr. S. W. Moore, our agent at Louisville, Ky., inclosing a bill for \$3,294.08, said to be the value of 42 hhds. of tobacco damaged in transit."

The letter goes on to state that the tobacco in question was caught in the flood, and that the company was not responsible because the damages were due to an act of God. The letter concluded as follows:

"Inasmuch as the tobacco was refused and left on our hands, we were obliged to dispose of same in the interest of whom it may concern and accordingly turned it over to auctioneers, who disposed of it to the best possible advantage, the net amount realized being \$8.41. We have this amount on hand after taking care of the advertising and other expenses of sale."

Professor Greenleaf, in his work on Evidence (section 575c, 16th Ed.), says:

"A further exception to the rule requiring proof of handwriting has been admitted in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received a reply purporting to be from the defendant, it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting; and that letters of an earlier date, in the same handwriting, might also be read, without other proof."

In 17 Cyc. 411, the rule is thus stated:

"A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him is prima facie genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity."

This doctrine has been approved and followed in a number of cases. National Acc.

Soc. v. Spiro, 78 Fed. 774, 24 C. C. A. 334; White v. Tolliver, 110 Ala. 300, 20 South. 97; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Davis v. Robinson, 67 Iowa, 355, 25 N. W. 280; Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631; Melby v. Osborne, 33 Minn. 492, 24 N. W. 253; Atlantic Ins. Co. v. Manning, 3 Colo. 224; Chicago, etc., R. Co. v. Roberts, 10 Colo. App. 87, 49 Pac. 428; J. H. Sanders Pub. Co. v. Emerson, 64 Mo. App. 662.

We see no reason why the rule should not be extended so as to apply to the facts of this case. Here plaintiff proved that he had sent a letter to S. W. Moore, agent of the Erie Railroad at Louisville, Ky. He introduced in evidence a copy of the letter. In this letter he asserted a claim against the railroad for damages to the tobacco in question. The natural thing for the agent to do would be to send the letter to the particular agent of the company having jurisdiction of freight claims. The letter in dispute shows on its face that it is in reply to the letter of plaintiff addressed to S. W. Moore, the local agent of the Erie road at Louisville, and forwarded to the writer. It is written on the letter head of the Erie Railroad and purports to come from the office of the freight claim adjuster and to have been signed by him. The letter shows on its face that it has reference to the very claim asserted by plaintiff. As the purpose of plaintiff's letter, though addressed to the agent at Louisville, was to assert a claim against the company, and the purpose of the reply, though coming from another agent, was to deny the justice of the claim against the company and to show what disposition was made of the tobacco, the effect is the same as if plaintiff's letter had been addressed and sent to, and the reply had been signed by and had come from, the company itself. We therefore conclude that the facts were sufficient to make out a prima facie case and to authorize the introduction of the letter without proof of its genuineness.

Finding in the record no error prejudicial to the substantial rights of the defendant, it follows that the judgment should be affirmed; and it is so ordered.

MORTON v. IMPERIAL REALTY CO. et al.
(Supreme Court of Tennessee. Jan. 22, 1916.)

1. LICENSES §39—NONPAYMENT OF OCCUPATION TAX—ACTION ON CONTRACT.

One pursuing an occupation defined as a privilege by statute cannot recover on a contract made in pursuance of the business, if he has not paid his privilege tax.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 76-78; Dec. Dig. §39.]

2. LICENSES §39 — NONPAYMENT OF OCCUPATION TAX—PLEADING.

Where, in suit on a contract made in pursuance of a business defined as a privilege by statute, the defendant pleads that the plaintiff has not paid his privilege tax, the burden to prove the fact so pleaded is on defendant, as the defense is essentially affirmative, and the plea evidence of extrinsic matter.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 76-78; Dec. Dig. §39.]

3. LICENSES §39 — NONPAYMENT OF OCCUPATION TAX—EVIDENCE.

One suing on a contract made in pursuance of a business defined by statute as a privilege cannot be defeated by failure to pay his privilege tax, in the absence of some proof in the record showing his default.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 76-78; Dec. Dig. §39.]

Appeal from Chancery Court, Knox County; J. Pike Powers, Jr., Special Chancellor.

Bill by Ph. Morton against the Imperial Realty Company and others. From a decree for defendants, complainant appeals. Reversed.

Bowen & Anderson, of Knoxville, for appellant. Green, Webb & Tate and Henry Hudson, all of Knoxville, for appellees.

GREEN, J. In this case a bill was filed to recover for the erection and maintenance of certain signboards upon which the complainant advertised the business of defendant.

Complainant's business is declared to be a privilege and a tax imposed thereupon by the revenue statutes of Tennessee. The complainant did not show that he had complied with these statutes, nor did it appear that he had paid his tax or taken out the license required.

These matters were interposed by the defendants in an amendment to their answer and relied on as a bar to complainant's suit.

The Court of Civil Appeals was of opinion that complainant was charged with the affirmative duty of showing compliance with the revenue law and payment of said tax before his suit could be maintained.

[1] It is well settled that one pursuing an occupation, defined as a privilege by our statutes, cannot recover on a contract made in pursuance of that business, if it be shown he has not paid his privilege tax. *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Ha-worth v. Montgomery*, 91 Tenn. 16, 18 S. W. 399; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 593, 22 S. W. 743.

It has been held that such a plaintiff will be repelled by the court when it appears from the proof that he has not complied with the provisions of the revenue law, although his failure to comply has not been pleaded as a matter of defense. *Cary-Lombard Lumber Co. v. Thomas*, supra.

In the case referred to and in our other cases of this character there has been proof before the court of the failure of the plaintiff to pay the privilege tax. In this case there is no proof whatever on the subject. We cannot tell from this record whether the plaintiff has paid his privilege tax or not.

[2] We think such a defense is essentially affirmative. Certainly when a plea of this character is introduced by a defendant, setting up a failure of plaintiff to comply with the revenue laws, such a plea introduces an extrinsic matter, and the burden of showing the facts so pleaded rests upon the defendant.

[3] Whether proof of a failure of complainant to comply with the revenue laws would be admitted over objection, without some pleading to justify it, we need not determine. There must, however, be some proof in the record showing the default of a plaintiff in this respect before he can be repelled. Such is the general rule. 25 Cyc. 634; *Margolys v. Goldstein*, 96 N. Y. Supp. 185; *Salmon Co. v. Box Co.*, 158 Cal. 567, 112 Pac. 454; *Woodley v. Zeman*, 178 Ill. App. 369.

We are of opinion, therefore, that the Court of Civil Appeals was in error in placing the burden of showing compliance with the revenue laws upon the complainant, and its decree in this respect is reversed. Other matters in the case have been dealt with in a memorandum opinion.

FRANKLIN v. THE DUNCAN et al.
(Supreme Court of Tennessee. Jan. 22, 1916.)

1. BILLS AND NOTES §126—LIABILITY OF INDORSER — STIPULATION FOR ATTORNEY'S FEES.

An indorser of a note, stipulating for payment of attorney's fees in case of suit, though he be an accommodation indorser, is liable for such fees, especially where he waives demand, protest, and notice.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 272, 273; Dec. Dig. §126.]

2. GUARANTY §36—LIABILITY OF GUARANTOR—BILLS AND NOTES—ATTORNEY'S FEES.

The liability of a guarantor of the payment of a note, stipulating for payment of attorney's fees in case of suit, included the liability of the maker for payment of the fees, especially where the contract of guaranty specified that the guarantor accepted all the provisions of the note.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 38-45; Dec. Dig. §36.]

3. BILLS AND NOTES §534 — ATTORNEY'S FEES—NECESSITY OF SUIT.

The holder of a mortgage note, providing for payment of attorneys' fees if the note was

placed "in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection," was entitled to have the fees allowed, over objection that its suit was needless, since foreclosure out of court was provided for in the mortgage, where a general creditors' bill was filed against the maker of the note and an injunction granted therein, which operated to enjoin the holder of the note from foreclosing the mortgage except in that case, and, on the holder's intervening to set up its claim by cross-bill, the complainant answered, denying the validity of the mortgage.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Creditors' proceeding by J. C. Franklin against The Duncan, a hotel corporation, and others. From a decree for the Penn Mutual Life Insurance Company against the hotel corporation and Oliver J. Timothy as guarantor for it, Timothy appeals. Affirmed.

Pitts & McConnico and W. N. Wright, all of Nashville, for appellee. Samuel N. Harwood, of Nashville, for appellant.

WILLIAMS, J. This cause is a general creditors' proceeding to wind up The Duncan, a hotel corporation, and the questions to be determined arise on the claim of the Penn Mutual Life Insurance Company against the insolvent company and Oliver J. Timothy, as guarantor for it.

The Duncan, as maker, executed a mortgage note for \$60,000 to the Life Insurance Company which contained, in its body, the following stipulation respecting attorneys' fees:

"It is stipulated that if this note is placed in the hands of an attorney for collection, has to be sued upon, or if litigation arises in the course of its collection, the undersigned agrees to pay ten (10) per cent attorneys' fees for such services as may be rendered in connection therewith, the same to be taxed as cost and become a part of any judgment rendered hereon, and said attorneys' fees are secured by said deed of trust."

On the back of the note was the following guaranty, signed by appellant, Timothy, before the delivery of the note to the payee:

"For value received, we, and each of us, jointly and severally, guarantee payment of principal and interest of the within note, as and when the same shall become due, and of any extension thereof in whole or in part, accepting all its provisions, * * * and waiving protest, demand and notice of protest," etc.

The only questions to be treated of are those made by Timothy on his appeal from a decree of the chancellor so far as by it he was held liable for attorneys' fees allowed the payee company.

It is argued that the liability of Timothy is the same, in that regard, as if he were a regular indorser in blank.

[1] It is said in 1 Daniel, Neg. Ins. (6th Ed.) 62 (a), that such a stipulation for attorneys' fees becomes a part of the contract of an indorser, and that rule as relates to a regular indorser appears to be sustained by

authority. First Nat. Bank v. Canatsey, 34 Ind. 149; Hubbard v. Harrison, 38 Ind. 323. And certainly the reasons are yet more cogent why this should be true of an indorser who waives demand, protest, and notice, thus dispensing with any condition precedent to his liability. 3 R. C. L. 1148, and cases cited.

An accommodation indorser is to be held liable for fees so stipulated to be paid. Hall v. Pratt, 103 Ga. 255, 29 S. E. 764.

The case of Bank of British N. A. v. Ellis (C. C.) 2 Fed. 44, involved the question of the liability of an accommodation indorser for attorneys' fees provided for in the face of a note. It was there said as to the liability of both kinds of indorsers:

"The maker of these notes having agreed to pay an attorney fee to the holder thereof, if the same were not paid without action, in my judgment each subsequent party thereto assumed a like responsibility to such holders, and therefore the plaintiff is entitled to recover such fee from the defendants in this case.

"But I think the defendants are liable to the plaintiff in this action for an attorney fee, even if the stipulation therefor can only be enforced between the immediate parties thereto. The defendants are accommodation indorsers. By their indorsement of them they authorized Gaston, the then holder, to transfer them to the plaintiff, which was done. Every stipulation in them, and every obligation incident thereto, thereby became the stipulation and obligation of the defendants made directly to the plaintiff."

[2] But the appellant in the pending case is a guarantor, and in the case of a guaranty, as a general rule, the extent of the liability of the principal debtor, or maker of the note, measures the liability of the guarantor. 20 Cyc. 1420; 3 R. C. L. 1155.

Therefore, the maker being liable for the fees, the guarantor takes that obligation under the measure of his liability to the holder, for reason even stronger than in the case of an indorser of whatever character.

In Riverside Milling, etc., Co. v. Bank, 141 Ga. 578, 81 S. E. 892, the guaranty on the back of the note was to the effect that its signers "guarantee the payment of the same at maturity or at any time thereafter," and it was held that they were liable on the note according to tenor, including the attorneys' fees provided for on the face of the note.

Another contention of appellant is: That by the terms of the guaranty he became guarantor of the payment of principal and interest only, and not of the payment of the attorneys' fees. If we apply the rules of construction applicable to ordinary contracts to the construction of the guaranty, we think it manifest that when the guarantor went further and made use of the phrase "accepting all its provisions" (referring to the provisions of the note), the stipulation as to attorneys' fees was made a part of his express obligation.

[3] But it is said that the insurance company is not entitled to have the fees allowed because its suit on the note was needlessly brought, since a foreclosure out of court was provided for in the mortgage, Clark v. Jones,

93 Tenn. 639, 643, 27 S. W. 1009, 42 Am. St. Rep. 931, being cited.

The general creditors' bill, with the injunction therein granted, operated to enjoin the insurance company from foreclosing the mortgage or trust deed, except in that cause. A foreclosure by means of a trustee's sale out of court could only have been had by leave of the court in that case. After the insurance company intervened to set up its claim by cross-bill, the complainant in the original bill filed an answer, denying the validity of cross-complainant's mortgage, and insisting that that instrument was not authorized by any corporate action of the stockholders, and directors of the corporation, The Duncan. Without meaning to intimate an opinion that but for this last-noted fact an allowance of fees would be improper, certainly the insurance company being thus held to support by proof and establish by decree the validity of its lien upon the assets against all other creditors, we think it clear that it has shown good and sufficient reason for not bringing the property to foreclosure sale by the trustee, under the power of sale vested in the trustee by the trust deed. It is therefore entitled to a judgment for attorneys' fees. *Bank v. Woods*, 125 Tenn. 6, 17, 140 S. W. 31.

The decree of the chancellor awarding same is affirmed.

KNAPFL v. KNOXVILLE BANKING & TRUST CO.

In re BACON.

(Supreme Court of Tennessee. Jan. 12, 1916.)

1. SUBROGATION — PAYMENT OF DEBT — SUFFICIENCY.

As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank was still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, would not discharge the obligation; for in such case, if the surety were pro rata subrogated to the bank's right to receive dividends, the city would be injured.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 51-59; Dec. Dig. — 28.]

2. SUBROGATION — CONTRACTS — CONSTRUCTION.

Though a bond to secure a city in a deposit of money in a bank declared that in case of default and payment of the claim the surety should be subrogated to all rights of the city against the bank to the amount of such payment, the surety only has the usual rights of subrogation, and his payment, together with dividends paid by the bank, not being sufficient to discharge the obligations due from the bank, he is not entitled to subrogation to the detriment of the city.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 51-59; Dec. Dig. — 28.]

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Suit by Joseph Knapp against the Knoxville

Banking & Trust Company, in which Charles H. Bacon filed a petition. From a decree sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Charles T. Cates, Jr., of Knoxville, for appellant. Wright & Jones, D. C. Webb, and Hugh M. Tate, all of Knoxville, for appellee.

FANCHER, J. The suit in which this petition is filed is a proceeding by complainants on behalf of themselves and all other creditors of the Knoxville Banking & Trust Company for the purpose of administering the affairs of said corporation as an insolvent concern. This particular intervening petition was filed by Charles H. Bacon to recover of the receiver of said Knoxville Banking & Trust Company in round numbers \$28,000, being the amount, with interest, of a bond executed by the said Charles H. Bacon and others, as sureties for the Knoxville Banking & Trust Company, as principal, to secure the city of Knoxville in the deposit of moneys in said banking institution.

Petitioner avers that judgment was rendered against him and all the other sureties on said bond, which judgment was paid by him alone; the other sureties being insolvent. This bond provided that the Knoxville Banking & Trust Company will "truly keep all sums of money deposited with it by the city of Knoxville, and shall pay over the same, and each and every part thereof, upon the written demand of the said city of Knoxville."

Petitioner avers, in effect, that he is entitled to recover of the receiver such pro rata as he may be entitled to on the \$28,000 paid by him, upon the ground that he will be subrogated to all the rights of the city of Knoxville to the extent of the payment made by him to the city on this obligation.

The petition does not aver that this payment was in full of all sums of money so deposited. On the contrary, it is admitted in the petition that the city had on deposit more than the amount of the bond, and has received only a 30 per cent. dividend. The amount of the city's deposit is shown by the bill or petition of the said city of Knoxville filed in the general cause which was ordered to be sent up with the transcript to be \$60,000, and in the briefs of counsel this sum is treated as the total amount of the deposit.

[1] The receiver demurred to this intervening petition upon three grounds. The first ground of demurrer, we think, is conclusive of the case, to wit, that it was not averred that the entire indebtedness due the city of Knoxville from the Knoxville Banking & Trust Company has been paid, and consequently the petitioner would not be entitled to subrogation or to any other relief against the Knoxville Banking & Trust Company or its receiver. It appears that, if the city should receive the full amount which will

be finally paid in the receivership proceeding, it will not receive a sufficient amount to cover the entire indebtedness.

A surety is not entitled to subrogation until the debt is paid in full, the creditor in the meantime left in control of the debt, and all the remedies for collection. A pro tanto assignment or subrogation will not be allowed. The reason is that subrogation is a creature of equity and will never be allowed to the prejudice of the creditor. *Harlan v. Sweeny*, 1 Lea, 686; *Gilliam v. Esselman*, 5 Sneed, 86; 37 Cyc. 408.

"If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable." *Columbia Finance, etc., Co. v. Ky. Un. R. Co.*, 60 Fed. 794, 9 C. C. A. 264.

In *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658, the New Jersey court said:

"The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied there ought and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim."

In the present case Bacon was not liable for the debt beyond the amount of his bond, but the obligation to pay the bond was conditioned that the bank should "well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof."

So that the bond was an obligation limited to \$25,000, but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. The full amount of the bond has been discharged by the surety, but the condition expressed has not been complied with. The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is concerned, but the cause and determination of that liability is not satisfied in full.

The particular prejudice to the city by permitting a pro tanto assignment in this case to the extent of the payment by the surety lies in the fact that the pro rata which the city would receive from the principal debtor would become less.

[2] But it is said that this case does not involve the doctrine of equitable subrogation alone. The bond provided for what is term-

ed conventional subrogation in the following words:

"In case of default hereunder and the payment of a claim under this bond, the said surety shall be forthwith subrogated to all the rights of the said city of Knoxville against the said bank, its receiver, or any person or corporation as respects such funds to the amount of such payment; and the city of Knoxville, Tennessee, covenants to execute all papers required and to co-operate with the said surety in order to secure for the said surety such rights."

This provision must be considered in connection with the undertaking, of which it is a part, to secure the city against all loss. It does not provide for subrogation pro tanto upon payment of a part of the obligee's claim. The bond was not to pay a particular \$25,000, but was an obligation to pay any deficit left unpaid by the principal, to the extent of \$25,000.

Had it chosen to do so, the city might have deferred action on the bond until it had received the last dollar from the receiver, and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case.

We are of opinion that this contractual subrogation is nothing more than the usual equitable right which the surety would have without stipulation. Before the court would permit a subrogation in favor of a surety that would be to the detriment of the obligee in the bond, the contract should be so certain as to admit of no doubt on that question. In the present case the main object of the bond was to secure and save harmless the city of Knoxville on all deposits it might make in the Knoxville Banking & Trust Company. We see no provision in the contract for a subrogation inconsistent with that purpose. The subrogation mentioned in the bond to be forthwith made in case of default and payment of a claim thereunder did not contemplate a subrogation which should lessen the recovery of the city, but only a subrogation in harmony with the purpose of the bond, which must have been upon such payment and under such conditions as would preserve all the rights to the city to receive its full debt. In other words, the subrogation not being stated otherwise, must be considered as in harmony with the obligation to well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof.

Counsel for petitioner cite *Ex parte Rushforth*, 10 Vesey, Jr., 409, in which a bond with surety in the penalty of £10,000 was conditioned for the payment of such sums as would be advanced to the principal. Twenty thousand pounds were advanced to the principal, who then became bankrupt. The sure-

ty paid the penalty and sought subrogation against the estate of the principal. In the opinion Lord Chancellor Eldon said:

"I think the bankers are not entitled in equity to say as against the surety that their demand is more than £10,000, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place; as to the residue of their debt they ought to be considered, if I may so express it, as their own insurers."

We think there is fault in the reasoning of this case, and that it is not in harmony with the principles of equity governing the doctrine of subrogation. The condition of the bond was to pay such sums as would be advanced to the principal without limiting the amount which should be advanced. The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal obligor can pay, and then resort to the bond for any amount left unpaid not exceeding the amount of the penalty; for it is the final amount left unpaid by the principal which is intended to be secured by the surety.

It results that, in our judgment, there was no error in the decree of the chancellor, and it is affirmed.

ELLEDDGE v. ANDERSON et al.

(Supreme Court of Tennessee. Jan. 22, 1916.)

1. FRAUDULENT CONVEYANCES — 177 — PARTIAL VALIDITY OF TRANSACTION — RIGHT OF GRANTEE — RESULTING TRUSTS.

Complainant purchased a one-half interest in a stock of goods in violation of the Bulk Sales Law (Laws 1901, c. 133). Thereafter, the seller having died, he acquired the remaining one-half interest on the understanding that creditors' liens should be discharged by the administrator and the seller's widow. The money paid for the second interest could be identified in a bank. *Held* that, as the seller's creditors could have followed the money, and as the whole of the stock was liable for their demands, complainant, who had paid the demands of creditors, was entitled to impress a trust upon such funds, notwithstanding the seller's widow at the time of the sale was mentally incompetent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 543-546; Dec. Dig. ¶ 177.]

2. EQUITY — 129 — BILL — SUFFICIENCY.

Where a bill set out the facts showing complainant to be entitled to relief, and concluded with a general prayer, it is sufficient, though not in so many words stating the theory upon which complainant was entitled to relief.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 309; Dec. Dig. ¶ 129.]

Appeal from Chancery Court, Giles County; Walter S. Bearden, Chancellor.

Bill by O. J. Elledge against Beulah S. Anderson and others. From a decree for complainant, defendants appeal. Affirmed.

Ben Childers, of Pulaski, for appellants.
J. D. Woodward, of Pulaski, for appellee.

GREEN, J. This bill was filed to reach \$1,365.83 in a Pulaski bank, claimed by Mrs. Beulah S. Anderson, widow of Ed F. Ander-

son. A demurrer was interposed and overruled, and defendants appealed to this court.

The controversy arises in the following manner:

In May, 1910, Ed F. Anderson, the husband of the defendant, was the owner of a drug store in Pulaski, and on that date he sold a one-half interest therein to the complainant, Elledge, for \$4,000.

Anderson was considerably indebted to mercantile creditors. Of this fact Elledge was unaware; Anderson telling him that the debts amounted to little and promising Elledge to take care of them. No attempt was made by the parties to comply with the provisions of the Bulk Sales Law (chapter 133, Acts of 1901). Neither of them knew of the existence of this statute at the time of the transaction.

After this sale Anderson's creditors brought suits against Elledge to hold him liable to the amount of the value of the stock purchased by him. The suits were founded on the statute referred to. This court held Elledge to be liable to such creditors to the extent of the interest acquired by him in the stock of goods, holding that his purchase of a one-half interest therein was in violation of chapter 133, Acts of 1901. *Daly v. Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

In May, 1911, about a year after Elledge had bought this interest in the business, Anderson died. At that time one of Anderson's creditors had recovered judgment against Elledge, and others had sued or were threatening to sue him.

Under these circumstances Elledge made a trade with the administrator of Anderson's estate whereby Elledge acquired the other one-half interest in the business for \$2,750, and as a part of this trade Anderson's administrator and the defendant Mrs. Beulah S. Anderson, the widow, undertook to protect Elledge from further liability on account of Anderson's debts.

The administrator paid off the creditor who had obtained the judgment against Elledge, but later other creditors appeared and brought suits, and, when Elledge sought to hold Mrs. Anderson and the administrator on their aforesaid guaranty, it developed that Mrs. Anderson was of unsound mind and incapable of making a binding contract at the time she signed the paper aforesaid. Elledge brought two suits to hold her liable, and in both of them she was adjudged to have been mentally incapacitated to enter into this contract.

It is conceded that Elledge knew nothing of this condition of her mind when he made such contract.

The \$1,365.83 sought to be reached in this suit is the balance of the sum of money paid to Anderson's administrator by Elledge for Anderson's remaining interest in the stock.

There is no question as to the identity of the fund.

It appears that the administrator personally is insolvent. Nothing can be realized from him by Elledge.

Mrs. Anderson claims the \$1,365.83 as her year's support, and insists by her next friend in this case that she is entitled to this sum for this purpose free from the claims of any creditor of her late husband, including the claim of Elledge.

[1] We think the chancellor's decree was correct, and that complainant, Elledge, is entitled to reach this fund. It appears that, notwithstanding the guaranty of protection made to him by the administrator and Mrs. Anderson at the time he purchased Anderson's remaining one-half interest in the firm, Elledge has been sued by Anderson's creditors and has paid more than \$3,500 in judgments against himself on this account.

Anderson and Elledge violated the Bulk Sales Law by the original deal in which Elledge acquired a one-half interest in the stock in 1910. This transaction was declared constructively fraudulent in *Daly v. Drug Company*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

Thereafter the entire stock was subject to the demands of these creditors of Anderson's. Elledge was personally liable to the extent of the interest which he had acquired, but all of the stock of goods was liable for Anderson's debts, and subject to attachment.

When Elledge purchased Anderson's interest, thus incumbered, from his administrator, he did so with the understanding that the creditors' lien was to be discharged by the administrator and Mrs. Anderson. Elledge's money really went into the administrator's hands impressed with a trust for the payment of Anderson's creditors. The creditors could undoubtedly have followed this fund.

In *Fecheimer-Kelffer Co. v. Burton*, 128 Tenn. 682-684, 164 S. W. 1179, 51 L. R. A. (N. S.) 343, considering a sale had in violation of the Act of 1901, it was said:

"It seems clear, since the sale was only fraudulent in law, * * * that the purchasers are entitled to stand in the place of the creditors whose demands against their vendor were thus paid by the purchase money notes, or the proceeds thereof. Those whose purchase of property has been under such a statute denounced as constructively fraudulent, and avoided by creditors of the seller, may stand in the place of other creditors whose demands have been thus paid."

For this the court cited *Adams v. Young*, 200 Mass. 588, 86 N. E. 942, *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 495, and *Alley v. Connell*, 40 Tenn. (3 Head) 578, which authorities fully sustain the proposition.

As we have pointed out, Elledge paid off Anderson's creditors to the extent of \$3,500, and under the authorities above he became subrogated to the rights of these creditors against Anderson's interest in the stock

of goods. These creditors had a lien as a result of the statute, on Anderson's interest and Elledge's interest—the entire stock. When Anderson paid them he acquired their lien, including their lien on Anderson's interest.

What, then, became of Anderson's interest? Where was it? It was represented by the fund Elledge had paid to the administrator. This payment was made on the faith of the bond executed by the administrator and by Mrs. Anderson that they would save Elledge harmless from the demands of Anderson's creditors.

Said sum of money so paid by Elledge, being the proceeds of property charged by the statute with a trust in favor of Anderson's creditors, could have been followed and subjected by the creditors in the administrator's hands. When Elledge paid the creditors he became subrogated to this right of theirs. He has traced part of the fund and found it in a Pulaski bank, and we think he is entitled to hold it.

The entire theory of the defendant rests on the idea that Elledge was merely a general creditor of Anderson as to the sums in which he was mulcted for Anderson's mercantile debts, and it is accordingly urged his claim could not have priority over the widow's claim for a year's support. The argument for the widow entirely overlooks the right of Elledge to be substituted to the rights and remedies of the creditors paid by him, and is for this reason unsound.

[2] Complainant's bill states the facts fully. While it does not in so many words present the theory upon which we have concluded the bill should be maintained, under the prayer for general relief the court thinks it proper to sustain the bill for the reasons herein stated.

Decree of the chancellor affirmed, with costs.

COHN v. HITT et al.

(Supreme Court of Tennessee. Jan. 15, 1916.)

1. BILLS AND NOTES — §301 — INDORSERS — RIGHTS OF.

A prior indorser of a note payable to a given bank is not discharged because the maker took the note to a discount broker, engaged him to secure its discount and the broker in the usual course of business indorsed the same, for there was no diversion of the proceeds of the note and the liability of the first indorser was in no way changed.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 706-721; Dec. Dig. § 301.]

2. BILLS AND NOTES — §298 — INDORSER'S LIABILITY.

Negotiable Instruments Law (Laws 1890, c. 94) § 64, declares that a person who places his signature in blank upon an instrument before delivery is liable as an indorser, while section 68 declares that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between themselves they have agreed

otherwise. Defendant indorsed a note for the accommodation of the maker and thereafter, to secure its discount, complainant also indorsed it. There was no evidence of any agreement whereby complainant should be primarily liable. *Held*, that as there was no diversion of the note, defendant was, both under the statute and at common law, liable to complainant, who was forced to pay the note at maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 739; Dec. Dig. ¶ 298.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Suit by S. Cohn against L. M. Hitt and one Gupton. From a decree for complainant, Gupton alone appeals. Affirmed.

W. R. Chambers and James B. Newman, both of Nashville, for appellant. Nathan Cohn, of Nashville, for appellee.

WILLIAMS, J. This suit was instituted by complainant, Cohn, to recover on a note for \$3,000 against Hitt, as maker, and Gupton as first indorser.

Hitt applied to Cohn to aid him in borrowing \$3,000, asking whether if he, Hitt, should procure his own note to be indorsed by Gupton, Cohn could get it discounted at the Fourth National Bank. After making inquiry as to Gupton's financial standing, Cohn agreed that if Hitt would bring him a note payable to that bank and so indorsed he would, for a fee of \$100 (Cohn being a licensed securities dealer), take the note to that bank and procure it to be discounted. This was done, the bank, in accordance with its custom, requiring Cohn to indorse the note, he being a customer of that bank. It was explained to Cohn by Hitt that both he and Gupton were customers of another national bank, and it was preferred that the discount be made in the Fourth National Bank so that the lines of credit of Hitt and Gupton in their own bank would not be affected or interfered with. Hitt went to the bank of discount with Cohn, but did not actually see Cohn indorse the note. Cohn received \$2,955 (6 per cent. interest being deducted) from the discount clerk, and handed same to Hitt, who paid Cohn his fee.

The note was renewed several times; on the first and every occasion Gupton's name preceded that of Cohn as indorser. When the original note was taken up by the first renewal, Hitt became aware of the actual fact of Cohn's indorsement, though from the outset he presumed that Cohn would be required, in accordance with the course of business, to indorse, and that he would accordingly do so. Gupton did not know of the indorsement of the several instruments by Cohn.

The chancellor decreed in favor of complainant Cohn against both defendants, but Gupton only has appealed.

[1] His first contention is that, since he did not execute the note with the expectation or understanding that Cohn would figure in the transaction, or know that Cohn had done

so, the latter could not, by his own act, bring about privity with, or liability on the part of, appellant. We can see no bearing that those facts have upon the rights of the parties. If the note, after the signature of Gupton was obtained, was diverted by being used with a person or at a bank of discount other than the one agreed upon, there might be room for a contention of nonliability on the part of appellant. *Perkins v. Ament*, 2 Head (39 Tenn.) 116; *Hickerson v. Raiguel*, 2 Heisk. (49 Tenn.) 829, 334; *Hermitage National Bank v. Carpenter*, 131 Tenn. 136, 142, 174 S. W. 263. But all that was done was but in furtherance of a discounting at the bank agreed on at the time Gupton indorsed the note.

No change in the mere subordinate steps in the plan for raising the money on a note thus indorsed for accommodation will constitute a diversion. If the note effected the substantial purpose for which it was designed by the parties, the indorser, though one for accommodation, cannot defend on the ground that the accommodation was not effected in the precise manner contemplated, where, as here, his interests have not been prejudiced. 1 *Daniel*, Neg. Inst. (6th Ed.) § 793.

[2] The next insistence is that Cohn must be treated as a joint indorser, and therefore cosurety, so to speak, with appellant; and, though it is conceded that Cohn purchased of the payee bank and took a transfer of the last renewal note at its maturity, it is argued that he is entitled to recover from appellant no more than one-half of the amount of the note.

At an early day it was held in this state, following the decision of the Supreme Court of the United States in *McDonald v. Magruder*, 3 Pet. 474, 7 L. Ed. 744, that a prior indorser is liable to every person whose name is placed on the note subsequent to his own, and who has been compelled to pay its amount.

"This is the regular course of business, when notes are indorsed for value; nor is the case altered, as it is contended, where the indorsements are made for the accommodation of the drawer. Where there is no contract between the parties, other than is created by their respective indorsements provided by the act of indorsement, the first indorser gives his name to the maker of the note for the purpose of using it in order to raise the money mentioned on its face; he makes himself responsible for the whole sum, upon the sole credit of the maker. His undertaking is undivided, and he is responsible for the whole." *Marr v. Johnson*, 9 Yerg. (17 Tenn.) 1; *Wallace v. Greenlaw*, 9 Lea (77 Tenn.) 115.

The Negotiable Instrument Law (Act 1899, c. 94) recognizes and embodies, and does not change, this rule. Thus:

"Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable, as indorser, in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. * * *

Section 68 defines the rights and liabilities of indorsers inter sese:

"As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

This refers to irregular or accommodation indorsers as well as regular indorsers. Without proof of an agreement prior indorsers for accommodation are liable in solido to a subsequent indorser who has paid the note. The law fixes their prima facie liability in accordance with the order of their names on the paper. In re McCord (D. C.) 174 Fed. 72; Goldman v. Goldberger, 206 Fed. 877, 126 C. C. A. 35; Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413; State Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Sup. 858; Harris v. Jones, 23 N. D. 488, 136 N. W. 1060.

It is not claimed that there existed any agreement between the indorsers, express or implied, tending to change this order of liability. Indeed, the proof and theory of appellant is that he did not even know of the indorsement by Cohn, and the latter expressly stipulated that the note should be delivered to him with the name of Gupton indorsed thereon. Harris v. Jones, supra.

Other assignments of error are disposed of in a memorandum for decree. Affirmed.

IN RE FORKED DEER DRAINAGE DIST.

(Supreme Court of Tennessee. Jan. 13, 1916.)

1. DRAINS §14 — DRAINAGE DISTRICTS — COUNTY COURTS.

Laws 1909, c. 185, as amended by Laws 1915, c. 61, provides that, where lands included in a drainage district shall lie in several counties, the county court of any one of the counties has jurisdiction to create and establish such district without the necessity of resorting to the county courts of other counties for concurrent or ancillary action. Const. art. 2, § 29, declares that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes. Held, that the constitutional provision applies only to taxes, and not to special assessments; hence the Legislature could validly give the county court jurisdiction over proceedings to establish a drainage district lying in several counties, since in the absence of restriction, the Legislature's power is plenary, and drainage districts, being governmental agencies, need not coincide with county lines.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. §14.]

2. DRAINS §1—POWER TO ESTABLISH.

In the absence of restriction, the Legislature has plenary power over the establishment of drainage districts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 1; Dec. Dig. §1.]

3. DRAINS §66—DRAINAGE DISTRICT — NATURE OF.

A drainage district is a governmental agency to which power to levy special assessments may be properly delegated.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. §66.]

Appeal from Circuit Court, Gibson County; Thomas E. Harwood, Judge.

Petition for the establishment of the Forked Deer Drainage District. The county court dismissed the petition, and on appeal to the circuit court the ruling was upheld, and petitioners appeal. Reversed and remanded.

Deason, Elder & Holmes, of Trenton, for appellee.

WILLIAMS, J. A petition was filed in the county court of Gibson county, seeking to have created a drainage district for the improvement of lands along the middle fork of the Forked Deer river in the counties of Madison, Gibson, and Crockett, the procedure being that set forth in Act 1909, c. 185, as amended by Act 1915, c. 61.

The county court held that it was without jurisdiction and power in the premises, and declined to act. On appeal to the circuit court this ruling was upheld.

The amendatory act of 1915 undertook to prescribe an additional method of procedure, and to give the county court of any one of the counties, in which such district might in part be located, jurisdiction to create and establish such a district without the necessity of resorting to the county courts of the other counties for concurrent or ancillary action.

The adverse judgments of the lower courts were based on the idea that, because some of the tracts of land sought to be included in the proposed district lay wholly in Crockett or Madison county, and were owned by residents of these counties, it was not constitutionally competent for the Legislature to impose on the court of a single county the duty of creating and establishing the proposed district.

The amendatory act undertakes to vest in such court full power to appoint a civil engineer, viewers to assess damages, commissioners to make assessments and apportion the same on the lands affected, all as fully as if the district lay entirely within one county, and also to provide that such court may make the final assessments on the lands in all of the counties, the assessment sums to be collected by the county trustees of the several counties so far as there were affected lands lying in their respective counties, and, when collected, to pay out the same on warrants to be drawn by the judge or chairman of such court. The assessments are made liens upon the lands.

[1] Is it within the power of the Legislature, under the Constitution, to vest in a single county court the powers thus attempted to be granted?

The original act of 1909, c. 185, was under review in State ex rel. v. Powers, 124 Tenn. 553, 137 S. W. 1110, and there upheld as constitutional.

One ground of attack on the original act in

that case was that it was violative of article 2, § 29, of the Constitution, which provides:

"The General Assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporation purposes respectively, in such manner as may be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation."

The court held that the act made provision for the levying of special assessments, and not of "taxes" within the meaning of that word in this constitutional provision, following *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, 5 Ann. Cas. 881, in distinguishing special improvement assessments from taxes.

In respect of taxes, proper, we have a line of cases holding distinctly that the power to levy taxes can be delegated by the Legislature only to counties and incorporated towns. *Smith v. Carter*, 131 Tenn. 1, 173 S. W. 430, and cases therein cited.

The case of *Smith v. Carter* involved an effort to vest a power to tax in a board of commissioners of a road improvement district who were not agencies of a county; the proposed district being composed of fractional parts of two counties. In the instant case we do not have to deal with a delegation of the taxing power proper; if so, the doctrine of *Smith v. Carter* would compel an affirmation of the judgment below. In such case the constitutional provision is specific, clearly applicable and inhibitory.

But we conceive that the case is different where the power involved is that of levying and collecting special assessments. We know of no constitutional provision which qualifies or interdicts the power of the Legislature in that regard. If there is not, the power is plenary.

[2] Such drainage districts are governmental agencies, and the powers respecting such are properly to be delegated to counties or to any other body the Legislature may see fit.

It would be entirely competent for the Legislature directly to delimit a body of lands and appoint commissioners to perform all the requisite functions that are usually delegated, and performed by assessors and commissioners chosen by the people of the district or some local authority. *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207; *State ex rel. v. Cummings*, 130 Tenn. 566, 172 S. W. 290, L. R. A. 1915D, 274.

"In fact, historically, such was the original method adopted when, in the reign of Henry VIII, the first statute was passed providing for the construction of sewers, drains, and other improvements designed to reclaim swamp lands (St. 23 Hen. VIII, c. 5, par. 1 [1531]), and such is the method still adopted in many of the states of this nation. It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to

this spirit, and not the compulsion of the law, which prompts the Legislature to give the land-owners so large a voice in the management of these affairs." *People v. Sacramento Drainage District*, supra.

[3] The power to construct drainage canals, when delegated because of such considerations, need not be devolved on a county or a municipality; it may be conferred, along with the power to specially assess therefor, upon any person or body upon which the Legislature may see fit to grant it. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545; *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; 9 R. C. L. 620, 642.

"The fact that the lands may be situated in more than one county cannot affect the power of the state to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the Legislature may designate." *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Reclamation District v. Hagar*, 66 Cal. 54, 4 Pac. 945; *Shaw v. State*, 97 Ind. 23.

The fact that lands affected and assessed for the construction of a ditch lie in two or more counties does not affect the authority and duties of the commissioners appointed by the court of the county where the proceedings were instituted to construct the ditch in its entirety, and assess all lands affected, whether in that or adjoining counties, in accordance with a drainage law under which the ditch is established. *Crist v. State ex rel. Whitmore*, 97 Ind. 389; *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390.

The county court is to be considered, therefore, as the delegate of the state. On it is imposed a special authority, conferred for a special purpose, beyond those exercised by it ordinarily and within the limits of the county for which it sits. This special authority comes from the state, the power of which, touching the subject-matter, is not limited, or embarrassed in execution, by county lines.

Finding error in the judgment of the circuit court, it is reversed, with a remand for further proceedings in accord with what is herein ruled.

MINTON v. WILKERSON et al.

(Supreme Court of Tennessee. Jan. 22, 1916.)

1. EQUITY — 381 — PRACTICE — SPECIAL ISSUES.

Generally, when in an equity case there are several issues of fact submitted to a jury, they must find on all or none, and a verdict on one or more is not valid.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 813-817; Dec. Dig. — 381.]

2. EQUITY — 381 — PRACTICE — SPECIAL ISSUES.

In a suit to recover complainant's alleged interest in the estate of his wife, where he attacked the validity of his release of the same, and the jury, to which special issues of fact were submitted, found in favor of the validity of the release, but failed to find on issues as to separation of complainant and his wife pre-

sented by defendants, the failure is immaterial and will not deprive defendants of a decree in their favor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 812-817; Dec. Dig. § 381.]

3. APPEAL AND ERROR §907 — REVIEW — FINDINGS.

Where complainant did not move for a new trial and preserve the evidence in a bill of exceptions, the finding of the jury against him on issues submitted in an equity case must be deemed by the appellate court as warranted by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.]

Error to Chancery Court, Davidson County; Jno. Allison, Chancellor.

Bill by G. B. Minton, by next friend, against J. Morgan Wilkerson and others. The case being tried before a jury on issues of fact, there was a disagreement, whereupon defendants moved for a decree in their favor upon the verdict, which was denied, and they bring error and certiorari. Reversed and remanded.

W. D. Covington and H. A. Luck, both of Nashville, for complainant. Samuel N. Harwood and Frank P. Bond, both of Nashville, for defendants.

WILLIAMS, J. The bill of complaint was filed by Minton, by next friend, against the administrator of the estate of complainant's wife, to recover the sum of \$4,000 left by that decedent, basing the claim on marital right. The bill set forth that Minton was of such unsound mind as to be incapable of transacting business; that three days after the death of complainant's wife, defendant Wilkerson, her brother, accompanied by an attorney, visited him while he was confined to his bed as a helpless invalid; that his mind, by reason of sickness and a constant use of drugs, was weakened so that he was incapable of understanding the nature of the transaction; that he was caused by these visitors to execute a release of his interest in the estate of his wife, which release was impeached for fraud, and prayed to be annulled as void.

The defendants answered, denying that the release was fraudulent, and setting forth acts of violence to, and of ill treatment and personal abuse by complainant of, his wife in her lifetime, which had caused her to leave and live separate from him, and that the fund sought to be recovered was acquired after such separation, which was not followed by a reunion. The defense was pitched on the provisions of Code (Shannon) § 4240, as construed in *Cooper v. Maddox*, 2 Sneed (34 Tenn.) 135, 149.

The case was tried before a jury on issues of fact submitted.

Complainant submitted five issues, all of which related to the validity of the release, and in responses made to all of them the

jury found against complainant and in favor of the validity of the release.

The defendants submitted eight issues, relating to a separation and the cause thereof, and to the dates when the fund was acquired. To some of these issues of the defendants the jury replied, "We cannot agree."

The complainant moved for a decree non obstante veredicto, which motion was denied, and then that a mistrial be entered, which motion was also refused.

The defendants moved for a decree in their favor upon the verdict, which the chancellor declined, and they have sued out writs of error and certiorari to review the rulings of the chancellor.

[1] A basic contention of the complainant is that because the jury reported their disagreement on certain of defendants' issues, the verdict was vitiated, and no relief in behalf of defendants can be predicated on it. In our view the solution of this question is decisive of the case.

The general rule undoubtedly is that when in an equity case there are several issues of fact submitted to a jury, they must find all or none, and may not find on one or more and disagree on another and the verdict be valid. *Berry v. Wallen*, 1 Overton (1 Tenn.) 186; *Auncelme v. Auncelme*, Cro. Jac. 31; 11 Enc. Pl. & Pr. 710.

[2] However, the failure of the jury in an equity case to agree upon or respond to an issue which is ab initio immaterial. (38 Cyc. 1924), or which becomes immaterial in view of the finding on other issues (independent of and not in conflict with the one unresponded to), does not vitiate the verdict, when, taken as a whole, the findings are sufficiently comprehensive to support a decree which properly disposes of the whole case. *Sears v. Sears*, 45 Tex. 557; *Coons v. Lain* (Tex. Civ. App.) 168 S. W. 981; *Brown v. Milwaukee, etc., Co.*, 148 Wis. 98, 133 N. W. 589; *Columbus Power Co. v. City Mills Co.*, 114 Ga. 538, 40 S. E. 800.

The case last cited, an equitable action in relation to a backflow of water, was submitted to a jury upon special issues, upon which judgment was rendered for defendant. Two issues were presented by plaintiff respecting the natural and present head and fall on the property of defendant, to each of which the jury answered, "We do not know." The defendant submitted an issue as to its prescriptive right to backflow the lands, which was found in its favor. The court, on appeal, held that:

"The answer with respect to the prescriptive right of the Mills Company was conclusive of the whole case, and sufficient, in and of itself, to defeat the plaintiff's action"

—and that the other issues were rendered immaterial.

So, in the case under consideration, it may be admitted that defendants' issues, not

agreed on or properly replied to, would have been material had the jury not held against complainant on the issues submitted as to the validity of the release. But any cause of action, when or if conceded to exist, was found to have been satisfied and released, and the essential foundation for a decree on the merits was afforded by the findings. The issues as to that may well be termed the paramount issues in such case. The other issues became immaterial, if the issues as to payment or release were based on adequate proof.

[3] The complainant did not move for a new trial and preserve the evidence in a bill of exceptions, and therefore the finding of the jury on such issues must be deemed, by us on appeal, to have been justified by the evidence. *Scruggs v. Helskell*, 95 Tenn. 455, 32 S. W. 386.

The chancellor was in error in not responding to defendants' motion by decreeing in their favor on the findings. Reversed, with remand to the lower court for proceedings in accord herewith.

RICHMOND TYPE & ELECTROTYPE FOUNDRY v. CARTER et al.

(Supreme Court of Tennessee. Jan. 22, 1916.)

1. REPLEVIN ⚡8—ACTIONS—RIGHT TO MAINTAIN.

A mere equitable title will not support replevin.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 46-68; Dec. Dig. ⚡8.]

2. CHATTEL MORTGAGES ⚡205—REPLEVIN ⚡8—EQUITABLE ASSIGNMENTS.

Where notes secured by a chattel mortgage were indorsed, but the mortgage was not assigned, the notes, while carrying with them the equitable title to the mortgage, did not carry such title as would warrant the holder in maintaining replevin in his own name for the mortgaged chattels.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 452, 453; Dec. Dig. ⚡205; *Replevin*, Cent. Dig. §§ 46-68; Dec. Dig. ⚡8.]

3. APPEAL AND ERROR ⚡713, 719—RECORD—NECESSITY OF BILL OF EXCEPTIONS.

In the absence of an assignment of error and a bill of exceptions presenting the question of the refusal of an amendment, the matter cannot be reviewed, though the action appeared in the motion for new trial; that being a mere pleading and not evidence of what occurred on the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2379, 2463, 2645, 2956, 2957, 2963-2982, 3490; Dec. Dig. ⚡713, 719.]

Certiorari to Court of Civil Appeals.

Replevin by the Richmond Type & Electrotype Foundry against George Carter and others. A judgment for defendants was reversed by the Court of Civil Appeals, and defendants bring certiorari. Writ granted, and judgment of Court of Civil Appeals reversed, and that of circuit court affirmed.

Garnett S. Andrews, of Nashville, for plaintiff. A. F. Whitman, of Nashville, for defendants.

GREEN, J. This is an action of replevin brought to recover certain printing machinery from George Carter and Mike Hol-loran, deputy sheriffs of Davidson county. The officers levied on the said equipment under attachment, and the plaintiff brought this suit, claiming to be entitled to the possession thereof. There was a judgment for defendants below. The Court of Civil Appeals reversed this judgment, and the defendants have filed a petition for certiorari.

It appears that the equipment of a publishing company in Nashville, known as the Daily Record Company, was sold to R. H. Yancey, Jr. Yancey executed purchase-money notes for the said equipment, and to secure the payment of these notes likewise executed a mortgage on the equipment to the Daily Record Company. It seems that the Daily Record Company was indebted to the Richmond Type & Electrotype Company, the plaintiff in this suit, and transferred the Yancey notes to the plaintiff to secure its indebtedness to plaintiff. There was no assignment by the Daily Record Company to the plaintiff of the mortgage made to the Daily Record Company by Yancey to secure the payment of these notes.

An attachment was levied on this printing outfit by certain creditors of the Daily Record Company, and under this attachment the defendant officers had possession of the property when it was replevined herein by the plaintiff.

The principal defense is that, inasmuch as no assignment of the mortgage securing these Yancey notes was made to the plaintiff, plaintiff never became vested with such a property right in the machinery as to enable it to maintain with reference thereto an action of replevin at law. The Yancey notes were transferred by the Daily Record Company to the plaintiff, and it is insisted for plaintiff that such transfer of the notes also effected a transfer of the mortgage securing the notes and conferred upon the plaintiff sufficient title to the property to enable it to maintain replevin as stated above. The circuit judge sustained the contention of the defendants. The Court of Civil Appeals reversed this action and rendered judgment for the plaintiff.

[1, 2] The Court of Civil Appeals based its action on the case of *Clark v. Jones*, 93 Tenn. 641, 27 S. W. 1009, 42 Am. St. Rep. 931, in which it was held that the transfer of notes secured by a mortgage carried with it the lien created by the mortgage. *Clark v. Jones* cited *Graham v. McCampbell*, 19 Tenn. (Meigs) 52, 33 Am. Dec. 126; *Cleveland v. Martin*, 39 Tenn. (2 Head) 123; *Roberts v. Francis*, 49 Tenn. (2 Helsk.) 127;

Anthony v. Smith, 28 Tenn. (9 Humph.) 511; Thompson v. Pyland, 40 Tenn. (3 Head) 537.

Clark v. Jones and other cases, supra, were all cases in which the transferees of notes secured by mortgage or other liens upon land came into equity and sought to enforce their rights upon the land. In these cases it was held that the transfer of such notes so secured carried the liens upon the land without formal assignment of the instrument reserving the liens. This is true in equity and in courts of equity. Such transferees are thus entitled to enforce their liens so acquired.

This, however, is a suit at law, and the question is whether the plaintiff has such title to or property in the mortgaged chattels as to permit an action of replevin for the recovery thereof to be brought in its name.

An assignee of mortgage notes to whom no assignment of the mortgage itself is made becomes merely the equitable owner of the mortgage and ordinarily cannot maintain in his own name an action at law respecting the property.

"An assignee of mortgage notes is, however, the mere equitable owner of the mortgage, and such an equitable assignment will not entitle him to maintain an action at law for conversion of the property; such an action can be maintained only in the name of the mortgagee." 5 R. C. L. 442.

See Crain v. Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Baker v. Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Ramsdell v. Tewksbury, 73 Me. 197; Jones, Chattel Mortgages, § 503.

In Smith's Ex'rs v. Mabry, 17 Tenn. (9 Yerg.) 313, this court held that an equitable title to slaves would not support an action of detinue.

The same general or special property is requisite for a plaintiff to maintain either detinue or replevin. Caruther's History of a Lawsuit (3d Ed.) pp. 134, 135. This court has likewise ruled that the equitable owners of property could not maintain a suit in replevin. Rice v. Crow, 58 Tenn. (6 Heisk.) 28.

So we must conclude that the Court of Civil Appeals erroneously held that the plaintiff could maintain this action of replevin in its own name.

[3] It appears from the motion for a new trial made below that the plaintiff sought to amend his warrant in the circuit court so as to bring the suit in the name of the Daily Record Company for the use of plaintiff. This amendment was not allowed by the circuit judge, however. Had the suit been so brought, it might have been maintained. The refusal of the circuit judge to permit this amendment is not made the basis of any assignment of error in this court by the plaintiff, and indeed this action of the circuit judge only appears in the motion for a new trial, not in the bill of exceptions. As we have pointed out in Sherman v. State,

125 Tenn. 19, 140 S. W. 209, a motion for a new trial is merely a pleading and cannot be looked to as evidence of what occurred on the trial. So the plaintiff is not in position to obtain any benefit of the refusal of the circuit judge to permit the amendment sought to be made there.

The plaintiff insists that an assignment of the mortgage was effected by a delivery of the same to it, and that no formal writing was necessary for this proposition. Plaintiff refers to De Liguero & Crozier v. Munson, 58 Tenn. (11 Heisk.) 18, and Cornick v. Richards, 71 Tenn. (3 Lea) 1. One difficulty is that the record does not even show delivery of the mortgage to the plaintiff. The case was tried on an agreed statement, and the mortgage appears in the record as an exhibit to this statement. The record does not show who brought forth the mortgage, however, nor is there anything to indicate that a delivery of this paper had been made to the plaintiff.

Other authorities cited by the plaintiff relate to cases where the mortgage as well as the notes secured thereby had been assigned, and consequently are not in point here.

The writ of certiorari is, accordingly, granted, the judgment of the Court of Civil Appeals reversed, and the judgment of the circuit court affirmed.

WINSLOW v. WINSLOW.

(Supreme Court of Tennessee. Jan. 13, 1916.)

1. DIVORCE ⇐241—ALIMONY—AWARD IN SOLIDO—STATUTE.

Under Shannon's Code, § 4222, providing that the court may decree to the wife such part of the husband's real and personal estate as it may think proper, where an absolute divorce was awarded a wife for abandonment against her husband, worth some \$170,000, the husband having been the more to blame in their difficulties, an award to the wife of \$200 a month alimony cannot stand, and she will be decreed \$50,000 in solido.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 679, 680, 690; Dec. Dig. ⇐241.]

2. DIVORCE ⇐227—ALLOWANCES—ATTORNEYS' FEE.

Attorneys for the wife in her successful suit for absolute divorce against her husband were entitled to a fee of \$5,000 from the husband, though they could have procured a divorce upon the ground of abandonment alone with very little trouble, but in fact charged cruel and inhuman treatment and infidelity as well.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. ⇐227.]

3. DIVORCE ⇐221—ALLOWANCES—ATTORNEYS' FEE.

Attorneys fees are treated as part of the expenses incident to a divorce case, and are generally allowed the wife, whether complainant or defendant, both upon the successful termination of her suit for divorce, as well as for services pendente lite.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 642, 643; Dec. Dig. ⇐221.]

Appeal from Chancery Court, Roane County; Hugh G. Kyle, Chancellor.

Bill for divorce by Lucile C. Winslow against Henry M. Winslow. From a decree for absolute divorce to complainant, allowing \$200 per month alimony and \$5,000 attorney's fees, defendant appeals. Decree for \$50,000 alimony for complainant, and the allowance of attorney's fees affirmed.

Jourolmon & Welcker, of Knoxville, for appellant. H. M. Carr, of Harriman, and Wright & Jones, of Knoxville, for appellee.

GREEN, J. The complainant filed a bill for divorce against defendant, charging him with adultery, cruel and inhuman conduct, and abandonment. An answer was filed by defendant and an immense amount of proof taken. Upon the hearing the chancellor found that the first two charges were not sustained by the proof, but granted a decree for absolute divorce to the complainant on the ground of abandonment. The chancellor also decreed an allowance of \$200 per month alimony in favor of complainant, and \$5,000 attorney's fees.

The complainant has appealed, objecting to this allowance of alimony and to the form in which it has been allowed, she insisting on a lump sum, and she also objects to the amount allowed as attorney's fees.

The defendant has filed the record for a writ of error, and insists that the allowance for alimony is too much, and also insists that the allowance to attorneys for complainant is excessive.

The Winslows were married in 1884 in Kentucky, having removed to Harriman, Tenn., about 1903. The proof in this case covers the period of their married life. Both parties have exhibited a singular lack of delicacy, and have revealed and elaborated the most intimate details of their domestic relations. We have discussed these things in an oral opinion, and they will not be referred to here. We find the greater blame to attach to the husband in the matrimonial difficulties of these parties.

The principal question to be determined in this court is the amount and form of alimony. There is no appeal from that part of the chancellor's decree granting complainant a divorce; but, inasmuch as alimony is affected by the conduct of the parties and is proportioned to some extent according to their respective merits, we have found it necessary to consider the proof in all its aspects.

A reference was ordered by the chancellor to determine the net value of the defendant's estate. The master thought this to be \$166,517.68. The chancellor thought the net value of the estate was \$178,765.28. The master and the chancellor concurred on the great majority of items, and we take it to be settled by this concurrent finding that the net value of defendant's estate is around \$170,-

000, and we will so value it in disposing of the question of alimony.

[1] Our statutes on the subject of alimony are contained in Shannon's Code, §§ 4221-4223, inclusive. They are as follows:

Sec. 4221. "Whether the marriage be dissolved absolutely or a perpetual or temporary separation be decreed, the court may make an order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, or out of his property, according to the nature of the case and the circumstances of the parties."

Sec. 4222. "And in such case the court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing which, the court may have reference to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise."

Sec. 4223. "The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the husband, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful ways and means as are usual and according to the course and practice of the court, as to the court shall seem meet and agreeable to equity and good conscience."

It is to be observed that under our statutes the court is expressly authorized to decree to the wife such part of the husband's real and personal estate as it may think proper.

The practice in Tennessee for many years has been to award alimony in solido, upon the granting of an absolute divorce, rather than to award to the wife a monthly or yearly allowance, payable by the husband.

In *Chenault v. Chenault*, 37 Tenn. (5 Sneed) 248, the court held that in case of a divorce from bed and board it was the duty of the court to set apart to the wife an allowance in money sufficient to support her as long as the marriage relation existed, the payment of this allowance to be charged on the husband's estate during the separation. But the court further said:

"In case of a divorce a vinculo, which extinguishes the marriage relation, and leaves the parties as if the marriage had never taken place, a very different rule prevails. In the latter case, the duty of maintenance, on the part of the husband, is at an end, as much as if the dissolution had been effected by the death of the wife. The course generally is to make a reasonable division of the husband's estate, and to vest in the wife absolutely a specific portion thereof. Such is the rule prescribed by the act before referred to." *Chenault v. Chenault*, supra.

In *Boggers v. Boggers*, 65 Tenn. (6 Baxter) 299, the court said:

"The principle decided in *Chenault v. Chenault*, 5 Sneed, is certainly correct; that is, that where the divorce is only from bed and board, the married relation still subsists, and the husband is still bound to maintain his wife, and this duty the court may, from time to time, enforce; but where the divorce is from the bonds of matrimony, the obligation of the husband to support the wife no longer subsists, and no order or decree can be made upon the husband to bind his future services or earnings.

In such case the court can only give the wife a decree for part or all that the defendant then owns, according to the circumstances."

In *White v. Bates*, 89 Tenn. 570, 15 S. W. 651, the same rule was recognized. Such has been the practice in Tennessee, and there is no occasion to depart from it in the case before us.

The relations between these two parties are unfriendly. If we undertake to have a periodical allowance, paid by the defendant to the complainant, the collection of the installments will no doubt occasion future disturbances. Moreover, the payment of an allowance to the complainant in the manner decreed by the chancellor is merely granting to her a life estate at best, and we see no reason why the very substantial alimony to which we think she is entitled in this case, absolutely, and in fee so far as the real estate is concerned, should be reduced to a life estate.

In addition to this, complainant's alimony should not be dependent upon the defendant's business fortunes. His property might be swept away. If a specific amount of this estate be decreed to her and she loses it, it is her own fault. At any rate, she desires her alimony in this form, and we think she is entitled to it under our statutes and the settled practice in Tennessee.

We do not find it worth while to review the authorities cited by learned counsel from other states as to the form in which alimony should be allowed. Each state has its peculiar statutes upon the subject, and the decisions from other states are of little service to us in construing our own acts.

In *Watson v. Campodonico*, 3 Higgins, 698, where this court affirmed the decree of the Court of Civil Appeals, it appeared that the husband had no real estate nor any personalty except articles of trifling value. He did have an earning capacity, and, upon granting his wife a divorce, the chancellor ordered him to pay \$8 per week toward her support. In subsequent proceedings this decree was attacked as void and beyond the jurisdiction of the court, but it was upheld in *Watson v. Campodonico*, and the Court of Civil Appeals and this court sustained the said decree as valid.

Campodonico had no property which might have been decreed to the wife, and we thought under the facts in that case it was proper for the court to have made the order "for the suitable support and maintenance of the complainant and her children by the husband," under section 4221, Shannon's Code. Mr. Justice Buchanan dissented from this conclusion.

In so far as *Boggers v. Boggers*, and *Chenault v. Chenault*, supra, held that future earnings of the husband could not, under any circumstances, be bound, upon the granting of a divorce from the bonds of matri-

mony, we declined to follow those cases. We thought they did not take into account the express provisions of Shannon's Code, § 4221. So we held that where the husband had no property, but did have an earning capacity, it was proper to charge that earning capacity and his future acquisitions with the wife's support upon granting her an absolute divorce.

Such procedure, however, is attended with inconvenience and is justified largely by the necessities of the situation, and where the husband has sufficient property at the time of the divorce, it is better to follow our settled practice and decree to the wife a specific portion thereof for her maintenance.

Under the facts of this case we think that the complainant is entitled to \$50,000 alimony, and a decree will be entered in her favor against the defendant for that sum, to be secured and settled in partial payments as directed in memorandum for decree.

[2] We think the chancellor reached the correct result as to attorney's fees, and that complainant's solicitors are entitled to a fee of \$5,000. It is urged that they could have procured a divorce upon the ground of abandonment with very little trouble, as such an effort would not have been resisted, and that complainant and her counsel unnecessarily injected other issues into the case, and that counsel should not be compensated for their efforts to prove the charges not sustained by the chancellor.

We think there was evidence before the counsel for complainant to justify them in making the other charges against the defendant. Abandonment is a ground for absolute divorce within the discretion of the court, and it was advisable that the other matters be included by complainant to strengthen her case in her effort to obtain a divorce a vinculo.

[3] In Tennessee attorney's fees are treated as—

"part of the expenses incident to the cause, and are generally allowed to the wife, whether she be complainant or defendant, in a suit for divorce. They follow, and are usually adjudicated with, the allowance of alimony and costs to the wife, but are not in themselves the substantive objects of the litigation." *Shy v. Shy*, 7 Heisk. (54 Tenn.) 125.

Under our practice the wife's attorney's fees are treated just like her alimony. She is entitled to recover both upon the successful termination of her suit for divorce, as well as an allowance for such purposes pendente lite. Here again we may observe that we cannot follow the decisions of other states called to our attention, inasmuch as our practice in this matter is settled.

All the costs of the cause will be paid by the defendant, and he will not be allowed any credit for sums heretofore advanced by him upon the order of the chancellor for temporary alimony, expenses, etc.

**GREEN v. OFFICERS AND DIRECTORS
OF KNOXVILLE BANKING &
TRUST CO.**

(Supreme Court of Tennessee. Dec. 14, 1915.)

**1. BANKS AND BANKING §58 — OFFICERS
AND DIRECTORS—LIABILITY TO BANK—AC-
TION—PREMATURE CHARACTER.**

A bill was prematurely brought at the chancellor's direction by the receiver of an insolvent bank against its officers and directors to recover for loans negligently made by them, whereby the insolvency was brought about, where the debtors were not wholly insolvent when suit was brought, but collections might yet be made from them, since there can be no recovery for negligence without damages resulting therefrom, but it would be otherwise where such insolvency existed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. §58.]

2. EQUITY §232—PLEADING—DEMURRER.

Demurrer to the bill as a whole which is not good to the whole must be held bad in toto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. §232.]

**3. BANKS AND BANKING §58 — OFFICERS
AND AGENTS—LIABILITY TO BANK—NEGLI-
GENCE AS TO LOANS.**

A bill filed at the instance of the chancellor by the receiver of an insolvent bank to recover of officers and directors for loans negligently made was maintainable although the assets of the bank were not first exhausted, since the suit was by the bank itself, i. e., by its receiver in its right, to hold its agents, the directors, liable for negligence, and the measure of damages was the amount of the negligent loans finally lost after due efforts to collect.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. §58.]

**4. EQUITY §239—PLEADING—DISREGARD OF
FOREIGN MATTER.**

Foreign matter contained in a pleading must be disregarded on demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. §239.]

**5. BANKS AND BANKING §58 — OFFICERS
AND AGENTS—LIABILITY TO BANK—RIGHT
OF ACTION—IMMATERIAL MATTER.**

The right of action of the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not impaired by the fact that, if all the assets in the receiver's hands should be realized and the whole demand made against the directors be successfully prosecuted, there would not be enough assets produced to satisfy the bank's debts, since the bank, owning the rights sued on, was entitled to collect not only for the payment of creditors but for distribution among stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. §58.]

**6. EQUITY §149—MISJOINDER OF CAUSES OF
ACTION—PARTIES INVOLVED.**

A bill by the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not bad for misjoinder of parties complainant on the ground that it was substantially one by creditors and stockholders to enforce their respective rights against the directors, while a right of action of creditors is ex delicto, depending on intentional fraud or willful mismanagement, and that of stockholders is based on contract, sustainable by proof of gross negligence

alone, since the suit was in legal effect by the bank itself.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. §149.]

**7. BANKS AND BANKING §58 — OFFICERS
AND AGENTS—LIABILITY TO BANK—ACTION
—PLEADING.**

The allegations of a bill by the receiver of an insolvent bank at the instance of the chancellor against its officers and directors to recover for fraud, willful mismanagement, and negligence bringing about the insolvency, that the defendants carried as solvent large assets in fact insolvent, published false statements, carried as cash items tickets, miscellaneous papers, and overdrafts which would be lost to the bank through insolvency, that the directors were guilty of negligence in permitting officers to extend to themselves a heavy line of credit and to lend to concerns in which they were personally interested large amounts of money, which would prove nearly a total loss, all of which could have been prevented by the directors by the exercise of ordinary diligence, were sufficient to justify overruling a demurrer, since to make a case against the directors it was unnecessary to allege they were guilty of fraud and willful mismanagement, the allegations of negligent conduct being sufficient, though allegations showing fraud and willful mismanagement would have been proper.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. §58.]

**8. BANKS AND BANKING §58 — OFFICERS
AND AGENTS—LIABILITY TO BANK AT COM-
MON LAW.**

Under the common law a bank itself has the right to redress for injuries inflicted upon it by the acts denounced by Shannon's Code, §§ 2067, 2068, and 3242, providing that intentional fraud in failing to comply with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to damages at the suit of any person injured; that the diversion of the funds of the bank, the payment of dividends leaving insufficient funds to meet its liabilities, the keeping of false books or accounts, whereby any one is injured, and the making and publishing of false reports, are such frauds as will subject those actively concerned to damages at the suit of any person injured; and that any director of any bank who shall be guilty of any fraud or willful mismanagement by which loss shall fall upon its creditors shall be individually liable for such loss.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. §58.]

**9. EQUITY §149 — PLEADING — MULTIFARI-
OUSNESS.**

A bill by the receiver of an insolvent bank filed at the instance of the chancellor against its officers and directors to recover for loans negligently made, which joined directors who served five full terms and those who served only a part of such five terms, was multifarious as to the short term defendants, though the defendants who served during all the terms could not object that the others were included with them for any period of time within the years during which they served, as they were connected with each of all the defendants in some part of the litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. §149.]

**10. EQUITY §147—PLEADING—MULTIFARI-
OUSNESS.**

Whether a bill should be declared multifarious is largely a matter of discretion controlled by considerations of the inconvenience to the parties

and the court of permitting the examination of disconnected controversies in the same litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 340; Dec. Dig. ¶147.]

11. APPEAL AND ERROR ¶917—PLEADING—DEMURRER.

The allegations of a bill must be taken as true by the appellate court on hearing to review a decree dismissing the bill on demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. ¶17.]

12. EQUITY ¶153—PLEADING—DEMURRER.

Every reasonable presumption must be indulged in favor of a bill when opposed by a demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386-389; Dec. Dig. ¶153.]

13. BANKS AND BANKING ¶58 — OFFICERS AND AGENTS—LIABILITY TO BANK—ACTION—PLEADING.

A bill by the receiver of an insolvent bank, filed at the instance of the chancellor, to recover against its officers and directors for loans negligently made, did not need to set out the particular circumstances of each loan, showing the situation and surroundings of the parties, since all complainant was required to do was to make a prima facie case of negligence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. ¶58.]

14. EVIDENCE ¶20 — JUDICIAL NOTICE — BANKING CUSTOM.

The court will judicially know that in Tennessee the duty to make loans does not ordinarily devolve on the directors of a bank.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. ¶20.]

15. BANKS AND BANKING ¶58 — OFFICERS AND AGENTS—LIABILITY TO BANK—ACTION—PLEADING.

In suit by the receiver of an insolvent bank at the instance of the chancellor to recover against its officers and directors for loans negligently made, the fact that a large number of items catalogued in the bill as cash items and overdrafts were undated did not render the bill demurrable as to defendants who served five full directorates, the period sued for; it being alleged that the items occurred during such period.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 111-113, 115-120; Dec. Dig. ¶58.]

Appeal from Chancery Court, Knox County; R. H. Sansom, Special Chancellor.

Bill by John W. Green, as receiver, against the officers and directors of the Knoxville Banking & Trust Company. From a decree dismissing the bill upon demurrers, complainant appeals. Demurrers overruled, except those based on multifariousness, and cause remanded.

Green, Webb & Tate and Wright & Jones, all of Knoxville, for appellant. James B. Wright, Shields & Cates, L. H. Spilman, Lindsay, Young & Donaldson, and Johnson & Cox, all of Knoxville, for appellee.

NEIL, C. J. It appears from the bill that the receiver was appointed by the chancellor in a suit heretofore brought by the creditors and stockholders of the Knoxville Banking & Trust Company to wind it up as an in-

solvent concern. It also appears that by an order entered in that case the receiver was directed to file the present bill against the officers and directors. Its purpose was to hold them liable for fraud, willful mismanagement, and negligence whereby the before-mentioned insolvency was brought about and the bank utterly ruined. Twenty-four grounds of demurrer were filed, all of which were overruled by the chancellor except the last, and as to his action upon the latter no appeal has been prosecuted to this court. The complainant, however, has appealed from the decree dismissing his bill upon the 23 grounds referred to.

It will be unnecessary for us to consider these grounds of demurrer in detail, presenting as they do very many attacks upon the bill from various angles. The counsel in their briefs have practically agreed upon the chief questions presented, and to these we shall in the main confine our attention, only referring to the demurrers themselves where it may be necessary to render our views, or the reasons for our decision, more clear.

[1-4] The first ground is that the action is premature. We do not think this objection is well taken.

It is true the bill concedes that a considerable percentage may be collected from some of the large loans alleged to have been improvidently made, and now in part insolvent; and it must follow that the extent of the liability of defendants for these cannot be ascertained until such special matters are settled by exhaustion of the debtors, yet that need not delay the bringing of suit to recover from the directors as to those loans, improvidently made, if they are otherwise liable, where the debtors have been exhausted or it has been lawfully made to appear that they are insolvent, that is, that the corporation has suffered loss in respect of these matters by reason of the negligence of the defendants. The bill states many instances in which loans, alleged to have been improvidently made, were, at its filing, wholly insolvent; indeed, wholly insolvent when made.

The cases of Johnson v. Churchwell, 1 Head (38 Tenn.) 146, Allison v. Coal Co., 87 Tenn. 63, 9 S. W. 226, Jackson v. Meek, 87 Tenn. 69, 72, 73, 9 S. W. 225, 10 Am. St. Rep. 620, and Albitzgui v. Guadalupe, etc., Mining Co., 92 Tenn. 600, 603, 22 S. W. 739, cited by defendants, do not apply.

In Johnson v. Churchwell the action was against the directors of a bank, under certain provisions of its charter, to hold them personally liable, on certain circulating notes issues of the bank, alleged to have been over-issues, on the ground that they had violated the terms of the charter in making such issues, and that the bank having failed, leaving the notes unredeemed, and its refusal to pay them having been made on demand, the plain-

tiffs were injured to the extent of the face of the notes. The court held there could be no action brought under the charter to recover the amount of the notes until there had been a prior judicial determination of the violation of the charter, and likewise until there had been an exhaustion of the assets of the bank. As to the latter point, it was said that the measure of the liability of the directors would be the amount which the assets of the corporation would fall short of discharging its liabilities, caused by the defendants' dereliction. Of course, it is true, as we have already intimated, that the present suit is premature as to those alleged improvident loans that are not wholly insolvent, but out of which collections may yet be made. This results, not from what may be held in any given case or authority, but from the fact that the basis of the liability of the directors, in a case of the kind before us, is negligence, and there can be no recovery without injury or damage resulting from the negligence, and this cannot be ascertained as to certain loans mentioned until the borrowers under the loans have been exhausted. But in the case before us hundreds of improvident loans are alleged, very many of which are charged to have been insolvent and uncollectible at their inception, and ever since. As to such loans there is no question of waiting for an exhaustion of the debtors. It is true that a special demurrer directed to those special parts of the bill in which it is alleged that collections are yet to be anticipated from certain loans, on the ground that as to these the bill is premature, would be bound to be successful; but there is no such demurrer. On the contrary, the demurrer is to the bill as a whole, and not being good to the whole must be held bad in toto. The theory of the demurrer seems to be that the suit is premature because the assets of the corporation were not first exhausted. This objection is necessarily altogether inapplicable, because this suit is one by the corporation itself, that is, by its receiver, in right of the corporation, to hold its agents, the directors liable for negligence, and the measure of damages is the amount of the alleged negligent loans finally lost after due efforts to collect, that is, if the directors are liable at all, under the facts stated in the bill. There are, it is true, some allegations in the bill, to which we shall later refer, quite unusual in, if not inapplicable to, a bill of the corporation or its receiver, and generally appearing only in a suit filed directly by creditors, themselves; but, in any event, such matters cannot change the controlling fact that the present bill was filed pursuant to the order of the chancellor, made in an insolvency proceeding instituted in the Chancery Court by creditors and stockholders for the purpose of winding up the corporation. The bill, in its essential nature, then, is a bill by the corporation to hold its direc-

tors liable (*Wallace v. Lincoln Savings Bank*, 89 Tenn. [5 Pick.] 630, 634, 635, 15 S. W. 448, 24 Am. St. Rep. 625), and can lawfully contain only matters fit for such a pleading. All foreign matter contained in it must be disregarded. The bill being one of the kind just indicated, of course no contention can be made that the assets of the corporation must be exhausted as a preliminary to their collection, as this would be a patent contradiction both in word and act.

Allison v. Coal Co., supra, is a case substantially similar to *Johnson v. Churchwell*. The case of *Jackson v. Meek*, supra, rests on the same principle. There an effort was made by an employé to hold the stockholders of a corporation liable, under a charter provision, for wages unpaid by the latter; and it was held that such a suit would not lie until the assets of the corporation had been exhausted. The case of *Albittzguil v. Guadalupe*, etc., Mining Co., supra, stands on the same general ground. There an effort was made by the creditors to compel the shareholders and directors of a corporation to pay the amount of debts incurred in excess of the corporate stock, and it was held the suit could not be maintained because it appeared there were plenty of assets on hand to pay all of the debts.

[5] The present bill, anticipating the defense of prematurity, alleges that if all of the assets already in the receiver's hands shall be realized, and likewise the whole demand made against the directors be successfully prosecuted, still there will not be enough produced to satisfy even the debts. We do not think this fact is material, as the defendants correctly insist, because, since the rights sued on, so far as applicable to the frame of the bill, belong to the corporation, it would, through its receiver, be entitled to collect, if its demands are well based, first for the payment of creditors, and next for distribution among the stockholders. The allegation, however, is pertinent to another aspect of the case, under which it is contended, in support of one of the demurrers, that the bill cannot be maintained for the benefit of stockholders, since it does not appear there were any stockholders other than the defendants themselves, and the court would not collect from them money to be immediately returned to them.

There being, as already indicated, no demurrer directed solely to those parts of the bill seeking a recovery in respect of loans not wholly insolvent, the bill must for the present stand as to these matters along with the rest, and the question in respect of such matters can hereafter arise only on objections made to the testimony that may be offered to show damages accrued in respect of them, unless in the course of the proceedings facts may develop showing that pending the present suit, before closing the account, the debtors refer-

red to have been exhausted, so that the damages arising may be shown.

[6] The next question is whether there was a misjoinder of parties complainant. This must be answered in the negative.

It is insisted for defendants that the bill is substantially one filed by creditors and stockholders as such to enforce their respective rights against the directors; that the right of action of the former is *ex delicto*, depending on proof of "intentional fraud or willful mismanagement," while the latter is based on contract, and may be sustained by proof merely of gross negligence. As we have previously indicated, the suit is in legal effect an action by the corporation itself. There is only one complainant, the receiver of the corporation. The allegation is many times repeated that the defendants were guilty of "fraud and willful mismanagement"; but there are also allegations of simple negligence, and numerous instances stated, involving in the aggregate many thousands of dollars, wherein the defendants "made and caused to be made" loans which were wholly insolvent at the time they were made, so continued, and were total losses to the corporation. It is also alleged that the defendants failed to make the stated examinations required by law (Shan. Code, §§ 2086, 2104), and thus failed to exercise due supervision over the officers; that too much power and control over the business of the bank had been committed to the officers of the bank, the president, cashier, and assistant cashier, who had committed frauds, which could have been detected by the directors by the exercise of reasonable diligence, but which they failed to exercise; and that by these frauds the bank was hastened to insolvency. Among the acts of fraud alleged against the officers, indeed against all of the defendants, are carrying as solvent large assets which were in fact insolvent, the publishing of false statements, the carrying, as cash, items involving a great many thousands of dollars, which were not cash, but "tickets," miscellaneous papers, and overdrafts, practically all of which will be lost to the bank, through insolvency; that among these there is a "cash ticket" against the president, W. H. Gass, for \$3,081.05, a draft paid for the cashier Willis of \$531, cash tickets against him for \$5,533.30, a stock certificate bought for him, \$400, in the Knoxville Auto & Garage Company, a concern of doubtful solvency, an overdraft of the said Gass for \$5,138.32, an overdraft of the said Willis for \$5,937.28, and another against him of \$3,420.70. It is alleged that the defendant directors were guilty of negligence in permitting these officers to extend to themselves such a line of credit; that the defendants were guilty of other negligence in permitting the said officers Gass and Willis to lend to certain concerns in which they were personally interested very large sums of money, running into thousands of

dollars, viz., to the McCormick Furniture Company, the Vine Street Furniture Company, S. M. Beaumont Company, Knoxville Auto & Garage Company, Tennessee Medicine Company, Picture Plays Theater Company, and Bonita Theater Company; that these loans will prove nearly a total loss; and that all could have been prevented by the directors by the exercise of ordinary diligence.

[7] The foregoing constitute sufficient allegations of negligence on the part of the directors to justify overruling the demurrer. *State v. Standard Oil Co.*, 120 Tenn. 86, 108, 110 S. W. 565; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 652, 653, 15 S. W. 448, 24 Am. St. Rep. 625; 10 Cyc. 831, 832, 833. To make a case against the directors it was unnecessary to allege that they were guilty of fraud and willful mismanagement, though surely they would be liable to the corporation for injury to its assets or business caused by such conduct on their part; the allegation of negligence was enough, still, if there were facts showing fraud and willful mismanagement causing injury, it was proper that such matters should be likewise presented in the bill.

Rights of action of the latter kind, however, under statutes to be presently noticed, are especially intended to furnish a means of direct relief to creditors, and all others suffering injury by the conduct referred to, through suits brought by them against directors or officers or stockholders. These rights of action are secured to such persons by Shan. Code, §§ 2067 and 2068, which are as follows:

"2067. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, to the penalties of a misdemeanor, and, moreover, to damages at the suit of any person injured thereby.

"2068. The diversion of the funds of the corporation to other objects than those mentioned in the incorporation; the payment of dividends which leave insufficient funds to meet the liabilities of the corporation; the keeping of false books or accounts, whereby any one is injured; and the making and publishing of false reports, are such frauds as will subject those actively concerned therein to the penalties of the preceding section."

Another guaranty of safety is given creditors in section 3242, which reads:

"Each stockholder in any of the banks of this state shall be individually liable for any loss sustained by the creditors of the institution, to the amount and value of his stock, until he has paid the same in full, on his original subscription. And if any director or directors of any of the banks in this state shall be guilty of any fraud or willful mismanagement of the affairs of such bank, by which any loss shall be occasioned to its creditors, such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss, and all the stockholders assenting thereto shall be liable in like manner."

[8] But without regard to the statutes referred to, and without dependence on them, we repeat, the corporation itself would un-

der the common law have the right to redress for any injuries inflicted upon it by any of the acts denounced by these statutes.

Therefore the allegations of "fraud and willful mismanagement," along with the allegations of negligence, do not make the bill a direct proceeding by creditors and stockholders, or by either. Indeed, the origin of the bill was such as necessarily to make it a bill by the corporation through its receiver, its filing having been directed by the chancellor in the insolvency proceeding in which the receiver was appointed.

[9] It is next insisted that the bill is multifarious, and we think this contention is well taken.

It sets out the names of the several boards of directors between the years 1908 and 1912, and inclusive of those years, and shows the date of the service of each individual director.

It appears that the following served during all the years mentioned: J. W. Hope, Joseph Knaff, Charles H. Smith, W. H. Gass, W. T. Newton, and Charles J. McKinney.

The following served only from January 16, 1908, to January 12, 1909, viz.: S. A. Lackey.

The following served from January 16, 1908, to January 12, 1909, and from the latter date to January 11, 1910, viz.: William Brakebill.

The following served from January 16, 1908, to January 12, 1909, and from the latter date to January 11, 1910, and from the date last mentioned to January 10, 1911, viz.: James R. Wooldridge.

The following served from January 12, 1909, to January 11, 1910, and from the latter date to January 10, 1911, and from the date last mentioned to January 9, 1912, viz.: G. J. Ashe.

The following served from January 11, 1910, to January 10, 1911, and again from January 9, 1912, till the failure of the bank in the latter part of the year, viz.: Charles H. Bacon.

The following served from January 12, 1909, to January 11, 1910, and from the date last mentioned to January 10, 1911, and from that date to January 9, 1912, and from that date to the failure of the bank; that is, during all of the years except the first year, or from 1909 to the end, viz.: N. B. Kuhlman and Arthur Groves.

The following served only from January 9, 1912, to the failure of the bank, viz.: H. G. Hutchinson.

[10] It is frequently a very difficult question to determine whether a bill should be declared multifarious; indeed, it is largely a matter of discretion, controlled by considerations of the inconvenience to the parties and to the court of permitting the examination of disconnected controversies in the same litigation. Gibson's Suits in Chancery (2d Ed.) § 149; Id., § 284; Insurance Companies v. Confectionery Co., 124 Tenn. 247,

267-289, 136 S. W. 915, 34 L. R. A. (N. S.) 897.

We think it clear that it would be unjust to the defendants S. A. Lackey, William Brakebill, Charles H. Bacon, and H. G. Hutchinson to continue them in a bill with those who served during all of the five terms, and on the remand hereinafter ordered permission will be given to file separate bills against the parties named without additional process pursuant to the authority granted the court in Shan. Code, § 6136. As to the defendants who have served during all the five terms, they cannot object that others are included with them for any period of time covered by the years during which they served, since they would be connected with each one of all the defendants in some part of the litigation. The bill can therefore stand as to them. Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114. As to Mr. Wooldridge, who served during three of the terms, Mr. Ashe, who likewise served through three, and Messrs. Kuhlman and Groves, who served through four of the five terms, we think there would be little practical inconvenience in permitting their cases to remain with those of Hope, Knaff, and others who served during all the terms.

The foregoing substantially covers all of the questions made by the demurrers, so far as they can affect the disposition of the case here; but there are some questions which have been argued that we think should be referred to, and our views stated, for the guidance of the parties, and of the chancellor when the case comes to a hearing on the issues made.

The first of these is the measure of duty incumbent upon directors in this state. Without discussing this matter, we say that we firmly adhere to the rules laid down on this subject in Wallace v. Lincoln's Savings Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, and thoroughly agree with and follow the opinion of the Supreme Court of the United States in Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. These cases are in substantial accord.

It is insisted in behalf of the defendants that under the by-laws the directors were authorized to appoint a finance committee, and that such a committee was appointed and served during the whole time; that on this committee was devolved the duty of making loans and investments. The allegations of the bill upon this subject are as follows:

"On January 16, 1908, the defendants J. W. Hope, Joseph Knaff, and W. H. Gass were elected as a finance committee of the board of directors, and these defendants have since said date served as said committee; that is, having held that position by election, they, as will more fully be alleged hereinafter, have inefficiently and negligently performed the duties which ought to have been performed by said committee, and have failed to perform duties which should have been performed by said committee, and have been guilty of fraud and willful mismanagement in law as such."

"Your complainant would further show that the defendants Joseph Knaff, J. W. Hope, and W. H. Gass, were by the other defendants constituted a finance committee, and the finance committee also was incumbered with the duty of inspecting the affairs of the said banking institution, and knowing of its transactions, and of reporting them in detail to the directors; and the directors likewise were incumbered with this duty, and were furthermore incumbered with the duty of seeing that the finance committee performed its duty; and the defendants all wholly failed in all these respects, and all of said willful mismanagement and negligence resulted in the above set out and still other losses to the creditors and stockholders of said banking institution."

[11] Upon this hearing we must receive as true the allegations of the bill. We cannot therefore go into the consideration of how far the directors might rely upon the finance committee's performing its duty, or how far they would be relieved of looking into the transactions of the bank by reason of the existence of such a committee.

[12] It is insisted that the defendant directors did not make the loans complained of; but, however the facts may be, the bill alleges they did make the loans, and caused them to be made, and we must at this time accept this as the true statement of the facts, in considering the bill and demurrer. An argument is made construing the expressions "made and caused to be made" and "made and permitted to be made" as equivalent simply to an allegation that the directors permitted the loans to be made. This would not be a correct method of construing a bill when opposed by a demurrer, the rule being that every reasonable presumption must be made in favor of the bill. *State v. Standard Oil Co.*, supra.

[13] It is said that there is no sufficient allegation of facts to support the charge of fraud and willful mismanagement, or even of negligence. We have already adequately considered this matter. We shall notice, however, in this immediate connection a further point made in the defendant's brief, to the effect that the particular circumstances of each loan are not set out, showing the situation and surroundings of the parties that would rightly move the discretion of any one making a proposed loan. This is not necessary. All that the complainant need do is to make a prima facie case of negligence, and this we think has been done. It is true this prima facie case may be met by the defendants showing qualifying circumstances that will completely overturn the charge of negligence either by showing that under all the circumstances the loans were properly made, or under the facts as they appeared to the parties at the time.

[14] At this point we deem it proper to say that in deciding this case we have rested specially upon the allegation that the directors themselves made the loans, and caused them to be made. We judicially know that as a rule this duty is not ordinarily in this state devolved on directors; but, since the

bill alleges that these acts were undertaken by the directors, we must accept it as true, and what we have written must be construed in the light of this fact. There is another branch of the inquiry, however, to which we direct attention. That is, the allegations of the bill already referred to that the defendants failed to make the examinations which the statute requires to be made every six months, and that if such examinations had been made the improvident conduct of the officers and of the finance committee would have been discovered, from time to time, and much of it prevented from happening thereafter. This is an element of negligence distinct from that charged in respect of making and causing to be made the several hundred loans complained of; so that, in case the allegations of the bill should not be sustainable upon the subject of making and causing to be made the loans, there yet remains the allegation of negligence based on the want of due examination and oversight.

[15] There are a large number of items catalogued in the bill under the head of cash items, or items carried as cash, and overdrafts. All of these are without date. A demurrer is based on this fact. Such demurrer, however, could not be good as to those of the defendants who served during the whole time, for it is alleged that these items occurred during the period sued for; and there is no demurrer filed separately by either of the defendants who are left in the bill, and whose terms of service do not cover the whole time. However, this is not material since we have held that, as to these latter, viz., Wooldridge, Ashe, Kuhlman, and Groves, no inconvenience sufficiently grave will be experienced to justify the court, under the theory of multifariousness, in separating these defendants from the main current of the litigation. Their rights in respect of these matters can be sufficiently preserved by exceptions to evidence offered in respect of the items referred to, in so far as dates are not furnished, as showing such items applicable to the periods during which the several defendants last named served as directors.

The result of the whole matter is that all of the demurrers will be overruled, except those based on the ground of multifariousness, and these will be sustained so far as concerns the defendants S. A. Lackey, William Brakebill, Charles H. Bacon, and G. H. Hutchinson. A decree will also direct the cause to be remanded to the court below, to the end that issues may be made as to the other defendants, and with leave to complainant to file separate bills without new process as to the said four parties last named.

The costs of the appeal will be divided equally between the complainant and the defendants other than the last four named; these latter will pay no costs.

NATIONAL LIFE & ACC. INS. CO. v.
JORDAN.

(Supreme Court of Tennessee. Jan. 22, 1916.)

JURY ~~25~~—JURY TRIAL—DEMAND.

Shannon's Code, § 4611 (Acts 1875, c. 4, as amended by Acts 1889, c. 220), declares that, when any civil suit is triable by jury, either party desiring a jury shall demand the same in his first pleading, tendering an issue triable by jury, or he shall call for the same on the first day of any trial term, and have an entry on the docket that he calls for a jury, and, unless such demand and entry is made, the court shall try the case without a jury. Sections 4616 and 4673 require the clerk to keep two dockets, styled, respectively, "nonjury" and "jury" dockets. Three days before the first day of the term defendant's counsel, by an entry in the clerk's docket, demanded a jury trial. *Held* that, as the amendatory act provided for demand other than with the first pleadings, and as the court cannot in a case triable by jury deny that right, the demand was sufficient, although not made to the court on the first day of the term.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. ~~25~~.]

Certiorari to Court of Civil Appeals. Action by Georgia Jordan against the National Life & Accident Insurance Company, begun in justice court, and appealed by defendant to circuit court. A judgment there for plaintiff being affirmed by the Court of Civil Appeals, defendant brings certiorari. Reversed and remanded.

R. E. Blake, of Nashville, for plaintiff in certiorari. G. S. Moore, of Nashville, for defendant in certiorari.

BUCHANAN, J. The action originated before a justice of the peace. It was a suit on two accident policies. The company was cast, and judgment went against it for \$72.50. On its appeal to the circuit court there was judgment against it for the amount of \$35. Its motion for a new trial in that court being overruled, it appealed to the Court of Civil Appeals, where the judgment was affirmed, and the case is before us on petition for certiorari.

The single question is whether the company made a call or demand for a jury trial in the circuit court in the mode and at the time prescribed by our statutes regulating the practice in such matters.

The first day of the term of the circuit court to which the case was appealed was February 1, 1915. The case was tried by the circuit judge without a jury during that term. Prior to the beginning of that term, to wit, on January 28, 1915, the attorney for the company, by an entry on the clerk's trial docket, where it had caused the style of the case to be set down in writing, made demand for a jury trial of the cause in these words:

"The defendant demands a jury to try this case February 1, 1915.

"R. E. Blake, Attorney for defendant."

This demand was on the clerk's jury trial docket on the first day of the term to which

the case was appealed, and at which it was tried, and the demand was made in accord with the practice of the attorneys who were accustomed to demand jury trials in causes pending in that court. Nevertheless his honor the circuit judge was of the opinion that the practice was not in accordance with the law, and he accordingly sustained the plaintiff's motion to remand the case to the nonjury docket; the ground of his action being that the record failed affirmatively to show that a demand for a jury trial was made by defendant on the first day of the term to which the case was appealed. The order reciting the action of the court vacates an order entered on page 363 of Minute Book 2 demanding a jury. We think it is evident from what is shown by this order that the clerk of the court, in accord with the former practice therein, had regarded what appeared upon his jury trial docket as a sufficient demand for a jury trial, and had made a minute entry on the first day of the term reciting, in substance, that a jury trial had been demanded in the cause. Our statutes (sections 4616 and 4673, Shan. Code) require the clerk to keep two trial dockets, styled, respectively, "nonjury" and "jury" dockets, upon which he is required to place the cases respectively designated to be tried without a jury, or by a jury. The sections of Shannon's Code relating to the matter in hand are numbered 4611 to 4616, inclusive.

The foregoing sections are compiled from two acts of our General Assembly; the first is chapter 4, Acts of 1875; the second is chapter 220, Acts of 1889. The act last mentioned is an amendment of the original act, and was, no doubt, passed in order to simplify the practice, and to avoid misapprehension of the exact meaning of the original act, as it had been construed in *Railroad v. Martin*, 85 Tenn. (1 Pick.) 134, 2 S. W. 381. The amendatory act puts the two classes of cases mentioned in section 1 of the act of 1875 on much the same footing. It did not repeal the right of a party to a suit originating in a court of record to demand a jury in his first pleading tendering an issue triable by jury. It left that provision standing as the same existed under the original act; but the amendatory act added to the existing mode in such cases another mode, and the two modes of making the demand or call are made apparent by an examination of section 4611, Shan. Code. The second mode named in that section was not available to a party in that class of cases under the original act. The amendatory act, by its express terms, applies to both classes of cases covered by section 1 of the original act, and the mode of calling for or demanding a jury which the amendatory act prescribes may be pursued with equal success in either class of cases. This mode, common to each class of cases, is laid down in the amendatory act with fair

exactness. At only one point is there ambiguity. The word "call" and the word "demand," as used in the first section of the amendatory act, are synonymous in meaning. The ambiguity lies in the absence of express words prescribing of whom the call or demand shall be made; but this ambiguity, when the history and purpose of the legislation is considered, may be easily cleared away. The prime purpose of the legislation was twofold: First, to expedite the business of the courts by dividing trials into jury and nonjury trials, and providing for jury and nonjury dockets; second, to prescribe some definite method by which it might become known to the courts and to the clerks which of the causes pending at the beginning of the term, and triable by jury were intended by the parties to be so tried, and, on the other hand, which of such cases the parties intended to submit to the judgment of the court without the intervention of a jury, and to accomplish these two purposes of the statute the jury and nonjury trial dockets were provided for, to be kept by the clerk of the court, and further to accomplish these purposes we find in the first section of the act of 1875 the declaration that:

"A failure to demand a jury as aforesaid shall be deemed and held conclusively an agreement of the parties to submit all issues and questions of fact to the decision of the judge without a jury."

Under the act of 1875 the parties were allowed the first three days of the trial term within which the demand might be made, but that provision was changed to one particular day by the amendatory act, under which the parties are allowed the first day of any term at which the suit stands for trial to make demand for a jury trial. The purpose of the amendatory act was that on the particular day designated by it there should be spread on the clerk's jury trial docket, the style of each case, and the demand or call of the party thereto who desired a trial of that cause by a jury; and it matters not, as we think, whether the entries aforesaid, upon the clerk's trial docket, be made before the first day of any term at which the case stands for trial, or on the first day of such a term. In either case the entry of the style of the cause and the demand for a jury trial thereof would suffice. In crowded centers of population, where the volume of business is great, a construction of the legislation which would require every demand for a jury trial to be made on the first day of the term by an entry of the style of the cause, and the demand, on the clerk's trial docket, on that particular day, would be exceedingly inconvenient, and would not serve, in our opinion, to forward any purpose of the legislation. We see no purpose in the legislation which would be advanced by requiring the call or demand to be made in open court, and upon the presiding judge thereof, on the first day of any term at

which the cause stands for trial. Neither of the acts expressly so provides, and nothing in either of them warrants us in importing into them such a meaning. Such a construction would impose upon the judge useless labor, and result in an unprofitable consumption of his time.

We think the call or demand which was made in the present case on January 28th, and which was recorded on the clerk's jury trial docket, and stood thereon open to the examination of the judge of the court and of the bar alike, on the first day of the term to which the cause was appealed, and that on which it stood for trial, and was tried, was a sufficient compliance with section 4612, Shan. Code, and the act of 1875, as amended by the act of 1889. The demand made in this case was a continuous one for every moment of the first day of the term. No mere direction of the attention of the circuit judge to the demand would have advanced any purpose of the statute. There was no discretion of the judge to grant or refuse it, if it were sufficient in form and substance as a compliance with the mode laid down in the statute. The warrant or right of a party to a jury trial in a cause triable by jury exists under the Constitution of the state and under the federal Constitution. The judge of the court was without power to deny such a right if it was demanded in the mode laid down in the statute and at the time specified. To be sure, if a party has made an abortive effort to make a demand for a jury trial, and in response thereto the cause has been set down on the clerk's jury trial docket, the opposite party may move to remand the cause to the nonjury docket, and this motion the court has power, and is under the duty, to grant if made in time. Such a motion may, of course, be made by the opposite party and disposed of by the court after the first day of any term at which the cause stands for trial. Such a motion was allowed in *Railroad v. Timmons*, 116 Tenn. (8 Cates) 29, 91 S. W. 1116, and in that case the legislation under consideration received, in substance, the same construction given to it herein.

The Court of Civil Appeals, in sustaining the action of the trial judge, seems to have followed the reasoning of this court in *Railroad v. Martin*, 85 Tenn. (1 Pick.) 134, 2 S. W. 381. Judges Wilson and Moore, however, dissented.

Railroad v. Martin, supra, was decided prior to the passage of the amendatory act; but *Railroad v. Timmons*, supra, was decided after that act, and the construction of the act in that case should have been followed by the Court of Civil Appeals.

It results that the writ is granted, the judgment of the Court of Civil Appeals is reversed, and the cause is remanded to the circuit court of Davidson county for further proceedings. A copy of this opinion will go down with the procedendo on the remand.

STONE v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Tennessee. Jan. 17, 1916.)

1. INSURANCE —455—ACCIDENT INSURANCE —"ACCIDENTAL MEANS."

An injury is not produced by accidental means, within the terms of a policy, where it is the natural result of an act or acts in which the insured intentionally engages, and is caused by a voluntary, natural, ordinary movement, executed as was intended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. —455.]

2. INSURANCE —455—ACCIDENT INSURANCE —"ACCIDENTAL MEANS."

Complainant, who attended a football game on a cool day when the ground was damp, and contracted a cold, resulting in lumbago, and who after medical treatment and the debility resulting from a purgative, and while lying in bed, had a paper brought, reached for it, and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina, destroying the sight of one eye, could not recover on a policy insuring him against bodily injury through "accidental means," since, while the result was not foreseen, the cause producing the result was not accidental, but an ordinary natural movement, executed as intended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. —455.]

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Action by J. C. Stone against the Fidelity & Casualty Company of New York. Judgment for defendant sustaining a demurrer to the complaint, and complainant appeals. Affirmed.

Spears & Spears, of Chattanooga, for appellant. Thompson, Williams & Thompson and Creed F. Bates, all of Chattanooga, and James B. Wright, of Knoxville, for appellee.

FANCHER, J. Complainant sued to recover under the terms of a policy which was to insure him against bodily injury sustained during the term of one year, through accidental means, and resulting directly, independently, and exclusively of all other causes, in immediate, continuous, and total disability. The injury complained of is stated as follows:

"Complainant would now show the court that some time in November, 1913, he went to Nashville, Tenn., to attend the football game between Vanderbilt and Sewanee; that the day was rather cool, and the ground was rather damp; he attended the game on the afternoon of November 27, 1913, and at that time contracted a cold, resulting in lumbago; that he stayed in Nashville all night, and sat up until about 12 o'clock, returning home the next day, the 28th. On the morning of the 28th he awoke with a cold and lumbago, and in the evening came home and went to bed, and was confined to his room and bed for seven consecutive days. He consulted Dr. Mitchell and told Dr. Mitchell that he was going to take some medicine known as 'black draught,' thinking by this means to clean out his system, and thus restore his health. This medicine was composed of two-thirds of a pint of whisky and a box of 'black draught,' which was a very strong liver medicine. These were poured together so as to make the whole in quantity above one quart. The effect of this

medicine was to purge the system. Complainant took a dose of this medicine on the morning of the third of December before supper and continued this treatment, taking it before each meal until the following evening. The consequence of taking this medicine was to debilitate the system, and this resulted in a very weak physical condition. This condition obtained until Thursday, when complainant was lying on the bed, and had had a short nap up to about 8 o'clock. Thereupon he called his wife to bring him the Nashville Banner, and asked her to turn on the light at the head of the bed so that he might read the paper. Complainant then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. On raising his hands he felt some change had come over his left eye. On consulting a physician he was informed that the loss of his left eye was due to the fact that in his weakened condition resulting from the purging of the 'black draught,' that he raised his hand suddenly to get the paper, and that his blood pressure was strong and rushed to his head, causing a blood rupture of the retina—that is causing a little clot of blood to rest on the nerve of the eye or in the retina, thereby destroying his sight. Complainant charges that the loss of his left eye resulted wholly from accidental means."

The demurrer which the chancellor sustained raises the point that the injury or disability suffered was caused by sickness or disease, and not through accidental means, resulting directly, independently, and exclusively of all other causes.

[1] The general rule is that an injury is not produced by accidental means, within the meaning of this policy, where the injury is the natural result of an act or acts in which the insured intentionally engages. A person may do certain acts the result of which produces unforeseen consequences resulting in what is termed an accident; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended.

Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. It is not sufficient that the injury be unusual and unexpected, but the cause itself must have been unexpected and accidental. In re Scarr, (1905) 1 K. B. 367, 2 B. R. C. 358, 82 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787; Cledera v. Scottish Accident. Ins. Co., (1892) 19 R. 355, 29 Scott L. R. 303; Smith v. Travelers' Ins. Co. (1914) 219 Mass. 147, 106 N. E. 607, L. R. A. 1915B, 872; Feder v. Iowa St. Traveling Men's Ass'n, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212; Shanberg v. Fidelity & Casualty Co. (C. C.) 143 Fed. 651, affirmed in 158 Fed. 1, 85 C. C. A. 343, 19 L. B. A. (N. S.) 1206; Lehman v. Great West. Acc. Ass'n, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 563; Smouse v. Iowa St. Traveling Men's Ass'n, 118 Iowa, 436, 92 N. W. 53; McCarthy v. Travelers' Ins. Co., 8 Biss. 362, Fed. Cas. No. 8,682; Niskern v. United Brotherhood, 93 App. Div. 364, 87 N. Y. Supp. 640;

Hastings v. Travelers' Ins. Co. (C. C.) 190 Fed. 258; Cobb v. Preferred Mut. Acc. Ass'n, 96 Ga. 818, 22 S. E. 976; Travelers' Ins. Co. v. Selden, 78 Fed. 285, 24 C. C. A. 92; Southard v. Railway Passenger, etc., Co., 34 Conn. 576, Fed. Cas. No. 13,182.

Attention is especially directed to the very excellent notes on the subject in 42 L. R. A. (N. S.) 563, and 1 Ann. Cas. 787. These notes illustrate the subject by statements of the facts.

In the foregoing cases no liability was found, because the injury was not produced by accidental means.

In Cobb v. Preferred Mut. Acc. Ass'n, supra, the plaintiff was in a feeble condition, and in carrying his baggage a short distance it was found that his eye was affected, finally resulting in blindness. The plaintiff had not fallen nor received any shock, blow, or jar, and there was nothing unusual in the manner of carrying the baggage or his movement while so doing. It was considered that the means producing the injury were not accidental.

In Feder v. Iowa St. Traveling Men's Ass'n, supra, a rupture of an artery occurred while the insured was reaching in an ordinary way over a chair to close some window shutters, and he did not fall or lose his balance. Everything was done as was intended. It was held the rupture was not sustained through accidental means.

The same doctrine is announced in other cases, but a recovery had because the injury was sustained through accidental means. These cases are Standard Life & Acc. Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112; Atlanta Acc. Ass'n v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; Reynolds v. Equitable Acc. Ass'n, 59 Hun, 13, 1 N. Y. Supp. 738; Pervanger v. Casualty, etc., Co., 85 Miss. 31, 37 South. 461; Bailey v. Interstate Casualty Co., 8 App. Div. 127, 40 N. Y. Supp. 513; Rodey v. Travelers' Ins. Co., 3 N. M. (Gild.) 543, 9 Pac. 348; Taylor v. Gen. Acc. Corp., 208 Pa. 439, 57 Atl. 830; Stout v. Pac. Mut. L. Ins. Co., 130 Cal. 471, 62 Pac. 732; Mutual Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

The following authorities are in conflict with those above cited: North American L. & A. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Horsefall v. Pacific Mut. L. Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; Young v. Railway Mail Ass'n, 126 Mo. App. 325, 103 S. W. 557; Rose v. Commercial Mut. Acc. Co., 12 Pa. Super. Ct. 394; Patterson v. Ocean Acc. & Guaranty Co., 25 App. D. O. 46.

[2] Now, looking to the particular facts here alleged, we find the cause alleged to have produced the injury was a natural and

ordinary movement. Complainant was lying quietly on the bed, and called to his wife to bring him the Nashville Banner that he might read it. He then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. He was informed by his physician that the loss of the eye was due to the fact that in his weakened condition, resulting from the purgative he had taken, he raised his hand suddenly to get the paper, and that his blood pressure was strong and rushed to his head, causing a blood rupture of the retina, thereby destroying his sight. The weakened condition due to the purgative was not accidental, nor was the excessive blood pressure; both being physical conditions produced from natural causes. The movement of the hand suddenly to get the paper was executed exactly as intended. It was a simple and ordinary movement. The rushing of the blood with excessive pressure, rupturing the retina, was therefore caused by natural means. While the result was not foreseen, the causes producing that result were not accidental. It is well in line with the cases above cited sustaining the majority rule, which we adopt. This rule affords a reasonable interpretation of the contract.

The position here taken is not in conflict, as we view it, with the opinion of our court in Insurance Co. v. Bennett, 6 Pick. (90 Tenn.) 258, 16 S. W. 723, 25 Am. St. Rep. 685, when the facts of that case are properly considered.

We deem it unnecessary to pass upon the next point, raised by demurrer, namely, that if the injury may be said to have resulted through accidental means, yet it did not so result "directly, independently, and exclusively of all other causes." The learned chancellor sustained the demurrer in this respect also, and there is strong authority for his position. But, inasmuch as the foregoing is decisive of the case, and the question of proximate cause and what contributing facts would be too remote to be considered as entering into the accidental means producing the injury must depend upon the facts of each case, discussion on that point is omitted.

Affirmed.

TENNESSEE POWER CO. v. LAY.

(Supreme Court of Tennessee. Feb. 1, 1916.)

EMINENT DOMAIN §307 — REMEDIES OF PROPERTY OWNERS—ACTIONS FOR DAMAGES —NECESSITY OF JURY OF VIEW—RES ADJUDICATA—"CORAM NON JUDICE."

In an action for damages for the taking of land for a power company's lines, wherein the amount of land taken was agreed upon, and the sole issue was its value, where compensatory and incidental damages were assessed by the trial jury, which laid off by metes and bounds the land taken, the proceeding was not coram non judice, since the court had jurisdiction of the controversy, although there was no issue as to the land taken, but the judgment was a valid adjudication on the question of damages, al-

though no jury of view was had, since Shan-non's Code, § 1866, provides that the injured party may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 820-824; Dec. Dig. 307.

For other definitions, see Words and Phrases, First and Second Series, Coram Non Judice.]

Certiorari to Court of Civil Appeals.

Action by Mary Lay against the Tennessee Power Company. From a judgment for plaintiff, defendant brought error to the Court of Civil Appeals, which affirmed the judgment, and defendant brings certiorari. Affirmed, and judgment entered.

T. T. Rankin, of Chattanooga, for plaintiff. Jno. T. Raulston, of South Pittsburg, for defendant.

NEIL, C. J. This action was brought in the circuit court of Marion county by defendant in error, Mary Lay, to recover damages arising out of the fact that the plaintiff in error had entered upon her land and constructed its line of poles, wires, etc., without authority. It was alleged that the plaintiff in error had taken an area of 40 feet wide across the farm. The plaintiff in error filed a plea stating that it had taken 100 feet. The defendant in error then, by leave of the court, amended her declaration so as to allege that the amount taken was 100 feet, and set out by metes and bounds a description of the land taken; this description purporting to have been drawn from the survey made by the plaintiff in error. It is also substantially alleged in the declaration that the plaintiff in error is a public service corporation, such as would have the right to condemn under our statutes.

A jury was impaneled, and the damages assessed, both for the taking and incidental damages. The jury also found the amount of land which was taken by the plaintiff in error, describing it with exactness as set forth in the amendment to the declaration.

A motion for a new trial was made and continued over to the next term of court. At the latter term the trial judge so far granted the motion as to suggest a remittitur of a part of the damages, and this was accepted by defendant in error. A bill of exceptions was then made up, and the case appealed to the Court of Civil Appeals by the plaintiff in error. That court declined to examine the bill of exceptions on the ground that it was filed too late; no time having been granted at the trial term for its filing thereafter. That court then proceeded to try the case on the technical record, and affirmed the judgment of the trial judge. The case was then brought to this court by the plaintiff in error on the writ of certiorari.

[1,2] Plaintiff in error concedes that it cannot rely upon the bill of exceptions, but insists that the adjudging of the land to it was coram non judice, since there was no issue on the subject, and no jury of view was appointed; that therefore it will not be protected by the plea of res adjudicata in case an effort should hereafter be made by defendant in error to recover the land or again secure damages, and therefore the result of a final affirmance would be that the defendant in error would recover her judgment for the amount, and the plaintiff in error would receive no consideration.

This is a mistaken view. The parties have agreed in their pleadings as to the land that had been taken and for which the damages were sought, and, no objection having been made as to the amount, or as to the description, the sole purpose of the suit being to recover damages, it was unnecessary to go through the formality of selecting a jury of view to lay off the land. So far as the assessment of damages was concerned, that was properly done by the regular jury impaneled to try the case. This was directly in accord with Shan. Code, § 1866. That section provides that the injured party "may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest." The pleadings sufficiently covered the controversy, and there was no necessity for any other jury than the regular trial jury; and we must conclude that that jury either ascertained the description of the land from the pleadings, or by proper evidence submitted to them, there being nothing in the record to the contrary.

The result is that the judgment of the Court of Civil Appeals will be affirmed, and a judgment will be entered here in accordance with this opinion.

WESTERN UNION TELEGRAPH CO. v. NASHVILLE, O. & ST. L. RY. CO. et al.

(Supreme Court of Tennessee. Jan. 22, 1916.)

1. TELEGRAPHS AND TELEPHONES 7—EXTENSION OF LINE—RIGHT TO MAKE.

A telegraph company was organized under New York act of April 12, 1848 (Laws 1848, c. 265), providing that any number of persons may associate for the purpose of constructing a line of telegraph through the state from and to any point without the state. New York act of April 8, 1851 (Laws 1851, c. 98), required the written consent of persons owning two-thirds of the capital stock of such companies as a condition to an extension of the lines, while New York act of June 29, 1853 (Laws 1853, c. 471), provided for an extension of the lines upon the terms and conditions prescribed in the act of 1848. Held, that after the passage of the act of 1853, written consent of persons holding two-thirds of the stock of such company was not

necessary to an extension of its line without the state.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 5; Dec. Dig. 47.]

2. EMINENT DOMAIN 47—TELEGRAPH AND RAILWAY COMPANIES—RIGHT TO CONDEMN.

As Act Cong. July 24, 1866, c. 230, § 1, 14 Stat. 221 (Rev. St. U. S. § 5263 [U. S. Comp. St. § 10072]), does not confer upon telegraph companies the right to condemn an easement over a railroad right of way, but merely denies the state power to prevent an occupation and use of such right of way for telegraph purposes, a telegraph company may, under the state laws, condemn for telegraph purposes a way over a railroad right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. 47.]

3. EMINENT DOMAIN 191—TELEGRAPH AND RAILWAY—WAYS—CONDEMNATION.

A petition by a telegraph company for condemnation of a way for a line of telegraph along a railroad right of way, brought under Acts 1885, c. 66, § 1, authorizing such condemnation, providing that the ordinary use of such railroad shall not be thereby obstructed, is not bad because the petition declared that the telegraph line would not obstruct the use of the right of way for railroad purposes, and offered to move the line in case the right of way should be obstructed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. 191.]

4. EMINENT DOMAIN 71—COMPENSATION—RIGHT TO.

As a telegraph company, upon condemning the right to erect a telegraph line on a railroad right of way is obligated to prevent its line from obstructing the use of the right of way for railroad purposes, Shannon's Code, §§ 1844-1859, providing for compensation in money, makes adequate provision for assessment of damages and allowance of compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180-187; Dec. Dig. 71.]

5. EMINENT DOMAIN 47—PROCEEDINGS—SELECTION OF LINE.

Where a telegraph company condemns the right to build a line on a railroad right of way, the telegraph company, and not the railroad company, is entitled to select the site for the telegraph line, so long as it does not interfere with the operation of the railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. 47.]

6. EMINENT DOMAIN 120—PROCEEDINGS—COMPENSATION.

As a telegraph company may acquire the right to construct its line on a railroad right of way where it does not obstruct the operation of the railroad, but there may be an interference not amounting to an obstruction, the railroad company cannot be denied substantial damages, particularly where the taking will force it, in case it builds its own telegraph line, to adopt a less advantageous route, this being so though the telegraph company offered to remove its line in case it should be an obstruction, for a slight interference would not amount to an obstruction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 315-319; Dec. Dig. 120.]

Certiorari to Court of Civil Appeals.

Condemnation proceedings by the Western Union Telegraph Company against the Nashville, Chattanooga & St. Louis Railway Company and another. From a judgment for plaintiff, defendants appealed to the Court of Civil Appeals, and from the judgment there, they bring certiorari. Reversed and remanded.

Shields & Cates, of Knoxville, and Cooper & Clark, of Trenton, for plaintiff. Claude Waller, John Bell Keeble, and Ed. T. Seay, all of Nashville, W. B. Lamb, of Fayetteville, and Peeler & Peeler, of Huntingdon, for defendants.

WILLIAMS, J. In February, 1912, the Western Union Telegraph Company, a body corporate under the laws of the state of New York, filed in the circuit court its petition for the condemnation of an easement or right of way over and along the railway rights of way owned, or occupied as lessee, by the Nashville, Chattanooga & St. Louis Railway in Carroll county, through which county run two divisions (the Nashville and the Paducah) of the lines of railway of that company. The Louisville & Nashville Railroad Company, as the owner and lessor of the Paducah division, was joined as a defendant, as were also certain others who had interests as trustees under trust deeds or mortgages executed by the two railway companies. For convenience all of the defendants will be referred to as "the railway" or "the railway company."

The Nashville division extends from Nashville, Tenn., to Hickman, Ky., embracing 24.95 miles in Carroll county. On that division the telegraph company at the time of the filing of its petition maintained, and for nearly 50 years prior thereto it had maintained, a telegraph line along the south side, which would be the left side (going towards Hickman) of the single track main line of railroad.

The Paducah division of the railway extends from Paducah, Ky., to Memphis, Tenn., and embraces 26.4 miles in Carroll county. The telegraph company, prior to the institution of the suit, had operated a line of telegraph on the east side of the single main line track of railroad—the left side, going towards Memphis.

The tracks of the two divisions cross at Hollow Rock Junction in Carroll county.

The primary purpose of the petition of the telegraph company was to condemn an easement for its pole lines along or on the routes then occupied by the petitioner on the rights of way of the railway. By stipulation in the record it appears that the widths of the rights of way on the Nashville division vary from 60 feet (the railway track being approximately in the center) to 100 feet, though it further appears from the proof probable that at places the width is about 200 feet. The rights of way along the Paducah divi-

sion are 100 feet in total width, the track of the railway being in the center.

The existing line of the telegraph company varies in its distance from the railway's track, on the Nashville division, due to the topography of the right of way (as it exists after the construction of the track through cuts and on fills), but its average distance would seem to be about 25 feet south of the center of the track. On the opposite or north side of the track, on that division, a telephone line has been constructed on the right of way of the railway, near the margin of that portion of the same that is fenced, by a commercial telephone company. There is no telephone line on the right of way of the railway's Paducah division.

Although it seems that the telegraph company's line was constructed along the Nashville division right of way prior to that date, it appears that its legal status was defined by a contract entered into on April 1, 1867, which provided for the furnishing of a telegraphic service to the railway's predecessor in title. This contract was ratified and extended on August 1, 1878, and again on May 14, 1880.

On June 18, 1884, another contract was entered into by the telegraph company and the railway, defining the rights of the parties as respects both the Nashville and the Paducah divisions, the latter division not having come into existence until after the date of the contract of May 14, 1880. In the contract of 1884, it was provided that one wire was to be set apart by the telegraph company for the preferential use of the railway, and that if the railway should at any time require greater wire facilities, the telegraph company should furnish an additional wire at the cost price thereof upon its poles, or, in the alternative, that the railway might, at its own cost, string such additional wire upon the telegraph company's poles in such position as the telegraph company might direct. Incorporated in this contract was the following clause which, it seems, has led to a breach and bitter litigation in this and other states between the contracting parties:

"Upon the wires thus set apart for the preferential use of the railroad company, its business messages, the family and social messages of its officers and agents may be sent free between all points on its roads," etc.

On June 27, 1911, the telegraph company wrote the railway, complaining of the extravagant use by the officers and agents of the railway of the above contract privilege, it being insisted that the service thus exacted on the defendants' systems during the year 1910 reached the value of \$521,925. It was requested by the telegraph company that this be remedied by way of a modification of the contract. Failing to reach an agreement, the telegraph company, on August 17, 1912, gave notice that the contract would be terminated. Thereafter negotiations for the

purchase by the telegraph company of an easement for its pole lines were commenced, but they proved unavailing. This litigation followed.

The petition for condemnation sets forth, among other things, that the petitioner proposes to so set its poles as not to interfere with any ditch, drain, culvert, or any work or structure of the railway or the ordinary travel upon or use of the railroad—

"and, in event it may be deemed by the railway necessary to change the location of its tracks, or to construct new tracks, or side tracks, or to construct new depots, or other buildings, or to change the location of those now, or hereafter to be constructed by the defendant company, where any of the petitioner's poles and wires are located upon the said right of way, petitioner hereby agrees to remove its said poles and wires from said places or points so to be used to any part of defendant's right of way thereunto adjoining which may be designated by defendant company, upon due and reasonable notice in writing given to the petitioner by said defendant, setting forth the desired change; all of said changes, and relocation of its wires, to be made at the expense of the petitioner."

The petition also embodied the consent of petitioner that the railway might take all earth materials and water needed by the latter, and its agreement to so reset, at its own expense, its poles as to conform to any consequent changes in the grade; to hold the railway harmless from any damages to petitioner's property; to hold down interference with the operation of cars or trains on any railway tracks, etc.

The circuit court adjudged that petitioner had a right to condemn, but denied it the location at the time held by its pole line along the Nashville division. That court assigned the telegraph company a different location, but on the same side of the track of that division, alongside the present line of the telegraph, thus recognizing that there was adequate space on the right of way of that division for an additional or third pole line. The location for the telegraph pole line at the place at the time occupied by the same on the Paducah division was also denied, and the location was shifted to the opposite side of the track. Substantial damages were denied and nominal damages awarded the railway.

On appeal the Court of Civil Appeals modified the judgment of the circuit court in such way as to designate for the petitioner the locations by it sought on the two divisions, but affirmed the circuit court in other respects. That court incorporated the above recited petition stipulations, or agreements, on the part of the telegraph company, in its judgment as conditions binding on that company.

The railway has petitioned for and been granted by this court the writ of certiorari in order to a review of the judgment of the Court of Civil Appeals; and, owing to the magnitude of the interests involved, in this and other states, the cause was set down for oral argument, and argued at the bar

of this court. While the pending case directly affects the rights of the parties in but one county, the principles to be herein declared will govern in other suits brought, or to be brought, in other counties of this state to test the telegraph company's right to condemn easements over the rights of way of two of our largest railway systems.

The first question for solution, as one lying at the threshold of the lawsuit and determinative of all contentions, if the railway be correct in its position respecting it, is the power of the telegraph company under the terms of its charter, granted by the state of New York, to own or operate telegraph lines in this state.

[1] The railway undertakes the maintenance of the proposition that the telegraph company cannot condemn property in this state since it is not authorized by its charter to exercise any corporate function of ownership, except under a certain provision of its charter (which it is claimed has not been complied with), requiring, by way of condition precedent to any extension of its telegraph lines, the obtaining by the telegraph company of "the written consent of the persons owning two-thirds of the capital stock of such company."

The determination of this question depends upon the proper construction of certain acts of the General Assembly of the state of New York.

The telegraph company was organized, under the name of New York and Mississippi Valley Printing Telegraph Company, on April 1, 1851, under the New York act of April 12, 1848, the first section of which provided:

"Sec. 1. Any number of persons may associate for the purpose of constructing a line of wires of telegraph through this state, and from and to any point within this state, upon such terms and conditions, and subject to the liabilities prescribed in this act." Laws 1848, c. 265.

The certificate of incorporation set out, in pursuance of section 2 of the act, the general route of the line of telegraph to be:

"Through this state from the city of Buffalo to the state of Pennsylvania, along the south side of Lake Erie."

Both the railway and the telegraph company construe the above act of incorporation to provide only for the ownership of lines within the state of New York, and we think correctly so.

On April 8, 1851, the Legislature of New York passed an act amending the act of 1848, so as to provide that the directors of telegraph companies incorporated thereunder—"may, at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, extend their line of telegraph, or may construct branch lines to connect with their main line, or may unite with any other incorporated telegraph company." Laws 1851, c. 98.

This amendment, as will be noted, followed the incorporation of the telegraph company by one week, and its purpose evidently was to enable it to extend the originally designed

line within the state of New York, touching which power the act of 1848 was silent.

The next act amending the act of 1848 was that of June 29, 1853, which, among other things, provided for the incorporation of any number of persons for the purpose of owning and maintaining lines of telegraph—

"whether wholly within, or partly beyond, the limits of this state * * * upon such terms and conditions, and subject to the liabilities prescribed in the act passed April 12, 1848. * * * And such association shall, upon complying with the provisions of the said act, * * * have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith." Laws 1853, c. 471.

By this act there were affected only companies owning lines wholly within or partly within and partly beyond the limits of New York. Ownership and maintenance of lines wholly beyond the state of New York yet remained to be dealt with. The development of the idea of a great system of telegraphic communication seems to have come, as was natural, by gradual stages, and the "lines" were conceived of as separate units. The telegraph company accepted and complied with the provisions of the act of 1853, and organized thereunder, with route set forth as being from Buffalo, N. Y., to Louisville, Ky., with a branch circuit to Lexington, Ky.

The line of the telegraph company in this state along the right of way of the railway appear to have been constructed after the passage of New York act of 1862, which provided, in substance, that any telegraph company incorporated in that state might own and maintain any line or lines not described in the original certificate of organization, "whether wholly within or wholly or partly beyond the limits of this state [New York]." Laws 1862, c. 425. Thus for the first time were there recognized and dealt with lines that might be wholly without the state of New York; and by the act it was further stipulated that such acquisition should be "upon the terms and conditions prescribed in the act of 1848," and not, as in the preceding act of 1853, upon the conditions prescribed in the Act of 1848 and in the several acts amending the same.

We are therefore of opinion that, even if the provision as to the procurement of the written consent of two-thirds of the stockholders embodied in the act of 1851 were one concededly to be treated in any event as a condition precedent, it does not apply to the line now sought to be acquired in Tennessee, and that the act of 1862, as the applicable act, does not so require. This is true, whether the line be deemed a separate one or an extension of a route designated in the charter of the telegraph company. Several considerations lead us to this result: (a) We think it manifest that, as the development of communication by telegraph became rapid and so comprehensive as to give promise of a nation-wide expansion, the Legislature of

the state of New York did not see fit to further impose such a cumbersome condition on the growth of the enterprise beyond the borders of that state; (b) able and diligent counsel of the railway do not point out that any question as to the lack of such a power under the above legislative acts has been raised in the courts of New York; and (c) in no reported case outside of that state does it appear that any defendant railway company has ever so much as submitted the question for adjudication, and a number of warmly contested suits between railway companies and this telegraph company, in respect of the latter's power to condemn, have been before the courts in recent years. A power thus exercised, unchallenged in that particular for 50 years, is not readily to be held ill based or nonexistent.

[2] The next assignment of error for consideration in logical order is that, since both the railway and the telegraph company are subject to the act of Congress regulating post roads, there is no power on the part of the state to authorize the condemnation sought in this case, for that it would be an invasion of the exclusive control by the federal government over the subject-matter.

It is admitted, as it must be, that the act of Congress of 1866 (R. S. § 5263) does not confer upon the telegraph company the right to condemn an easement over a railway right of way. The purpose of that act was to deny to the states the power to prevent an occupation and use of such a right of way for telegraph purposes, and the power to condemn remains within state jurisdiction. *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 207 Fed. 1, 124 C. C. A. 573; *Western Atlantic R. Co. v. Western Union Telegraph Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, and note.

No jurisdiction, therefore, is attempted to be asserted by the Congress, if it were competent for it to do so, over the particular matter of the power or mode of acquiring title that could be or become exclusive. The result of the railway's contention, if sustained, would be that there could be no condemnation by a telegraph company at all. There is no merit in the assignment of error.

[3] It is a further contention of the railway that the petition for condemnation is unknown to the forms of law, in that it does not seek to have any definite or fixed right of way condemned, but seeks, it is claimed, to have made a judicial contract between the petitioner and defendant, and that, too, for an ambulatory or shifting easement over the right of way of the railway.

By our Act 1885, c. 66, § 1, it is provided that telegraph companies may construct and

maintain a line of telegraph upon, along and parallel to any of the railroads of this state, "provided that the ordinary use of such railroad be not thereby obstructed," and provision is made for the condemnation of easements in the manner prescribed by law for the taking of private property for works of internal improvement. By Act 1885, c. 135, more specific reference was made to the Code sections, relating to the taking of property for public works, which in terms were extended so as to apply to condemnation by such companies.

The telegraph company, conceiving that it was incumbent on it to construct and hereafter maintain a line of telegraph on the railway right of way that would not materially "obstruct" the ordinary use of that right of way for railroad purposes, embodied in its petition for condemnation, as has been noted, a proposal and agreement on its part to shift the location of its line to any part of the defendant's right of way which may be designated by defendant railway in event of changes in the location of its tracks, depots, etc., now or hereafter to be constructed, and that the poles shall be reset to conform to changes in the grade and curvature of the railway's tracks, etc.

The argument of the railway is that only a fixed and permanent easement may be condemned under our Code provisions—one of specific, definite, and unchanging metes and bounds. However that may have been prior to the later acts (1885) above outlined, we are of opinion that those acts are to be construed to provide for a maintenance of the line of telegraph after condemnation in such a way as will not obstruct the railway's user, as that user may itself be a changing quantity, as time runs and railway traffic increases so as to call for additional facilities. This construction is one favorable to the railway, as we see it, and certainly it is conformable to the needs of commerce and the public weal, which both the railway and the telegraph company were created to serve.

Under this construction the terms set out and acceded to by the petitioner are not to be considered contract terms. They are not party imposed or court imposed, but law imposed. Any subsequent shifting in the pole line is to be referred for basis to the statute's provision for the safeguarding of the railroad user. It does and will not depend upon the volition of the condemnor. An easement for a telegraph line is to be condemned, subject to such noncontract provisions in favor of the railway. To guaranty the observance of such terms by the petitioner, the petition sets them forth and judgment goes in accord. Similar stipulations in the petition were recognized as proper and enforced, seemingly without question, and therefore without discussion, in *Railroad Co. v. Telegraph Co.*, 101 Tenn. 62, 46 S. W. 571.

The point has been ruled directly in other

jurisdictions. In *St. Louis, etc., R. Co. v. Postal Telegraph Co.*, 173 Ill. 508, 51 N. E. 382, the petition contained stipulations of similar character, and it was said:

"These allegations in the petition are in the nature of stipulations, to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court. *Chicago & Alton Railroad Co. v. Joliet, Lockport & Aurora Railway Co.*, 105 Ill. 388 [44 Am. Rep. 799]; *Peoria & Pekin Union Railway Co.*, 105 Ill. 110. Indeed, section 2 of the act in regard to telegraph companies only authorizes such companies to construct lines of telegraph along and upon railroads, and to erect poles for supporting the insulators and wires of their lines, upon condition that such construction and erection are done in such manner and at such points, as not to incommode the public use of the railroad." It is a condition precedent to the erection of the telegraph line, that the public use of the railroad shall not be incommoded."

In *American Telephone, etc., Co. v. St. Louis, etc., R. Co.*, 202 Mo. 656, 684, 101 S. W. 576, 584, it was said:

"It is next contended by defendant's counsel that the easement proposed to be acquired is so lacking in precision and definiteness as to render the proceeding void. They argue that the property to be appropriated must be definitely located and described in the petition and judgment. They say this requirement was disregarded in the case at bar. Is this so? We think not. * * *

"It has been well determined in the cases referred to that reservations, stipulations, promises, and limitations made and placed, as in this case, on the easement by the petition and the judgment may be likened to covenants running with land, and in such case as this run with the easement and are binding upon plaintiff company and its successors. *Railroad v. S. W. Tel. Co.*, 121 Fed. 276 [58 C. C. A. 198]; *Railroad v. Postal Tel. Co.*, 173 Ill. 535 [50 N. E. 807], and cases cited; *Railroad v. Post. Tel. Co.*, 76 Miss. 731, 752 [26 South. 370], 45 L. R. A. 223.

"The statutory rule in section 1272, supra, limiting the right under the second appropriation to such use as shall not materially interfere with the uses impressed on the primary easement by law, seems to demand a flexibility in the petition and judgment which will subserve the useful purpose constituting the life of that statute; and the lack of definiteness complained of by defendant is really but another name for this flexibility. If hereafter defendant is obliged by law or by an advance in the knowledge of railroading to install the block system or any other contrivance or mechanism on its line as a protection to life and property, the judgment should be so worded as to prevent the poles and wires of plaintiff from interfering with the use of such safety appliances in the future."

Obviously cases are not pertinent which hold that, where real property of an ordinary owner is being taken originally for a public use, it is erroneous for the court, in the absence of statutory warrant, to stipulate that the party condemning shall do certain things for the benefit of the owner and to make an award of lessened damages to the owner accordingly. There the taking is in nature unconditional—of a full user.

[4] This being the case, the railway, on that basis, further contends that the Code sections (Code, Shannon, §§ 1844-1850, inclusive) do not supply a procedure for the ascer-

tainment and allowance of just compensation to the railway, and that the taking is in consequence without constitutional warrant. Further, that it is entitled to be paid damages in money, and not to have such stipulations, promissory in character, substituted in whole or in part therefor.

We deemed this contention and its several phases to be met substantially by what is said under the assignment of error next above. The telegraph company does not pay in mere promises; it pays for the easement taken by it, burdened and qualified at the time of taking with the conditions imposed by the statute.

[5] Another point, much stressed by the railway, is that it was erroneously denied by the Court of Civil Appeals its claim of preferential right in the selection of the portion of its own right of way which it desires to use for the construction of a telegraph line with which to operate its railroad, that court having held that the first right of selection, for its telegraph line, was in the telegraph company.

In support of this insistence on error the railway first urges that it was in the use of the line now occupied by the telegraph poles when, and before, the petition for condemnation was filed, in that it owns one or more wires strung on same, and that this fact gives the preference sought by it. The poles, cross-arms and the other wires are, however, the property of the telegraph company, and the maintenance of the particular wires referred to for railway use was on the line as that of the latter company, so recognized by the railway for many years and throughout all transactions. The occupation prior to petition filed was, then, that of the petitioner company, and the use of two wires was, by contract permission, through or an incident to that occupation by means of the pole line.

In this attitude where lies the preferential right of selection of location on or after the filing of the petition for condemnation which designated for future use by the petitioner the location of the line now in existence?

The attempt of the railway to make the selection of that identical route was some months subsequent to the filing of that petition.

When a railway company proceeds to condemn a right of way for its purposes, it is granted the right of preference as to the location of its right of way, over the owner of the soil. 2 Lewis, *Eminent Domain* (3d Ed.) §§ 460, 604; *Railroad v. Railroad*, 116 Tenn. 500, 532, 95 S. W. 1019.

By what process of reasoning may it be held to have also a preference when another is by the state granted the power of eminent domain in respect to a taking of an easement over the railway's right of way? In each instance there is a subjection of an estate and by the authority of the same power.

In the case of *American Telephone, etc.*,

Co. v. St. Louis, etc., R. Co., supra, this language was used in relation to a like claim:

"Defendant may no more question the policy, the good taste and propriety of plaintiff's selection of that route for its poles and lines than could the original proprietors raise such issue with defendant when it selected the route for its railroad. When the Legislature delegated to defendant the power of exercising the right of eminent domain in its own behalf, it granted to it by necessary implication (barring malice and fraud) the discretion of selecting its route; and when it granted to plaintiff the same right, it clothed that right with the same attribute of discretion—provided always that when an easement for a public use is to be condemned in an existing easement for a public use, the new easement (not being superior to the former) ought not to destroy, or be materially detrimental to, the prior use."

In *Western Union Tel. Co. v. L. & N. R. Co.* (D. C.) 201 Fed. 946, 949, Evans, D. J., said:

"The suggestion that the defendant may want to devote the very part of its property which complainant seeks to condemn to the construction in the future of a telephone or telegraph line of its own was disposed of in an opinion recently delivered in the condemnation suit, where the defendant, in its answer, made a similar claim under section 1 of the Kentucky act, authorizing condemnations by telegraph companies. While for other reasons overruling a demurrer to a paragraph of the answer which, among other things, set up this claim, the court said that in doing so it by no means intended to intimate that it yielded to the defendant's contention that the defendant has the first right to choose what part of its right of way shall be taken by the plaintiff or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of section 1 of the act does not seem to confer any rights upon the defendant as to a nonexistent telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view we take. Indeed, there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had, and which it desires to hold, shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it 'desires,' though this, of course, is subject to the other provisions of the act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. * * * The taking of one particular part of a thing may involve greater compensation, including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires."

On appeal to the United States Circuit Court of Appeals, Sixth Circuit, under the style of *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 207 Fed. 1, 124 C. C. A. 573, the court, while declining to express its opinion upon the ultimate merits of this particular question on the ground that it was one for solution by the state courts of Kentucky, yet held that the United States District Court had not improperly exercised its discretion in the matter of enjoining the railway company, and said:

"It is true that the Supreme Court of Georgia (construing, as we do, the language of the opinion in connection with the syllabus prepared by

the court) has held that the telegraph company could not condemn lines on both sides of the railway tracks, and that it is vested with no preference in the adoption of location, and that it should be enjoined from condemning a right of way selected in good faith by the railway company. See *Western & Atlantic Ry. Co. v. Western Union Telegraph Co.*, 188 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225. * * * That decision must be recognized as the law of Georgia, so far as it pertains to appellee's condemnation proceeding pending in that state. But we think it requires no modification of the injunction under review, because, first, appellee has no lines in Georgia on both sides of the railway tracks, and the District Court in the Kentucky condemnation proceedings took a different view of the question under the Kentucky statutes," etc.

If the ruling in the Georgia case may not fairly be confined within the limits indicated, it may be said to run counter to the trend of authority on this point. *Postal Telegraph Co. v. Oregon, etc., R. Co.* (C. C.) 104 Fed. 623, affirmed 111 Fed. 842, 49 C. C. A. 663; *Union Pacific R. Co. v. Colorado Postal, etc., Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; 2 *Lewis, Eminent Domain* (3d Ed.) § 604.

We deem the true rule to be that property already dedicated to a public use is in this respect on the same plane as other property, provided there does not exist a condition that would prevent condemnation—an interference with the first public use by the second so material as to "obstruct" or seriously and extraordinarily impair the use for ordinary railway purposes, including telegraphic communication by means of the railway's own line of wires.

If the interference goes to the extent of so obstructing the earlier use, the power to condemn is lacking; but the theory underlying our statute is that when the interference does not go that far, the inconvenience and impairment may be compensated for in damages and the taking for the second use permitted.

The circuit judge held against the defense raised by the railway to the effect that a pole line of the telegraph company placed on the right of way would not leave safe and suitable space for a line of telegraph for defendant's purposes, and the Court of Civil Appeals ruled that "the portion of the right of way selected by the telegraph company in this case will not, as the proof shows, materially interfere with, or obstruct, the ordinary travel on this railroad," and the context shows that by this was meant that the ordinary use for all railroad purposes would not be interfered with materially. Without going into a discussion of the proof in detail, we are of opinion that this ruling was correct. Particularly do we think it demonstrated by the testimony adduced that the railway may, with reasonable safety and convenience, construct and maintain its own telegraph line on the Nashville division on that side of the main track where stands the poles of the line of the Cumberland Telephone Company, and on the Paducah division

on the opposite side of the track from the line of petitioner.

The Court of Civil Appeals further upheld the selection by the telegraph company of the lines for many years, and yet, by it maintained on the right of way of the two divisions of railway, where they are now located, and this ruling being in accord with the authorities as to the right of selection, above discussed, will not be interfered with.

[8] This brings us to a consideration of whether the Court of Civil Appeals was in error in its judgment awarding to the railway company only nominal damages for the easements thus appropriated. Although that court affirmed a similar ruling of the trial judge, it said in its opinion that "this, to us, has been the most troublesome question to determine," and two of the members of that learned court, Judges Wilson and Higgins, dissented from the ruling. We think the majority of that court was led to its conclusion (so far as the Nashville division is concerned) by a mistaken construction or application of the case of *Railroad v. Telegraph Co.*, 101 Tenn. 62, 46 S. W. 571. It was held in that case by this court, on the facts there appearing, that nominal damages were properly allowed in a case of appropriation of a telegraph line on a railroad right of way. But it was not meant to be held that as a matter of law in no event would the rule of substantial damages be applicable to such an appropriation. On the contrary it was there said:

"It is not insisted in this case that the use of the right of way, and construction of the telegraph line, will be any detriment or obstruction to the railroad, but, on the contrary, it is shown that it would be a benefit and convenience."

Recurring to what was said above in the discussion of the question of preferential right of selection, the law recognizes that there may be an interference with the railway's use of such a degree of materiality as to require compensation, though it fail to obstruct or supersede such earlier use. In other words, the interference by the subsequent public use with the former use may be so slight as to indicate nominal damages, it may be material to the point of indicating substantial damages, and it may reach the degree of obstruction, with the result of a denial of condemnation to the telegraph company.

We think the facts of the present case bring it within the second class, so far as the line along the Nashville division is concerned, and that the lower court erred in the rulings that excluded testimony competent to show the injury and inconvenience to be suffered by the railway by reason of the interference to be occasioned by the pole lines on the easement of way of the telegraph company. *Cleveland, etc., R. Co. v. Ohio Postal Telegraph Co.*, 68 Ohio St. 306, 67 N. E. 890, 62

L. R. A. 941; *American Telephone, etc., Co. v. St. Louis, etc., Co.*, supra.

We are of the further view that it was competent for the railway to show, if it could, that the taking of the existing telegraph line on that division by the condemnor compels it, the railway, to construct a telegraph line, necessary to be built presently, in a location (even when made at the next best place) less desirable and more expensive, as well as for it to show damages, if any, by way of direct nonobstructing interference of petitioner's line with the railroad user.

The argument of the telegraph company to the contrary is that a condition of its being allowed to take at all is that it shall remove or readjust its line when it shall become an interference; but this is not maintainable under our holding favorable to that company on another point, to the extent of defeating the allowance of substantial damages. The proof offered indicated that the telegraph line on the Nashville division will be at the outset an interference that will incommode and injure the defendant to a substantial degree. Only such proof as tends in this direction is meant to be here indicated to be competent, in relation to that line.

As to the line sought to be condemned along the Paducah division: Here there exists no telephone line on the side of the track opposite to the existing telegraph line, and the latter is so far from the track and from any telegraph line reasonably and practicably to be constructed by the railway that the ruling as to measurement of damages as nominal under the doctrine of the case of *Railroad v. Telegraph Co.*, 101 Tenn. 62, 46 S. W. 571, was in our opinion warranted. The rule of that case on this point has been approved in several other jurisdictions. *Atlantic, etc., R. Co. v. Postal Telegraph Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734; *Mobile, etc., R. Co. v. Postal Telegraph Co.*, 120 Ala. 21, 24 South. 408; *Western Union Telegraph Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 South. 788; *Mobile, etc., R. Co. v. Postal Telegraph Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; *Postal Telegraph Co. v. Oregon, etc., R. Co.* (C. C.) 114 Fed. 787, and cases therein cited.

The assignment of errors, as shaped, do not call for rulings by us on specific offerings of evidence by the railway tending to show in detail how the railway will be damaged by petitioner's line on the Nashville division, and necessarily they have been dealt with broadly.

The circuit judge erred in giving the jury peremptory instructions to award nominal damages in so far as it is above shown; and the Court of Civil Appeals erred on the same point. Reversed and remanded, for further proceedings in accord with the rulings embodied in this opinion.

The cost of the appeal will be paid by the telegraph company.

LOUDERMILK v. MIDYETT. (No. 102.)
(Supreme Court of Arkansas. Jan. 10, 1916.)
APPEAL AND ERROR ⇐1010—**REVIEW—FINDINGS.**

A finding of fact by the circuit judge sitting as a jury will not be disturbed, though the proof was by no means conclusive and satisfactory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇐1010.]

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Claim by H. A. Midyett against T. J. Loudermilk, executor of the estate of D. M. Doyle, deceased. The claim being dismissed by the probate court, an appeal was taken to the circuit court, and from a judgment there for claimant, the executor appeals. Affirmed.

J. N. Rachels and Jno. E. Miller, both of Searcy, for appellant. Brundidge & Neely, of Searcy, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of allowance by the circuit court of the claim of H. A. Midyett, an attorney, against the estate of D. M. Doyle, deceased. The claim was first presented to the executor of the estate showing the balance claimed and by him allowed. He then discovered some notes of Midyett's among the assets of the deceased and had the probate court to disallow the claim, from which judgment an appeal was taken to the circuit court.

There was some testimony tending to show the employment by the deceased of the attorney as he claimed and an agreement to pay a certain amount for his services; the attorney himself stating the amount to be \$200 per month. He owed the deceased at the time of his death two notes for land for \$210 and \$78, respectively, in which a vendor's lien was retained, and there was also a note of his for \$26.50 to Doyle for borrowed money, with which he had put up as collateral the note of Dr. Bruce.

The claim for services seems altogether out of proportion to the value of the services rendered the deceased by the appellee so far as the record discloses, and appellee's account shows he claimed the deceased was indebted to him in more than the amount of the \$210 note given by him for the purchase money of the land at the time of its execution, and that deceased was largely indebted to him at the time he executed the note for \$26.50 borrowed money and put up the note of Dr. Bruce as collateral.

The proof establishing the claim is by no means conclusive and satisfactory, but the matter was heard by the circuit judge sitting as a jury and a judgment rendered in appellee's favor, and we are not able to say that the testimony is insufficient to support it.

The judgment is affirmed.

SHEARER v. FARMERS' & MERCHANTS' BANK et al. (No. 100.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. APPEAL AND ERROR ⇐994 — **REVIEW OF VERDICT.**

The jury being the judges of the credibility of the witnesses, their verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. ⇐994.]

2. CONTRACTS ⇐123—**CONSIDERATION—COMPOUNDING FELONY—NOTES.**

Where defendant gave notes to a bank under agreement, express or implied, that in consideration of the notes the bank would refrain from prosecuting its defaulting cashier, defendant's son-in-law, the notes were without consideration and void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633-653; Dec. Dig. ⇐123.]

3. TRIAL ⇐260—**INSTRUCTIONS—REFUSAL.**

The refusal of instructions substantially covered by those given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⇐260.]

4. APPEAL AND ERROR ⇐501 — **RECORD — SHOWING OF PRESENTATION OF GROUNDS OF REVIEW.**

Improper argument will not be reviewed where the record does not show the reservation of exceptions thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. ⇐501.]

Appeal from Circuit Court, Woodruff County; J. M. Jackson, Judge.

Action by the Farmers' & Merchants' Bank and others against John Shearer. From a judgment for plaintiffs, defendant appeals. Affirmed.

Harry H. Myers, of Little Rock, for appellant. Harry M. Woods, of Augusta, for appellees.

HART, J. Appellees recovered judgment against appellant on two promissory notes, and from the judgment against him appellant prosecutes this appeal. Appellant admitted the execution of the notes, but says that he signed them in consideration that the directors of the Farmers' & Merchants' Bank, of McCrory, Ark., would not prosecute his son-in-law for embezzlement. His son-in-law had been cashier of the bank, and an examination of his books showed that he was a defaulter, and appellant testified, in short, that he executed the notes sued on in consideration that the directors would not prosecute his son-in-law. The directors testified in behalf of appellees and denied that appellant executed the notes in consideration that his son-in-law would not be prosecuted. They said he signed the notes to settle the indebtedness found to be due by his son-in-law to the bank.

[1] We have not attempted to set out the evidence in detail, for the jury were the judges of the credibility of the witnesses, and under the settled rule of this court their

finding of fact against appellant will not be disturbed on appeal.

[2, 3] Appellant, in an instruction numbered 2, asked the court to instruct the jury that if they believed from the evidence the notes sued on were signed by appellant under an agreement, express or implied, on the part of the bank officials that his son-in-law would not be prosecuted by the bank officials for any felony, the notes were without consideration and void. The instruction as asked for was correct. See *Goodrum v. Merchants' & Planters' Bk.*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511. But substantially similar instructions were given by the court to the jury, and it is well settled that the court need not multiply instructions on the same point.

[4] Again, it is the contention of counsel for appellant that the judgment should be reversed on account of certain remarks made by counsel for appellees to the jury. We need not set out these remarks, or consider them, for the record does not show that counsel saved proper exceptions to them.

It follows that the judgment must be affirmed.

HOCKADAY v. WARMACK. (No. 82.)

(Supreme Court of Arkansas. Jan. 3, 1916.)

1. GARNISHMENT §112, 233 — LIABILITY OF GARNISHEE.

A garnishee, after service of the writ upon him, must retain possession of all property and effects of the principal debtor in his hands, for failure to do which he is liable to the plaintiff in the principal action for the full value of the goods, or for all moneys due.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 235, 451; Dec. Dig. §112, 233.]

2. INTEREST §51 — SUSPENSION — GARNISHMENT.

Where the garnishee had previously purchased land from defendant, and had agreed to give him a mortgage and notes, but on service of the writ of garnishment he refused to deliver them, claiming that under the writ he could not do so, he was liable to the defendant for interest that would have accrued on the notes if delivered as agreed, since had he delivered the note and mortgage he could not have been damaged, as they were not yet due and could not have been collected until the due date.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 120-122; Dec. Dig. §51.]

3. INTEREST §51 — SUSPENSION — LIABILITY OF GARNISHEE — RETENTION OF AMOUNT DUE.

In such case, where the garnishee deposited money with the bank, in lieu of a portion of the notes attaching certain conditions as a prerequisite to their delivery to the defendant, such conditions not being a part of the original contract between them, he was liable for interest on such sum until delivery to the defendant.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 120-122; Dec. Dig. §51.]

4. EVIDENCE §419 — PAROL EVIDENCE VARYING WRITING — EXPLANATION OF CONSIDERATION.

Where a contract for the sale of a hotel recited a consideration of \$15,000 and acknowledged receipt thereof, parol evidence was admis-

sible to show that other sums and goods also formed a part of the consideration.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. §419.]

5. APPEAL AND ERROR §1009 — SCOPE OF REVIEW — FINDINGS OF FACT.

Findings of fact made by the chancellor, when not clearly against the weight of the evidence, must be sustained on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. §1009.]

6. EXCHANGE OF PROPERTY §7 — CONTRACTS TO PAY "TAXES" — CONSTRUCTION.

Where a contract for the exchange of properties provided that each party should pay the taxes upon the property he acquired by the exchange, and upon one piece of property special assessments had accrued through the formation of a levee district and the doing of work thereon, the agreement to pay taxes included the levee district assessments, as well as the ordinary taxes.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 12-14; Dec. Dig. §7.]

For other definitions, see *Words and Phrases*, First and Second Series, Taxes.]

Appeal from Chancery Court, Miller County; Jas. D. Shaver, Chancellor.

Action by L. M. Warmack against Ed Hockaday. From a decree in part for plaintiff, and for the defendant on his cross-complaint, the defendant appeals, and the plaintiff enters a cross-appeal. Decree affirmed.

On November 17, 1913, appellant exchanged with appellee a hotel in Kingfisher, Okl., for a plantation containing 883 acres of land and certain personal property in Miller county, Ark. There was a mortgage on the land for \$18,000, which, with interest, amounted to over \$19,000, which the appellant assumed. Each party was to pay the taxes for the year 1913 on the property received by them, respectively, in the exchange. On December 22, 1913, appellee sold the hotel, which he had received in exchange for his land, back to appellant for \$15,000, for which appellant was to execute his note due January 1, 1915, bearing interest at 8 per cent. from date until paid, and to be secured by a mortgage on the hotel. On December 23, 1913, before the mortgage and note were executed, appellant was garnished in a suit brought by one Spearman against the appellee for the sum of \$2,500. Appellant also learned that other liens existed against certain of the property for which he had traded. Appellant declined to execute the note and mortgage for the purchase of the hotel, but, instead, he sent to the State National Bank, at Texarkana, his check for \$5,000 and his note for \$10,000, due January 1, 1915, and wrote a letter to the bank, specifying certain conditions under which the bank should deliver to the appellee the \$5,000, or any part of it, and also under which it should deliver the \$10,000 note. Appellee demanded that appellant carry out his agreement as to the purchase of the hotel by executing his note and mortgage

as provided by the written contract between them. Appellant, after taking possession of the plantation, claimed that he discovered, in February, 1914, that there was a large shortage in the personal property he had bought of appellee. On the 30th of June, 1914, appellee and Spearman adjusted the garnishment proceedings between them, and appellee then requested appellant to carry out his contract, but appellant still refused. After some negotiations toward an adjustment of the differences between them, the parties met on June 30, 1914, and entered into a written agreement, whereby appellant was to pay to appellee the sum of \$12,000 and appellant was to retain in his hands the sum of \$3,000, to indemnify him against certain probable losses therein specified, and appellee was to institute suit to determine whether or not appellant was due him interest on the \$5,000 at 8 per cent. from December 22, 1913, until June 30, 1914, and whether or not, under the original contract of exchange of properties, it was incumbent on the appellee to pay the levee taxes, and to settle other differences between the parties, but it was stipulated that nothing contained in the agreement entered into on that day should be construed as annulling, setting aside, or affecting any contract of settlement theretofore entered into by the parties.

Accordingly appellee instituted this suit, and the issues raised, as shown by the pleadings, were substantially as follows: Appellee claimed that appellant was indebted to him for interest on \$5,000 at 8 per cent. per annum from December 22, 1913, until June 30, 1914. Appellant denied that this interest was due, setting up that the \$5,000, remainder of the purchase money, on which appellee claimed interest, was deposited in the bank for the special benefit of appellee, to which he tacitly agreed, and that by reason of the levy of the garnishment against him (appellant) he was precluded from complying with the letter of his agreement to execute his note and mortgage; that appellant deposited \$5,000 January 20, 1914, after appellee had written to him that he needed the money; that appellee partially complied with the conditions upon which the deposit was made by surrendering to the bank what he claimed to be a memorandum of sale, but appellee never repudiated the deposit until June 30, 1914, the date of the final agreement as to the settlement, and appellant therefore claimed that the \$5,000 was subject to the appellee's control, and that appellant was therefore not chargeable with interest thereon. Appellee further contended that appellant was indebted to him in the sum of \$250, the earnings of the hotel property from the date of the exchange of the properties, November 17, 1913, until the date when appellee sold the hotel to appellant, to wit, December 22, 1913. Appellant denied that there were any earnings from the hotel during this

period. Appellant set up, by way of cross-complaint, that appellee was indebted to him in the sum of \$488 for levee taxes for the year 1913, which were a lien on the land and which appellant had to pay to prevent the sale of the land for such taxes. He contended, also, that there was a shortage in the personal property amounting in value to \$2,729.40, which he claimed was included in their agreement to exchange properties. Appellee denied that under the agreement he was to pay levee taxes for 1913, and also denied that he was indebted to the appellant in the sum claimed as shortage in personal property, and contended that whatever shortage there was in the personal property contemplated by their original agreement for exchange of properties was included and settled and went in as part of the consideration for the sale of the hotel property by the appellee back to the appellant on December 22, 1913. The court found that the appellee should recover of the appellant interest on the sum of \$5,000 at 8 per cent. per annum from December 22, 1913, until June 30, 1914, amounting to the sum of \$208.89, and interest on that sum from June 30, 1914, at 8 per cent. per annum. The court further found that appellee was not entitled to recover earnings on account of the operation of the hotel property. The court further found that the appellant was not entitled to recover for any alleged shortage of personal property under the contract of November 17, 1913, but that he was entitled to recover the sum of \$488 on account of levee tax on the land, with interest at 6 per cent. per annum from August 31, 1914, until paid. On these findings the court entered a decree in favor of the appellee against the appellant in the sum of \$208.89, with interest from June 30, 1914, until paid, at the rate of 8 per cent. per annum, and entered a decree in favor of the appellant against the appellee for the sum of \$488, with interest from August 31, 1914, until paid for at 6 per cent. per annum. The appellant appealed, and the appellee entered a cross-appeal. The facts as set forth in the first part of the statement are undisputed, and such other facts as may be necessary, bearing on the issues, will be stated in the opinion.

Webber & Webber, of Texarkana, for appellant. D. B. Sain, of Nashville, for appellee.

WOOD, J. (after stating the facts as above). The evidence is voluminous and we will not undertake to set out and discuss in detail all the evidence bearing upon the issues as it could serve no useful purpose and would unnecessarily extend the opinion.

[1] 1. The appellant contends that the garnishment proceedings prevented him from complying with his contract to execute the note and mortgage for the hotel property purchased of the appellee, and that he is there-

fore not liable for the interest on the \$5,000 deposited in the bank. It is a well-settled rule that a garnishee, after service of the writ upon him, must retain possession of all property and effects of the principal debtor in his hands, and if he fails to do so, he is liable for the value of the same to the plaintiff in the principal action. Such was the holding of this court in *Adams v. Penzell*, 40 Ark. 531. See, also, 20 A. & E. Ency. 1068, 1069.

[2] Appellant cites and relies upon the above case. But in that case the garnishee had in his possession funds belonging to the debtor defendant in the original suit, which he paid out after a lien was fixed upon same by the service of a writ of garnishment upon him, and, of course, it was held that he paid at his peril the proceeds belonging to the debtor in the original suit. *Bergman v. Sells & Co.*, 39 Ark. 97-101. But the facts of this record differentiate the case at bar from *Adams v. Penzell*, *supra*, and the rule there announced has no application here.

The debt from appellant to appellee, which should have been evidenced by the note and mortgage, under the contract between them, was not due until January 1, 1915. If, therefore, appellant had answered the garnishment to the effect that he had executed the note to the appellee in accordance with his contract, and that he would be due the appellee on the 1st of January, 1915, the amount evidenced by the note and mortgage, and if judgment had been rendered against the original debtor in favor of the plaintiff, and also against the appellant as garnishee, appellant could not have been made to pay the judgment until his note to appellee was due. The record discloses, therefore, that appellant was not, and could not have been, injured by the service of the writ of garnishment. He had no assets in his hands at that time belonging to the appellee. He had paid nothing to the appellee, and was not bound to pay him anything until January 1, 1915. The service of this writ on appellant was no legal justification for his failure to execute the note and mortgage in accordance with his contract with appellee.

[3] While the \$5,000 was deposited in the bank, yet the deposit was made upon certain conditions not bottomed upon the contract between appellee and appellant for the sale of the hotel property. Appellant himself testified, in part, as follows:

"I learned before I got home that I had been garnisheed, and I preferred not to execute the note and mortgage, although I had agreed to do so, and I wrote a letter to the bank, which is made an exhibit to my deposition, in which letter I made certain requirements and propositions which were never complied with. Mr. Warmack never did surrender to me the original contract for the purchase of the hotel, and I did not turn over to him any of the money deposited in the bank until June 30, 1914, when a new contract was made. The money remained subject to my orders through the bank. The bank had instructions to pay it to him on certain conditions, with which he never com-

plied, and the money remained mine until he complied with those requirements."

And the letter to which he referred shows clearly that appellant, without expressly repudiating the binding force of the contract, did not propose to comply with it, but undertook to make a different contract without the consent of the appellee. In this letter to the bank, giving instructions as to conditions upon which appellee was authorized to draw the \$5,000, among other things, he says:

"Mr. Warmack desired a mortgage on my hotel property here. I have never given a mortgage. I have almost unlimited credit, even in New York City, without mortgage. My credit would suffer by my signing such a document. In lieu of this and to provide Warmack with the funds he professes to need at once, I will be willing to pay \$5,000 on this at once and the rest, unsecured, on my note until due."

It thus appears from appellant's own testimony that he ignored the obligations of his contract and retained the \$5,000, which was a part of the consideration for the purchase price of the hotel, and for which he should have executed his note and the mortgage, and that he had the use of the money on which he should have been paying interest from the 22d day of December, 1913. The judgment of the court, therefore, awarding to appellee interest on this sum was correct.

[4] 2. Appellant contends that the court erred in denying his claim for shortage in personal property, amounting to \$2,729.40, under the original contract for exchange of properties between him and the appellee. The appellee contends that whatever shortage there was in the personal property contemplated in the contract of November 17, 1913, for the exchange of properties between the appellant and the appellee was settled and included as a part of the consideration of \$15,000, which appellant was to give appellee for the hotel under their contract of December 22, 1913. As to whether or not this shortage in personal property claimed by appellant was settled by appellee and included as a part of the consideration of \$15,000 which appellant agreed to pay the appellee for the hotel property is purely one of fact, but appellant contends that under the contract (December 22, 1913) that fact cannot be established by oral testimony. The contract of December 22, 1913, recited as follows:

"I hereby sell to Ed Hockaday the Hockaday Hotel for fifteen thousand, \$15,000.00, paid with note due Jan. 1st, 1915, at 8% interest from date to be secured by mortgage on said Hockaday Hotel."

In *Ward v. Cooper-Searan Grocery Co.*, 108 Ark. 430, 157 S. W. 1154, we held that parol evidence was admissible to show that the consideration was not as recited in the instrument, and that, in a controversy as to the amount due by plaintiff to defendant under the bill of sale, it was competent to show by parol evidence how the parties arrived at the amount. And in *McGill Lumber Co. v. Lane-White Lumber Co.*, 90 Ark. 420, 119 S. W. 822, we held that, while the re-

citals in a bill of sale could not be contradicted by parol evidence for the purpose of defeating the instrument, it was competent to prove by such evidence that other considerations, not recited, were agreed to be paid when such proof does not contradict the terms of the writing, and that an acknowledgment in a bill of sale of the receipt of the consideration named therein, construed as a receipt for the whole consideration, was nevertheless only *prima facie* evidence of the fact and might be rebutted by parol evidence.

It will be observed that in the memorandum of agreement or contract for the purchase of the hotel by appellant from appellee the consideration is expressed in general terms, and is merely an acknowledgment that the amount named had been paid by a note as the purchase price. No other consideration of a contractual nature in addition to this is specified. The deed executed by appellee in pursuance of this memorandum of agreement was likewise, so far as the consideration is concerned, no more than a mere statement of fact or acknowledgment that the sum of \$15,000 was paid for the property. It simply recites that such was the consideration, and acknowledges the receipt thereof. The written contract of December 22, 1913, and the deed into which it was merged, come within the doctrine of this case, and oral evidence was therefore competent to show that the amount of the alleged shortage of personal property was considered and included as a part of the consideration of \$15,000 which appellant was to pay appellee for the hotel. The doctrine of *Williams v. C., R. I. & P. Ry. Co.*, 109 Ark. 82, 158 S. W. 967, relied upon by appellant to sustain his contention that parol evidence was inadmissible, is not in conflict, but in harmony, with the above cases. There we said:

"The contract before us contains more than a mere recital or acknowledgment of the amount to be paid as the consideration. The writing shows upon its face that it was a compromise of the differences between the parties concerning the subject-matter stated, and that the amount to be paid was a part of the contract. That part of the contract constituted more than a mere receipt for the money paid, and it would be inconsistent with the express terms of the writing itself to prove an additional or further consideration."

The court, through the Chief Justice, reiterates the doctrine, announced above in the former cases, that:

"Parol proof is admissible to establish the fact that other considerations, not recited in a deed or written contract, were to be paid, when such proof does not contradict the terms of the writing"

—and quotes many authorities stating and showing that such is the rule where the statement of the consideration is, in general terms, an acknowledgment of the payment of a stated sum of money and contains no other recitals, of a contractual nature, as a part of the consideration.

[5] Without reviewing in detail the evidence on this point, it suffices to say that a

finding, to the effect that all differences that existed between the appellant and the appellee with reference to the alleged shortage of personal property under the contract of November 17, 1913, were adjusted, and that the value of such shortage was included as a part of the consideration of \$15,000 which appellant was to pay appellee for the hotel property, is not clearly against the preponderance of the evidence. There is a decided conflict in the evidence on this issue, but the chancellor's finding, not being clearly against the weight of the evidence, must be sustained.

[6] 3. The appellee contends that under the contract of November 17, 1913, he was not liable for the levee taxes for that year, and that the court erred in rendering a decree against him for such taxes. The contract of November 17, 1913, for exchange of properties, provided that appellee was "to pay all taxes for 1913" on the lands transferred by him to the appellant, and appellee contends that the words "taxes" as used in the contract does not include levee taxes, and he relies upon *Sanders v. Brown*, 65 Ark. 498, 47 S. W. 461, and *Stewart v. Fleming*, 96 Ark. 371, 131 S. W. 955. In *Sanders v. Brown*, supra, Brown purchased of Sanders, certain lots under a deed which contained the following warranty:

"We hereby covenant with the said B. J. Brown that we will forever warrant and defend the title to said lands against all lawful claims whatsoever, except the taxes of the year 1893, which the grantee is to pay."

The lands were in an improvement district in the city of Little Rock, and they had been assessed for five years for the local improvement. Sanders having failed to pay the assessment for the year 1893, Brown was compelled to pay the same, and he brought suit at law against Sanders to recover the amount paid, claiming that, under the language of the exception contained in the warranty, assessments for local improvements were not taxes, and that Sanders was therefore liable to him under his general warranty. The case turned wholly upon the meaning of the word "taxes" as used in the exception to the warranty clause in the deed. The court said:

"Plaintiff contends that the word 'assessment' is not included in the word 'taxes,' but that the two mean different things; and in this we are of the opinion that he is correct. *McGehee v. Mathis*, 21 Ark. 41. The assessment sued for, not being covered by the exception to the warranty, the plaintiff was not bound to pay the same, but the defendant was, under the warranty."

In *Stewart v. Fleming*, supra, plaintiff sued on a contract to recover rents for the year 1908 and levee taxes for the years 1907 and 1908, which defendant had refused to pay. The contract sued on provided, among other things, that the defendant, Stewart, should—"keep all taxes and legal assessments on or against said lands promptly paid as the same should come due."

Defendant, in his answer, denied that he had ever agreed to pay levee taxes on the

land, and set up that he had leased the land from plaintiff under a former written contract, not the one sued on, in which he was to pay the taxes assessed against the land during the period of the lease, and that that contract did not contain the words "any legal assessments on or against said lands," as contained in the contract sued on; that the last contract, the one sued on, was intended as a continuation of the former contract, but that the words "any legal assessments on or against said lands" were inserted in the contract by the agent of the plaintiff, and the contract was signed by the defendant through mistake, relying upon the representations of the plaintiff's agent that it contained the same provisions and stipulations as the former contract except as to the amount of rent. The defendant prayed that the case be transferred to chancery, etc. On motion of the plaintiff in that case the court struck out the allegations and prayer. In holding that the lower court erred in so doing, we said:

"This, we think, constituted a good defense to the suit for the recovery of the levee taxes, and the court erred in striking it from the answer. There was a very material difference between the two contracts with respect to the payment of taxes, in that the last contract—the one now sued on—in addition to the agreement on the part of defendant to keep all taxes on the land paid, added the words 'and legal assessments.' The difference was a material one, for, under the language of the former contract specifying only 'taxes,' it could not have been within the contemplation of the parties that special assessments for levee purposes were to be included, when no levee district had been organized at the time of the execution of the contract."

It is manifest from the above cases that the court construed the term "taxes" as used in the contracts in those suits not to include assessments for local improvements, because there was no testimony to show that the parties to those contracts used the term in any other sense than in the ordinary sense of taxes for general revenue purposes. But, in the present case, without reviewing the evidence in detail, it is sufficient to state that the conduct, letters, and statements of the appellee showed clearly that when he agreed to pay the taxes on the land which he gave in exchange to appellant for his hotel, he contemplated the payment of all taxes, including local assessments. In *Shibley v. Ft. Smith*, 96 Ark. 421, 132 S. W. 444, we said:

"The word 'tax' may be, and sometimes is, susceptible of a different meaning when used in a different connection, according to the manifest intention of the framers of the Constitution. When the Constitution of 1874 was framed, the plan of constructing levees as local improvements, to be paid for by special assessments on the lands to be affected thereby was a part of our legislative scheme. * * * It is obvious that the framers of the Constitution used the word 'tax' in the homestead provision as meaning all assessments or impositions authorized under the taxing power."

Now, at the time appellee agreed to pay the taxes for the year 1913 on his plantation of

883 acres, the levee district had been organized, and it is unreasonable, under the testimony, to conclude that he did not know that assessments had been levied on his lands for the year 1913 for levee purposes. The proof tends strongly to show that he did know it. The finding of the chancellor, to the effect that he intended by his agreement to pay the taxes to include the assessment for levee purposes for the year 1913, is certainly not against the clear preponderance of the evidence. We are convinced from the contract and all the evidence that the appellee, on his part, contemplated that the appellant should take the land free of incumbrance of every character except the \$18,000 mortgage, which appellant assumed, and that appellant, on his part, likewise contemplated that appellee should take the hotel free from liens of every character.

4. Appellee next contends that the court erred in not rendering a decree in his favor for earnings of the hotel from November 17, 1913, to December 22, 1913. Appellant's testimony and the exhibits to his deposition tend to show that during the time that appellee owned the hotel and same was operated by appellant, from November 17 to December 22, 1913, there were no net profits, but a loss. This was purely an issue of fact, and it is sufficient to say that the preponderance of the evidence on the issue was in favor of the finding of the chancellor.

The decree is correct, and it is in all things affirmed.

BARR v. WEAVER et al. (No. 78.)

(Supreme Court of Arkansas. Jan. 3, 1916.)

APPEAL AND ERROR ~~671~~—ABSTRACTS—NECESSITY.

Where appellant failed to abstract the evidence in the case or the pleadings in a former case between the same parties, the appellate court cannot determine whether the finding of the chancellor on the facts was correct or whether appellant's plea of *res adjudicata* was improperly denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ~~671~~ 671.]

Appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor.

Action by J. J. Barr against Sam Weaver and others. From the decree, plaintiff appeals. Affirmed.

R. W. McFarlane, of Greenwood, for appellant. Holland & Holland, of Ft. Smith, for appellees.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Sebastian county for the Greenwood district, by appellant, J. J. Barr, against appellees, Sam Weaver, E. J. Hogan, and the firm of White & Coffin, to enforce a lien which appellant asserts as landlord on bales of cotton raised by Weaver on the leased premises. It is al-

leged that Weaver is indebted to appellant for rent and for supplies furnished to enable him to make and gather the crop, and that he sold the cotton to Hogan, who in turn sold it to White & Coffin. It is alleged in the complaint that said purchasers of the cotton had knowledge of the lien when they made the purchase. The appellees answered separately. Weaver in his answer admitted the tenancy, but denied some of the allegations of the complaint, and the other defendants filed separate answers denying that they had any knowledge of appellant's alleged lien on the crop at the time they purchased it.

The case was heard by the chancellor upon testimony adduced by each side, but that testimony is not abstracted. Therefore we are unable to determine whether or not the finding of the chancellor on the disputed questions of fact were correct. All of the evidence that appellant sets forth is his own account against Weaver and Weaver's account against him. A reply was filed by appellant, setting up the fact that the issues presented by Weaver's answer concerning the items of the account had been adjudicated in a former trial, but none of the pleadings in the former trial are abstracted, and we are unable to say whether or not the chancellor was correct in his conclusions concerning the plea of res adjudicata. In order to get any idea of the real merits of the case, it would be necessary for the judges of this court to explore the transcript.

Since appellant has failed to comply with the rules of the court by furnishing an abstract of the record, nothing remains but to act upon the presumption that the decree of the chancellor is in accord with the preponderance of the evidence.

The decree is therefore affirmed.

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**SPECIAL SCHOOL DIST. NO. 79 et al v.
SPECIAL SCHOOL DIST. NO. 2
(No. 91.)**

(Supreme Court of Arkansas. Jan. 3, 1916.)

**1. SCHOOLS AND SCHOOL DISTRICTS — 26 —
RURAL SPECIAL SCHOOL DISTRICTS—ESTABLISHMENT—TERRITORY.**

A rural special school district can be established only out of territory not already incorporated in such a district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 44; Dec. Dig. ¶ 26.]

**2. SCHOOLS AND SCHOOL DISTRICTS — 27 —
RURAL SPECIAL SCHOOL DISTRICTS—ESTABLISHMENT—ELECTIONS.**

Where petition for establishment of a rural special school district has been presented, and thereon the county judge has ordered an election, he has, prior to the holding of such election, no authority to consider and order an election on another petition for the establishment of another such district, including part of the same territory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 45; Dec. Dig. ¶ 27.]

Appeal from Greene Chancery Court; Chas. D. Frierson, Chancellor.

Suit by Special School District No. 2 against Special School District No. 79 and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Block & Kirsch, of Paragould, for appellants. Geo. A. Burr and R. E. L. Johnson, both of Paragould, for appellee.

KIRBY, J. This appeal involves the validity of certain rural special school districts in Greene county. The required number of electors petitioned the county court for the establishment of rural special school district No. 79, with a map showing the territory desired to be so organized. The court ordered the election to be held on the 30th day of August, 1913, and on the 22d day of August, 1913, a petition for the creation of certain territory in rural school district No. 3, with a map showing the territory was presented to the county court and an election ordered by it to be held on the 29th day of August. Both districts as shown by the maps of the territory proposed to be included in each embraced the west half of the northeast quarter of section 10 in township 18 north, range 5 east, Greene county. The elections were held at the times appointed, and the districts declared established. Others presented a petition on the 30th day of August, 1913, for rural special school district No. 2, and the election was ordered held on the 9th day of September, 1913. This district, as shown by the map presented with the petition for its establishment, embraced much of the territory included in special school district No. 79, which was the first district petitioned for, but none of that included in special district No. 3, which held the first election. The validity of plaintiff district No. 2 is dependent upon the invalidity of school district No. 79, first petitioned for. The county judge or county court ordered the election for each district petitioned for, and all were regularly established so far as following the procedure required by the statute therefor and the vote of the election is concerned. The petition for the establishment of district No. 79 was presented to the county judge on the 19th day of August and the election ordered and held on the 30th day of August, while the petition for the establishment of district No. 3 was presented on the 22d day of August and election ordered and held on the 29th day of August, one day in advance of the time of the election for the district first petitioned for.

[1] Rural special school districts can only be established out of territory not already incorporated in a special school district, and such district, when once established, cannot be dismembered by including a portion of its

territory within the boundaries of another rural special school district. *Crow v. Special School District No. 2*, 102 Ark. 401, 144 S. W. 226.

[2] If the election for the establishment of district No. 79, first petitioned for, had been held and resulted in a majority in favor of its establishment, the district would have been organized as held in *Common School District v. Oak Grove School District*, 102 Ark. 411, 144 S. W. 224, and *Bonner v. Snipes*, 103 Ark. 298, 147 S. W. 56. But district No. 8 held its election at the time appointed, one day prior to that fixed for the election in said district 79 first petitioned for, and a majority voted in favor of the establishment thereof. Under the law authorizing the county judge to fix the date of the election for the establishment of districts petitioned for not less than 7 nor more than 15 days from the date of the presentation of the petition, these dates could be fixed as they were for the election petitioned for if the county judge has authority to order an election for the establishment of certain territory into a rural special school district which has already been included in the map, showing the territory asked to be made into another rural special school district already petitioned for. The majority is of opinion that he has no such authority, and the law does not contemplate that there shall be more than one election ordered at a time for the establishment of particular territory into a rural special school district, nor that, after a petition has been presented for the organization of such special district with the map showing the territory asked to be included therein, any other petition for the inclusion of any of such territory into another rural special school district shall be considered by the county judge, nor an election ordered thereon until the election ordered upon the petition first presented shall have been held. In other words, when the required petition is presented for the establishment of the district with the map showing the territory to be included therein, the field is occupied so far as such territory is concerned, and no other election upon a petition for the establishment of a district which will affect it can be held until the first election ordered shall have resulted in a failure to establish. It follows that, district No. 79, including the portion of said section 10 which was also included in the territory asked to be established as district No. 8, having been organized into a special school district, said district numbered 8 cannot be so established, since its organization would have effect to cut off said territory embraced in said district numbered 79, which cannot be done.

The fact that the election ordered for its establishment was held one day before the election ordered for the establishment of said district No. 79 first petitioned for did not

have effect to include it within such district, nor validate its organization, since the county court was without power to order such election before the date of the one designated to be held for the establishment of said district numbered 79, which was established by a majority vote upon the date of election so designated. It follows that both said districts later petitioned and voted for were void as attempting to include territory already established into a rural special school district, which could not be done.

The judgment is reversed and the cause remanded, with directions to dismiss the complaint for want of equity.

SAULS v. SHERRICK. (No. 99.)

(Supreme Court of Arkansas. Jan. 10, 1916.)
JUDGMENT \Leftrightarrow 735 — CONCLUSIVENESS — RES JUDICATA.

In an action on a note defendant set up a plea of *res judicata*, alleging that plaintiff had previously been denied an attachment in a prior action on the note; the issue being submitted to the jury. It appeared that the attachment action was begun before maturity of the note, and, though defendant denied the execution and validity of the note, the case was disposed of on the ground that the debt was not then due. Held that, where plaintiff's evidence in the earlier action, showing the validity of the note, was in no way questioned, the judgment in the prior action was not a bar to a subsequent action on the note.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. \Leftrightarrow 735.]

Appeal from Garland Chancery Court; Jethro P. Henderson, Chancellor.

Action by Joseph Sherrick against Gus Sauls. From a judgment for plaintiff, defendant appeals. Affirmed.

Gus Sauls, pro se. Davies & Davies, of Hot Springs, for appellee.

HART, J. On the 15th day of June, 1914, this action was instituted in the chancery court by Joseph Sherrick against Gus Sauls. The complaint states that on the 18th day of December, 1913, the defendant, Gus Sauls, executed and delivered to the plaintiff, Joseph Sherrick, a promissory note for \$350, due six months after date; that the consideration of said note was a half interest in an automobile which had been sold by the plaintiff to the defendant; that the sale was made on condition that the title to the automobile should remain in the vendor until paid for. The defendant filed an answer, denying the allegations of the complaint, and also entering a plea of *res adjudicata*. W. C. Springer filed an intervention, in which he stated that in June, 1914, the defendant, Sauls, had executed to him a mortgage on the automobile to secure a note of \$160. He alleged that the note was due and asked for a foreclosure of his mortgage. The chancellor found the issues between the plain-

tiff and the defendant in favor of the plaintiff, and the defendant has appealed.

The issue in regard to the intervention not being involved in this appeal, no further reference need be made to it. In regard to the plea of *res adjudicata*, the facts are substantially as follows:

On December 13, 1913, Joseph Sherrick and Gus Sauls entered into a written contract whereby the former sold to the latter an automobile, and it was expressly agreed that the title to the automobile should remain in the vendor until the automobile was paid for. A note of the same date was given for the purchase price of the automobile. The note was payable six months after date to the order of Joseph Sherrick. In March, 1914, Joseph Sherrick instituted an action in the circuit court against Gus Sauls, in which he set up the execution of the above contract and alleged that no part of the indebtedness had been paid, and that Sauls had disposed of the property with the fraudulent intent to cheat, hinder, and delay his creditors in the collection of their debts. A general and specific order of attachment was prayed for. The defendant filed an answer, in which he denied the execution of the contract and note for the automobile, and denied the ground of attachment. The case was tried before a jury, which returned a verdict for the defendant, whereupon the court ordered and adjudged that the attachment be dissolved and the property be restored to the defendant free from the attachment lien. The judgment contained a recital showing that the case was submitted to the jury on the issue of the attachment.

Upon the trial of the present action the plaintiff introduced in evidence the note and contract which was the foundation of the action. He also testified that no part of the note had been paid. A brother of the plaintiff testified that he was present when the contract was entered into between the plaintiff and the defendant, and corroborated the testimony of the plaintiff to the effect that no part of the note had been paid. Under these circumstances we do not think the plea of *res adjudicata* by the defendant can be held to be a bar to the present action. In the case of *McCombs v. Wall*, 66 Ark. 336, 50 S. W. 876, the court held that, to render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record or from extrinsic evidence that the particular matter sought to be concluded was raised and determined in the prior suit. In *Kraft v. Moore*, 76 Ark. 391, 89 S. W. 51, the court held that where the issues in a former and a pending suit were not the same, and a different relief was sought in the two suits, a plea of *res adjudicata* is unavailing.

Counsel for the defendant contend that the present suit is barred by the judgment in his favor in the circuit court on the first

suit. They say that he denied the execution of the note sued on in the first suit, and that the finding in favor of the defendant in that suit is necessarily a bar to this action, which, they contend, is based on the same cause of action. We do not agree with them in this contention. Though the plaintiff's first action was founded on the same note sued on in the present case, it was not the same cause of action; and though the defendant denied the execution of the note and contract in the first action, that was not the issue which was tried in that case. The issue was on the attachment. The contract and note were introduced in evidence, and no testimony was offered tending to show that the defendant did not execute them. The plaintiff and his brother both testified that no part of the note had been paid, and no effort was made to contradict their testimony in this respect. The proof was directed to the issue on the attachment. The undisputed proof shows that the note was not due at the time the first suit was brought. The jury found in favor of the defendant on the attachment branch of the case, and that disposed of the whole case. There being no ground of attachment, no judgment could be rendered on note; for the suit was prematurely brought, and there was no adjudication on the merits. The relief sought in the two actions was not the same, and the judgment in the circuit court in the first suit is no bar to a recovery in the present suit, which was brought after the purchase money for the automobile became due. See *Black on Judgments* (2d Ed.) vol. 2, § 714; *New England Bank v. Lewis*, 8 Pick. (Mass.) 113; *Kirkpatrick v. Stingley*, 2 Carter (2 Ind.) 269. So, too, in the case of *Cooper v. McCoy*, 173 S. W. 412, this court held that a former judgment, to be a bar against another action, must have been a decision on the merits.

The decree will be affirmed.

NOBLES et al. v. POE et al. (No. 104.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. INFANTS — CONTRACTS — VALIDITY — DISAFFIRMANCE — LACHES.

Although there is no exact rule as to when an infant on attaining majority must disaffirm his prior contract, where a number of conveyances of land intervened between that of the plaintiff who seeks to disaffirm a conveyance made during her minority and that under which defendant holds, and plaintiff waited 43 years to disaffirm her deed, and knew of improvements placed upon the land by the various grantees and their assignees, she was guilty of such laches as to prevent disaffirmance of her contract.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. ¶ 58.]

2. EQUITY — LACHES.

"Laches" is not mere delay, but delay that works disadvantage to another, which disadvan-

tage may arise from loss of evidence, change of title, or intervention of equities, and other causes.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210-220, 225, 226; Dec. Dig. ¶¶ 72.

For other definitions, see Words and Phrases, First and Second Series, Laches.]

Appeal from Scott Chancery Court; W. A. Falconer, Chancellor.

Action by Nancy A. Nobles and others against Alfred C. Poe and others. From a decree of the chancellor for defendants, plaintiffs appeal. Affirmed.

J. H. Wilkins, of Los Angeles, Cal., and A. S. McKennon, of McAlester, Okl., for appellants. A. G. & M. B. Leming, of Waldron, and Daniel Hon, of Ft. Smith, for appellees.

SMITH, J. Nancy A. Nobles, one of the appellants herein conveyed to her attorneys an undivided half interest in an undivided one-sixth interest which she had inherited from her father in the lands involved in this litigation. She alleges in the complaint filed on behalf of herself and her coappellants on June 30, 1914, that on August 31, 1871, when she was an infant and only 17 years of age, she conveyed her interest in these lands to one Frizzell, and that she was then, and has been at all times since, and is now, a married woman. There is proof in the record in support of these allegations.

It was shown on behalf of appellees that there have been many conveyances of the land in controversy, and that the title passed through various persons to the present owners, none of whom had any information about the infirmity of the title, which appeared from the records to be perfect. It was shown that the various owners occupied the land adversely to all persons, and paid the taxes continuously and improved the lands, so that they have enhanced tenfold in value, and that, although appellant had lived for the past 20 years in Oklahoma, she knew of the improvements which had been made and were being made on the lands. It is also earnestly insisted that the proof does not show that Mrs. Nobles was an infant at the time she executed her deed. The court below made no special finding of fact, but made a general finding that "the court finds the issues for the defendants on their answer and cross-complaint." Without setting out the evidence, which is more or less vague, indefinite, and conflicting on the subject of Mrs. Nobles' age, we announce our conclusion to be that the preponderance of the evidence shows her to have been an infant at the time of the execution of the deed. Much of the uncertainty on this subject grows out of the great length of time which has elapsed and the consequent loss of evidence. For instance, it was shown that there was a family Bible which gave exactly the age of Mrs. Nobles and all of her family, but this Bible has been lost. Persons testi-

fied who knew Mrs. Nobles when she was a child, but from the very lapse of time they were not as positive as they would no doubt have been had they been called upon to testify before their recollection was dulled by the lapse of time. Mrs. Nobles herself was shown to have been thus affected; for, in answer to the question when she was married, she stated, "I think it was in 1870 or 1871; I don't just remember the year," and in other respects it appears that her recollection had become somewhat hazy.

Appellant relies chiefly on the case of Stull v. Harris, reported in 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741. The cases are somewhat similar, in that each grantor was a married woman who claims to have been a minor when she executed the deed she sought to set aside, and that each deed was executed before the Married Woman's Enabling Acts were passed, and that each husband was still living pending the suit, and that each woman had children by her husband born alive.

[1] Without intending in any manner to impair the authority of that case, it must be said that it is not controlling here. While no exact rule can be laid down, for application in all cases, to determine whether or not one is guilty of laches, it must be said that the Stull Case, supra, approaches the limit beyond which even an infant married woman might not wait to disaffirm her deed. But this is an even more extreme case than that. In that case the parties were the original grantor and grantee, and the grantee was a brother-in-law of the grantor; and, while the grantee there made improvements which necessarily enhanced the value of the land, the opinion there expressly recites the fact to be that the grantor was not shown to have had notice of that fact. Here the grantor waited 43 years to disaffirm her deed, more than twice as long as the grantor had waited in the Stull Case. Here the grantor knew of the improvements, and waited until there had been many conveyances of the land. In the Stull Case there was no uncertainty about the proof; while here, from the very lapse of time, there is loss of evidence and uncertainty of proof.

[2] In the case of Casey v. Trout, 114 Ark. 359, 170 S. W. 75, we quoted with approval from 5 Pomeroy's Equity Jurisprudence (3d Ed.) § 21, the following statement of the law:

"Laches, in legal significance, is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law. But when, knowing his rights, he takes no step to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side, and injury therefrom on the other, it is a ground for denial of relief."

The proof here does not show that the consideration originally paid was grossly inadequate; nor is it contended that any advantage whatever was taken of Mrs. Nobles in procuring the execution of the deed which she now seeks to disaffirm. And we think this is a case in which we should apply the doctrine, which has been so often quoted and approved, laid down by Lord Camden in the case of *Smith v. Clay*, 3 Bro. C. C. 640, that:

"A court of equity, which is never active in relief in cases against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing."

This language was quoted with approval in the case of *Auten v. St. L., I. M. & S. Ry. Co.*, 110 Ark. 24, 160 S. W. 873, in which case we said:

"Of necessity there must come a time, beyond which one cannot wait, to begin the enforcement of any right, however meritorious."

We think that limit has been reached and exceeded in this case, and the decree of the chancellor will therefore be affirmed. *Oarmical v. Ark. Lumber Co.*, 105 Ark. 668, 152 S. W. 286; *Finley v. Finley*, 108 Ark. 58, 145 S. W. 885; *Segers v. Avers*, 95 Ark. 178, 128 S. W. 1045; *Earle Imp. Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84; *Tatum v. Ark. Lumber Co.*, 108 Ark. 251, 146 S. W. 135; *Dickson v. Sentell*, 83 Ark. 385, 104 S. W. 148; *Davis v. Harrell*, 101 Ark. 230, 142 S. W. 156.

GORDON v. GREENING et al. (No. 105.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. EXECUTORS AND ADMINISTRATORS — COMPENSATION — RIGHT OF TESTATOR TO FIX — STATUTE.

Under Kirby's Dig. § 134, providing the maximum compensation to be allowed administrators and executors, where a decedent's will appointed his nephew, a legatee, executor, providing that for carrying on testator's business for three years and winding up the estate the executor should receive \$150 per month, such executor was not entitled, in addition, to a 2 per cent. commission on money distributed to legatees, since a testator may fix his executor's compensation; the statute applying only when the will has not otherwise provided.

[Ed. Note.—For other cases, see *Executors and Administrators*. Cent. Dig. §§ 2078-2081, 2088; Dec. Dig. § 490.]

2. EXECUTORS AND ADMINISTRATORS — RIGHT TO COMPENSATION AT COMMON LAW.

At common law an executor was not allowed compensation, a rule changed in Arkansas by statute.

[Ed. Note.—For other cases, see *Executors and Administrators*. Cent. Dig. §§ 2069, 2071-2077; Dec. Dig. § 488.]

Hart, J., dissenting.

Appeal from Circuit Court, Ouachita County; Chas. W. Smith, Judge.

Settlement of George R. Gordon, as execu-

tor of the will of George L. Ritchie, deceased. From a judgment sustaining exceptions by E. S. Greening and others, legatees, to the allowance of a commission to the executor, and directing him to charge himself back with such commission, he appeals. Affirmed.

Thomas W. Hardy, of Camden, for appellant. Gaughan & Sifford, of Camden, for appellees.

SMITH, J. George L. Ritchie, a citizen of Camden, died in the fall of the year 1913, leaving an estate valued at more than \$400,000, which consisted of a mercantile business in the city of Camden, which he had carried on for many years, during that time selling almost entirely on a credit to many customers in Ouachita and other counties, many with security and many without. The amount furnished yearly from his store was between \$25,000 and \$40,000, and the number of his customers was around 300. The notes and stock of goods at the time of his death inventoried a little over \$63,000. The balance of the estate consisted of lands, stocks, bonds, and notes of different people, some wholly and some partly secured. Before his death he made and executed a will which, except for specific bequests to distant relatives of small amounts, divided his estate equally into 21 parts. The will directed that the estate might be kept together for the period of three years, and that the mercantile business should be carried on for three years for the purpose of realizing as much as possible from it.

George R. Gordon, who is the appellant here, was appointed executor in said will. He was one of the nephews of the testator and one of the 21 legatees, receiving an equal share with the other legatees. Prior to the death of the said testator, appellant had been bookkeeper in the store for a number of years, and was well acquainted with the business affairs of the testator, and had been paid a salary of \$100 per month. At the end of the first year of appellant's services as executor of said estate he filed his settlement with the probate court, showing the distribution of the sum of \$164,745.97 to the legatees. In said settlement the probate court allowed appellant \$150 per month as manager of the mercantile business and his expenses for carrying on the same, and 2 per cent. commission on the amount distributed.

Certain of the legatees filed exceptions to the allowance of the 2 per cent. commission. These exceptions were overruled by the probate court, and an appeal was duly prosecuted to the circuit court, where, upon a trial anew, the exceptions were sustained, and the executor was directed to charge himself back with the 2 per cent. allowed him as commissions, and this appeal has been duly prosecuted from that judgment.

The exceptions to the allowance of this commission were grounded on the last paragraph of the will, which reads as follows:

"I direct that my said executor, George R. Gordon, shall for three years after my death continue the mercantile business in which I am now engaged, with the end in view of realizing as much as possible from the indebtedness due me from the various parties whom I am now, and will then be, furnishing or supplying, after which time the notes and accounts and stock of merchandise may be sold by my said executor at public or private sale. For his services in continuing the said business and winding up said estate he shall receive the sum of \$150 per month for such time as he may be so engaged."

Two questions are presented: The first is the right of a testator to fix the compensation to be paid his executor. The second is whether the testator fixed appellant's compensation. While there is some conflict in the authorities, the great weight of authority sustains the proposition that a testator can fix the compensation of his executor. In support of the contrary view, appellant cites and relies upon the case of *Frazer v. Frazer*, 76 S. W. 15. That was a case decided by the Court of Appeals of Kentucky and the facts were that the testator directed that the executor serve without compensation, yet upon final settlement he was allowed compensation. It appears, however, that the provision of the will, that the executor should serve without compensation, was inserted in the will by reason of an advantage given the executor, who was a son of the testator, in the division of the estate, which he did not obtain by reason of the widow's refusal to take under the will. The court there said that, because of this refusal and the consequent defeat of the testator's intention, compensation would be allowed, but the court also said:

"But under the circumstances of the case we do not think that he [the executor] ought to have anything near the statutory compensation."

And in the opinion there the court called attention to the fact that there were several decisions of that court in which it had been held that the executor was not entitled to anything as compensation, where the will provided that no compensation should be paid.

[1,2] The relation of testator and executor, created by a will, is one of great trust and confidence, and we see no reason why a testator should not only be allowed to name his executor, but should not also be allowed to fix his compensation. At common law an executor was not allowed compensation, but that rule has been changed in this state by statute. Section 134 of Kirby's Digest provides the maximum compensation to be allowed administrators and executors, but this section must be construed to apply when the will has not otherwise provided. Certainly, if the will fixed a greater compensation than that allowed by statute, it would

not be contended that only the statutory commissions could be allowed. If the executor named in the will is not willing to serve for the compensation fixed by the will, he is not required to serve, but may decline to do so. If the person or persons named in the will decline to serve, the statute expressly provides that letters of administration with the will annexed shall be granted to the person to whom administration would have been granted had there been no will. Section 12, Kirby's Digest.

We are not now called upon to decide what the commission of an administrator would be under those circumstances, as that question is not presented. It is sufficient for the decision of this case to say that the appellant had the option of serving for the compensation named in the will, or of declining to serve. Ordinarily the compensation is not fixed by the testator, in which event the compensation is fixed by the court in such sum as is found to be fair and just, not exceeding, however, the limitations fixed by section 134 of Kirby's Digest. The proof shows that after appellant qualified as executor he employed a man to perform the duties which he had performed in the lifetime of his uncle, and all of the services which were rendered by him were rendered as executor; that is, he did those things which would have been done had some other person been named instead of himself.

We think the proper interpretation of the paragraph set out above is that the testator intended that his executor should receive as full compensation "for his services in continuing the said business and winding up said estate," the sum of \$150 per month. It was contemplated that this service would probably continue for the period of three years, in which event a total compensation of \$5400 would be earned. The testator intended that this sum should be full compensation for all services rendered by his executor, and the judgment of the court below will therefore be affirmed.

HART, J., dissents.

EARL v. HARRIS. (No. 106.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. TAXATION \S 658—TAX SALES—RECORD—SUFFICIENCY.

Under Kirby's Dig. \S 7086, requiring a notice of sales of land for delinquent taxes to be published with a list of such lands before the sale, a certificate reciting "List of land returned for nonpayment of taxes and sold June 9, 1902" will not support a sale, since it shows on its face that it was made after the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1332-1335, 1339; Dec. Dig. \S 658.]

2. TAXATION \S 660—TAX SALES—NOTICE—CERTIFICATE—SUFFICIENCY.

Under Kirby's Dig. \S 7085, requiring notices of sales of land for taxes to be published

"weekly for two weeks between the second Monday in May and the second Monday in June," a certificate showing publication on "May —, 1902, and May —, 1902," is insufficient, as it fails to show compliance with the statute; the dates of publication being omitted.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1338-1340; Dec. Dig. ¶660.]

3. ADVERSE POSSESSION ¶114—CONFLICTING POSSESSION—EVIDENCE.

Evidence held insufficient to establish title by adverse possession in one who paid taxes and occupied a portion of the land claimed.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ¶114.]

4. ADVERSE POSSESSION ¶100—COLOR OF TITLE—POSSESSION—EXTENT.

One who takes possession of a part of a tract of unoccupied land under a tax deed conveying the entire tract acquires title to the entire tract by limitation after two years, though the tax sale was void, in the absence of actual possession by the true owner of some portion of the land; but, if the true owner has possession of any part of the land, the adverse possessor can acquire title only to the extent of his own actual possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. ¶100.]

Appeal from Perry Chancery Court; Jno. E. Martineau, Special Chancellor.

Action by C. H. Earl against John S. Harris. From a decree of the chancellor for defendant in part, plaintiff appeals. Affirmed.

J. H. Bowen, of Perryville, for appellant. Mehaffy, Reid & Mehaffy, of Little Rock, for appellee.

SMITH, J. This litigation involves a tract of land which had been owned by a negro named George Bull. Some time before his death Bull gave a mortgage on this land, which was later foreclosed in the Perry county chancery court, and at the sale under this decree appellee became the purchaser and received a commissioner's deed dated April 3, 1906. This foreclosure suit was begun in 1903, and the parties defendant were the children of George Bull.

Appellant purchased the land at a sale for the taxes of 1901, and received a tax deed dated September 9, 1904, based on this sale, and he undertook to show that he immediately entered into and retained possession of the land until March, 1909, at which time his tenant was forcibly dispossessed.

[1] The record of the tax sale under which appellant claims was introduced in evidence and the heading or caption of the record showing the list of lands returned delinquent reads as follows:

"List of Land and Town Lots Returned for Nonpayment of Taxes for the Year 1901 in Perry County, Arkansas, and Sold June 9, 1902."

The clerk's certificate showing publication of the delinquent notice reads as follows:

"And I further certify that the same was duly and legally advertised in the Perryville News, a weekly newspaper printed and published, and having a bona fide circulation in Perry

county, to wit, May —, 1902, and May —, 1902, the last insertion being more than two full weeks before the day of sale, and both insertions being between the second Monday in May and the second Monday in June, 1902."

We think the language of the certificate showing the list of lands returned as delinquent makes it appear that this record was not made until after the sale. This certificate shows that the lands were "sold June 9, 1902," and also shows the name of the purchaser at the sale. The sale was therefore void for this failure to comply with section 7086 of Kirby's Digest by recording the list of delinquent lands before the date of sale. *Martin v. Allard*, 55 Ark. 218, 17 S. W. 878; *Logan v. Eastern Arkansas Land Co.*, 68 Ark. 248, 57 S. W. 798; *Hunt v. Gardner*, 74 Ark. 583, 86 S. W. 426; *Magness v. Harris*, 80 Ark. 583, 98 S. W. 362.

[2] We think, too, that the certificate to the notice of sale is insufficient, in that it does not show the dates of publication of the notice of sale.

In construing section 7085 of Kirby's Digest in the case of *Walter v. Swaim*, 107 Ark. 242, 154 S. W. 511, we said (to quote the syllabus):

"The requirement in Kirby's Digest, § 7085, that the list of lands delinquent for taxes shall be published 'weekly for two weeks between the second Monday in May and the second Monday in June in each year' is not met by a publication, the first insertion of which is on May 22d, and the last on June 5th, because these two dates are not weekly in succession, and there being no affirmative showing that there was an intermediate publication."

[3] Appellant insists, however, that even though the tax sale was invalid, he has title by virtue of his possession under his tax deed, and the correctness of this contention is, we think, the controlling question in the case. The finding of the chancellor was adverse to appellant's contention, and we cannot say that finding is contrary to the preponderance of the evidence.

During the pendency of the foreclosure suit and for some time thereafter the Greenville Stave Company operated a mill on this land and cut the timber thereon, but this possession was permitted by the parties to the foreclosure proceeding under an agreement that, if the Bull heirs wished to pay off the mortgage sought to be foreclosed, the money received from the timber might be used for that purpose, but it does not appear what became of this money.

Appellant testified that he received rent for the years 1904 to and including 1908 on a part of the old Bull farm, but it appears that the rent paid appellant was paid by one of the Bull heirs who was in possession of a tract of land which had also been owned by his father adjoining the land in question.

The evidence on the part of the appellee is to the effect that he took possession of the land in 1905; that one Reuben Dozier had

rented a part of the land from one of George Bull's heirs under an agreement that the rents were to be held and turned over to the successful party in the chancery court, and that appellee took possession of the land when he received his deed, and that he thereafter rented the land to one of the Bull heirs for a third of the cotton, and later rented it to one Surratt; that the Bulls owned another tract of land adjoining the land in controversy, and, when he went to put a division fence between this land and the other tract, appellant notified him not to put up the fence, but that he did put the fence up, and appellant cut it down. There was other testimony corroborating appellee, and the effect of his evidence is that he had adverse and continuous possession of the land from the date of his deed in 1906 to the beginning of this litigation.

Appellant's evidence does show the receipt of certain rents, yet these rents were paid by one of the Bull heirs who was in possession of an adjoining tract, and the evidence does not definitely show the extent or boundary of the land so occupied.

[4] It is settled that one who takes possession of a part of a tract of unoccupied land under a tax deed conveying the entire tract acquires title to the entire tract by limitation after the lapse of two years, and that this is true even though the sale under which the deed was made is void. *Jones v. Pond & Decker Mfg. Co.*, 79 Ark. 184, 96 S. W. 756. But this is true only when the land is occupied only by the tax purchaser, and would not be the law if the owner of the land was in the actual possession of any portion thereof.

In the case of *Crill v. Hudson*, 71 Ark. 390, 74 S. W. 299, it was decided that possession of a part of a tract of land sold for taxes under color of title for the whole, for the requisite period of time gives title to the tract by limitation, where the owner is not in actual possession of any part.

In the case of *Woolfolk v. Buckner*, 67 Ark. 411, 55 S. W. 168, it was decided (to quote the syllabus):

"A purchaser of land under a void tax title will acquire title, under the two-year statute of limitation, * * * only to so much of the land as he has held in his actual and adverse possession for the requisite period; * * * the constructive possession of so much of the land as is unoccupied being in the holder of the legal title."

Under the doctrine of these cases we must hold that appellee had the constructive possession of all of the land in controversy which was not occupied by appellant, and only a small part of the land was actually occupied by either party. Appellant made no attempt to describe the portion of the land on which he claims to have received rent with that certainty which would enable us to describe it and set it aside separate and apart from the remainder of the tract, and the decree of the chancellor which

awards the land to appellee, but decrees a lien on the land in appellant's favor for the amount of the taxes paid, will be affirmed.

WILLIS et al. v. CITY OF FT. SMITH et al.
(No. 103.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. MUNICIPAL CORPORATIONS — 59 — POWERS — GRANT.

Municipal corporations can exercise only those powers expressly granted by the Legislature and those necessarily implied and incident to those so granted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 149; Dec. Dig. — 59.]

2. LICENSES — 6 — POLICE POWER — REGULATION OF TRANSPORTATION.

Under Kirby's Dig. § 5454, empowering municipalities to regulate every description of carriages kept for hire, and Acts 1911, p. 102, § 13, providing that cities shall not regulate the use or speed of motor vehicles, but that the act shall not affect their power to regulate motor vehicles used for public hire, cities may require all jitney busses to be licensed, having all the police power inherent in the Legislature, and the regulation of jitney busses being a proper exercise of that power.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. — 6.]

3. MUNICIPAL CORPORATIONS — 703 — POLICE POWER — REGULATION OF CARRIERS — BONDS.

An ordinance requiring operators of jitney busses to file a bond conditioned that they will pay final judgments rendered against them is valid, since it does not create a new liability, but only secures the payment of a liability already existing.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. — 703.]

4. CONSTITUTIONAL LAW — 208, 230 — PRIVILEGES — CLASS LEGISLATION.

A municipal ordinance regulating jitney busses and requiring a license and bond from their operators is not invalid as discriminatory class legislation, or for denying equal protection of the laws; the classification being a reasonable one resting on substantial differences.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677, 687; Dec. Dig. — 208, 230.]

5. CONSTITUTIONAL LAW — 208 — PRIVILEGES — CLASS LEGISLATION.

A legislative classification of subjects must rest on a substantial difference between those included and those excluded, and must operate uniformly upon those to which it applies, and, if it does so, it is not arbitrary or capricious.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. — 208.]

Appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor.

Action by D. M. Willis and others against the City of Ft. Smith and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

T. J. Wear, of Ft. Smith, for appellants. Kimpel & Daily, of Ft. Smith, for appellees.

KIRBY, J. This appeal challenges the validity of an ordinance of the city of Ft. Smith regulating the operation of "jitneys" and "jitney busses"; it being contended that said ordinance was beyond the power of the city to make, and that it is unconstitutional and void. The ordinance provides (section 1) that each person, firm, or corporation who desires to operate a jitney in or over any of the streets in the city of Ft. Smith shall first execute and file with the clerk a bond in the penal sum of \$2,500 for each jitney, with sufficient sureties to be approved by the board of commissioners, conditioned:

"That the principal of said bond will promptly pay any final judgment which may be recovered against said principal, or his agent or employes. Said bond shall run in the name of the city of Ft. Smith for the use and benefit of any person or persons who may recover any such judgment."

It also makes provisions as to renewal thereof. The second section restricts the number of persons who may be carried in the jitney, and makes it unlawful to carry a greater number. Under the third section, they are not permitted to be stopped on "street crossings," which term is defined. The fourth section fixes the license for each jitney carrier at \$20 per annum and \$12.50 for six months, payable in advance, and makes it unlawful to operate any jitney without first having paid the license. Section 5 defines the term "jitney" to include any and all self-propelled vehicles operating for hire between fixed points or places along designated or advertised routes, or which shall be regularly operated along any portion of any particular street or streets. Section 6 prescribes the penalties for violation of the act.

[1] Municipal corporations can only exercise such powers as are expressly granted to them by the Legislature and as are necessarily implied for effecting the purposes for which the grant of power was made and as incident thereto. Such corporations have expressly been given control and supervision of the streets and highways within their limits. Section 5456, Kirby's Digest; *Sanderson v. Texarkana*, 103 Ark. 534, 146 S. W. 105; *Fitzgerald v. Saxton*, 58 Ark. 494, 25 S. W. 499; *Hughes v. Railways*, 74 Ark. 194, 85 S. W. 773.

[2] Section 5454, Kirby's Digest, provides: "They shall have the power * * * to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire, and all livery stables."

Section 13 of the motor vehicle law (Act 134 of the Acts of the General Assembly of 1911) expressly provides that municipal corporations shall not have power to restrict the use or speed of motor vehicles, except as provided in the act, and further:

"That nothing in this act contained shall be construed to affect the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor vehicles which are used within their limit for public hire."

The state has the right to regulate and control the use of motor vehicles, except as it has granted such right to other governmental agencies, and it expressly recognizes in the motor vehicle law the exclusive right of municipal corporations to make and enforce rules and regulations for motor vehicles used for public hire. The definition of the term and use of the jitney as a conveyance brings such instrumentality within the operation of the provisions of said section 5454 of Kirby's Digest giving such corporations express power of regulation of every description of carriages which may be kept for hire. The municipal corporation therefore has all the power that belonged to the state for regulation of the operation of machines and instrumentalities of the kind included in the ordinance, and, unless such ordinance was beyond the authority of the state to grant, it was not beyond the power of the city to make. The regulation of such vehicles and traffic comes under the police power, and it is generally recognized that such regulations are a proper exercise of that power. The jitney bus business, transporting people for hire, for a uniform five-cent fare, in low-priced or secondhand automobiles, over definite routes in cities or towns, is of but recent origin, but the regulation of the business followed hard upon its development by acts of the Legislature in some instances and by ordinances of the municipalities, in which they operated in others. The question of such regulation has been passed upon by the courts of the states of California, West Virginia, Tennessee, Texas, and Louisiana, all holding that the business was in effect a common carrier of passengers for hire and necessarily subject to regulation by the state and its authorized agencies. *Ex parte Cardinal* (Cal.) 150 Pac. 348, L. R. A. 1915F, 850; *Ex parte Dickey* (W. Va.) 85 S. E. 781, L. R. A. 1915F, 840; *Ex parte Sullivan* (Tex. Cr. App.) 178 S. W. 537; *Greene v. City* (Tex. Civ. App.) 178 S. W. 6; *City of Memphis v. State*, *Relations of Riles* (Tenn.) 179 S. W. 681; *Le Blanc v. City of New Orleans* (La.) 70 South. 212.

[3] The contention that the requirement of the execution of a bond for the payment of judgments is a restriction the municipality was not authorized to impose, it creating, in effect, a civil liability, is without merit.

In *Little Rock v. Reinman*, 107 Ark. 174, 155 S. W. 105, the court, in discussing the term "regulate," said:

"The state, in the exercise of its police power, has given to the city the power to regulate certain callings, pursuits, trades, and business as specified in said section of the statutes. The power to regulate gives authority to impose restrictions and restraints upon the trade or business regulated. 'Regulate' means 'to direct by rule or restriction; to subject to governing principles or laws.'"

The requiring of such bond for the payment of judgments for damages resulting from the negligent operation of the jitneys for the benefit of those injured thereby does

not create a liability where none existed under the law, nor was it intended to do so, but only to secure the payment of damages for such injuries from operatives of instrumentalities that were so dangerous as to require the prescribed regulation and appeared to the city council so irresponsible as to make necessary the restriction for the security required. The requiring of the execution of bonds by the operators of such conveyances has been held a valid exercise of the police power and within the authority of the state and its governmental agencies, municipal corporations under the grant of authority thereto in the above-cited cases.

[4, 5] It is next contended that the ordinance is discriminatory class legislation in restraint of trade and denying to the operators of jitneys and jitney busses the equal protection of the law contrary to provisions of the Constitution. It is insisted that the jitneys, as operated, are not more dangerous than taxicabs, or other motor vehicles used and kept for hire, and that they should no more be required to give the bond than such vehicles and street cars operated upon the streets of the city. When a classification of subjects is made by legislation, such classification must rest on some substantial difference between the classes created and others to which it does not apply, but, where the statute or ordinance appears to be founded upon a reasonable basis and operates uniformly upon the class to which it applies, it cannot be said to be arbitrary and capricious. *Helena v. Dunlap*, 102 Ark. 131, 143 S. W. 138; *Railway v. State*, 86 Ark. 412, McLean v. State, 81 Ark. 334, 98 S. W. 729, 126 Am. St. Rep. 1037, 11 Ann. Cas. 72.

The authorities already cited from other jurisdictions support the proposition that the regulation of jitneys by the requirement of the bond is a reasonable classification of such vehicles, and we hold that such classification in this ordinance is not arbitrary nor unreasonable, but bears a just relation to the purpose attempted to be effected and classification made.

The decree is affirmed.

CITY MEAT MARKET et al. v. BOLEN. (No. 96.)

(Supreme Court of Arkansas. Jan. 10, 1916.)
1. SALES ⇨181—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In an action for the price of one hog, defended on the ground that one of those delivered was a boar unfit for sale for meat, evidence held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 478-491; Dec. Dig. ⇨181.]

2. TRIAL ⇨252—INSTRUCTIONS—ACTION FOR PRICE.

Where the plaintiff's evidence tended to show that he exhibited all of the hogs to defendant at the time of the purchase and made no concealment of the fact that one of them was a boar, and that defendant examined them,

defendant's instructions that, if it purchased the hogs without knowing that one of them was a boar, and that all were killed before it was discovered, and defendant in a reasonable time thereafter repudiated the purchase and tendered the hog back to plaintiff, it was not liable for its price, and that, if plaintiff understood he was selling a boar, and that defendant understood that it was not buying such boar, there was no contract, and plaintiff could not recover, were properly refused, as inapplicable to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ⇨252.]

Appeal from Washington Circuit Court; J. S. Maples, Judge.

Action by Chas. Bolen, by his next friend, against the City Meat Market and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John Mayes, of Fayetteville, for appellants.

McCULLOCH, C. J. The amount involved in this suit is a mere trifle—the price of one hog. Defendants (appellants) were engaged in operating a meat market in the city of Fayetteville, and purchased six hogs from the plaintiff, to be delivered in two installments, three at each time. One of the hogs delivered was a boar, which the testimony shows was unfit for sale for meat. Defendants did not butcher the animals, but engaged the services of a man who was operating a slaughterhouse, Lang, by name, to do that for them. The hogs were sent to Lang, who butchered them, and on the weight slip made mention of the fact that one of the hogs was a boar. Thereupon the defendants sent for plaintiff, or communicated with him and informed him that one of the hogs was a boar, and that they declined to carry out the terms of the sale. They had given a check for the price of the last three hogs and stopped payment on it. This is a suit for the price.

[1] The contention of the defendants is that they informed the plaintiff at the time of the purchase of the hogs that they did not want a boar, and that they did not know at the time of the purchase that one of the hogs was a boar, and as soon as they ascertained that fact they repudiated the purchase. On the other hand, the contention of the plaintiff is that he exhibited all of the hogs to the defendants in a wagon at the time he made the sale, and that they had an opportunity to see that one of them was a boar, and that they did, in fact, know it. That issue was tried out before the jury, and the verdict was in favor of the plaintiff. The evidence is conflicting, and we think there was enough to support the verdict of the jury in plaintiff's favor.

[2] Error of the court is assigned in refusing to give two of the instructions requested by defendant, as follows:

"(1) You are instructed that, if you find from the evidence that the defendant purchased from the plaintiff certain hogs, and at the time of so doing did not know that one of the hogs was a

boar, and that the hogs, including the boar, were killed before the defendants gained such knowledge, and find that the defendants within a reasonable time after such discovery repudiated the purchase of the same and tendered the said hog back to the plaintiff, then defendants would not be liable for the price of such boar hog."

"(2) I charge you that, if you find from the evidence that plaintiff understood that he was selling one boar hog, and further that defendants understood he was buying no boar, this would not constitute a contract between them as to the boar, and the plaintiff could not recover for the value of such hog."

Neither of those instructions were correct as applicable to the issues in this case. The evidence adduced by the plaintiff tends to show that he exhibited all of the hogs to the defendants at the time the latter purchased them, that he made no concealment of the fact that one of them was a boar, and that the defendants had ample opportunity to observe the fact that one was a boar. Therefore the instruction was not correct in telling the jury that the plaintiff was not entitled to recover if the defendants did not know that one of the hogs was a boar.

The second instruction correctly states, in the abstract, the proposition of law, but it, too, is inapplicable to the facts of this case, for the reason, as before stated, that according to the testimony of the plaintiff the defendants had ample opportunity to examine the hogs, and did examine them, and that the minds of the parties are presumed to have met upon the contract of purchase and sale of the property thus exhibited.

Other assignments of error are not of sufficient importance to discuss.

Judgment affirmed.

STEPHENS et al. v. UNIVERSAL STENO-TYPE CO. (No. 95.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

APPEAL AND ERROR § 656—RECORD—PERFECTION.

Where the record clearly showed that the special judge was qualified and was duly elected in accordance with Const. 1874, art. 7, § 21, submission on appeal will not be postponed to perfect the record, where the only ground of appeal was the invalidity of the election of the special judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2826-2828; Dec. Dig. § 656.]

Appeal from Circuit Court, Clay County; W. F. Kirsch, Special Judge.

Action between Maggie Stephens and others and the Universal Stenotype Company. From a judgment for the latter, the former appeals. Affirmed.

F. G. Taylor, of Corning, for appellants. G. B. Oliver, of Corning, for appellee.

PER CURIAM. This case was tried in the circuit court before a special judge, and the only point raised on the appeal is whether or not the record shows that the special

judge possessed the requisite qualifications, and that he was legally elected by "the regular practicing attorneys in attendance on said court." Article 7, § 21, Constitution of 1874.

The briefs on that point have been filed, but counsel for appellee now presents a motion for postponement in order to get an amendment of the record to correct what he conceives to be a possible defect in the record of the election of the special judge. However, on consideration of the record as now presented, and the briefs of counsel on the point involved, this court is convinced that the record shows with sufficient certainty that the special judge was a resident of the state and a member of the bar of the trial court, and that he was legally elected at an election held by the clerk of the court and participated in by the regular practicing attorneys in attendance. It is unnecessary, therefore, to postpone the submission of the case for an amendment of the record.

Judgment affirmed.

YELVINGTON v. POLZIN. (No. 97.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. MASTER AND SERVANT § 305—DISOBEYING ORDERS—MASTER'S LIABILITY—CUTTING TIMBER—TRESPASS.

Where defendant was getting out railroad ties on land adjoining plaintiff's land, and he pointed out the line of plaintiff's land to his men, but they trespassed on plaintiff's land and cut logs there, defendant was liable to plaintiff for the value of logs cut, though the fault was altogether that of the cutters, and not of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.]

2. APPEAL AND ERROR § 1068—SCOPE OF REVIEW—HARMLESS ERROR.

Where defendant's cutters by trespass cut plaintiff's logs, the question whether an instruction that plaintiff could recover the value of the finished product was erroneous was immaterial where the amount awarded was less than the value of the raw product.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.]

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

Action by Fred R. L. Polzin against J. B. Yelvington. From a judgment for plaintiff, defendant appeals. Affirmed.

Stevens & Stevens, of Magnolia, for appellant. C. W. McKay, of Magnolia, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee to recover the price of timber alleged to have been wrongfully cut by appellant from appellee's land in Columbia county, Ark. The amount sought to be recovered was the sum of \$200, and the jury awarded damages to appellee in the sum of \$60.

[1] Appellee testified that 16,000 feet of oak timber had been cut, and that it was of the value of at least \$4 per 1,000 feet. That testimony was not contradicted. The timber was made into railroad ties, and the evidence shows that there were 202 of the ties made out of appellee's timber. The price of the ties was 30 cents each, which made the aggregate sum a trifle more than the amount of damages assessed by the jury. The evidence adduced by appellee is sufficient to show that the timber was wrongfully cut by employes of the appellant. The testimony is to the effect that appellant was getting out ties on an adjoining tract of land, and put his men to work there, and that they got over the line and cut timber from appellee's land. There is no dispute about the timber being cut by men who were employes of appellant, but appellant testified that he showed his men the line, and that it was the fault of the cutters that he had employed, and not his own fault, that the timber was taken from appellee's land. There can be no question about appellant's liability for the value of the timber that was cut.

[2] Error of the court is assigned in giving an instruction which told the jury that appellee was entitled to recover the value of the finished product of the timber if it be found that appellant had wrongfully cut it from appellee's land. The undisputed evidence in the case shows that the timber in its original state was worth more than the amount of damages assessed by the jury; therefore it is useless to discuss the correctness of the instruction.

Judgment affirmed.

BAKER v. YOUNG et al. (No. 56.)

(Supreme Court of Arkansas. Dec. 20, 1915.)

1. INSANE PERSONS §8—ADJUDICATION—JURISDICTION.

Kirby's Dig. §§ 4204, 4206, 4207, providing for the commitment by circuit judges to the insane asylum of persons acquitted of offenses on the ground of insanity, or who cannot be tried on criminal charges because insane, and providing the method for subsequent release, are not in violation of the constitutional provision, vesting in probate courts exclusive original jurisdiction in matters relative to persons of unsound mind, since such sections prescribe procedure necessarily incident to the exercise of criminal jurisdiction, and the determination of the circuit judge is only prima facie evidence of insanity, the fact of which must be ultimately adjudicated by the probate court.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 16; Dec. Dig. § 8.]

2. INSANE PERSONS §29 — COMMITMENT — REMEDY.

The remedy of one committed to the insane asylum under such sections is to apply to the probate court for an adjudication on the question of his sanity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. § 29.]

Hart, J., dissenting.

Certiorari to Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Certiorari by Albert L. Baker, to review an order of remand by the chancellor rendered on his writ of habeas corpus issued against Dr. Frank B. Young, Superintendent of State Hospital for the Treatment of Nervous Diseases. Writ quashed, and judgment of chancellor affirmed.

Walter M. Purvis, of Little Rock, for appellant. Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for appellees.

McCULLOCH, C. J. The petitioner is confined in the State Hospital for Nervous Diseases (originally known as the Arkansas State Lunatic Asylum) under a certificate of the judge of the circuit court of Franklin county, where he was tried, according to the substance of the certificate, on a charge of murder and acquitted on his plea of insanity. He sued out a writ of habeas corpus before the chancellor of the Pulaski chancery court against the superintendent of said institution, and sought to be discharged from custody under the writ on the ground that he was unlawfully detained. The chancellor sustained the state's demurrer to the petition, and made an order remanding the petitioner to the custody of the superintendent of the state hospital. The order of the chancellor has been brought before us by a writ of certiorari for review.

[1] The contention is that the circuit judge was without jurisdiction to issue a certificate of commitment to the asylum, and that the statute conferring that authority is void because it is in conflict with the provisions of the Constitution, which vests in the probate courts of the state "exclusive original jurisdiction in matters relative to * * * persons of unsound mind and their estates." The state's institution for the care of persons of unsound mind was first authorized by the act of the General Assembly of 1873, and was constructed and has been maintained since that time. The act of April 13, 1893 (Acts 1893, p. 304), relates to the confinement in the asylum of persons who have been acquitted of crime on a plea of insanity, or who are found to be insane during the pendency of the charge. Three of the sections of that act read as follows:

"Section 4204. It shall be the duty of the superintendent of the state insane asylum to admit into said asylum, upon the certificate of the judge before whom the case is pending upon presentment or indictment, any person that has been, or who may hereafter be, acquitted upon a plea of insanity of the charge made in said presentment on indictment, or any person who has been or may hereafter be, adjudged insane, as provided by law where such person has been held upon presentment or indictment and cannot be tried because of such insanity."

"Section 4206. Any person admitted to the said asylum under the provisions of this act, shall be there and then kept until restored to reason, which shall be ascertained as in case of other insane persons in said asylum."

"Section 4207. When any person confined in said asylum under the provisions of this act shall be ascertained to be restored to reason, it shall be the duty of the said superintendent to give notice thereof to the sheriff of the county in which the indictment or presentment against such person is pending, and said sheriff shall forthwith proceed to said asylum and take such person into his custody, and convey him to the jail of said county, or hold him in custody until admitted to bail or otherwise discharged according to law." Kirby's Digest, §§ 4204-4207.

It will be seen from reading these sections that the act provides for the commitment of persons who have been acquitted on a plea of insanity, and those who are being held on presentment or indictment and "cannot be tried because of such insanity." Section 4206 relates to the discharge of persons of the class first mentioned above, and section 4207 relates to the last-mentioned class. Circuit courts derive their jurisdiction over insane persons merely as an incident to the exercise of criminal jurisdiction, for jurisdiction, in other respects, is expressly vested by the Constitution in the probate courts of the state. The jurisdiction of the circuit court to pass on the question of the sanity of one under indictment for crime arises as a necessary incident to the enforcement of the criminal laws. There is not the slightest reason to believe that the framers of the Constitution meant, by the language giving exclusive jurisdiction to the probate courts over the persons and estates of persons of unsound mind, to take away the power of the circuit courts to determine the question of the sanity of a person before that court on a charge for crime. It is equally evident that the law-makers who framed the act of 1893 had no intention of invading the jurisdiction of the probate court, but intended to make the provision for a certificate of the circuit judge, where there has been an acquittal on a plea of insanity, merely a means for the admission to the asylum of a person charged with crime who has been acquitted on a plea of insanity. That, too, follows as merely an incident to the criminal jurisdiction of the circuit court. It does not constitute an adjudication of the present insanity of the person charged, but merely prima facie evidence of that fact upon which the accused may be held until the question of his insanity can be adjudicated in a court exercising exclusive jurisdiction over such matters. Section 6206 must be construed to relate, not merely to persons who have been restored to reason since the confinement began, but also to the right of persons confined under such certificate to seek an adjudication of the question of his sanity at the time of the commitment. In other words, the certificate of the circuit judge only makes a prima facie case until there is an adjudication by the probate court, which can be invoked at any time.

[2] Viewing the statute in that light, it is not an invasion of the exclusive jurisdiction conferred upon the probate court, and it is

a valid enactment. The remedy of the petitioner is therefore to apply to the probate court for an adjudication of the question of his sanity, and if he is found to be sane, he is entitled to a discharge from the asylum.

The chancellor was therefore correct in refusing to discharge the petitioner, and the writ of certiorari is quashed, and the judgment of the chancellor on the habeas corpus proceeding is affirmed.

HART, J., dissents.

RAINWATER et al. v. CHILDRESS.
(No. 66.)

(Supreme Court of Arkansas. Dec. 20, 1915.)

1. CORPORATIONS \S 28 — CORPORATION DE FACTO.

Where persons signed a subscription contract for the formation of a corporation, but no steps toward incorporation were thereafter taken, although some of the subscribers purchased machinery and established a canning factory, there was no de facto corporation, nor were the signers to the subscription contract liable as stockholders thereof, since some of the statutory steps in the formation of a corporation must be taken in an honest attempt to comply with the requirements and exercise by the associates of corporate powers in order to have a de facto corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. \S 28.]

2. PARTNERSHIP \S 41 — FORMATION — SUBSCRIPTION TO STOCK.

Where the signers of a subscription contract for the establishment of a canning factory lived in the town where a part of them established such a factory without incorporation and knew that it was in operation, but supposed it had been organized as a corporation and took no part in the business in any manner, supposing that the parties establishing it had done so on their own account, such signers were not liable to creditors of the business as partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. \S 41.]

3. PARTNERSHIP \S 41 — FORMATION.

Where signers of a subscription contract for the establishment of a cannery actively engaged themselves in establishing it without incorporating, and in operating it after establishment with knowledge that no attempt had been made to incorporate such signers were liable to the creditors of the business as partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. \S 41.]

4. PARTNERSHIP \S 41 — LIABILITY OF PARTNER — SCOPE OF BUSINESS.

Where part of the signers of a subscription contract for the establishment of a cannery, without incorporating, were active in establishing and operating it, thus rendering themselves liable as partners to its creditors, and, upon failure of the tomato crop in the vicinity, decided, over the protest of one of their number, that the cannery should grow its own tomatoes, such protesting partner was not liable for the debt incurred in planting and growing the tomatoes, since the enterprises of canning and growing tomatoes are separate and distinct, while under the general rule that a grant of express power to do a particular thing carries, by implication, the right to do any act reasonably necessary to affect the power expressly granted, the implied power must be used to carry out

the powers expressly granted, and in no instance can be availed of to enlarge the express power.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. § 41.]

Appeal from Conway Chancery Court; J. T. Bullock, Special Chancellor.

Suit by H. H. Childress against Lloyd Rainwater and others. From a decree, plaintiff, the named defendant, and other defendants unnamed appeal. Affirmed.

H. H. Childress sued Lloyd Rainwater and about 25 other persons for contribution on a debt which he alleges he and the defendants became liable for as partners. The defendants denied liability. The material facts necessary for a determination of the issues raised by the appeal are as follows: In the fall of 1908 a proposition was made by a promoter to the board of trade of Morrilton, Ark., to establish a canning factory if a bonus of \$5,000 should be given him. Some of the citizens of the town of Morrilton assembled at the board of trade rooms to consider the proposition, and after a discussion of the matter decided to themselves organize a corporation for the purpose of establishing a canning factory. A subscription list, stating that the signers would pay the amount set opposite their names towards the establishment of a canning factory, was written out, and the plaintiff and defendants and some other citizens of the town of Morrilton signed the subscription contract. The amount subscribed was about \$2,275. It was the intention of the subscribers that a corporation should be formed, but nothing was done towards that end, except to procure the signers to the subscription contract as above stated. Some of the subscribers, among whom were H. H. Childress, Lloyd Rainwater, S. W. Simpson, and Walter Smith, met, and after looking at the signatures decided that the signers were good for the amount subscribed by them and would pay it. They thought that the establishment of a canning factory would be a paying proposition. Simpson, Childress, and Smith were appointed as a committee to examine the machinery of other canning factories and to purchase machinery for their own plant. After an examination of canning factories at other places they purchased machinery of the value of about \$1,500, and established a canning factory in the town of Morrilton. A committee was appointed to collect some of the subscriptions, and the amount collected was applied toward the payment of the machinery. Rainwater was cashier of the Bank of Morrilton, and agreed that his bank would finance the proposition if Childress was made manager. By common consent of all the interested parties Childress became manager of the canning factory, and it was operated for the season of 1909. It turned out that the factory was not a profitable enterprise, this being due partly to the fact that the farmers did not raise sufficient tomatoes with which to oper-

ate it. So in the spring of 1910 it was agreed to rent land and grow tomatoes with which to operate the plant. Simpson objected to this course, and declared that he would have nothing to do with the venture of renting land to grow tomatoes. Childress and others, however, rented the land, and proceeded to raise tomatoes to be used by the canning factory. This also proved to be a losing venture. Lloyd Rainwater was absent from the state when the agreement to raise tomatoes was reached, but afterwards returned home and proceeded to finance the business just as if he had been present when the venture was decided upon. In 1912 the Bank of Morrilton sued H. H. Childress, Lloyd Rainwater, its cashier, and all the other defendants herein for the indebtedness due the bank by the canning factory. The bank took a non-suit as to all the parties except H. H. Childress, and judgment was rendered against him in favor of the bank for the amount sued for. Childress paid the judgment, and this suit was instituted by him for contribution against the other subscribers to the stock in the canning factory on the ground that a partnership existed between them. The whole machinery of the canning factory was sold to satisfy a debt incurred by the factory in its operation, and Childress became the purchaser thereof for the sum of \$152.90. Other facts will be referred to in the opinion.

As to all of the defendants who had paid for their stock prior to the institution of this suit, the court dismissed the complaint of the plaintiffs for want of equity. As to the subscribers who had not paid their subscriptions, the court rendered judgment in favor of the plaintiff for the amount subscribed by each one. The court found that H. H. Childress, Lloyd Rainwater, and S. W. Simpson actively promoted and engaged in the business of the canning factory, that they adopted and used the name of the "Morrilton Canning Factory," and that they were primarily liable for the indebtedness up to the 10th of April, 1910, and judgment was rendered against them for that amount. The court further held that Childress and Rainwater engaged in the business of growing tomatoes in 1910, and incurred further indebtedness in that enterprise, and that Simpson protested against going into that business, and was not liable for any of the indebtedness so contracted. The court held that Childress and Lloyd Rainwater were jointly liable to the bank for that indebtedness, and judgment was rendered in favor of Childress against Rainwater for half the amount. The court also held that Childress purchased the machinery of the canning factory at an inadequate price, and that he held the same in trust for the other parties interested. A decree was entered accordingly, and both Childress and Rainwater have appealed. The defendants against whom judgment was rendered on the subscription contract have also appealed.

Sellers & Sellers, of Morrilton, for appellants. W. P. Strait and Edward Gordon, both of Morrilton, for appellee.

HART J. (after stating the facts as above). Counsel for the defendants other than Rainwater insist in their brief that the decree be affirmed. Therefore we shall assume that the facts justified the court in rendering the decree as to them, and no further consideration of that branch of the case will be given.

Counsel for the plaintiff, Childress, and the defendant Lloyd Rainwater both urge that the defendants were jointly liable for the debt incurred by the canning factory as partners, but we do not agree with them in that contention. All of the signers to the subscription contract stated that it was the intention of the parties to form a corporation for the purpose of operating a canning factory in the town of Morrilton. Some of the defendants said that they subscribed for stock in such a corporation, and that they took no further part looking towards the organization of the corporation or in the management of the canning factory after it was put in operation. Other defendants stated that they did not intend to subscribe for stock in the corporation, but only intended to donate the amount subscribed by them for the purpose of procuring the establishment of a canning factory at Morrilton. Childress, Lloyd Rainwater, S. W. Simpson, and Walter Smith actively engaged in establishing and operating the canning factory. Walter Smith was not made a party to the suit and for that reason his liability, if any, need not be further considered.

[1] It may be stated here that the signers to the subscription contract are not liable as stockholders in a de facto corporation. The effect of our decisions in *Whipple v. Tuxworth*, 81 Ark. 391, 99 S. W. 86, and *Bank of Midland v. Harris*, 114 Ark. 344, 170 S. W. 67, is to hold that a strict or substantial compliance with the laws regulating the organization of corporations is necessary to constitute a corporation de jure. To constitute a corporation de facto there need not be a strict or substantial compliance with the statute, but there must be a colorable compliance with the statute; that is to say, there must be color of a legal organization under the statutes and user of the supposed corporate franchise in good faith. Courts differ among themselves as to how much must be done in order to constitute a corporation de facto. But all of the courts agree that some of the statutory steps must be taken in an honest attempt to comply with the requirements of the law and exercise by the associates of the corporate powers. See *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, and *Modern American Law*, vol. IX, page 52 et seq. Here there was no attempt whatever

to comply with the statutes relating to the formation of corporations. It is not enough that there is a law under which the subscribers might have incorporated, and that they agreed to form a corporation. They had not even signed articles of incorporation.

[2,3] None of the defendants to this suit, except Lloyd Rainwater, H. H. Childress, and S. W. Simpson, was instrumental in establishing and operating the canning factory at Morrilton. It is true they lived in the town of Morrilton, and knew that the canning factory was in operation, but they supposed it had been organized as a corporation, and that the parties establishing it had done so on their own account trusting to make it a paying business with the amount collected on the subscription contracts. They took no part in the business transacted by the canning factory, either as principals, partners, agents, directors, or otherwise. They did not sign articles of association, incorporation, or partnership. They did not know that Childress, Rainwater, and Simpson were attempting to run the business as a partnership. Under these circumstances, we do not think the court erred in refusing to hold them liable as partners. See 7 R. C. L. § 332; *Rutherford v. Hill*, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596; *Seacord v. Pendleton*, 55 Hun, 579, 9 N. Y. Supp. 46; *Fuller v. Rowe*, 57 N. Y. 23. The last two cases were cited in *Harrill v. Davis*, supra, and Judge Sanborn who delivered the opinion of the court said:

"There are cases in which stockholders who take no active part in the business of a pretended corporation which was acting without any charter or filed articles, who supposed that the corporation was duly organized, have been held exempt from individual liability for the debts it incurred; but if they had been actively conducting its business, with knowledge of its lack of incorporation, those decisions must have been otherwise."

In the application of these principles we hold that Childress, Rainwater, and Simpson are liable as partners because they were actively engaged in establishing the canning factory and in operating it after it was established and with the knowledge that no attempt had been made to incorporate it.

[4] We are also of the opinion that the court was right in holding that Simpson was not liable for the debt incurred in planting and growing tomatoes. As above stated, the business established was that of operating a canning factory in the town of Morrilton. No other purpose was mentioned in the subscription contract or by the parties at the time the canning factory was put in operation. Of course it is the general rule that when express power is granted to do a particular thing, this carries with it by implication the right to do any act which may be found reasonably necessary to effect the power expressly granted. *El Dorado Farmers' Union Warehouse Co. v. Eubanks*, 94 Ark. 355, 126 S. W. 1075. The implied power must

be used to carry out the powers expressly granted, and can in no instance be availed of to enlarge the express powers. A person might have been willing to subscribe to the stock in a corporation, organizing for the purpose of erecting and operating a canning factory, or willing to enter into a partnership for that purpose, and still be wholly unwilling to enter into a corporation, firm, or partnership for the purpose of growing tomatoes. The two enterprises are separate and distinct. The new enterprise enlarged the original undertaking and added new responsibilities and new hazards upon the parties. Therefore the parties could not force Simpson against his will to go into the business of growing tomatoes, and he is not liable for the debts incurred in carrying out that enterprise.

The record in this case is long, and many witnesses were examined and cross-examined at length by counsel for the respective parties; but we think we have in the foregoing opinion set out substantially the testimony bearing upon the relation of the parties to each other, and have carefully considered the facts as applicable to the law bearing upon them.

We are of the opinion that the decree of the chancellor should be affirmed; and it is so ordered.

C. M. JOHNSON SAND & GRAVEL CO. et al. v. QUARLES. (No. 101.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. NAVIGABLE WATERS ⇐36—OWNERSHIP OF SUBMERGED LAND.

The state is the owner of lands under its navigable waters between high-water marks.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. ⇐36.]

2. NAVIGABLE WATERS ⇐39—RIGHT OF RIPARIAN OWNER TO REMOVE SAND — STATUTES.

Acts 1907, p. 836, granting to riparian owners on the Mississippi river the exclusive right to remove sand and gravel, for private use or for sale as an article of commerce, from the beds, sand bars, and towheads formed in the river in front of his lands, to the thread of the stream, has been repealed, on account of their complete inconsistency, by Acts 1913, p. 1088, expressly repealing all laws in conflict and making it unlawful for any corporation or person to take sand and gravel from any sand and gravel bar of any navigable stream without notifying the Attorney General, and, upon his consent, paying the state treasury a price per yard, and by Acts 1915, p. 532, making it unlawful for any person, corporation, or association to take sand or gravel from the beds or bars of navigable rivers and highways without first procuring the consent of the Attorney General and agreeing in writing to pay a designated price per cubic yard and report monthly to the Attorney General an itemized verified statement of the amount taken, making it a misdemeanor to remove sand or gravel without the Attorney General's consent, an act limited, by its third section, to persons taking sand or gravel for com-

mercial purposes, and not to those removing it for personal or private use.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. ⇐39.]

3. NAVIGABLE WATERS ⇐37—TRUSTEESHIP OF STATE—DELEGATION.

A state cannot delegate its trusteeship for the public in disposing of its navigable waters and the beds thereof.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

4. NAVIGABLE WATERS ⇐37 — GRANT OF PRIVILEGE TO UTILIZE BED—WITHDRAWAL.

Where the state by statute granted to riparian owners on the Mississippi river the exclusive right to take and sell sand and gravel from the beds adjoining the shore lands, without granting any such right to riparian owners along other navigable streams, such grant was, at most, a privilege, subject to withdrawal at any time.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

Appeal from Circuit Court, Phillips County; W. G. Dinning, Special Judge.

Suit by Clarence Quarles against the C. M. Johnson Sand & Gravel Company, in which the State intervened, by Wm. L. Moose, Attorney General. From rulings on demurrers and a judgment based thereon, the defendant and the intervener appeal. Reversed and remanded, with directions.

Wm. L. Moose, Atty. Gen., Jno. P. Streepey, Asst. Atty. Gen., and R. W. Wilson, of Monticello, for appellants. Andrews & Burke, of Helena, for appellee.

KIRBY, J. Clarence Quarles, the owner of certain lands on the Mississippi river, brought this suit against the sand and gravel company for sand and gravel taken from the bed of the Mississippi river between his shore lands and the thread of the stream, claiming to be the owner of said sand, with the exclusive right to remove and sell same under Act 348 of the Acts of 1907 of the General Assembly of Arkansas.

The defendant, the sand and gravel company, demurred to the complaint and specially demurred, alleging that said act was repealed by Act 205 of the 1913 session and Act 138 of the 1915 session of the Legislature, and that it was void, being in violation of sections 18 and 19, art. 2, of the Constitution.

The state of Arkansas filed an intervention and a general demurrer, and specially demurred to the complaint for the same reasons set out by the defendant, and as a fifth ground alleged the said act of 1907 was invalid, because the bed of the navigable stream belonged to the state in trust for the people, and the Legislature was without power to delegate the trust. It alleged its ownership of the sand and gravel, that same had been taken by the appellant the C. M. Johnson Sand & Gravel Company, which was indebted

to it in the sum of \$5,000, on account thereof.

The defendant sand and gravel company interposed a demurrer to the state's complaint. The court overruled the demurrers of C. M. Johnson Sand & Gravel Company and of the intervener, the state of Arkansas, to the complaint of the plaintiff, and sustained the demurrer of the defendant, the sand and gravel company, to the complaint of the intervener and the defendant, C. M. Johnson Sand & Gravel Company, and the intervener, the state of Arkansas, declined to plead further, and the complaint of the intervener was dismissed, and judgment rendered against the defendant, C. M. Johnson Sand & Gravel Company, from which rulings these appeals were prosecuted.

Act No. 348 of the Acts of 1907 grants the exclusive right to remove sand and gravel for private use or for sale as an article of commerce from the beds, sand bars, and tow-heads formed in the Mississippi river to the riparian owner in front of whose lands such sand and gravel may be found to the middle thread of the stream, and provides that the right granted shall not be exercised in such manner as to interfere with the use of the stream as a public highway.

The Legislature of 1913, by Act No. 265, makes it unlawful for any corporation or person to take sand and gravel from any sand and gravel bar of any navigable stream in the state without notifying the Attorney General, and upon his consent paying into the state treasury a certain price per yard for the gravel taken; the money realized from the sale to be placed to the credit of the general revenue fund. Said act specially repeals all laws in conflict.

The Legislature of 1915, by Act 138, entitled "An act to protect the beds and bars of navigable streams and lakes in the state of Arkansas," made it unlawful for any person, firm, company, corporation, or association of persons to take sand or gravel from the beds or bars of navigable rivers and highways of the state without first procuring the consent of the Attorney General and agreeing in writing to pay therefor the designated price per cubic yard and report monthly to the Attorney General an itemized verified statement of the amount taken. This act makes it a misdemeanor to remove the sand or gravel without the consent of the Attorney General. The act prescribes the punishment for its violation and authorizes the Attorney General to bring suit to recover the price of any sand or gravel, etc., taken and not paid for in accordance with its terms. Section 3 of this act limits its provisions to such persons and corporations as shall take sand or gravel for commercial purposes, and it does not apply to those who remove it for personal or private use.

[1] It is no longer questioned that the state is the owner of the lands under the navigable waters within this state and be-

tween the high-water marks, and said Act 265 of the Acts of the General Assembly of 1913, authorizing the sale of sand and gravel upon the restriction provided, has been held a valid enactment. *State ex rel. Attorney General v. Southern Sand & Material Co.*, 113 Ark. 149, 167 S. W. 854. It was there decided that the state held the title or rights as a trustee for its citizens, and that the disposal by sale of sand and gravel in the bed of a navigable stream was not a relinquishment of the state's control over the common property, and did not impair the rights of common enjoyment nor interfere with navigation; that the sale of the sand and gravel as provided was not a tax, but a method of utilizing the common property of the state for the benefit of the citizens. It was there said:

"Now, the state cannot delegate its trusteeship by disposing of navigable waters or beds thereof; for one Legislature might resume a power which has been surrendered by its predecessor. * * * The bed of the stream being held by the sovereign for the benefit of the citizens, that right may be enjoyed in the way that the legislative branch of government may determine for the benefit of the public, and it is not inconsistent with the public use to require those who actually take sand and gravel to pay for it so that the benefits may be diffused among all the people of the state."

[2] It cannot be denied that said special act of 1907 grants the exclusive right to take, use, and sell sand and gravel from the bed of the Mississippi river to the riparian owner in front of whose lands such sand and gravel may be found, but the provisions of said acts of 1913 and 1915 are both inconsistent with and repugnant to the provisions of said special act of 1907; the act of 1913 expressly repealing all laws in conflict.

[3, 4] The state cannot delegate its trusteeship in disposing of navigable waters or beds thereof as said in *State v. S. Sand & Material Co.*, supra, where it was held that said act was but a method of utilizing the common property of the state for the benefit of the citizens. Conceding without deciding that the state could grant the exclusive right to the riparian owners of lands on the Mississippi river to take and sell sand and gravel from the beds thereof adjoining the shore lands without granting any such right to other owners along navigable streams, it was, at most, but a privilege, the grant of which could be withdrawn at any time. By said acts of 1913 and 1915 the Legislature provided an exclusive method for the sale and disposition of the sand and gravel in all the navigable streams of the state, and made it unlawful to take any sand and gravel therefrom for sale otherwise than as provided. These later acts cover the entire subject-matter to which they relate and manifest an intention to abrogate the privilege granted by the special act since the provisions of said special act cannot stand with the others, being inconsistent with and repugnant thereto. *Hampton v. Hickey*, 88

Ark. 327, 114 S. W. 707; Western Un. Tel. Co. v. State, 82 Ark. 302, 101 S. W. 745; United States v. Claffin, 97 U. S. 546, 24 L. Ed. 1082.

It follows that the court erred in overruling the demurrers to the plaintiff's complaint and in sustaining the demurrer of C. M. Johnson Sand & Gravel Company to the state's complaint as intervener.

For this error the judgment is reversed, and the cause remanded, with directions to sustain the demurrers of both the sand and gravel company and the state to the complaint of plaintiff, and to overrule the demurrer of defendant sand and gravel company to the intervener's complaint, and for further proceedings according to law.

SCULLIN et al. v. THOMASON. (No. 111.) (Supreme Court of Arkansas. Jan. 17, 1916.)

MASTER AND SERVANT—§187—INJURY— NEGLIGENCE OF RAILROAD—MOVEMENT OF TRAIN.

In an action for the death of a brakeman on defendant's train, where it might be found that the deceased was walking along the running board of a tank car with his lantern, and that the jerk or movement of the train in spotting the tender for a tank threw him off, so that he fell under the trucks and was killed, the taking up of the slack of the train was not a movement of the train, within the rule requiring a signal of three blasts to be given to indicate the backing of the train when standing, so that there was no negligence in such respect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. §187.]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

Action by A. B. Thomason, administrator, against John Scullin and others, receivers of the Missouri & North Arkansas Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed, and cause dismissed.

W. B. Smith, J. Merrick Moore, and H. M. Trieber, all of Little Rock, for appellants. H. A. Gardner, of Monett, Mo., for appellee.

MCCULLOCH, C. J. This is an action to recover damages on account of injuries sustained by reason of the death of plaintiff's intestate while working as brakeman in the service of the receivers of the railroad company. The train on which plaintiff's intestate was working was being operated in interstate traffic, and plaintiff's cause of action, if any existed, is based upon the federal statute regulating the liability of railroad employers. There was a judgment below in plaintiff's favor, and the defendants have appealed.

Plaintiff's intestate, Lee Thomason, was head brakeman on a freight train, and was killed about midnight at Everton, a station in Boone county, Ark. There was a tank at the station, and the train, as it came to the station, was stopped at the tank for the

purpose of taking water. Shortly thereafter Thomason's dead body was found under the front trucks of an oil tank car, which was the second car back of the engine. The conductor of the train, who was introduced as a witness by plaintiff, testified that when the train stopped at the tank he got out, as usual, for the purpose of walking up alongside of the train to make a casual examination as to the condition of the train, and that in making this examination he found the body of Thomason, as before stated. He testified that the last time he saw Thomason was at St. Joe, the last station at which the train was stopped before reaching Everton. There was no direct testimony showing how Thomason came to his death, but the plaintiff introduced two witnesses, whose testimony tended to show that he fell from the train while the train was being "spotted" for the water tank. The two witnesses were men who were out in front of a house a short distance from the tank, and they testified that as the train approached the tank they saw the light of a lantern moving along the side of the oil tank car, which was a short distance behind the engine. They could not see the man holding the lantern, but could tell from the movement that it was in the hands of some person moving along the side of the tank car. They saw the reflection of the light on the side of the oil tank and on the end of the boxcar in front. They testified that the train came to a stop, and immediately moved slightly backward and then forward, and that as this movement was made they saw the lantern fall from the side of the car. The testimony of those two witnesses justifies the inference that Thomason was walking along the running board on the tank car with his lantern in his hand, and that the jerk or movement of the train threw him off, and that he fell under the trucks and was killed. The testimony also warrants the finding that no signal was given of the movement of the train, and the plaintiff contends that this was in violation of one of the rules of the company, which provides that a signal of three blasts is to be given to indicate the backing of the train when standing. It is not contended that there was negligence in any other respect, and it must be conceded that, unless the rule just referred to applied to the movement of the train when "spotting" the tender at the tank, there was no negligence of the trainmen which would render the defendants liable in this case.

We are of the opinion that according to the undisputed evidence in this case the train was not being moved within the meaning of the rules which require the giving of signals. The only testimony on the subject was adduced by the plaintiff, and the testimony of each of the three witnesses who testified on that subject (including the conductor) shows that the train was not being moved, but that

merely the slack was being taken up in the effort to "spot" the tender of the engine at the spout of the tank. The conductor testified that he was in the caboose when the train came to a stop at the tank, and that there was no other movement of the whole train. He said that the caboose did not move at all. The other two witnesses merely said that the train was being lined up or "spotted" at the tank, and that when it first stopped there was a backward movement, and then a forward movement, without signals being given. Viewing this testimony in its strongest light, it does not warrant the inference that the train was being moved about, except that the slack was being taken up and a slight movement forward to connect the spout of the tank with the tender of the engine so as to take water. The testimony of one of the witnesses on this point is as follows:

"Q. Now, as you stood there watching, did the train stop, or did the train go through the station? A. Stopped there. Q. Did it come to a full stop? A. I couldn't tell for sure. It stopped there to take water, and of course they come to the full stop for that purpose. Q. As you noticed it did stop? A. Yes; it stopped there right smart little while. Q. Now then, what did it do after it stopped? A. I couldn't tell you, I went to bed. Q. But before you went to bed, while you were out there, when the train stopped, what occurred immediately after it stopped, or soon after? A. Never noticed anything unusual. I saw a light behind the engine drop down, but I just supposed it was a brakeman or conductor. Q. What was done just before the light went down? A. The only thing I noticed, it seems that the engine didn't get quite stopped, lined up—didn't get quite lined up for the stop, and it seemed he moved his engine. Q. Which way? A. I couldn't say; I couldn't tell in the dark; I couldn't tell whether it was moved backward or forward. Q. What did you hear, Mr. Cooper? A. I heard a noise as if the slack was taken up in the cars. Q. Tell the jury what you understand by slack. A. The slack of a train is the slack in those drawbars, and when the engine takes up slack it makes a rattling noise. Q. You heard the rattling noise, and it seemed as though they were taking slack? A. Yes. Q. At what time, did you say? A. Well, just about that time the light dropped off the car; it seems that the light drop-

ped just as the slack of the train was moving one way or the other; I don't know which way that slack was taken. Q. You heard the noise, and just at that time you saw the light drop down? A. The best I remember, the light dropped just prior to the noise I heard, I couldn't tell what become of the light."

The testimony of the other witness on this subject was as follows:

"Q. Now, you say that it seems they didn't quite make the right kind of a stop at the water tank. Could you see anything about that? A. No, sir. Q. You couldn't tell whether they were at the right place, could you? A. I could just see the bulk of the cars. Q. And it just seems that they didn't stop right? A. Yes, sir. Q. That is just guesswork; you didn't know about that? A. No. Q. You said it seemed as if he couldn't go forward, and that he took up the slack; you heard a noise—heard both noises? A. Yes, sir. Q. You can tell the difference? A. I can tell when they take slack or go forward. Q. You could tell from the noise when they went forward or backward? Now, you say that they went backwards, and you saw this light go down, all occurred at the same time—just instantly with the backing of the cars the light went down? A. Yes, sir."

The statement of the conductor is that the caboose was not moved at all after they stopped at the tank, and it necessarily results from his testimony, if true, that there was no movement, except that the cars at the front end of the train were moved in taking up the slack, and perhaps a slight forward movement to connect with the spout of the tank. It is clear, we think, that this does not come within the rule, as the train was not being put in motion. Those rules were adopted to govern the movements of trains, and not to require signals of the jerks incident to stopping at a given point. Such movements are necessarily incident to the operation of trains, and are among the ordinary dangers, the risk of which the employes assume when they take service. Nothing is proved in this case which supports a charge of negligence against those who were operating the train.

This being true, the judgment of the trial court is without any evidence to sustain it, and it is therefore reversed, and the cause is dismissed.

BAKER v. CROSBYTON SOUTHPLAINS R. CO. (No. 2433.)

(Supreme Court of Texas. Jan. 26, 1916.)

COURTS \S 480 — JURISDICTION — INJUNCTION AGAINST EXECUTION — STATUTES.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4653, providing that injunction to stay execution on a judgment shall be returnable to and tried in the court where such judgment was rendered, the district court is without jurisdiction to try the issues in a suit to enjoin execution on a judgment of the county court; it not affirmatively appearing that the judgment is void or that the property attempted to be levied on is exempt.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1270-1278; Dec. Dig. \S 480.]

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by the Crosbyton Southplains Railroad Company against J. A. Baker for injunction. Judgment for plaintiff was affirmed by the Court of Civil Appeals (146 S. W. 569), and defendant brings error. Reversed and rendered.

R. A. Sowder, of Lubbock, and Cooper, Merrill & Lumpkin, of Houston, for plaintiff in error. W. D. Benson, of Lubbock, for defendant in error.

YANTIS, J. J. A. Baker, the plaintiff in error, secured a judgment in the county court of Lubbock county, against the Crosbyton Southplains Railroad Company, defendant in error herein. A portion of the judgment was paid. Baker caused to be issued an execution out of said county court in his favor, and was threatening to levy it upon the property of the said Crosbyton Southplains Railroad Company, defendant in error. The latter applied to the district court of Lubbock county for a temporary injunction to restrain the levy of said execution from the county court. The injunction was granted by and made returnable to the district court, and an order entered restraining the officers from levying said execution. From this order an appeal was prosecuted to the Honorable Court of Civil Appeals for the Seventh District. By said court the judgment of the district court, which granted said restraining order, was affirmed. A writ of error was granted by this court upon the question, which is controlling in the case, as to the jurisdiction of the district court to hear and determine the controversy as to the merits of the injunction.

The litigation arose in this way: The Crosbyton Southplains Railroad Company, defendant in error, brought a condemnation suit against J. A. Baker, who is the plaintiff in error in this suit, in the county court of Lubbock county, to condemn part of lots 6, 7, 8, 9, 10, 11, and 12 in block 33 of the Overton addition to the town of Lubbock, in Lubbock county, Tex. for right of way purposes. The judgment of the county court was, in

effect, that the lots were condemned for right of way purposes as prayed for, and J. A. Baker was given a judgment against the said railroad company in the sum of \$1,750 as damages. The judgment also provided that the sum of \$973.60 should be retained in the registry of the county court to pay and satisfy a vendor's lien note owed by J. A. Baker to E. P. Watts. The railroad company paid to J. A. Baker upon said judgment the sum of \$654.52, but did not deposit in the registry of the court the amount called for as a deposit by said judgment to pay the said note held by E. P. Watts. At the time the judgment was rendered in the county court, the Watts note had been placed in the hands of an attorney for collection, and attorney's fees were due thereon, but for some reason were not taken into account in rendering the county court judgment. Watts was not a party to the suit in the county court. In due time he filed a suit in said district court on said vendor's lien note against J. A. Baker, the plaintiff in error, to recover the amount of said note, interest, and attorney's fees. He also prayed for a foreclosure of his lien. The Crosbyton Southplains Railroad Company was made a party defendant in said suit by Baker. In this state of the litigation, Baker caused the execution to issue out of the county court on the judgment which had been rendered in his favor therein. The injunction sued out in the district court by said railroad company was to restrain the levy of this execution. There was no allegation by the railroad company in its application for injunction charging that the judgment of the county court was void, or that the property about to be levied upon was for any legal reason not subject to levy and sale under the execution. The only charge is that the judgment is not large enough in amount to satisfy the attorney's fees on the said Watts note, of which no account was taken in the trial in the county court, and that the execution is about to be levied upon the rolling stock of the railroad company.

We think the Court of Civil Appeals erred in affirming the judgment of the district court. The latter court was without jurisdiction to try the issues involved in the injunction suit. It had jurisdiction to issue the writ of injunction, but its duty was to make it returnable to the county court in which the judgment was rendered. Article 4653, Vernon's Sayles' Texas Civil Statutes 1914, provides that:

"Writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered. * * *

This statute commanded that, when the district court issued its writ of injunction, it should make it returnable to the court where the judgment which was rendered

attack by it had been rendered. By implication it deprived the district court of jurisdiction to do more, except in cases where the judgment of the county court is void upon its face, or where it appears affirmatively from the record that such judgment is void, or that the property attempted to be levied upon is exempt from such levy, or is owned by persons not parties to the judgment. *Cotton v. Rea*, 106 Tex. 220, 163 S. W. 2; *Moore v. Vogt*, 127 S. W. 284; *Lincoln v. Anderson*, 51 S. W. 278; *Wheeler v. Powell*, 114 S. W. 689; *Bell v. York*, 43 S. W. 68; and *Texas & Pacific Railway Co. v. Butler*, 52 Tex. Civ. App. 327, 135 S. W. 1064. If the rule were otherwise, it would result in conflicts of judgments in trial courts, and in interminable confusion. The remedy for an erroneous judgment is by direct appeal, and not by application to another trial court for restraint of the judgment by injunction.

This holding is not in conflict with the cases of *Leachman v. Capps & Canty*, 89 Tex. 690, 36 S. W. 250, and *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578, where in each case the proceeding was to protect the homestead which was exempt from forced sale. In such cases the parties do not sue to enjoin the execution of the judgment in the sense of seeking to impair or destroy the judgment, but only sue to prevent the levy upon and sale of the property belonging to them, because such property in no event could be subject to sale under any execution, however valid the judgment upon which it issued might be.

The district court being without jurisdiction to hear and determine the merits of the injunction, it follows that the judgment of the Court of Civil Appeals, which affirmed the judgment of the trial court, should be reversed. The petition for writ of injunction presents no valid ground for a stay of execution, and the judgment of the district court should be here reversed and rendered in favor of the plaintiff in error, and it is, accordingly, so ordered.

HAWKINS, J. I concur in the result, and also in the reasoning upon which it is rested, including the application made of article 4653; but I do not think this case calls for a decision as to whether said statute does or does not apply where the judgment under which the execution issued is void, etc., and upon that point I express no opinion.

GALVESTON, H. & S. A. RY. CO. v. DICKENS. (No. 2768.)

(Supreme Court of Texas. Jan. 28, 1916.)

1. APPEAL AND ERROR \S 811—**ADVANCEMENT OF CASE—GROUNDS—CONFESSION OF ERROR.**

A confession of error after the granting of a writ of error does not justify the advancement and hearing of the case in the Supreme Court out of its regular order upon the docket, since, as it is the duty of the court to determine all

questions correctly, a confession of error cannot facilitate a decision of the case, the only ground for advancement on the docket.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3191-3194; Dec. Dig. \S 811.]

2. APPEAL AND ERROR \S 811—**ADVANCEMENT OF CASE ON DOCKET—VACATION—GROUNDS.**

Where, after defendant in error confessed error in the charge to secure an advancement of the case on the docket, he filed, in good faith and with the sanction of the court, a written argument citing authorities in support of the charge merely to afford the court the benefit of the authorities discussed, the action was not sufficient basis for granting of plaintiff in error's motion to vacate the advanced submission of the case, as such action was not inconsistent with the confession of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3191-3194; Dec. Dig. \S 811.]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by C. W. Dickens against the Galveston, Harrisburg & San Antonio Railway Company. To review a judgment for plaintiff, defendant brought error, and plaintiff filed motion to advance submission of the case, which was granted. Submission of the case vacated on further consideration, and the order advancing it set aside.

See, also, 170 S. W. 835.

Baker, Botts, Parker & Garwood, of Houston, and *Templeton, Brooks, Napier & Ogden* and *Ed W. Smith*, all of San Antonio, for plaintiff in error. *C. C. Harris* and *M. J. Arnold*, both of San Antonio, for defendant in error.

PHILLIPS, C. J. A writ of error was granted in this case because of probable error in the trial court's charge to the jury. After the granting of the writ, the defendant in error filed a motion to advance the submission of the case, confessing error in the particular indicated in our allowance of the writ, and making such confession the basis of the motion. Our view at the time was that this probably warranted the advancement of the case. The motion was accordingly granted, and the case was recently submitted on an advanced hearing.

[1] We are convinced, however, upon further consideration, that a confession of error after the granting of a writ of error does not justify the advancement and hearing of the case in this court out of its regular order upon the docket. It could be regarded, we think, as a sufficient ground for such action only upon the theory that by the acknowledgment of error the decision of the case by the court would be facilitated, and therefore ought not to be postponed for a hearing in ordinary course. But a confession of error does not accomplish such result. It is the duty of the court to determine all questions correctly, notwithstanding confession of error by the parties; and we

would disregard such confession, entirely, if of the opinion on the final consideration of the case that the particular question had been correctly determined in the Court of Civil Appeals. While a writ of error is granted only when it is deemed that it should issue, it does not conclude the question of error, as is well understood. The confession of error cannot bind the court, and it does not bind the party making it. It is therefore of no practical value or effect in our decision of the case. For these reasons it does not entitle the case to any advantage in the hearing over other causes pending.

[2] After the confession of error was filed, the defendant in error's counsel, with the permission of the court, filed a written argument, with authorities cited, in support of the correctness of the charge. This has been made the basis of a motion by the plaintiff in error to vacate the advanced submission of the case. The argument in question was filed by counsel in good faith, and with the sanction of the court. It sufficiently appears that its only purpose was to afford the court the benefit of the authorities it discusses. Under these circumstances, we have not regarded it as inconsistent with the confession of error, and have therefore overruled the motion of the plaintiff in error to vacate the submission, because unwilling to sustain it upon the ground urged.

Of our own motion it is ordered that the submission of the case be vacated and the order advancing it be set aside, believing, for the reasons we have indicated, that the motion to advance ought not to have been granted. The case will stand for submission in its regular order upon the docket.

MELTON v. STATE. (No. 3895.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. CRIMINAL LAW §594—CONTINUANCE—ABSENCE OF WITNESS.

Diligence being conceded, it was a sufficient showing for continuance that the only person, other than defendant, relying on self-defense under apparent danger, who was present the night before the homicide when deceased was alleged to have made threats, was absent sick.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. §594.]

2. CRIMINAL LAW §448—EVIDENCE—OPINION—CHARACTER OF DECEASED—STATUTES.

Under Pen. Code 1911, art. 1143, providing that when proof of threats by deceased against defendant in homicide, seeking to justify himself on the ground thereof, has been shown, it shall be competent to introduce evidence of whether he was such a person as might reasonably be expected to execute a threat made, a witness may state whether or not deceased was such a man, against objection of its being his opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1061; Dec. Dig. §448.]

3. AFFIDAVITS §2—PERSONS COMPETENT TO TAKE.

The affidavit introduced by the state should not be considered, the oath thereto being taken by counsel for the state.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 5-15; Dec. Dig. §2.]

Appeal from District Court, Freestone County; A. M. Blackmon, Judge.

Anderson Melton was convicted, and appeals. Reversed and remanded.

R. M. Edwards, O. M. Wroe, and James MacIntosh, all of Fairfield, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder and given 15 years in the penitentiary.

[1] He filed a second application for continuance, partly written and partly oral; the oral part being by agreement. The state concedes diligence. It is alleged, among other things, this was the only witness by whom he could prove the fact that on the day before the homicide the deceased had threatened the life of appellant. The absent witness was sick and confined and in bed with consumption. The court overruled the application, and motion was then made for postponement long enough to take the depositions of the witness, who lived about 13 miles from town. The court ordered the case to trial, with permission to get the depositions if he could by 1 o'clock the following day. This was impossible, and the case proceeded, resulting in a conviction of appellant for murder. The application for a continuance should have been granted. The absent witness was the only witness who knew of the threats, she being the only one present at the time the threats were made, except the defendant. Defendant, in the light of application for continuance, is not to be regarded as a witness. He does not have to take the stand unless he prefers to do so. It is a matter entirely discretionary with him. Under such circumstances, the application does not treat the accused as a witness. If another witness had been present and knew of these facts, appellant would be required to exhaust all of his resources in the introduction of testimony; but the witness was absent, and appellant was his only witness in regard to these matters. An affidavit of the absent witness was taken by the state in answer to appellant's motion for a new trial. In some respects it was not in conformity with, but rather contradictory to, the application for continuance, but not so as to the threats made the previous evening. In that respect it was in accordance with appellant's statements in his application for continuance. This was a very important matter for appellant on his theory of self-defense, as he relied upon apparent danger. The question of actual danger was not in

the case. We are of opinion that this was such a showing for a continuance as should have been granted.

[2] Another question growing out of the introduction of evidence of threats is suggested for reversal. Defendant testified to threats made by deceased and what he thought was apparent danger at the time that he fired the shot that killed the deceased. It is unnecessary to go into a detailed statement of all those matters. The question of apparent danger was clearly suggested by the evidence.

In this attitude of the case, appellant proposed to prove that deceased was a man of dangerous character among his race, he and defendant being negroes, but was not so regarded as to white men. These matters having been proved, appellant then offered to show that deceased was a man of such character and reputation that he would likely execute any threat he had made to kill or inflict serious bodily injury. The court excluded this testimony upon the theory that it was but an opinion of the witness, and that the jury was as well qualified to pass on this matter as was the witness. We do not understand the law to be as found by the court. The statute provides that, where threats are shown to take life or inflict serious bodily injury, the deceased's reputation as being a man who was likely to execute his threats, or otherwise, becomes a legitimate subject of investigation. The court erred in this matter. This character of testimony has always been held to be legitimate and proper. If the character of the deceased is such that he would likely execute a threat he had made, it becomes legitimate for the accused to show this by legitimate testimony, and, on the other hand, the state may prove good character of the deceased upon the theory that, while he may have made the threats, still he was of that character and standing that would not render it probable that he would execute the threats. However, these matters are provided by statute, and the defendant was entitled to have the witness state to the jury whether or not deceased was a man who would likely execute a threat when he made it. For this reason the judgment should be reversed.

[3] The state met the defendant's application for a new trial with the affidavit of the absent witness mentioned in the application for continuance. In part, this affidavit would contradict the motion for continuance, but would sustain it with reference to the threat made the day prior to the homicide. This was entertained by the court, and evidently considered in making up his judgment overruling the motion for a new trial. The affidavit shows to have been taken before counsel for the state. This counsel swears the witness who made the affidavit. Under the authorities found in our reports, this affidavit should not have been considered, and

the court was in error in considering it under the circumstances.

For the reasons indicated, the judgment is reversed, and the cause remanded.

INGRAM v. STATE. (No. 3758.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915. On Motion for Rehearing, Jan. 19, 1916.)

1. CRIMINAL LAW §510½ — TESTIMONY OF ACCOMPLICE—CORROBORATING EVIDENCE.

In a prosecution for murder, where the state, knowing that the testimony of the widow of the deceased would show her to be an accomplice and that she would testify to adulterous relations between herself and the defendant, and relied thereon to show defendant's motive to kill deceased, evidence that defendant was seen at or near her house frequently and that he telephoned her frequently from the sheriff's office, put in before defendant himself testified to the relations and telephone talks, was admissible to corroborate the widow's testimony as to their relations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1136; Dec. Dig. § 510½.]

2. CRIMINAL LAW §1169—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in the admission of such testimony would not be reversible error after defendant himself testified to his relations with the deceased's wife and his frequent telephone talks with her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 8083, 8130, 8137-8143; Dec. Dig. § 1169.]

3. WITNESSES §321—IMPEACHMENT OF OWN WITNESS—PREDICATE—SURPRISE.

Where defendant called the deceased's son as a witness, and was immediately informed by the district attorney that he could not claim surprise, because the witness had testified at the inquest that he did not make the statements which it was anticipated defendant would try to show, and was tendered the evidence taken at the inquest, and the witness testified that he did not know whose pistol had killed his father, that he did not say that his father had shot himself with his mother's pistol, and the state did not cross-examine the witness further than to prove his age, etc., defendant could not lay predicate to impeach him by testimony of other witnesses as to whether witness had told them that his father had shot himself with his mother's pistol, so as to secure the admission of testimony otherwise inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. § 321.]

4. WITNESSES §393—IMPEACHMENT—SURPRISE.

In such trial, where defendant was surprised at the testimony of a witness injurious to his cause, he might show prior statements of the witness made before the grand jury different from those testified to at the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.]

5. HOMICIDE §166—EVIDENCE—ACCUSATION.

Where the state proved by the sister of the deceased's widow that about two weeks after the murder defendant came to her and told her that the father of deceased was accusing the widow of having killed deceased, and that defendant did not think she had done so, testimony for defendant that witness told defendant that he had heard it rumored that the widow of deceased had been accused, without showing that he had heard the father of deceased say so or that witness so

toled defendant, was properly excluded, as furnishing no basis for the statement by defendant to the state's witness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.]

6. WITNESSES § 318—CROSS-EXAMINATION—CORROBORATION.

In a trial for murder, where defendant failed to show by the son of the deceased that his father had shot himself with his mother's pistol, and called a witness contradicting the son's testimony, and the weight of the testimony of such witness was affected by the state's cross-examination though he was not impeached by the state, defendant could not introduce testimony to support him that the witness resided in and was well known in the county.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1064-1086; Dec. Dig. § 318.]

7. WITNESSES § 209—EXAMINATION.

Where defendant, on his direct examination, testified that he was an Odd Fellow, it was permissible for the state to ask him if he said he was an Odd Fellow and to elicit a reply that he had been, but improper to ask him when he had been expelled from the Odd Fellows.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.]

8. CRIMINAL LAW § 1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Such error was harmless, where the court promptly sustained objection to the state's question as to when defendant had been expelled, and instructed the jury not to consider the answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 3088, 3130, 3137-3143; Dec. Dig. § 1169.]

9. HOMICIDE § 166—EVIDENCE—RELATION OF PARTIES.

Where the state relied upon the adultery of the wife of the deceased and defendant to show motive, evidence that defendant's witness had stated to another witness that he had shadowed defendant and saw him give money to her was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.]

10. CRIMINAL LAW § 724—TRIAL—EVIDENCE—ARGUMENT.

In a trial for murder, where defendant admitted having gone into the home of the deceased and broken it up, and where it appeared that deceased had left four children, comment of defendant's counsel on the widow of deceased, whom he said the evidence showed to be a wayward and wicked woman, peddling her charms from San Angelo to Cameron, that she was a self-confessed adulteress and perjurer, and the prosecutor's statement that the record showed that a home had been broken up and four children disgraced, that defendant was the guilty party, and sat before the jury with unmitigated brazenry, and the statement of the state's counsel, in reply to defendant's objections, as to why he should object when he also had denounced the widow as unworthy of belief, were all legitimate arguments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. § 724.]

11. CRIMINAL LAW § 730—TRIAL—ARGUMENT.

The statement of the district attorney in his closing address as to the attitude of the widow of deceased in the position of an accomplice, when promised immunity, that she then asked if they wanted her to tell the whole thing, which, on interruption of the court, was withdrawn, followed by an instruction not to consider the remarks, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.]

12. CRIMINAL LAW § 1124—APPEAL—PRESENTATION OF GROUNDS—TIME.

Where the term of court at which defendant was convicted adjourned, and the evidence heard on the motion for a new trial on the ground of newly discovered evidence was not filed in the trial court until 7 weeks thereafter, such ground would not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.]

13. CRIMINAL LAW § 866—TRIAL—VERDICT BY LOT.

In a trial for murder, where it appeared that the last ballot on one day stood 10 for conviction and 2 for acquittal, that it was agreed that each juror would write the punishment he would assess, that 10 wrote the punishment they would assess and that 2 wrote nothing, that the time was added and divided into 12, resulting from 62 to 63 years, and the punishment was afterwards fixed by agreement of all the jurors at 60 years, the verdict was not invalid as a verdict by lot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.]

14. HOMICIDE § 234—WEIGHT AND SUFFICIENCY OF EVIDENCE—CORPUS DELICTI.

In a trial for murder, it was necessary for the state to prove that deceased was unlawfully killed, and that, if killed, that defendant had killed him or was a party to the crime, which requisites might be shown by circumstantial evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.]

15. CRIMINAL LAW § 510—ACCOMPLICE TESTIMONY—CORPUS DELICTI.

The state need not show that deceased was unlawfully killed, independently of accomplice testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.]

16. CRIMINAL LAW § 510—ACCOMPLICE TESTIMONY—CORROBORATION.

The testimony of an accomplice alone cannot establish the fact of an unlawful killing or that defendant was the guilty party, but must be corroborated by other facts and circumstances tending to show such facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.]

17. CRIMINAL LAW § 535—CORPUS DELICTI—CONFESSIONS.

The fact that deceased was unlawfully killed and the further fact of defendant's connection with the crime may be shown by confessions, in connection with the other facts and circumstances in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.]

18. HOMICIDE § 228—SUFFICIENCY OF EVIDENCE—MURDER.

Where the state relied upon the adultery of the wife of the deceased and defendant as a motive, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471-476; Dec. Dig. § 228.]

On Motion for Rehearing.

19. CRIMINAL LAW § 695—APPEAL—EXCLUSION OF EVIDENCE.

Where evidence for defendant to meet and explain evidence offered by the state was inadmissible on any phase of the case, it was immaterial as to what objection to it was made, or

as to what reason the court gave for excluding it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. ¶ 695.]

20. WITNESSES ¶323 — IMPEACHING OWN WITNESS—SURPRISE.

Where a witness for the state failed to testify to material facts as he testified before the grand jury, but testified adversely to the state, his testimony before the grand jury is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1096; Dec. Dig. ¶323.]

21. CRIMINAL LAW ¶828 — TRIAL — ARGUMENT—INSTRUCTION.

Where defendant in a criminal trial did not think the court's instruction given on sustaining his objection to the prosecutor's argument was sufficient to remove its harmful effect, but did not request further instruction in writing, no error was presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. ¶828.]

22. HOMICIDE ¶166—EVIDENCE—MOTIVE.

Where the state relied upon the adultery of defendant and the wife of deceased as a motive, testimony of the sheriff as to defendant's frequent use of his telephone in conversations with her and that he objected to such frequent use, given before defendant himself testified to his adultery with her, and even if defendant did not know that the sheriff objected to his use of the telephone, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. ¶166.]

23. CRIMINAL LAW ¶511—EVIDENCE—ACCOMPLICE—CORROBORATION.

Under Vernon's Ann. Crim. Proc. 1916, art. 801, providing that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence connecting the defendant with the offense committed, corroborative evidence is sufficient if it connects defendant with the crime, though it be not sufficient to convict and does not corroborate in detail, and relates to material matter and tends directly and immediately, and not remotely, to connect defendant with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. ¶511.]

24. CRIMINAL LAW ¶511 — CORROBORATION OF ACCOMPLICE—SUFFICIENCY.

Where the state relied on the adultery between defendant and the wife of the deceased as a motive, and where her testimony placed her in the position of an accomplice, evidence held to sufficiently corroborate her in material matters tending directly and immediately to connect defendant with the commission of the offense, independent of and in addition to her testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. ¶511.]

Appeal from District Court, Milam County; J. C. Scott, Judge.

A. I. Ingram was convicted of murder, and he appeals. Affirmed.

Lyles & Lyles and Henderson, Kidd & Gillis, all of Cameron, for appellant. Ramsey, Black & Ramsey, of Austin, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder and his punishment assessed at 60 years' confinement in the state penitentiary.

[1, 2] In this case the state was seeking to corroborate the testimony of Mrs. L. W. Ward, the wife of deceased, the state knowing her testimony would place her in a position to be an accomplice to the crime, and knew she would testify to adulterous relations existing between herself and appellant, the state relying on this to show a motive for appellant to kill deceased, and to corroborate her the state was adducing testimony that he was seen at or near her house frequently, and that he telephoned Mrs. Ward frequently. While making this proof the state called Charlie Smith as a witness, and proved by him that appellant frequently used the telephone in the sheriff's office and talked a great length of time. That he, Smith, had ascertained Mrs. Ward's phone number was 409, and when appellant was talking over the sheriff's phone he went to another phone and called for 409, and found that it was busy. The state also proved that appellant used this phone so frequently and for so great a length of time, the sheriff had to object to appellant using the phone. At the time this testimony was offered, appellant had not taken the stand and admitted the adulterous relations, and had not admitted he talked several times a day—almost every day—with Mrs. Ward over the telephone. As said by this court in the Noftsinger Case, 7 Tex. App. 307, in a case depending on circumstantial evidence the mind seeks to explore every source from which any light, however feeble, may be derived. In this case, not knowing that appellant would testify, and he could not be compelled to do so, the state knew it must rely on circumstantial evidence to corroborate the testimony of Mrs. Ward as to adulterous relations, and the court did not err in admitting the testimony. If this were not true, after appellant himself testified to the adulterous relations and that he frequently talked to Mrs. Ward over the telephone—almost every day—the bills would not present error.

[3] In the next bill it is shown that defendant called Leonard Ward, a son of deceased, as a witness, and the record discloses that:

"When this witness was put on the stand, and before he was asked any questions, the jury having been retired, the district attorney made the following statement:

"We anticipate that they put this witness on for the purpose of laying a predicate for impeachment of him. This is the young man, son of the deceased, and we want to state to them, so that they cannot claim surprise, that this young man testified at the inquest, which was held the night the body left here, that he did not make these statements and that he did not know anything about the pistol, and we want to apprise them of the fact, so that they cannot claim surprise, and we tender them the evidence which they had at the habeas corpus, and they had this sworn testimony of the inquest, and they cannot claim surprise when they ask him these questions:

"My name is Leonard Ward. I live at Detroit, Tex. I used to live here in Cameron. I

will be 14 years old in August. I am the son of L. W. Ward, Jr., and his wife, Vasti Ward. I was living in Cameron at the time of the death of my father. I was at the house the night that he died. I was asleep at the time, but I got up. I was in a different room. The pistol shot woke me up, and I came into the room. There was a light in the room when I came in. My mother had lighted the lamp. When I went in the room, I saw papa laying on the bed. I saw my mother in there. There was nobody else. My mother said he had shot himself. I never saw the pistol in my father's hand until after Dr. Denson came. It was only a short while before he got there. When he came he found the pistol in his hand. He took it off and laid it on the bed. I broke it open and the cartridges fell out on the bed. There were five of the cartridges. It was not a six-shooter. It was size 38, and shot five cartridges. I think I would know the pistol if I saw it. This is it (38 S. & W.). I do not know whose pistol it was. I never did see it until that night. I don't know whether it was my mother's pistol or not. I never saw it until that night. I don't know whether it was her pistol and whether she kept it in her trunk or not. I never saw it until that night. I did not trim one of the cartridges that went into the pistol. I never did see it. Mr. Storey lives just across the fence from us. We lived on the same block, just a fence between us. It is about 50 yards. Dr. Denson got there in just a few minutes. Mr. Storey got there a little while after Dr. John got there. A minute or two after Dr. John got there he sent me after Mr. Storey. I called for Mr. Storey after I got to his house. I told him papa had shot himself. I did not show him the bullets when I went in there. I did not have them there. I did not show Mr. Storey the bullets, and tell him that I had trimmed one of them, and that was the one that my father was killed with. I did not break the pistol until after he came. I did not say I trimmed the cartridges, because I never did see any 38 cartridges there. I did not tell him that I had trimmed one of the cartridges, and that that was the bullet that killed my father. I did not tell him that at that time or at any other time. I went into the house at Mr. Storey's. He got up and lighted a fire and let me in. I did not tell him that my father had shot himself with my mother's pistol. I did not say whose it was. I did not state that he had shot himself with my mother's pistol that she kept in her trunk. I did not say where my father got the pistol because I did not know whose it was. I did not tell him that I did not know how my father got the pistol out of the trunk. I did not tell him that the cartridge I trimmed was the one that killed my father. Mr. Storey went back to our house with me. After we got back to the house, Mr. Quinn Walker came over there. I don't know how long before he came. He was a pretty close neighbor, just the other side of Mr. Storey's. He got there five or ten minutes after Mr. Storey came."

The state did not cross-examine the witness further than to prove by him that he was 14 years old, and had two sisters and a brother. After the witness had testified as above at the instance of defendant, he sought to lay predicates to impeach the witness by asking him if he had not told Mr. Walker and others that his father had shot himself with his mother's pistol. The court sustained the objection of the state, and would not allow appellant to lay predicates to impeach the witness, and sustained the objections of the state when appellant offered witnesses to impeach the witness as to the question above

propounded. In this the court did not err, as it is made to appear that the witness had testified at the inquest and by his testimony it was made plain that defendant could not expect the witness to testify to any such state of facts as he had testified otherwise at the inquest, and the inquest papers had been tendered appellant's counsel before he propounded any questions to the witness, and the witness had been called to lay predicates to secure the admission of testimony otherwise inadmissible, and which could be admitted only to impeach him. One cannot himself call a witness knowing or being informed that he would not so testify and lay predicates to impeach his own witness and thus secure the admission of testimony otherwise inadmissible. Under the common law one was not permitted to impeach his own witness, as he was supposed to vouch for the truthfulness of a witness called by him, but our statute has slightly modified that rule. Article 815, C. C. P. Appellant cannot claim that he was surprised at the testimony of the witness—that he thought he could prove by the witness that the pistol found by deceased was his mother's pistol. If the witness had so told the witnesses named by appellant he knew or could have known by reading the testimony when tendered him, that the witness had sworn at the coroner's inquest that it was not his mother's nor his father's pistol. So it is manifest that the whole purpose of appellant in placing the witness on the stand was to lay a predicate upon which he could impeach the witness, and thus get testimony admitted which was otherwise inadmissible. The rule is clearly stated in Branch's Criminal Law, § 866, when one can and when one cannot impeach his own witness. *Scott v. State*, 20 S. W. 549, is particularly in point.

[4] The authorities cited by appellant correctly hold, under our statute, when one is surprised at the testimony of the witness, and the witness testifies to facts injurious to his cause, he then may show prior statements different from those to which he testifies on the trial, and for this reason there was no error in admitting the statement Cozler Walker made before the grand jury. Had appellant not been informed prior to the time he called the witness, Leonard Ward, and propounded to him the questions he did, that the witness would not so testify, and had testified to a different state of facts at the coroner's inquest, he probably could claim that he was surprised at the testimony of the witness. But the bill and record discloses that he was given full information that the witness would not so testify; therefore there was no error in the ruling of the court.

[5] The deceased was found in bed in a dying condition about 1 o'clock on the night of January 23d, and subsequently his father shipped the body to Detroit for burial. Mrs. Ward, wife of deceased, had a sister living

at Temple, Miss Minnie Mayse, and on making its case the state proved by Miss Mayse that on February 5th appellant came to Temple and told her the father of deceased had come back to Cameron, and was having the household goods shipped to Detroit, and that Mr. Ward, Sr., was blaming Mrs. Ward, Jr. (the wife of deceased) with the killing of the deceased, and that he, appellant, did not think Mrs. Ward did the killing. After this appellant placed Will Yates on the stand and offered to and could have proven by the witness that he told appellant that he had heard it rumored on the streets of Cameron that the wife of deceased was accused and suspected of murdering her husband. The witness would not have stated that he had heard Mr. Ward say so, nor that he so told appellant, nor would he have stated that he had heard a rumor that Mr. Ward accused his daughter-in-law of murder, nor did he so tell appellant. So the statement made by the accused to Miss Mayse, and the statement he could have proven was made to him by Will Yates were wholly different statements, and the court did not err in his ruling. If appellant could have proven by any witness that he had been told Mr. Ward was accusing his daughter-in-law of having committed the crime, such testimony should have been admitted, and this is all the authorities cited by appellant hold. But as the testimony of Will Yates would furnish no basis for the statement made by appellant to Miss Mayse, the ruling of the court presents no error.

[6] After defendant had called Leonard Ward as a witness, and said witness had failed to testify to facts defendant desired, he, defendant, called Leonard Storey to testify as to what Leonard Ward had told him immediately after his father, L. W. Ward, was shot. And Leonard Storey testified that he was told by Leonard Ward that his father had killed himself with his mother's pistol, that he had cut the nose off of one of the bullets in the pistol, and this was the one that had killed his father. The state rigidly cross-examined the witness Leonard Storey and asked him if he had testified to such facts when before the grand jury, and the witness answered that no question had been propounded to him calling for such information. After this cross-examination the state offered no proof as to what his testimony before the grand jury was, but stopped with the cross-examination of the witness, and in deference to appellant's contention it may be stated the cross-examination was such as would probably affect the weight the jury would give to the testimony of Leonard Storey on direct examination; but this will not authorize the introduction of testimony in support of the witness where he resided in and was well known in the county in which the trial was had. Had the state offered any proof to contradict or impeach the testimony of the witness, the testimony of Allen Hooks and others would have been admissible as

to what Storey had told them; but as the state contented itself with a rigid cross-examination and stopped there, the witness Storey could not be supported by showing that he had made similar statements to others as to the same facts he testified to on the trial. In *McCue v. State*, 170 S. W. 289 et seq., we discussed the question of when a witness can and cannot be supported, citing a great many authorities, and there held that a witness could not be supported when the cross-examination went only to test the truthfulness of the testimony, and he was attacked in no other way. Cross-examination is intended to test the truthfulness of the evidence given on direct examination, and to say, because a witness had been cross-examined in a manner to weaken the weight of his testimony, he could be supported, would render a trial endless, and inject into every case testimony supporting each and every witness and cause a jury to lose sight of the main issue on trial. The same rule applies as to the effort to support the testimony of Mrs. Leonard Storey. The state introduced no testimony to impeach her.

[7, 8] The defendant on his direct examination stated he was an "Odd Fellow." On cross-examination the state cross-examined him as to whether or not he was an Odd Fellow, and he answered that he had been. The state then asked him, "When were you expelled?" and appellant answered, before objection could be made, "Since this has been against me." As the court promptly sustained the objection when made, and the question of whether or not he was a member of the Odd Fellows' lodge had been injected into the case on his direct examination by appellant, the bill presents no error. Had appellant not injected the matter into the case, a different rule would prevail, but he having stated on direct examination he was an "Odd Fellow," it was permissible for the state to ask him if he said he was an Odd Fellow, and to elicit a reply that he had been. It was improper to ask, "When were you expelled from Odd Fellowship?" But as the court promptly sustained the objection to such question, and at once instructed the jury not to consider the answer, the bill presents no reversible error.

[9] Wyatt Miller testified to material facts for defendant, and on cross-examination he was asked if he had not shadowed appellant and saw him throw some money to Mrs. Ward. He denied having done so, when he was asked if he had so told V. P. Woolley, and he said he had not. V. P. Woolley was permitted to testify that Wyatt Miller had so told him. Appellant contends this was permitting a witness to be impeached upon an immaterial issue. If it was upon an immaterial matter, his contention would be sound; but, as before stated, the relations existing between appellant and Mrs. Ward was a very material issue in this case.

[10] In a bill it is shown that Hon. J. M.

Ralston, in presenting the case to the jury, said:

"The records show a home in Cameron has been debauched and four little children disgraced and their lives ruined. Who is the guilty party? The evidence shows he sits before this jury with unmitigated brazenry, not paralleled in the annals of crime."

The court sustained an objection to this argument, and instructed the jury not to consider it. If any error was committed it was in sustaining the objection to the argument, because the record disclosed, and appellant admitted, he had gone into the home of L. W. Ward, Jr., and engaged in acts of sexual intercourse with his wife. The evidence further showed that they had four children, and necessarily such conduct reflected on the children. It is true that under this record appellant is not the only one subject to censure, Mrs. Ward's conduct being equally censurable, yet we do not think the above remarks wholly unwarranted by the testimony. The bill further shows that counsel for appellant, in presenting his defense, had been severe in their comments on Mrs. Ward, and said the evidence showed her to be a wayward and wicked woman peddling her charms from San Angelo to Cameron—that she was a self-confessed adulteress and perjurer. Such remarks were not wholly unwarranted by the record, and appellant's counsel was authorized to make such remarks, having some foundation in the testimony, and other remarks of similar import if he deemed it advisable; but when state's counsel in reply to such remarks asked counsel for the defendant, "Why should you object, when you and your co-counsel stood before this jury and denounced this little woman as a strumpet, peddling her charms, and unworthy of belief?" This comment was also objected to. We are inclined to think the argument of both counsel for the state and appellant were legitimate under the record before us.

[11] In another bill it is contended that the district attorney, in his closing address, said: "I want to tell you Mrs. Ward's attitude and what she did when she was promised immunity by your good county attorney and myself. When she went into the county attorney's office she said—." At this juncture the remarks were objected to, and while the objection was being made, the district attorney continued, "She said, 'Do you want me to tell the whole thing?' If you could have seen her then." Here counsel for the state was told by the court to cease, and the court instructed the jury not to consider the remarks, and the district attorney said: "If you object I will withdraw it." The court said, "I have sustained the objection, and I now admonish the jury not to consider the remarks." Under such circumstances those bills, complaining of the remarks of counsel, and none of them, present error.

We have carefully read the court's charge and appellant's exceptions thereto, and none of the exceptions present error. The court's charge on accomplice testimony, on circumstantial evidence, and on alibi is in language frequently approved by this court. The charge of the court is an able and full presentation of the law of the case, under the testimony adduced; therefore it was unnecessary to give any of the special charges requested.

[12] The alleged newly discovered testimony, in the light of the affidavit of C. H. Ruby, filed in reply to that ground of the motion, presents no reason why the court should have granted a new trial. Again, those grounds in the motion alleging newly discovered testimony and that the verdict was arrived at by lot are presented in a way we are not authorized to review them. The term of court at which appellant was tried adjourned June 4, 1915. The evidence heard on these grounds of the motion for a new trial was not filed in the trial court until the 27th day of August, 1915, seven weeks after the adjournment of court for the term. In *Black v. State*, 41 Tex. Cr. R. 186, 58 S. W. 116, this court held:

"It is evident to our minds that these statutes refer exclusively to the statement of facts adduced on the trial of the case itself, and have no application to issues of fact formed on grounds set up in the motion for new trial. Except where the statute makes provision for the filing of papers, which shall become a part of a record on appeal, after the adjournment of court, these papers must all be filed during the term. Our statute has not made provision for the filing of evidence, either 'affidavits or otherwise,' which is adduced for the purpose of sustaining grounds of the motion for new trial, and we are not cited to any cases which so hold. Nearly every ground set out in the Code of Criminal Procedure which forms the basis of a motion for new trial involves matters of fact, and is the subject of contest. While this is true, the statute has not gone further, and provided, as in statement of facts, that this evidence can be filed after the adjournment of court. Nor could a statement of the evidence adduced upon the trial be so filed, except for the warrant of the statute above mentioned. It seems that a contest may be had on the motion for new trial as to the diligence of a defendant in seeking an application for continuance. This may be determined by evidence, and this may be adduced when the action of the court refusing the continuance is called in question by the motion for new trial. But it has been universally held, so far as we are aware, that the action of a court overruling an application for continuance must be perpetuated by bill of exceptions. We take it the same rule applies when the misconduct of the jury is alleged, or when the allegation is that the verdict has been decided by lot, or when a juror has received a bribe to convict, or that he has been guilty of any other corrupt conduct, or that any material witness for the defendant has been, by force, threats, or fraud, prevented from attending court, or where written evidence tending to establish the innocence of the defendant has been intentionally destroyed or removed so that it could not be produced upon the trial, and where newly discovered testimony is alleged. But these matters must be made part of the record during the term of court. There is no statute authorizing such matters to be perpetuated in papers filed subsequent to the term."

This rule has been adhered to since the rendition of that opinion, and we copy in full again this ruling that the profession may understand and preserve such matters in a bill of exceptions filed in term time, if they desire to have this court review the ruling of the trial court on such matters. If such rule is deemed inadvisable, the Legislature should be requested to change the law in respect to such bills, as it has in other instances. We will state, however, that we have read the affidavits of Messrs. Russell and Harrison attached to the motion for a new trial, and also the state's contest, including the affidavits of eleven of the jurors, including Messrs. Russell and Harrison; also the evidence heard on the trial, and if we were authorized to consider all these matters we would not be authorized to hold that the court erred.

[13] It may be said that affidavits and evidence would disclose that the last ballot taken before adjourning for the night stood 10 for conviction, and 2 for acquittal. That when the jury convened next morning they discussed the case for some time, and it was agreed that each juror would write the punishment that should be assessed against appellant. That two of the jurors—Messrs. Russell and Harrison—wrote nothing, and the others wrote the term of years they thought should be assessed. This was added up and divided by 12, and the result was between 62 and 63 years. After this was done, it was discussed, and the punishment was not fixed at this result, but by agreement of all the punishment was assessed at a different number of years, 60 years confinement in the penitentiary. While our decisions hold that an agreement beforehand to be bound by the result obtained in adding up the different number of years, is a verdict by lot, yet many courts hold otherwise, where all jurors agree to it after the result of addition and division has been ascertained. We would not be understood as varying from the rule so long adhered to in this court, but the decisions of this court also have held always that where the result is obtained, and this result is not adhered to, and a different punishment assessed, to which all agree, it is not a verdict by lot. So if we could consider the statement of facts on this issue, the trial court did not err in overruling the motion for a new trial on this ground, but followed the rule adhered to in this court. *Pruitt v. State*, 30 Tex. App. 159, 16 S. W. 773; *McAnally v. State*, 57 S. W. 833.

[14-16] This brings us to a consideration of the only remaining question, and to our minds the most serious question in the case; that is, the contention that the corpus delicti is not proven in accordance with the rules of law. It is true it was necessary for the state to prove that deceased was unlawfully killed, and, second, if murdered, that appellant fired the fatal shot, or was a party to the crime. Appellant's contention is, however, that the

state must show, independent of the testimony of the accomplice, that deceased was unlawfully killed, is not supported by the authorities. The testimony of the accomplice alone is not sufficient to establish that, or any other fact, is conceded, but that the testimony of the accomplice must be wholly ignored, is not sound. If an unlawful killing must be shown by evidence other than that of the accomplice, the testimony of an accomplice would have no place in the record. We can and should consider the testimony in proving that or any other fact, but such testimony alone cannot establish that or any other fact; there must be other facts and circumstances in the record tending to show that fact, corroborative of the accomplice testimony, as well as corroborative of the fact that appellant was the guilty party after a crime has been shown to have been committed.

[17] In the recent case of *Kennedy v. State*, 180 S. W. 238 (not yet officially reported), we had occasion to investigate this question, and there we quoted from the opinion of Judge Hurt in *Kugadt v. State*, 38 Tex. Cr. R. 694, 44 S. W. 989, wherein it was said:

"In other words, in the establishment of the corpus delicti the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence."

This rule has been adhered to in this court in a number of cases since then. *Little v. State*, 39 Tex. Cr. R. 654, 47 S. W. 987; *Mathews v. State*, 39 Tex. Cr. R. 555, 47 S. W. 647, 48 S. W. 189; *Tidwell v. State*, 40 Tex. Cr. R. 41, 47 S. W. 466, 48 S. W. 184; *Nicks v. State*, 40 Tex. Cr. R. 7, 48 S. W. 186; *Gallegos v. State*, 49 Tex. Cr. R. 116, 90 S. W. 492; *Fredrickson v. State*, 44 Tex. Cr. R. 291, 70 S. W. 754; *Sowles v. State*, 52 Tex. Cr. R. 18, 105 S. W. 178. By reading those cases and the authorities therein cited it is shown that the fact that deceased was unlawfully killed may be shown by circumstantial evidence, and the further fact, defendant's connection with the crime, may also be so shown.

[18] It is further held that a confession, or the testimony of an accomplice, while insufficient to establish that fact alone, will be considered in establishing both facts, and if the evidence, in addition to the accomplice testimony, tends to show that deceased was unlawfully killed and also tends to show appellant's guilt of the crime, the evidence is sufficient to sustain the conviction. And this need not be shown by direct testimony, but may be shown by circumstantial evidence. It would be remarkable if direct or positive testimony could be obtained to show that a murder had been committed when the killing takes place in the dead hours of night—in this instance about 1 o'clock at night, after deceased had undressed and gone to bed. It is unquestioned he was killed by a pistol shot, the ball entering his head in front about three-fourths of an inch from the hair line.

There is some slight evidence raising the issue that deceased's wife might have killed him, and some that it might be a case of suicide. The court submitted both these issues to the jury, and they found that appellant fired the shot that killed deceased while he was in bed. Mrs. Ward testified that appellant tried to get her to kill her husband, but she refused to do so, but that she did agree to appellant killing him; that during the day appellant had told her he would kill him that night, and that she lay awake expecting appellant; that she finally went to sleep and was awakened by a noise in the room; that then she heard a pistol fire, after which she got up and lit a lamp, and deceased was lying on the bed shot in the head, with a pistol laying in his left hand, but not gripped. That she never saw the pistol before; that it did not belong to deceased. Appellant insists that this does not exclude the idea that deceased may not have shot himself, as no one saw the shot fired, nor saw appellant at this house at this time. But the conversation she says she had with him the next day could be legitimately construed, if true, into an admission that he had caused the death. But we concede that her testimony alone would be insufficient to show that appellant was guilty of the crime, unless there are other facts and circumstances in evidence tending to connect appellant with the crime. It would be useless to recite the evidence showing the adulterous relations existing between appellant and deceased's wife, as he himself testified to such relations, and testified that they existed from the latter part of 1913 until the date of deceased's death, January 23, 1915. He also admits that in July, 1914, deceased caught him and Mrs. Ward in a compromising position at night, and appellant also admits that after that time it was not so easy for him to get access to Mrs. Ward at night; that "before he caught me her husband was sleeping across the hall and I would slip up to the window and talk to her and would have intercourse with her while he was in the other room; that afterwards the husband moved his bed into his wife's room." With this testimony of appellant in the record, a key is furnished with which to read the letter written by appellant to Mrs. Ward, which he admits writing, whether written in October, as he contends, or in December, as Mrs. Ward testifies. The letter reads:

"Dear Wife I going to write you a few lines if my finger is hurting me I do wish I could be with you to night I would try to make you enjoy yourself the best I could I do believe you love me sweet I love you better than anything are anybody in the world Dear if you make up your mind and do what we were talking about I would be with you a hole lots of times but if you don't think it best why all right.

"I did not sleepe a bit good last night but my finger did not hurt like I thought it would I went by about twenty minutes to ten Mama was there last night and we sit up and talke till eleven thirty and then went to bed sweet

heart I wish I could see you when I wanted to and be with you all the so I would not have to write that is to cold and far off for me Honey do you want to be tied up like this all the time are not Dear one I know you don't Honey if you was mine I could be with you all the time and feel good Dear do you want me with you are had you rather do this way sweet you are the dearest and sweetest little woman in the wide world but know what we are doing now is dangers to all off us so you decide and make up your mind what to do Dear I wish I could see you now my finger is pretty sore but I am big and can stand a hole lot of punishment I do not like to punish by having to stay away from you for that is the worst one I have but dear it is not going to be that way all the time is it sweet I heard you say no where are you anyway I am looking for you sweet sweet you are so dear to me I got up at five this morning so I could write you but every one comes in stops me so I will close hopping to be with you soon for all night and day to Dear I will if I ever get that chance so good by to the sweetest woman in the world."

By all the testimony it is shown that this letter was written after Mr. Ward had caught appellant and his wife in the compromising position, and after he had moved his bed into his wife's room. When he writes:

"Dear if you make up your mind and do what we were talking about I would be with you a hole lots of times"

—it is made plain what he means when she testifies that they had been discussing killing Mr. Ward, and especially is this true when we take the sentence:

"Dear do you want me with you are had you rather do this way * * * but know what we are doing now is dangers to all off us so you decide and make up your mind what to do * * * I do not like to punish by having to stay away from you * * * but dear it is not going to be that way all the time," etc.

When we consider, according to appellant's own testimony, that this letter was written by him after the husband had moved his bed into his wife's room, and his easy access at night stopped, we can readily understand what was meant, and a jury would be authorized to draw deductions that he meant that deceased was not going to be in the way all the time, and this letter corroborates Mrs. Ward's testimony in many material particulars, and in and of itself alone would have a tendency to show that appellant took the life of deceased that deceased might no longer be an impediment to his being with Mrs. Ward in the nighttime. Then again the pistol found by deceased, with which the fatal wound was inflicted, Mrs. Ward testifies her husband owned no such pistol. In this she was corroborated by her son Leonard Ward, who was called to the witness stand by appellant, and who testified that he had never seen the pistol before. It was a .38 caliber Smith & Wesson pistol. Leonard says he never saw the pistol until that night. This would support a finding that it was not a case of suicide. On the question of whose pistol it was, the pistol found by the dead man was introduced in evidence, and Milton Norton testified that he formerly worked for appellant in his meat market, and that he

saw a pistol in the market in a pigeon hole under the counter and also in the desk; that he saw a small pistol there; that he never saw a pistol there like this (a 45 caliber pistol). "This is the pistol I saw there—the 38 caliber pistol found by deceased." Cozler Walker also testified on direct examination that he worked for appellant, and said:

"There was a pistol there in the market. It was kept under the cash register. I cannot say that was the pistol [referring to the 38 caliber Smith & Wesson found by deceased]. It is one like that—might have been a little brighter. About the same size."

Of course, the testimony of these witnesses was weakened on cross-examination, and appellant introduced testimony that the pistol seen in the market belonged to George Bolinger, and George Bolinger so testified on the trial. However, the state called the county attorney and three members of the grand jury, and they all testified, when George Bolinger was before the grand jury, Bolinger swore he owned no pistol, and did not have one at the market. And the testimony further shows that if Bolinger had a pistol at the market, it was a 45 caliber pistol, and Milton Norton is positive that the pistol he saw at the market was not that large a pistol; was a 38 caliber pistol. This testimony, if believed, would tend strongly to connect the defendant with the commission of the offense. It would show deceased in possession of no such pistol, and appellant in possession of that character of pistol, with a motive for desiring that deceased be gotten out of his way where he could have easy access to his wife at night. The testimony further shows, exclusive of the testimony of Mrs. Ward, that when the body was shipped and she left to accompany it, she turned the keys of the house over to appellant; that upon getting to Detroit she wrote appellant, and in replying to the letter he sent her the newspaper clippings commenting on the death of her husband in which it was called a suicide, and said in the letter, "All is well at this time—I am sending you the clippings from the paper." These and other facts and circumstances in the case tend to show that the deceased was murdered in his bed at night, and tend to connect appellant with the commission of the offense; and when we also take into consideration the testimony of Mrs. Ward, the accomplice, it would authorize a jury to find that the testimony as a whole was of a conclusive nature, producing, in effect, a reasonable and moral certainty that the accused and no other person killed Mr. Ward.

The judgment is affirmed.

On Motion for Rehearing.

Appellant's able counsel have filed an exhaustive motion for a rehearing, and a learned argument thereon—the motion itself containing some 59 pages of typewritten matter, while the argument embraces some 13 pages

of printed matter. We have carefully and thoughtfully read the papers filed, and re-read the entire transcript, and we find all of appellant's contentions summarized in the concluding paragraphs, which read as follows:

"The opinion shows that, in disposing of this appeal, the court pointedly fails to follow and apply the holding of all former authorities in the following particulars, to wit:

"(1) Considering the proceedings relating to the erroneous exclusion of the testimony of the witness Will Yates, as actually set forth in the record, the court's disposition of the error shown ignores the text of section 947, 2 Wharton, Crim. Ev. (10th Ed.) pp. 1826, 1827, and overturns the holding in *Turner v. State*, 46 S. W. 830, and in other authorities cited in appellant's brief.

"(2) Considering the proceedings relating to the erroneous admission in evidence of the written statement of the witness Cozler Walker, as actually set forth in the record, the court's disposition of the error shown pointedly disregards the holding in *Knigh v. State*, 65 S. W. 88, and in other authorities cited in appellant's brief.

"(3) Considering the proceedings relating to the misconduct of the district attorney in demanding that appellant 'tell the jury when and why you were expelled from the Odd Fellows,' as actually set forth in the record, the court's disposition of the error shown either overlooks or disapproves the holding in *Tijerina v. State*, 45 Tex. Cr. R. 182, 74 S. W. 913, *Levinski v. Cooper*, 142 S. W. 961, and in other authorities cited in appellant's brief.

"(4) Considering the proceedings relating to the misconduct of the district attorney in his closing argument to the jury, as actually set forth in the record, the court's disposition of the errors shown is in total disregard of the holding in *Millner v. State*, 72 Tex. Cr. R. 45, 162 S. W. 355, and in other authorities cited in appellant's brief.

"(5) Considering the proceedings relating to the erroneous admission in evidence of the impeachment testimony of the witness Wooley, as actually set forth in the record, the court's disposition of the error shown is contrary to the holding in *Woodward v. State*, 50 Tex. Cr. R. 294, 97 S. W. 501, and in other authorities cited in appellant's brief.

"(6) The failure of the court to reverse the judgment because of the erroneous admission in evidence of the testimony of the sheriff, Allen Hooks, is contrary to the holding in *Gardner v. State*, 11 Tex. App. 265, and in other numerous authorities.

"The court's opinion, affirming the judgment, not only misinterprets, in vital particulars, certain proceedings contained in the record, and appears to be based upon a material misconstruction of the proceedings set forth and relied upon by appellant to show serious and reversible errors, but is so at variance with former holdings of this court and with other universally accepted authorities as to present not only confusion, but irreconcilable conflict of opinion on the questions involved.

"(1) The opinion holds, and in affirming the judgment applies the holding, that in testing the sufficiency of evidence relied upon to corroborate an accomplice, such evidence may be considered and interpreted by, and construed in the light of, the accomplice testimony—all former decisions holding that in making such test, the accomplice testimony must be eliminated. *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 920; *Hoyle v. State*, 4 Tex. App. 245; *Hanson v. State*, 27 Tex. App. 140, 11 S. W. 37; *Jones v. State*, 59 Tex. Cr. R. 559, 129 S. W. 1120, and numerous other authorities cited in appellant's brief.

"(2) The opinion, in holding that the evidence supports the judgment, holds that accomplice

testimony, if corroborated by other evidence, remotely tending to establish the essential facts at issue, warrants a judgment of conviction—all former decisions holding that to warrant a conviction on accomplice testimony, it must be corroborated by other evidence, which, of itself, tends directly and immediately to establish the essential facts at issue. *Clark v. State*, 30 Tex. App. 402, 17 S. W. 942; *McGowen v. State*, 51 Tex. Cr. R. 205, 100 S. W. 1157; *Vails v. State*, 59 Tex. Cr. R. 340, 128 S. W. 1119, and other authorities cited in appellant's brief.

"(3) The opinion holds in effect that motive on the part of the accused to commit the offense charged is sufficient corroboration of accomplice testimony to warrant a conviction—the earlier decisions expressly and pointedly holding that such motive is not the corroboration of accomplice testimony required by the statute. *Vails v. State*, 59 Tex. Cr. R. 340, 128 S. W. 1119.

"If the court has not misinterpreted certain proceedings contained in the record, and if the holdings in the opinion, which are in conflict with former decisions, are advised and not the result of oversight or misconstruction, then it is submitted that the opinion should make special mention of the former decisions with which it is in conflict, and should expressly overrule such decisions, or otherwise reconcile the conflict and dispel the confusion."

It is thus seen that appellant's counsel are insistent that the opinion in this case is in conflict with the former decisions of this court in several material particulars, and, if so, the opinion should not be adhered to, for it was not the intention of the court to overrule a single rule of law announced in the cases cited by appellant, but either the court or appellant is in error in the conclusion reached that the evidence in this case brings the errors complained of within the rules announced in those cases.

The first contention is that in holding that the trial court committed no error in excluding the testimony of Will Yates this opinion is in conflict with the rule of law announced in *Turner v. State*, 46 S. W. 830, and other cases cited by appellant, and section 947, 2 Wharton, Crim. Ev. *Turner's case*, supra, is in no way applicable to the facts in this case. In that case it was held that the appellant should have been permitted to testify that deceased told appellant he had whipped his daughter as having a bearing on the state of mind of the appellant on the issue of manslaughter; and that the daughter ought to have been permitted to testify that her father (deceased) had in fact whipped her for going with appellant. The evidence of Will Yates could not and would not tend to show why appellant killed deceased, if he did do so, nor his state of mind in so doing. In fact, what Will Yates would testify to occurred after the homicide, and could not and would not have any bearing on why appellant killed deceased, if he did so. The homicide in this case occurred in the dead hour of night, while Mr. Ward was asleep, if he did not commit suicide. In Wharton's Crim. Evidence, § 947, the only sentence that could have any bearing on this case is where it is said: "And a satisfactory explanation of suspicious circumstances always

operates in favor of the accused." This rule of law we do not question, but if necessary would reiterate, and so held in the recent case of *Ward v. State*, 180 S. W. 240, and if the testimony of Will Yates would explain why appellant visited Temple and told Miss Mayse that deceased's father was accusing her sister of murdering her husband, the evidence should have been admitted, and we were in error in holding otherwise. Miss Mayse testified that appellant came to her at Temple one or two weeks after the homicide, on Friday—she thought the 5th of February—and told her he wanted to see her privately, and told her that:

"Mr. Ward, Sr., had come to Cameron and was shipping her sister's things [Mrs. Ward, Jr., the wife of deceased] back home, and that he had been investigating the case and he understood was blaming her sister with the homicide, and that he did not think her sister did it, and he thought it was nothing but right to let us know that Mr. Ward, Sr., was trying to blame it on sister."

The state did introduce this testimony, as contended by appellant, as one of the circumstances tending to show appellant's guilt; that he made this trip to Temple, and made this statement to Miss Mayse immediately after the discovery of a letter written by him to Mrs. Ward, Jr., found under the carpet by Tom Jameson. The letter so found is copied in the original opinion. This letter was read by Mr. Jameson and Henry Ruby, and then delivered by them to Sheriff Allen Hooks. This letter, if anything, is apparently what must have caused the talk on the streets of Cameron about which Will Yates would have testified. This is the only conclusion that can be reached from the record before us. It is true Sheriff Hooks showed the letter to Mr. Ward, Sr., who was having the things moved, but there is nothing in the record to show that Mr. Ward made any remark to Sheriff Hooks, Messrs. Jameson and Ruby, or either of them, when he read the letter, and this letter would more clearly point to appellant as the guilty party than to Mrs. Ward, Jr., or any other person. It is perhaps the discovery of this letter that led to appellant's arrest, and in and of itself would be a reason why appellant would visit the sister of Mrs. Ward, Jr., in an effort to get Mrs. Ward away from the home of the father of the deceased where she then was staying, but it would furnish no explanation of this visit to Miss Mayse consistent with his innocence. The fact that shortly after the discovery of this letter appellant visited Miss Mayse and told her that Mr. Ward, Sr., was charging her sister with the murder of his son and thus get her away from Mr. Ward's home and influence, is a strong circumstance against appellant's innocence. Now, if Will Yates would have testified that he told appellant Mr. Ward was charging Mrs. Ward, Jr., with the crime, this would have a tendency to explain his visit, but the bill does not show that Yates

would have so testified. All the bill shows is that Yates would have testified:

"One morning the defendant Ingram was in my shop and I had a talk with him and said to him, 'Ab, it is rumored that some people think she killed that man and that he did not kill himself.' And he said, 'Surely not.' And knowing that he had something to do with the woman and as he was a friend to me, I said to him, 'Yes, and you had better lay low, for you were mixed up with the woman before this thing come up.'"

Does this testimony furnish any reason why appellant should have gone to Temple and told Miss Mayse that Mr. Ward was charging her sister with the crime? Certainly Yates would not have testified he so told appellant, or the bill would have so stated. There is nowhere in the record a suggestion that Mr. Ward, to any person in Cameron, charged his daughter-in-law, Mrs. Ward, Jr., with the crime, and it was an explanation that would not have explained why appellant went to Temple and told Miss Mayse that Mr. Ward was charging her sister with the crime. Mr. Ward's name was not mentioned by Yates, nor does any other person testify that Mr. Ward so stated to any person in Cameron. In fact the record is silent as to what Mr. Ward said in Cameron, if he said anything. It seems as soon as he was placed in possession of the letter found under the carpet he went to his home in Detroit to see his daughter-in-law and asked her about the contents of the letter, and if appellant ascertained that Mr. Ward was in possession of the letter, it furnishes a most cogent reason why he should want Mrs. Ward, Jr., out from under the influence of deceased's father, and the proposed testimony of Will Yates would not explain nor tend to explain why he visited the sister of Mrs. Ward at Temple and told her that Mr. Ward was blaming her sister with the death of his son. Mr. Ward apparently said nothing on his visit to Cameron; at least this record fails to disclose what he said, if he said anything. We are not overruling the case of *Turner v. State*, supra, nor the other cases cited by appellant on this point, but merely holding that the testimony of Will Yates would not explain nor tend to explain why appellant went to Temple and told Miss Mayse that Mr. Ward, Sr., was charging her sister with the murder of his son, when Yates' testimony shows that he had never heard that Mr. Ward had made such a charge, nor does any other witness testify that Mr. Ward had made any statement in Cameron that put such rumor afloat in Cameron. He was a stranger in that city, while Sheriff Hooks, Mr. Jameson and Mr. Ruby, who also read the letter, resided in Cameron, and if such a rumor was afloat in Cameron the natural inference would be that they and not Mr. Ward had put it in circulation. Mr. Ward was not a witness in this case, and the only intimation in the record that Mr. Ward ever charged his daughter-in-law with the crime is contained in her cross-examination by appellant. She testifies that

when Mr. Ward returned to Detroit where she was staying that he had the letter written by defendant to her, which was found under the carpet (which appellant admits writing) and is copied in full in the original opinion. Mr. Ward came to her and said, "You or somebody else has killed my son and you've got to come across." That after thinking the matter over, knowing he had the letter, she made a full statement as testified to by her on this trial. This is the only time that Mr. Ward appears to have said anything, under this record, and this was after he had left Cameron and gone back to Detroit, and after appellant's conversation with Miss Mayse. Mr. Ward then got from Mrs. Ward, Jr., what appellant was fearful he would get, and furnishes the reason for his visiting Miss Mayse in an effort to get Mrs. Ward, Jr., away from the home of the father of the deceased.

[19] Appellant, in his argument filed, insists that the objection urged by this court to the admissibility of the testimony was not the objection urged by the district attorney, and cites us to the case of *Hunter v. State*, 59 Tex. Cr. R. 448, 129 S. W. 125, and other cases, wherein it is held:

"It is well settled in this state that objections to testimony must set forth the objections that were interposed; otherwise, the action of the court below will not be revised."

To this rule of law we adhere. It is a correct enunciation of the law, and relates solely to testimony admitted on the trial, as will be found by referring to the case above cited and other cases cited by appellant. It has no reference to testimony rejected, and which is admissible under no phase of the case. When testimony is excluded we pass on the question only of whether under the bill and the record it should have been admitted. If the record as a whole, and the bill, demonstrates conclusively that the testimony was not admissible under any phase of the case, certainly the court excluding it would not present error. If the testimony was admissible under any phase of the case, there would be error in excluding it, but if not, it would be immaterial what objection was offered—the testimony being inadmissible under any theory of the case. The fact that the court gave as a reason for rejecting the testimony a certain reason, or the district attorney stated certain objections, would be immaterial. The question to be decided by us: Was the testimony rejected admissible? If so, error would be presented. If not, certainly no error would be presented. It would be the height of folly for us to hold that certain testimony was inadmissible, but because the wrong reason was assigned, the case should be reversed; yet on another trial the court should not admit the testimony.

[20] The next ground is that the court erred in admitting the statement made by Cozier Walker before the grand jury, and that in holding there was no error in admitting it we overruled the case of *Knight v.*

State, 65 S. W. 88, and other cases cited by appellant. In that case it appears by the opinion that the state introduced Ben Smith as a witness and examined him, and he was cross-examined and excused; that the state subsequently recalled him and laid a predicate to impeach him. The court says:

"The witness [Ben Smith] had made no * * * statement against the state, but had simply failed to make his testimony as strong as the state desired. This was simply a failure of testimony, and not the statement of a fact damaging to the state."

That he could not be impeached under the circumstances stated is correctly held, and we adhere to that rule of law, but it is wholly inapplicable to the facts of this case. The state called Cozler Walker as a witness. On direct examination he testified to facts material to the state. There was a pistol found in the hand of deceased, loosely held. Cozler Walker testified on direct examination:

"There was a pistol over there in the market. It was kept under the cash register. It was a kinder short pistol. I could not say that that was the pistol (38 S. & W. in evidence). It is one about like that, might have been a little brighter, about the same size and I think it might have been a little brighter. * * * I think it was a pistol the size of that one, but might have been a little brighter. It was not a pistol like this (41). It was not a pistol like this (automatic). Mr. Ingram owned the market. Mr. Ingram owned the cash register. I saw the pistol pretty near all the time I worked there when I looked. When I noticed it would be there."

The pistol exhibited to the witness was the pistol found held loosely in the hands of the deceased. On cross-examination his testimony was slightly weakened. He was then excused, but next day was recalled by defendant, and gave affirmative testimony very detrimental to the state, in proving that the pistol held in the hands of deceased was not the pistol of appellant. This was not a failure to testify, but was giving testimony adverse to the state, wholly different to that given by him on the direct examination before being recalled by defendant, and wholly different from that given by him before the grand jury. When before the grand jury he testified:

"During the time I worked for Mr. Ingram, I would often see a pistol just like the one shown me here, which is a 38 Smith & Wesson. This is the same pistol or one just like it. It was kept in a pigeon hole right under the counter near the register. I would see it every time I would go around there. I saw it off and on till Mr. Ingram closed the market. The pistol was rusty just like this pistol shown me."

This was the testimony the state had a right to expect the witness would give on the trial of this case. If he had only failed to give this testimony, the state would not have had the right to impeach him, but when recalled by the defendant he gave testimony that tended strongly to show that the pistol found in the hands of deceased (a 38 Smith & Wesson) was not the pistol he saw in the market, but the pistol he saw in the

market was a 41 caliber pistol. As the witness not only failed to testify to facts material to the state's case, as he had testified before the grand jury, but when recalled as a witness testified affirmatively to facts inimical to the state's case, there was no error in admitting the testimony of the witness before the grand jury. We are not overruling the Knight Case, supra, but simply adhering to the rule announced in the cases of Baum v. State, 60 Tex. Cr. R. 688, 138 S. W. 271; Williford v. State, 36 Tex. Cr. R. 424, 37 S. W. 761; Self v. State, 28 Tex. App. 406, 13 S. W. 602; Clanton v. State, 13 Tex. App. 152, and cases cited in Branch's Criminal Law, § 866.

The next contention is that the court erred in holding that there was no error in permitting the district attorney to ask: "When and where were you expelled from the Odd Fellows' lodge?" We did not hold that there was no error in permitting the district attorney to ask such question, but what we held was that as appellant in his testimony injected into the case that he was a member of the Odd Fellows' lodge, there was no error in permitting the district attorney to show that at the time of the trial he was not a member of the lodge. We specifically held that the district attorney should not have been permitted to go further, but that as appellant's objections were sustained to the questions propounded, and the jury instructed not to consider such questions, there was no error. This in no wise conflicts with the cases of Tijerina v. State, 74 S. W. 918; Levinski v. Cooper (Civ. App.) 142 S. W. 961, nor other cases cited by appellant. In the Tijerina Case, supra, it was merely held that questions should not be permitted where the purpose is merely to create prejudice against the defendant, and to this rule of law we adhere. In the case of Levinski v. Cooper, supra, it was held that if the question propounded was of so hurtful a nature that the exclusion of the answer would not cure the error, it would present error. In neither of those cases had it been testified affirmatively by appellant to a given fact that would be beneficial to him, which fact the state knew he was not entitled to have operative to his benefit. In this case appellant had testified he was a member of the Odd Fellows' lodge, which, if true, would necessarily inure to his benefit on the trial of this case. The state knew, as a matter of fact, when this prosecution arose, that the Odd Fellows' lodge had required appellant to withdraw from its membership. If appellant had not sought by his testimony to secure to himself the benefit accruing from membership in so highly respected an order, of course the state should not have been permitted to prove that he no longer was a member of that order. But when appellant, as a witness, testified that he was a member of the Odd Fellows' lodge, hoping thereby to draw to his plea of inno-

cence of this crime the well-known and recognized idea that this lodge would not admit to membership men charged with crime until their innocence was known, it was permissible for the state to show that he was no longer a member of that highly respected order. And when the state undertook to go further than this, the court promptly sustained the objection of appellant; therefore no error is presented. The Odd Fellows' lodge is an order highly respected in this state, and each and every juror that might be impaneled would appreciate that fact, and when appellant in this case sought to bring to bear the influence that might be brought to bear by reference to his membership in such order it was permissible for the state to show that that lodge no longer threw its protecting shield about the appellant. If appellant had not sought to show that he was a member of the Odd Fellows' lodge and thus secure to himself the benefit accruing from such membership, then the testimony introduced by the state should not have been admitted; but when appellant offered evidence that he was a member of the Odd Fellows' lodge, then testimony that he was no longer a member of that order became admissible, and this fact could be shown on cross-examination of him.

Neither do we think this opinion is in any way in conflict with that of *Millner v. State*, 72 Tex. Cr. R. 45, 162 S. W. 355, wherein it was held that the argument of counsel in that case presented error. In that case the objection to the argument was overruled, and the argument permitted. In this case the bill shows the district attorney said:

"I want to tell you her (the witness Mrs. Ward's) attitude and what she did when she was promised immunity by your good county attorney and myself. When she went into the county attorney's office, she said—"

Here objections were made to the argument, and the court sustained the objections. However, the district attorney continued and said: "She said, 'Do you want me to tell the whole thing?'" The court then stated, "I have sustained the objection, and I now admonish the jury." The bill further shows the district attorney continued and said, "If you could have seen her then." Here the district attorney was stopped and the court said, "I have sustained the objection, and told the jury not to consider the objectionable remarks." The district attorney then stated, "If you object, I will withdraw the remark." It is thus seen how wholly dissimilar are the facts in this case to the facts in the *Millner Case*, supra, upon which appellant relies. In this case his objections were sustained, and the district attorney withdrew the remarks. The district attorney did not get far enough along to tell the jury anything Mrs. Ward said or did, but apparently was just on the point of doing so when he was stopped. District attorneys in their zeal should never go out of the record, nor

seek to get anything before the jury not in evidence, and if they do so and the trial court does not sustain the objections when made, and the remarks are hurtful and harmful, of course such matter will present error. But if the objections when made are sustained and the jury instructed not to consider the remarks, unless the remarks are of such nature that the harm done cannot be removed by instructions not to consider the objectionable argument, no reversible error is presented.

[21] If appellant did not think the instructions of the court given at the time he sustained the objections sufficient to remove any and all harmful effect, he should have requested further instructions in writing. This he did not do, and the rule is, as said by the court in *Pennington v. State*, 48 S. W. 507, where the remarks were excepted to but no charge in regard to them was asked, no error is presented. See, also, *Trotter v. State*, 37 Tex. Cr. R. 468, 38 S. W. 278; *Miller v. State*, 35 Tex. Cr. R. 210, 33 S. W. 227; *Morris v. State*, 35 Tex. Cr. R. 317, 33 S. W. 539; *Levine v. State*, 35 Tex. Cr. R. 649, 34 S. W. 969, and cases cited.

The next insistence is that the court erred in holding there was no error in permitting V. P. Wooley to testify "that Wyatt Miller had stated to him he had shadowed his brother (appellant) and saw him throw some money into the yard to Mrs. Ward," appellant contending that such holding is in conflict with *Woodward v. State*, 50 Tex. Cr. R. 294, 97 S. W. 501. By reading that case it will be seen it was dealing with a wholly different state of facts. In that case it was not in regard to anything the person on trial had said or done, but the witness was asked if he, witness, "had not said there would be somebody killed over there in three days." That was a prediction that a killing would occur, and which did occur, but the person on trial was in no way connected with such prediction or remark being made, and did not know it had been made. In this case Wyatt Miller was a material witness for the defendant, and it could be shown that he had made statements at variance with his testimony on this trial about a matter which was material to the case—the relation existing between Mrs. Ward and appellant, and such holding is no wise in conflict with the *Woodward Case*, supra, but is in accordance with the rule that has always prevailed in this court. *Gonzales v. State*, 35 Tex. Cr. R. 35, 29 S. W. 1091, 30 S. W. 224; *Newman v. State*, 70 S. W. 953, and cases in *Branch's Crim. Law*, § 871.

[22] It is contended that our holding that the testimony of Allen Hooks was admissible is in conflict with the opinion of this court in *Gardner v. State*, 11 Tex. App. 265. In that case the wife of deceased was permitted to testify that Gardner had made improper proposals to her, which fact was unknown to

deceased. The court held that this fact being unknown to deceased, it could have had no bearing on the difficulty or the cause leading up to it, was testimony which would prejudice the jury against Gardner, and as it had no bearing on the issues involved in the case on trial, it should not have been admitted. What Sheriff Hooks testified to was the frequent use of his telephone by appellant. Certainly appellant knew that he frequently used this telephone, if he did so, and it was a circumstance in the chain of evidence showing the relations existing between Mrs. Ward and appellant. Appellant at the time this testimony was admitted had not testified and it was not known he would take the stand and admit the adulterous relations. It may be true that appellant did not know Sheriff Hooks objected to his using the telephone so frequently, but the sheriff's reasons for objecting, as stated by him, "My phone rings, I expect, 50 or 100 times a day, and probably more, and I had to put in long-distance calls, and I cannot afford to let any one talk over it long at a time," certainly could in no way be injurious to appellant. The fact testified to by the sheriff, that appellant used his telephone frequently and talked over it a long time, was admissible, when it was further shown that he was talking to Mrs. Ward at those times.

The next contention of appellant is a general assault on the opinion as a whole, and by the remarks used shows a misconception of the holding of the court. What we held was that the accomplice testimony might be taken into consideration in passing on the corpus delicti; that is, whether or not Mr. Ward had been unlawfully killed, and such holding is not in conflict with the authorities, but is supported by an unbroken line of decisions by this court. Mr. Branch, in his work on Criminal Law, § 235, says the confession may be used to aid the proof of the corpus delicti, citing *Kugadt v. State*, 38 Tex. Cr. R. 694, 44 S. W. 989; *Jackson v. State*, 29 Tex. App. 464, 16 S. W. 247; *Anderson v. State*, 34 Tex. Cr. R. 549, 31 S. W. 673, 53 Am. St. Rep. 722; *Gallegos v. State*, 48 Tex. Cr. R. 62, 85 S. W. 1150; *Gallegos v. State*, 49 Tex. Cr. R. 115, 90 S. W. 492; *Attaway v. State*, 35 Tex. Cr. R. 403, 34 S. W. 112; *Lott v. State*, 60 Tex. Cr. R. 162, 131 S. W. 555; *Nicks v. State*, 40 Tex. Cr. R. 40, 48 S. W. 186; *Cox v. State*, 69 S. W. 147; *Landreth v. State*, 44 Tex. Cr. R. 241, 70 S. W. 758; *Austin v. State*, 51 Tex. Cr. R. 328, 101 S. W. 1162; *Bradshaw v. State*, 49 Tex. Cr. R. 165, 94 S. W. 223; *White v. State*, 40 Tex. Cr. R. 370, 50 S. W. 705; *Sullivan v. State*, 40 Tex. Cr. R. 639, 51 S. W. 375. In this latter case Judge Davidson says:

"It is well settled that the confession of the accused alone will not justify a conviction. This question has been frequently decided by various decisions of this state; but, so far as we are aware, it is settled that the death of the deceased being shown to have been brought

about by the criminal agency or procurement of some one, the confession is sufficient to connect the party making the confession with the crime."

And in *Anderson v. State*, this court, speaking through Judge Hurt, held:

"The corpus delicti cannot be proven by the uncorroborated testimony of an accomplice. Nor can the corpus delicti be proven alone by the confession of the accused. Must it be proven independently of the confession? This is not necessary."

Again, in the *Kugadt Case*, supra, that learned jurist held:

"The general doctrine is that extra judicial confessions, standing alone, are not sufficient proof of the corpus delicti; and some of the cases hold that the corpus delicti must be proved independently of confessions. But we do not understand such to be the better doctrine. In other words, in the establishment of the corpus delicti the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence. See note 3 to case of *State v. Williams*, reported in 78 Am. Dec. 254. And this rule is recognized in this state. See *Jackson v. State*, 29 Tex. App. 458 [16 S. W. 247]. Said case quotes with approval an excerpt taken from 4 American and English Encyclopedia of Law, p. 309, as follows: 'A confession is sufficient, if there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of a jury beyond a reasonable doubt.' 'Such suppletory evidence need not be conclusive in its character. When a confession is made, and the circumstances therein related correspond in some points with those proven to have existed, this may be evidence sufficient to satisfy a jury in rendering a verdict asserting the guilt of the accused. "Full proof of the body of the crime, the corpus delicti, independently of the confessions, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient."' 3 Am. & Eng. Enc. of Law, p. 447. We take it that there can be no question that the prosecution is permitted to prove by circumstantial evidence the corpus delicti, and in aid thereto use confessions of the appellant."

Wharton's Criminal Evidence (10th Ed.) § 634, states the rule to be:

"As to the corpus delicti, the evidence need not be direct, but it may be established by circumstances corroborating the confession, and the confession itself may be considered together with all the other evidence to establish the fact that a crime was committed"—citing many authorities.

In this case there can be no question of the fact that the dead body of Mr. Ward was found, undressed, lying on his bed with a bullet hole in his head; that this wound caused his death. This is shown by the testimony of Dr. Denson and a number of other witnesses. Appellant sought to inject the issue of suicide in the case by proving statements made by Mrs. Ward and her son on the night of the homicide. There was no direct testimony raising such issue, but it was raised indirectly in this way. In proving that the death of Mr. Ward was caused by unlawful means, must the testimony of Mrs. Ward, a confessed accomplice, be excluded, as appellant contends? Under all the authorities above cited, and we have none in this state holding otherwise, the testimony

of the accomplice will not be excluded in passing on that issue, but it will and should be considered in connection with all the other facts and circumstances in the case. If there were no other facts and circumstances in evidence, of course, the accomplice testimony alone would not prove that fact. But we have no such case. The authorities cited by appellant announce no contrary rule. In those cases the question being passed upon was not whether the confession or accomplice testimony could be considered in connection with other facts and circumstances in passing on whether or not a crime had been committed, but was passing on the question as to the connection of the person on trial with the crime, and it was held that there must be other facts and circumstances in evidence, in addition to the accomplice testimony, tending to connect the person with guilty participation in the crime before a conviction is authorized. This rule of law we do not question, and there is nothing said or held in the original opinion, in our opinion, that would bear the construction that we held or intended to hold that a person could be convicted upon the uncorroborated testimony of an accomplice.

[23] But the testimony, independent of the testimony of the accomplice, does not in and of itself necessarily have to establish the guilt of the person on trial beyond a reasonable doubt; if so, there would be no necessity nor place for the accomplice testimony. All that the testimony, in addition to the accomplice testimony, need to do is to, by and in of itself, tend to connect the defendant with the commission of the offense charged. This is the law in this state by virtue of article 801 of the Code of Criminal Procedure. In Vernon's Crim. Proc. § 15, under article 801, the authorities are collated and the rule stated to be:

"Corroborative evidence is sufficient if it tends to connect defendant with the crime. It need not be sufficient to convict nor need it corroborate in detail. *Wilkerson v. State*, 57 S. W. 962; *Bruton v. State*, 21 Tex. 337; *Coleman v. State*, 44 Tex. 111; *Gillian v. State*, 3 Tex. App. 182; *Jones v. State*, 7 Tex. App. 457; *Clanton v. State*, 13 Tex. App. 139; *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318; *Boyd v. State*, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Elizando v. State*, 31 Tex. App. 237, 20 S. W. 560; *Warren v. State*, 149 S. W. 130; *Holmes v. State*, 70 Tex. App. 423, 157 S. W. 487; *Gillespie v. State*, 73 Tex. Cr. R. 585, 166 S. W. 135; *Savage v. State*, 170 S. W. 730; *Cooper v. State*, 177 S. W. 975.

"The corroborating evidence to be sufficient, must, of itself, and without the aid of the accomplice testimony, tend in some degree to connect the defendant with the commission of the offense for which he is on trial, but it need not be sufficient of itself to establish his guilt. It must tend to connect the defendant with the offense committed. It must be as to a material matter. It must tend directly and immediately, not merely remotely, to connect the defendant with the commission of the offense. Corroboration as to immaterial facts, having no tendency to connect the defendant with the commission of the offense, is not sufficient. The corroboration must be as to a criminative fact or facts. But

it need not be corroborative of any particular statement made by the accomplice. The corroboration is not sufficient if it merely shows the commission of the offense by some person; it must go further, and tend to connect the defendant with its commission. The accomplice testimony need not be corroborated circumstantially and in detail, and if corroborated in material matters, it is immaterial that it was also corroborated in immaterial matters, as it is permissible to strengthen such testimony by proof of connected incidents tending to show its reasonableness and consistency. *Dill v. State*, 1 Tex. App. 278; *Nourse v. State*, 2 Tex. App. 304; *Davis v. State*, 2 Tex. App. 588; *Jones v. State*, 3 Tex. App. 575; *Hoyle v. State*, 4 Tex. App. 239; *Jones v. State*, 4 Tex. App. 529; *Jackson v. State*, 4 Tex. App. 292; *Tooney v. State*, 5 Tex. App. 163; *Myers v. State*, 7 Tex. App. 640; *Simms v. State*, 8 Tex. App. 230; *Roach v. State*, 8 Tex. App. 478; *Bruton v. State*, 21 Tex. 337; *Watson v. State*, 9 Tex. App. 237; *Welden v. State*, 10 Tex. App. 400; *Jernigan v. State*, 10 Tex. App. 546; *Harper v. State*, 11 Tex. App. 1; *Cohea v. State*, 11 Tex. App. 622; *Powell v. State*, 15 Tex. App. 441; *Dunn v. State*, 15 Tex. App. 500; *Zollicoffer v. State*, 16 Tex. App. 312; *Phillips v. State*, 17 Tex. App. 169; *Harrison v. State*, 17 Tex. App. 442; *Tisdale v. State*, 17 Tex. App. 444; *Blakely v. State*, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912."

[24] With this well-established statutory rule before us, let us consider what the testimony in this case tends to show, independent of the testimony of Mrs. Ward. The death of Ward is shown beyond question. Appellant himself takes the stand and testifies to adulterous relations between himself and Mrs. Ward; he testifies that Ward caught him and Mrs. Ward in a compromising position at night; he testifies that Ward then moved his bed into the same room with Mrs. Ward, and that he could not go there at night and have carnal intercourse with Mrs. Ward as he had theretofore been doing. A letter is found under the carpet in the dead man's house. Appellant admits he wrote this letter to Mrs. Ward subsequent to the time deceased had caught him and Mrs. Ward in a compromising position. In this letter he says:

"I do wish I could be with you to night I would try to make you enjoy yourself the best I could * * * Dear if you make up your mind and do what we were talking about I would be with you a hole lots of times * * * sweetheart I wish I could see you when I wanted to and be with you * * * so I would not have to write that is to cold and far off for me Honey do you want to be tied up like this all the time are not Dear one I know you don't Honey if you was mine I could be with you all the time and feel good * * * know what we are doing now is dangers to all of us so you decide and make up your mind what to do * * * I do not like to punish by having to stay away from you for that is the worst one I have but dear it is not going to be that way all the time," etc.

In the light of appellant's own testimony, that after deceased had caught him, he moved his bed into his wife's room so that he, appellant, could no longer go there at night and have intercourse with his wife, what are the natural and only deductions to be drawn from this letter admitted by appellant to have been written by him? "It is not going

to be this way all the time." How was the condition to be remedied except by the removal of Mr. Ward, and after this letter was written, he was "removed" by a pistol shot in the head in the dead hours of night. Does not this letter have a tendency to connect appellant with the removal of Mr. Ward, so that he could renew his amorous relations in the nighttime, when appellant's own wife would know nothing about his conduct.

Then after Ward's death, when Mrs. Ward goes with the body to Detroit, he admits he clipped out of the newspapers the comments on the death, wherein it is termed a suicide, based on what Mrs. Ward told the night of the death, and sends them to Mrs. Ward, writing at the same time, "All is well at this time." When the letter is found, which would lead any one to believe that the writer of the letter had something to do with the death of Mr. Ward, we find appellant going to Temple, and telling Miss Mayse that Mr. Ward, Sr., was charging her sister with the murder of his son. Why does he of all men fly to the rescue of Mrs. Ward and champion her innocence. There is no testimony that the dead man owned a pistol of the character and kind that inflicted the fatal wound, while the testimony of Milton Norton and Cozier Walker on direct examination would authorize a jury to find that it was appellant's pistol found clasped loosely in the deceased's hand. These are facts and circumstances in evidence independent of the testimony of the accomplice, Mrs. Ward, and can we say or hold that they have no tendency to connect appellant with the death of Mr. Ward? If you cannot so say and hold, then the testimony of the accomplice, Mrs. Ward, is corroborated in material matters, tending directly and immediately to connect the defendant with the commission of the offense, which testimony is independent of and in addition to her testimony, coming from other and different sources.

There are other matters presented in the lengthy motion for a rehearing, but they were all disposed of in the original opinion, and we do not deem it necessary to write again on them; but the above questions were summarized by appellant and pressed by him, and are the questions seemingly relied on, and out of deference to the earnestness with which they are pressed by appellant's able counsel, we have written at length on those questions, but after a renewed study of the

record, we are most thoroughly convinced that no error is presented which would justify a reversal of the case, and the motion for a rehearing is overruled.

MILSTEAD v. STATE. (No. 3898.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

INDICTMENT AND INFORMATION \Leftrightarrow 43—FILING —NUNC PRO TUNC—ENTRY.

A nunc pro tunc placing by the clerk of file mark on complaint and information, as of the date they were filed with him, may be permitted by the court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 154; Dec. Dig. \Leftrightarrow 43.]

Appeal from Upshur County Court; W. H. McClelland, Judge.

W. E. Milstead was convicted, and appeals. Affirmed.

Martin & Nelson, of Longview, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of a misdemeanor theft, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

The record contains but two bills of exception, and they both relate to the same subject. It appears that the county attorney had prepared and filed a complaint and information and placed them with the papers, but the clerk had neglected to place the file marks thereon. Appellant moved to dismiss the complaint and information because they had not been filed. The county attorney made a motion requesting the court to permit and require the clerk to place the proper file mark on the complaint and information. This was done, and shows the papers to have been filed on August 9, 1915, while the case was not called for trial until September 21, 1915. These bills present no error. *Nelson v. State*, 51 Tex. Cr. R. 849, 101 S. W. 1012; *Starbeck v. State*, 53 Tex. Cr. R. 192, 109 S. W. 162; *Brogdon v. State*, 63 Tex. Cr. R. 473, 140 S. W. 353.

While there is a sharp conflict in the evidence for the state and defendant, yet the evidence for the state, if believed, would authorize a finding that appellant stole a Panama hat from P. C. Wright.

The judgment is affirmed.

JONES v. STATE. (No. 3907.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. CRIMINAL LAW §59—PRINCIPALS.

Defendant was a principal, even if H., and not he, telephoned B. that I. wanted four sacks of sugar, and that a wagon would be sent therefor, whereupon defendant hired an expressman, who got it and took it to H., who paid defendant for aiding in working the scheme.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 40, 41; Dec. Dig. §59.]

2. CRIMINAL LAW §1092—APPEAL—BILL OF EXCEPTIONS—LATE FILING.

Bills of exception filed several days after the time allowed by the court cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834—2861, 2919; Dec. Dig. §1092.]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Cleveland Jones, alias Will Jones, was convicted, and appeals. Affirmed.

G. Q. Youngblood, of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of a misdemeanor, and his punishment assessed at a fine of \$25 and one year's confinement in the county jail.

[1] We have read the statement of facts, and it amply supports the verdict. The evidence for the state would show that appellant approached S. A. Hamra and offered to sell him four sacks of sugar for \$20; that Hamra agreed to buy the sugar, but would only pay \$18 for it; that appellant or some one then telephoned the wholesale house of Blair-Hughes Company that Bodeker's Ice Cream Company desired four sacks of sugar, and would send a wagon for it. Appellant then approached Alex Hampden, who drives an express wagon, and employed him to go to Blair-Hughes Company and get the sugar, and instructed him to carry it to Hamra's grocery store. Hampden got the sugar from Blair-Hughes Company and carried it to Hamra's. Hamra says he paid appellant \$18 for the sugar. Appellant denies telephoning Blair-Hughes Company, says Hamra did so, but he admits employing Hampden to haul the sugar, and that Hamra paid him \$10, saying that Hamra paid him this for aiding him in working the scheme. If his statement was true, we think his testimony would constitute him a principal offender, and under any and all phases of the testimony he would be guilty.

[2] The bills of exception were not filed within the time allowed by the court, nor for some days thereafter; therefore they cannot be considered. We have read each of them, however, and, as qualified and approved by the court, none of them would present error.

The judgment is affirmed.

GALLIER v. STATE. (No. 3901.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

CRIMINAL LAW §1023—APPEAL—SUSPENDED SENTENCE.

Notice of appeal should not be permitted where the court in its judgment suspended sentence, as, under the suspended sentence law, accused can appeal from the conviction only when, if ever, proper sentence is later pronounced against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583—2598; Dec. Dig. §1023.]

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Babe Gallier was convicted, and appeals. Dismissed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of ordinary burglary, not of a private residence, and his punishment assessed at five years in the penitentiary. The jury in their verdict found the proper facts and recommended a suspension of his sentence. This the court did in his judgment. Upon the court overruling his motion for a new trial, he gave notice of appeal to this court. The trial court should not have permitted notice of appeal to have been given; for, under the suspended sentence law, an accused cannot appeal from the conviction, and can only do so when proper sentence is later, if at all, pronounced against him. Bierman v. State, 78 Tex. Cr. R. 284, 164 S. W. 840.

The appeal in this case is therefore dismissed.

DAUGHERTY v. STATE. (No. 3894.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. CRIMINAL LAW §1099 — STATEMENT OF FACTS—LATE FILING—DILIGENCE.

Defendant, having prepared a statement of facts and early on the last day of the term presented it to the proper officers in time to have it disposed of on that day, was not wanting in diligence, and so was entitled to have it considered on appeal, though under a ruling of the judge, of no necessity, approved of by the county attorney, it, without an order granting time after adjournment, was not taken up and approved and filed till the following day.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866—2880; Dec. Dig. §1099.]

2. CRIMINAL LAW §535—CONFESSION—CORPUS DELICTI.

An extrajudicial verbal confession by defendant is not enough for conviction, being insufficient to establish the corpus delicti.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. §535.]

3. WEAPONS §17—CARRYING PISTOL—SUFFICIENCY OF EVIDENCE.

That during a storm a noise was heard from the direction of defendant, which some of those

hearing it thought was a pistol or gun, is insufficient for a conviction of carrying a pistol; defendant and the only other person in a position to know testifying that he did not fire a pistol.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22–33; Dec. Dig. ¶¶ 17.]

Appeal from Williamson County Court; Richard Critz, Judge.

A. J. Daugherty was convicted, and appeals. Reversed and remanded.

Wilcox & Graves, of Georgetown, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of unlawfully carrying a pistol, his punishment being assessed at a fine of \$100.

[1] Motion is made to strike out the statement of facts because filed after adjournment of the term, without an order entered for that purpose. This motion of the Assistant Attorney General is met by affidavit, to the effect that on the last day of the term, which was the 30th of October, a statement of facts prepared by appellant's counsel was presented to the proper officers for approval, the county attorney and the judge. This may have been, and doubtless was, presented in ample time to have been read and disposed of, as the statement of facts is short. But this was not done, and after full free discussion among themselves, the county judge held it was not necessary, the county attorney agreeing with him, and one of the attorneys for appellant said he agreed with them on reading article 845, but was afraid of it, and preferred to have an order entered granting time. However, they all agreed finally that the law was so plain, as they expressed it, that it was not necessary to enter the order, and it was not entered. Appellant's counsel rather insisted, however, that it should be entered. The last day of the term being Saturday, the statement of facts was not approved, but Monday, after going over the matter with the county attorney, an agreement was reached, and the county judge approved the statement of facts, and it was filed on that day, which was the 1st day of November, court having adjourned the 30th of the preceding month. The question is, Was this sufficient diligence on the part of counsel to obtain a statement of facts, and was he by no fault on his part deprived of the same? We are of opinion that he was not wanting in diligence. He presented the statement of facts early enough on Saturday to have had it approved that day, and in view of the ruling of the county judge and the county attorney that it was not necessary to enter the order, they did not take up the matter and approve the statement of facts during term time. This should have been done, or proper order entered granting time after adjournment of court. Under this view of the case we believe appellant is entitled to have his statement of facts considered, or the case reversed because he was deprived of such

statement of facts. Inasmuch as the statement of facts is before us, signed by both parties and approved by the judge, and filed as above stated, we are of opinion it is not necessary to reverse for that reason, but consider the evidence.

[2, 3] The facts show that some parties were going from Florence to Briggs in an auto at night. There came up a very heavy thunder storm and rain, which put their car out of commission, and they spent the night in the car on the road. The lightning and thunder was vivid and heavy, and the rain came down with considerable force and in great quantities. During the night a noise was heard on the left-hand side of the car at the front end. It was discussed among the occupants of the car as to what created the noise. Some said it was a gun or pistol; others said it was lightning or obstruction of a nearby object, and thunder, etc. No one saw any pistol, and if appellant had a pistol, it was at this point. He sat on the right-hand side of the car and was driver. Another witness sat by his side in front of the car on the left. He says appellant did not have a pistol and did not fire one; that in order for him to have fired out of the left-hand side of the car he would have had to reach across the body of the witness and shoot out of the left-hand side of the car. This he says appellant did not do. This is the state's case, except one witness, Sudduth, who had made threats to break up the defendant by prosecution, etc., on account of some difficulty they had about settling some financial matters; he testified that appellant stated to him he fired a pistol at this time and place. This may be said to be the sum and substance of the facts. No one saw the pistol; two heard a noise. The only witness who seems to have been in position to know said appellant did not fire a pistol and did not create the noise. Appellant himself testified that he did not have a pistol, and did not own a pistol at the time, except an old broken one, which was at home, incapable of being shot. Under this state of case we are unwilling to affirm this judgment. The extrajudicial verbal confession of a defendant will not prove the case. It has always been held that extrajudicial confession alone is not sufficient to establish what we term the "corpus delicti." This has specially been so held since *Hill v. State*, 11 Tex. App. 182. If appellant had a pistol and fired it, of course he would be guilty; at least he could be charged with having had the pistol at the time. This case is treated not as raising the question of appellant being a traveler, though the facts show he was going from Florence in Williamson county to Briggs in Burnet county. But the mere fact of a noise under the circumstances here detailed, and the thunder storm, with lightning and heavy rain, would not be sufficient of itself to show appellant had a pistol, or that the noise was made by a pistol. Then the state is relegated to the fact that appellant

stated to the witness Sudduth that he fired the pistol. It would hardly be sufficient to prove the case independent of some fact or circumstance that appellant had a pistol. Appellant denied this most strenuously, and stated he made no such statement to Sudduth.

We are unwilling to affirm the judgment in this condition of the record; therefore it is ordered that the judgment be reversed, and the cause remanded.

FURLOW v. STATE. (No. 3912.)
(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

HUSBAND AND WIFE — 304—DESERTION AND NONSUPPORT—WILLFULLY—DESTITUTE.

Defendant's wife having a house and \$300 in money when he left her, and the fact that she afterwards became destitute or in need, if she did, not being brought to his knowledge, he is not within Vernon's Ann. Pen. Code, 1916, art. 640a, declaring a punishment for a husband who willfully deserts or fails to provide for his wife, in destitute or necessitous circumstances.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. —304.]

Appeal from Harris County Court, at Law; Murray B. Jones, Judge.

Webb Furlow was convicted, and appeals. Reversed and remanded.

K. C. Barkley, of Houston, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of deserting his wife in destitute and necessitous circumstances, and his punishment assessed at a fine of \$100.

The statute under which appellant was indicted reads:

"That any husband who shall willfully or without justification, desert, neglect or refuse to provide for the support and maintenance of his wife, who may be in destitute or necessitous circumstances, * * * shall be punished by a fine, etc." Article 640a, Penal Code (Vernon's 1916).

The law is not unconstitutional, and the information charges an offense under the law. As the record is presented, there is but one question that need be discussed. The law requires that the act of appellant shall be "willful," and the wife must be in destitute and necessitous circumstances.

Appellant and his wife had parted several times. The testimony of both of them would convince any one that their marital relations were not pleasant. As to whose fault, this need not be discussed at this time. Appellant decided to quit his wife, and did so, remaining in the same town she lived in. Before quitting her he had deeded her one lot shown to be worth \$700. After quitting her, he deeded her the home in which they were living, worth some \$1,000 or \$1,200. Against this were some notes for about \$250 or \$300.

She and appellant both agree she had \$300 in money when he quit her. She had been raised by appellant's brother, who had married the aunt of appellant's wife. After the separation, she went and lived with his brother again. While it is true that Mrs. Furlow testifies that she had spent the \$300 and was in necessitous circumstances, yet it is apparent she was not quite destitute, because she had a place at which she could live—the place she lived before she married, with the brother of appellant. At least it does not appear that appellant had been put in possession of facts that would make known to him his wife was in either necessitous or destitute circumstances. He testifies that, while he had not given her any money since they parted, she admits she had never called on him for any. He testifies further, if she had, he would have given her money according to his ability.

The facts in this case, we think, do not make a case within the purview and meaning of the statute. There is no willful desertion of or failure to provide for a wife in necessitous and destitute circumstances. She was neither in need nor destitute at the time of the separation, and, if she became so after the separation, this fact must be brought to the knowledge of appellant, before he can be said to have willfully refused to provide.

Reversed and remanded.

LOOPER v. STATE. (No. 3890.)
(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

CRIMINAL LAW — 1090—APPEAL—QUESTIONS PRESENTED FOR REVIEW.

Where accused pleaded guilty to violating the local option law and received the lowest punishment, his appeal presents nothing for review, there being no statement of facts or bill of exceptions showing the proceedings at trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2853, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. —1090.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Baylor Looper was convicted of a misdemeanor, and he appeals. Affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant pleaded guilty, waiving a jury, to violating the prohibition law, which was in force in Johnson county as a misdemeanor. The judge assessed the lowest punishment. There is no statement of facts, if any testimony was introduced on the trial. Neither is there a bill of exceptions. There is nothing that can be reviewed. Evidently the appeal was for delay merely.

The judgment is affirmed.

McGEE v. STATE. (No. 3889.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. On Motion for Rehearing, Feb. 2, 1916.)

1. CRIMINAL LAW \S 1095, 1102 — APPEAL — STATEMENT OF FACTS — BILLS OF EXCEPTIONS — TIME FOR FILING — MOTION TO STRIKE.

A statement of facts and bills of exceptions not filed until more than 90 days after denial of new trial and sentencing of accused, notice of appeal being given at time of sentence, will be stricken on motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2847; Dec. Dig. \S 1095, 1102.]

On Motion for Rehearing.

2. CRIMINAL LAW \S 1092, 1099 — APPEAL — STATEMENT OF FACTS — BILL OF EXCEPTIONS — POWER TO APPROVE.

Where accused was tried by a judge other than the regular judge, the regular judge could not approve either the statement of facts or the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2803, 2829, 2834–2861, 2866–2880, 2919; Dec. Dig. \S 1092, 1099; Judges, Cent. Dig. \S 157.]

3. CRIMINAL LAW \S 1095, 1102 — APPEAL — STATEMENT OF FACTS — BILL OF EXCEPTIONS — MOTION TO STRIKE — AFFIDAVIT — DILIGENCE.

Where it appeared from the affidavit filed by appellant in opposition to a motion to strike out a statement of facts and bills of exceptions, which were not filed until more than 90 days after denial of new trial, sentencing of accused and the giving of notice of appeal, that the case was tried by a judge other than the regular judge, that accused waited until the return of the regular judge to the district and for some time thereafter before attempting to get him to act on the papers, and that not until after such judge had stated that he preferred the trial judge to pass on the papers did he attempt to see the trial judge in respect to the matter, such lack of diligence was shown as required that the motion be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2847; Dec. Dig. \S 1095, 1102.]

Appeal from District Court, Tarrant County; W. J. Oxford, Judge.

Tom McGee was convicted of assault with intent to murder, and appeals. Affirmed, and rehearing denied.

Walter A. Nelson, of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for an assault with intent to murder.

[1] By law the term of court at which he was convicted could continue in session for more than eight weeks, and, as a matter of fact, as the record shows, was in session full three months. The court overruled his motion for a new trial on September 2, 1915, and then sentenced him, at which time he gave notice of appeal to this court; all of which was then duly entered. The statement of facts and bills of exceptions herein were not filed until more than 90 days after that time. Hence the Assistant Attorney

General's motion to strike out and not consider the bills of exceptions and statement of facts must be sustained. *Demarco v. State*, 178 S. W. 1024. This has been held many times. There is nothing in the absence of these which can be reviewed.

The judgment is therefore affirmed.

On Motion for Rehearing.

Appellant's attorney files his affidavit accompanying his motion for rehearing, seeking to show diligence in having filed his statement of facts and bills of exceptions within the time allowed by law and the order of the court.

[2, 3] This affidavit, in substance, shows that Judge Oxford held one week of the term of Judge Swayne's court in Ft. Worth, at which time this case was tried. It further shows that Judge Oxford left Ft. Worth and went to his home immediately after the overruling of his motion for a new trial and his notice of appeal, etc.; that within ten days thereafter he prepared his three bills of exception, and within a very short time thereafter ordered and requested the official stenographer to make out a statement of facts. The affidavit does not state when the statement of facts was made out. The statement of facts with the record contains not quite 36 pages in typewriting. Of course, we know, and every one knows, that such a statement of facts could have been made out within a very few days.

The affidavit further shows that appellant awaited the return of Judge Swayne, showing that he was sick, out of the state, and absent for several weeks thereafter. It seems from the affidavit that appellant's attorneys depended on getting his bills of exceptions and statement of facts approved by Judge Swayne; that, even after waiting these several weeks for Judge Swayne's return, he did not see him to get him to pass on these documents for some time after his return. Under the law Judge Swayne, not having tried the case, could have approved neither the statement of facts nor bills of exception, under both the statute and the decisions. *Richardson v. State*, 71 Tex. Cr. R. 111, 158 S. W. 517, and many other cases.

The affidavit further shows that it was not until some time after Judge Swayne's return, the time not definitely stated, that he even saw Judge Swayne and was told by him that, as he had not tried the case, he preferred that Judge Oxford act on these papers; that he attempted to find Judge Oxford or get the papers to him. The whole affidavit shows such a lack of diligence that, under no authority, can we consider the statement of facts or bills of exception. There are a great many decisions of this court holding that, under such circumstances as shown herein, this court cannot, and will not, consider either the statement of facts

or bills of exception. We cite only a comparatively few of them. *Turner v. State*, 22 Tex. App. 42, 2 S. W. 619; *Henderson v. State*, 20 Tex. App. 304; *Bryant v. State*, 35 Tex. Cr. R. 395, 33 S. W. 973, 36 S. W. 79; *Bell v. State*, 31 Tex. Cr. R. 521, 21 S. W. 259; *Riojas v. State*, 36 Tex. Cr. R. 182, 36 S. W. 268; *George v. State*, 25 Tex. App. 229, 8 S. W. 25; *Monk v. State*, 38 Tex. Cr. R. 602, 44 S. W. 153; *Dennis v. State*, 41 Tex. Cr. R. 160, 53 S. W. 111; *Adams v. State*, 60 S. W. 255; *Shaffer v. State*, 65 S. W. 1072; *Ashman v. State*, 74 S. W. 317; *Murphy v. State*, 45 S. W. 719; *Bracy v. State*, 49 S. W. 598; *Farris v. State*, 26 Tex. App. 107, 9 S. W. 487; *Alstrop v. State*, 31 Tex. Cr. R. 467, 20 S. W. 989; *Jones v. State*, 163 S. W. 75; *Gowan v. State*, 73 Tex. Cr. R. 227, 164 S. W. 6; *Laws v. State*, 73 Tex. Cr. R. 287, 164 S. W. 1015.

However, we will state that we have examined each of appellant's three bills of exceptions and have read carefully the statement of facts. The evidence clearly establishes appellant's guilt if we could consider the statement of facts. Neither of his bills of exceptions would present any error authorizing a reversal if we could consider them, so that in no event could this court have done otherwise than affirm this case.

The motion is overruled.

DAVIDSON, J., not present at consultation.

SMITH v. STATE. (No. 3923.)

(Court of Criminal Appeals of Texas. Jan. 19, 1913.)

CRIMINAL LAW §1020—APPEAL—AMOUNT OF FINE.

Under Code Cr. Proc. 1911, art. 87, if the punishment imposed in the county court on appeal be a fine not exceeding \$100, its judgment is final, and further appeal will not lie.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.]

Appeal from Lamar County Court; Tom L. Beauchamp, Judge.

Ruth Smith was convicted, and appeals. Dismissed.

C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of vagrancy. The case arose in the justice court. On conviction in that court an appeal was prosecuted to the county court, where the jury convicted and awarded appellant a fine of \$100.

Motion is made here to dismiss the appeal on the ground that before the jurisdiction of this court will attach on appeal from the county court the punishment, if it be a fine, must be in excess of \$100; that, unless it

exceeds \$100, the jurisdiction of the county court is final. This seems to be a correct proposition. See article 87 of the Revised Code of Criminal Procedure, and numerous authorities collated in the note under that article.

The motion to dismiss the appeal for the reasons stated is granted, and the appeal is dismissed.

Ex parte LOPEZ. (No. 3902.)

(Court of Criminal Appeals of Texas. Jan. 12, 1913.)

BAIL §43—HOMICIDE—EVIDENCE.

Where relator was charged with murder, the homicide being committed in perpetration of a robbery, but the proof was not evident that relator was present or connected with the homicide, held, that relator was entitled to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 153-164; Dec. Dig. § 43.]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Proceedings by Lorenzo Lopez, Jr., for admission to bail. Application granted.

Frank C. Pierce and Webster & Green, all of Brownsville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Relator was arrested, charged with murder. The homicide was committed in the perpetration of robbery. If appellant participated in that killing and robbery, he would not be entitled to bail. This would be murder of the first degree under the prior statute, and if the facts are shown with sufficient cogency, it would still be a capital case, if the jury saw proper to so find. The serious question in the case is relator's presence at the time and place. We are of opinion, without stating the facts, that the proof is not evident that he was present or connected with the homicide. It leaves our minds in such doubt that we are of opinion relator is entitled to bail, which is granted in the sum of \$10,000. Upon the giving of this bond in the terms of the law, to be approved by the sheriff of Cameron county, relator will be discharged from custody.

LOFTON v. STATE. (No. 3893.)

(Court of Criminal Appeals of Texas. Jan. 12, 1913.)

1. FORGERY §34—MISTAKE IN SPELLING—VARIANCE.

Under an indictment for forgery alleging that the false instrument purported to be the act of "Mariah Thorn," which by copy showed that it was a bank check for \$16 signed by "Mar-ih Thorn," followed by the explanatory allegation that the name "Mar-ih Thorn" was intended for and meant "Mariah Thorn," there was no fatal variance between the purport clause and the spelling of the word "Mariah."

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 85-102; Dec. Dig. § 34.]

2. FORGERY \S 37—EVIDENCE—CHECK—MISTAKE IN SPELLING.

In a prosecution for forgery of an instrument purporting to be the act of "Mariah Thorn," the forged check, which had been copied in the indictment, and appeared to be signed by "Marlh Thorn," was admissible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 105-107, 111; Dec. Dig. \S 37.]

3. FORGERY \S 37—ADMISSIBILITY OF EVIDENCE.

In a prosecution for forgery under an indictment alleging that a check for \$16, purported to be the act of "Mariah Thorn," evidence of a bank clerk that on the date of the forged check defendant presented it to him for payment as a check on that bank purporting to be signed by "Mariah Thorn," that he told defendant that "Mariah Thorn" had no account at that bank, but might have an account at another bank, and that defendant on the same day presented to another witness a check for \$13 on such other bank, purporting to be signed by "Etta Thorn," and told witness that, if he would cash the check, he would pay him \$3 on an account due witness, that witness telephoned to such bank to learn if the check was good, that he told defendant that "Etta Thorn" had no money in such bank, but that "Mariah Thorn" did have, that defendant told him that "Mariah Thorn" sometimes signed her name "Etta," and that defendant took the \$13 check away, and shortly returned with a \$16 forged check and requested witness to cash it, was material and admissible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 105-107, 111; Dec. Dig. \S 37.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Esmus Lofton was convicted of forgery, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State

PRENDERGAST, P. J. [1] Appellant was convicted of forgery. The indictment is in the standard approved form therefor. It alleges that the false instrument purported to be the act of "Mariah Thorn"; then alleged it was to the tenor as follows; then copied the instrument, which is a bank check for \$16; and the name signed thereto is copied as "Marlh Thorn." This is followed by the explanatory allegation that the name "Marlh Thorn" signed to the check was intended for and meant "Mariah Thorn." Appellant contends that there is a fatal difference between the purport and tenor clause in the variation of the spelling of the word "Mariah" as shown above. His contention is untenable. Feeny v. State, 62 Tex. Cr. R. 588, 138 S. W. 135; Pye v. State, 71 Tex. Cr. R. 93, 154 S. W. 222; Gentry v. State, 62 Tex. Cr. R. 497, 137 S. W. 696.

[2] The uncontroverted testimony clearly shows appellant's guilt. He neither testified nor offered any testimony. The appellant objected to the forged check when offered in evidence, because of the misspelling of the word "Mariah," as explained above. The check was literally the same as copied in the

indictment, and was properly admitted in evidence.

[3] The court correctly admitted the testimony of John Thomas over appellant's objection to the effect that on May 29, 1915, the date of the forged check, appellant presented to him, as a clerk of the Stone Fort National Bank, for payment, a check on that bank purporting to be signed by Mariah Thorn, that he stated to appellant at the time that Mariah Thorn had no account at that bank, but that, knowing said old negro woman, Mariah Thorn, to be a good woman, he told appellant that she likely had an account at the Commercial Guaranty State Bank, the next door. Nor did the court commit any error in admitting in evidence the testimony of S. L. Miller to the effect that on the same day appellant presented to him a check for \$13 purporting to be signed by Etta Thorn on said State Bank, appellant telling Miller at the time that, if he would cash the check for him, he would pay him \$3 of the amount on an account appellant was due him; this witness further testifying that he at once telephoned to said bank to learn if the check would be good. He was not permitted to tell what the bank answered him over the phone, but he testified that he at once told appellant that Etta Thorn had no money to her credit at said bank, but Mariah Thorn did have; that appellant thereupon told him that Mariah Thorn sometimes signed her name "Etta" as well as "Mariah"; that he took that \$13 check, left his store, was gone about an hour, and returned with a \$16 forged check, as stated, and presented that to him requesting him to cash it, and stating that, if he would cash it, he would pay him \$6 on his account. It was admitted by both sides that neither Mariah Thorn, nor any of her people, signed the said purported forged check, nor made it, nor authorized or consented for any person to sign or make the check. All of said testimony of said Thomas and Miller was material, pertinent, and clearly admissible testimony.

There is no error in the record, and the judgment will be affirmed.

SMITH v. STATE. (No. 3891.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. CRIMINAL LAW \S 636½—TRIAL—PERMITTING WITNESS TO CONSULT ATTORNEY.

In a prosecution for cattle theft, the action of the court in permitting a witness under indictment for the same offense to talk with his attorney after being placed on the witness stand and before testifying was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1576; Dec. Dig. \S 636½.]

2. CRIMINAL LAW \S 508—EVIDENCE—CODEFENDANT UNDER INDICTMENT.

That a witness is a codefendant of the defendant on trial and under indictment for the

same offense does not prevent him from being used as a witness by the state if he sees proper to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. 508; Witnesses, Cent. Dig. §§ 244-248.]

3. CRIMINAL LAW 508—EVIDENCE—CODEFENDANT OF ACCUSED—PROMISE OF IMMUNITY.

That a witness, who is a codefendant of accused and under indictment for the same offense, has been promised immunity, does not make him incompetent as a witness for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. 508; Witnesses, Cent. Dig. §§ 244-248.]

4. CRIMINAL LAW 510—CATTLE THEFT—TESTIMONY OF ACCOMPLICE—CORROBORATION.

In a prosecution for cattle theft, it was essential to a conviction that the testimony of a witness, who was a codefendant of accused and under indictment for the same offense, should be corroborated by testimony tending to connect accused with the original taking.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. 510.]

Appeal from District Court, Leon County; S. W. Dean, Judge.

Jule Smith was convicted of cattle theft, and appeals. Affirmed.

J. M. Chatham, of Centerville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of cattle theft; his punishment being assessed at three years' confinement in the penitentiary.

In a bill of exceptions it is contended the court erred in permitting Mattison to testify for the state, because he was a principal and codefendant in two indictments for theft of cattle in the district court of Leon county, for one of which defendant was then upon trial; that Mattison was directly or indirectly promised immunity from punishment in case he testified against the defendant; that Mattison was placed upon the stand as a witness, and refused to make any statement unless he was permitted to talk to his attorney and to the district attorney. The court permitted the witness to leave the witness stand and the courtroom to talk with his attorney and the district attorney, notwithstanding the witness was sworn with the other witnesses and was under the rule at the time he last talked to his attorney and the district attorney. Shortly afterwards Mattison returned into court and gave very damaging testimony against the defendant, to wit: That he was induced by this defendant to steal and dispose of the cattle charged in the indictment; that they both left Centerville together, got the cattle off the range in the evening, driving them to the home of witness; that the next morning, a short distance from witness' house, appellant joined them, and they drove the cattle and put them

in a pen for delivery to Mr. McIver, and did deliver the cattle into a herd being driven by McIver and carried into Madison county, and there sold the cattle to McIver; that same was done without the knowledge or consent of the owner of the cattle.

Another clause in the bill of exceptions recites that the court erred in not compelling the attendance of Wm. Watson as witness for defendant for the reasons set up in defendant's motion for a new trial; that said witness had been duly summoned and failed to appear, and the defendant applied to the court for an attachment for said witness to compel his attendance, but the court refused to have attachment issued for said witness, who was then in town not over 500 yards distant from the courthouse. The court approves this bill with the explanation that process was served on William Watson, an attorney, during the progress of the trial, for the purpose of showing that Mattison had been promised immunity. Watson was sick in bed and unable to attend, and assured the court that Mattison had not been promised immunity, and Mattison said he had not been promised immunity and pleaded guilty to the charge, and is now serving his sentence. There is on file an affidavit of Watson to the facts above stated, and that the proof required by defendant could not have been made by him, and was not the truth, and no postponement was requested.

[1-3] As to the action of the court in permitting the witness to talk with his attorney, the court states witness was placed on the stand, and, being under indictment for the same offense, stated to the court that before testifying he would like to ask Mr. Watson, his attorney, a question, and this was permitted to be done by the court. He retired from the courtroom, went to Watson's office, and almost immediately returned with the announcement that he was then ready to testify. We are of opinion there was no error committed by the court in this ruling. Although a codefendant and under indictment for the same offense, Mattison could be used as a witness by the state if Mattison saw proper to take the stand and testify. Witness had legal right to consult his attorney before testifying. This rule would not apply if Mattison was sought to be used by the defendant. This is the rule provided by legislative enactment. He could turn state's evidence and testify, with or without promise of immunity, if he saw proper so to do. We are of opinion that, even if the witness had been promised immunity, it would not render him incompetent as a witness for the state under the statute. The court's qualification excludes the idea of any promise of immunity, because he also states the witness had pleaded guilty and was serving a sentence under the plea of guilty.

[4] There is another ground stated in the

exception; that is, the court erred in overruling defendant's motion for a new trial, especially because the verdict of the jury was contrary to the law and the evidence. The motion further narrates the fact that Mattison was not corroborated, so as to make out the case. Of course, Mattison would have to be corroborated by testimony which tended to connect the defendant with the original taking. If this was not done, the state had failed to prove its case. The statute requires the accomplice shall be corroborated by testimony which tends to connect the defendant with the case for which he is being tried. We are of opinion from reading the testimony that Mattison was sufficiently corroborated in several ways, and especially by the witness McIver. It occurs to us there is no necessity for detailing the testimony, but we find that the corroboration is sufficient.

The judgment, therefore, will be affirmed.

Ex parte DUNCAN. (No. 3809.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. CONTEMPT — CONSTRUCTIVE CONTEMPT — WHAT CONSTITUTES.

Where language contained in a brief for writ of error which was filed in the district court in vacation was improper and intemperate, the contempt was constructive only.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1-3, 5, 7, 8; Dec. Dig. § 2.]

2. CONTEMPT — PUNISHMENT — CONSTRUCTIVE CONTEMPT — PROCEDURE.

Where relator used improper language in a brief for writ of error, a copy of which was filed in the district court in vacation, the district court is not entitled to summarily punish relator on an order to show cause why he should not be adjudged guilty of contempt, made upon unverified petition of opposing counsel calling the court's attention to the language and without affidavit filed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.]

Original application by John T. Duncan for a writ of habeas corpus. Writ issued, and relator discharged.

Dickens & Dickens, of Austin, and A. Burleson, of Smithville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Relator was adjudged guilty of contempt of court by Hon. Frank S. Roberts, judge of the district court of the Twenty-Second judicial district, and his punishment assessed at a fine of \$50 and one day's imprisonment in the county jail.

Relator made application to this court for a writ of habeas corpus, but inasmuch as the petition showed that the alleged contempt was certain statements contained in a brief in a civil cause on appeal, we first declined to issue the writ until it was presented to our Supreme Court, deeming it probable that that court had jurisdiction under article 1529

of the Revised Civil Statutes, as the alleged contempt grew out of proceedings had in a civil case. However, upon consideration, one of the justices of the Supreme Court indorsed on the application that the Supreme Court declined to issue the writ for lack of jurisdiction, and as there could be no doubt that this court had jurisdiction under the Constitution to issue the writ, after the Supreme Court had held it was without jurisdiction, we ordered the writ to issue, returnable on January 5, 1916. On that day the cause was heard, and it was made to appear that in the case of Isolda Zapp v. Y. F. Mossop, in the district court of Fayette county, the said Hon. Frank S. Roberts, as judge of that court, on the 18th day of December, 1914, entered a certain judgment in favor of plaintiff. Notice of appeal was given, but no appeal perfected. However, in September, 1915, the defendant Y. F. Mossop sued out a writ of error to the First Court of Civil Appeals at Galveston, and filed a brief in said cause on September 23, 1915, and also filed a copy of the brief with the clerk of the district court, in Fayette county, as he was required by law to do. It is a portion of the language used in this brief by relator, as attorney for Mossop, that is held to improperly reflect on the trial court, and for the use of which language he was held to be in contempt of court.

[1] It is agreed that the district court of Fayette county was not in session when the brief was filed, and that the language was not used in the presence and hearing of the court; but, if the language was improper, it constituted what in law is termed constructive contempt. Relator earnestly insists that the language used was in no wise intended to reflect on the trial judge, but was intended to be but an earnest plea for his client. As Hon. Frank S. Roberts has held said language to be contemptuous, we will not discuss that question, but only inquire into whether or not the necessary and proper steps were taken to confer jurisdiction on the judge of the Twenty-Second judicial district to adjudge relator guilty. If the proper steps were not taken to confer jurisdiction on that court, relator is entitled to be discharged.

[2] After the brief had been filed, Mr. C. D. Krause, an attorney of the Fayette county bar, having his attention called to the brief (it also using language that he contended improperly reflected on him), addressed a petition to the judge, calling his attention to the language used in the brief. Upon the filing of this petition, Judge Roberts ordered process to issue summoning relator to appear before him and show cause why he should not be adjudged to be guilty of contempt for making use of such language. On the day named relator appeared, and filed an answer, first pleading that the court had no jurisdiction, in that the petition filed was

not sworn to by Mr. Krause, nor any other person. We are of the opinion this plea should have been sustained, and this court so held in *Ex parte Foster*, 44 Tex. Cr. R. 425, 71 S. W. 593, 60 L. R. A. 681, 100 Am. St. Rep. 866, and *Ex parte Landry*, 144 S. W. 962. In this latter case Judge Davidson exhaustively reviewed the authorities and held:

"If the acts or conduct occur in the presence or hearing of the court, it may deal summarily with the contemnor without a written statement charging the contempt; but, where the contempt does not occur in its presence and hearing, the better practice is to present the contempt by written charges, which should be sworn to, unless presented in writing by the district attorney in his official capacity."

State's counsel contends that we were wrong in so holding, in an able brief, and that those decisions should not be followed. In deference to the earnest insistence, we have again investigated this question, and we think the great weight of authority is with the holding of the court. In *Rapalje on Contempt*, § 93, it is said:

"In the United States the almost universal practice in this matter is to present to the court an affidavit setting forth the facts and circumstances constituting the alleged contempt, sworn to by some person who witnessed or had knowledge of the offense. Unless such an affidavit be presented, process will not be granted. The issuing of process without the filing of the proper affidavit is erroneous, and the error is not cured by the subsequent filing thereof."

Of course, this rule only applies when the language used, or conduct complained of, was not in the presence and hearing of the court; for where the contemptuous acts or conduct are committed in the presence of the court, he may inflict summary and immediate punishment.

In *State v. Blackwell*, 10 S. C. 35, it was held: It is a fatal objection to a rule to show cause why a party should be attached for contempt for an offense not committed in the presence of the court that it was issued without an affidavit setting forth the facts. In *Ency. of Pleading & Practice*, vol. 4, page 779, the rule is stated:

"The almost universal method by which contempt proceedings are begun is by an affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence an affidavit is essential."

In the case of *Wyatt v. People*, 17 Colo. 261, 28 Pac. 964, the Supreme Court of Colorado says:

"Constructive contempts—those not committed in the presence of the court—must of course in some regular and legitimate way be brought to the court's knowledge; until this is done the process of attachment will not issue. And in *Gandy v. State*, 13 Neb. 445 [14 N. W. 143], it is said that such proceedings must be commenced by a sworn information. But the practice generally recognized throughout the United States, and according to Blackstone frequently followed in England, is for some proper official or interested party to set forth by affidavit the material facts relied on. A little contrariety

of opinion exists as to whether the warrant of commitment or the order of court must recite the jurisdictional facts. But the overwhelming weight of authority in this country sustains the proposition that the affidavit upon which the proceeding for a constructive contempt is based must state facts which, if established, would constitute the offense, and that, if the allegations of the affidavit are not sufficient in this respect, the court is without jurisdiction to proceed."

The Supreme Court of California, in *Batchelder v. Moore*, 42 Cal. 412, says:

"When the alleged contempt is not committed in the presence of the court, an affidavit of the facts constituting the contempt must be presented, in order to set the power of the court in motion."

In *Whittem v. State*, 36 Ind. 213, it is held:

"The proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued, unless upon affidavit specifically making the charge."

In the case of *State v. Henthorn*, 46 Kan. 616, 26 Pac. 937, it is held:

"A careful examination of the authorities satisfies us that in all cases of constructive contempt, whether the process * * * issues in the first instance, or a rule to show cause is served, a preliminary affidavit or information must be filed in the court before the process can issue."

In the case of *In re Wood*, 82 Mich. 82, 45 N. W. 1116, it is said:

"Those contempts not committed in its immediate view and presence must be brought before the court by affidavit of the persons who witnessed them, or have knowledge of them; and a rule is made, based upon such affidavit, either that an attachment issue, or that the accused show cause at a certain time and place why he should not be punished for the alleged contempt"—citing 4 Black. Com. 286; 2 Hawk. P. C. 222; 1 Tidd, Prac. (4th Am. Ed.) 85, 478, 479; in *re Judson*, 3 Blatchf. 148, Fed. Cas. No. 7,563; 6 Dane, Abr. page 528, c. 193, art. 27; *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Matthews*, 87 N. H. 450; *Crow v. State*, 24 Tex. 12.

In the case of *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584, it is held:

"A court has no authority to proceed against a party for contempt on account of acts not committed in the immediate view and presence of the court, unless the facts constituting the contempt are shown by an affidavit presented to the court."

See, also, *In re Nickell*, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 318; *Flannery v. People*, 225 Ill. 69, 80 N. E. 60; *Thomas v. People*, 14 Colo. 256, 23 Pac. 326, 9 L. R. A. 569; *Hurley v. Commonwealth*, 188 Mass. 447, 74 N. E. 677, 3 Ann. Cas. 757; and cases cited in those authorities.

As no affidavit, nor petition sworn to, was filed in this case, the jurisdiction of the court was not properly invoked, and therefore the relator is entitled to be discharged; and it is so ordered. We do not deem it necessary to discuss the other questions presented.

Relator is discharged.

VENN v. STATE. (No. 3897.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. INTOXICATING LIQUORS \Leftrightarrow 239—VIOLATION OF LOCAL OPTION LAW—ALIBI—INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for violating the local option law, the state's principal witness testified that he bought whisky from defendant at a certain time and place, and several witnesses for defendant testified that he was at a different place at that time, the refusal of requested instructions on alibi was error.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. \Leftrightarrow 239.]

2. WITNESSES \Leftrightarrow 414—CORROBORATION—TESTIMONY OF GRAND JUROR.

In a prosecution for violating the local option law, the testimony of a witness that he was foreman of the grand jury which indicted accused, that the state's purchasing witness testified before that body after being confined in jail for refusal to testify, and that his testimony that he bought whisky from accused was a surprise to the witness, and not the result of being forced or led by the grand jurors, was improperly admitted; it not being proper to corroborate the testimony of the purchasing witness in this manner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. \Leftrightarrow 414.]

3. CRIMINAL LAW \Leftrightarrow 1137—EVIDENCE—MATTERS FIRST ADDUCED BY ACCUSED.

In a prosecution for violating the local option law, accused could not predicate error on the admission of testimony that there was much drinking and drunkenness at the time and place of the alleged sale, where he had adduced testimony as to the same matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. \Leftrightarrow 1137.]

4. CRIMINAL LAW \Leftrightarrow 1137—EVIDENCE—MATTERS FIRST ADDUCED BY ACCUSED.

Where accused elicited testimony that the prosecuting witness had run off and forfeited his attachment bond as a witness, it was not error to permit the county attorney to prove by the witness why he had forfeited such bond.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. \Leftrightarrow 1137.]

5. CRIMINAL LAW \Leftrightarrow 1137—EVIDENCE—MATTERS FIRST ADDUCED BY ACCUSED.

Permitting the sheriff to testify that, when he arrested defendant, he had had in his possession for about two years a warrant for defendant's arrest in a felony case, and that he had been unable to arrest defendant because he was constantly on the dodge, was not error, where evidence as to such matter was first introduced by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. \Leftrightarrow 1137.]

Appeal from Upshur County Court; W. H. McClelland, Judge.

Willie Venn was convicted of violating the local option law, and appeals. Reversed and remanded.

Sanders & Florence, of Gilmer, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

[1] He introduced testimony showing clearly an alibi. The state's evidence was made by a witness who stated that he had bought whisky from appellant, at Union Grove about 8:30 or 9 o'clock in the morning. Appellant proved by several witnesses that at that time he was at another place several miles distant, some of whom went with him from his home to the point designated, and by other witnesses who were on the ground at that point. There seems to have been picnic occasions at both points; these places being three or four miles apart. Appellant's alibi covers practically from 8 o'clock in the morning until 4 o'clock in the evening. The matter was properly presented, and special requested instructions presenting the alibi were refused. The matter is timely and properly reserved and presented. This was error. This was his main defense. Of course, the other matter was in the record that he did not sell because of the fact he was not at the place where the sale is said to have occurred. This charge should have been given.

A bill of exceptions was reserved to the remarks of the county attorney in his closing argument. This should not have occurred, and will not, we suppose, upon another trial, and is therefore not discussed.

[2] Another bill recites that while Ferrell was testifying he stated that he was foreman of the grand jury, and that Weaver, the state's purchasing witness, testified before that body; that the grand jury was trying to induce him to tell about buying whisky from bootleggers and if he had bought from certain parties. Witness first stated he did not remember. Finally, after being pressed, he said he bought whisky, but would not tell from whom. The witness was then carried before the district judge and finally sent to jail. After spending two days and nights in jail, he was brought before the grand jury, and then told of several instances where he had bought whisky. These sales were by several different persons, one of which was the quart he bought from appellant at Union Grove. The witness says:

"We did not force him or lead him to tell it. In fact, I was surprised when I learned he had bought whisky from the defendant. We were not inquiring or him of sales made by the defendant."

Various and sundry objections were urged to all this. This testimony, we think, was not admissible. This witness could not be corroborated in this manner. This question was suggested by the bill of exceptions. Upon another trial this testimony should not be permitted to go to the jury.

[3] Another bill recites Mr. Bennett testified there was a great deal of drinking and drunkenness in and around Union Grove that day, meaning the time and place of the al-

leged sale. Various objections were urged to this. The court approves this with the explanation that the testimony of Ben White with reference to the same matter had been adduced by defendant as well as defendant in direct examination of the witness Bennett, and all this matter should not have gone before the jury, but, inasmuch as the defendant first introduced the matter, we are of opinion that the bill does not show reversible error.

[4] Another bill recites that the prosecuting witness Weaver was asked by defendant if he did not run off and forfeit his attachment bond in a district court case growing out of some cases "turned in by him" before the grand jury, whereupon the county attorney asked this question: "Why did you run off and forfeit your attachment bond as a witness?" Witness answered: "Because I was afraid of some of the characters I was dealing with." Under the decisions it seems that this testimony, having been brought out by the defendant, or the fact rather that he ran away and forfeited his attachment bond in regard to a district court case, would justify the county attorney in inquiring into the reasons why he forfeited such attachment bond. It seems it did not apply to this case, but the defendant elicited the fact that witness had forfeited this attachment bond. We are under the impression that under such circumstances the county attorney would be entitled to prove by him why he forfeited the bond. The matter had nothing to do with this case in any way, but, inasmuch as the defendant brought out the matter, it became the subject of cross-examination by the state.

[5] Another bill recites that by the witness Bule, sheriff of Upshur county, the state was permitted, over the objection of appellant, to show that at the time he arrested appellant in this case he had in his possession a warrant for the defendant for about two years in a felony case against him; that he also had the warrant in the felony case at the time the county attorney and others shot at Venn when he ran from the officers, but he was constantly on the dodge was the reason he had not arrested him. The court explains this bill by stating that this evidence was first introduced by defendant, and the testimony here complained of was admitted on redirect examination. It would seem that under this statement there was no error. Where one party brings out a fact, whether legitimate or illegitimate, and it is permitted to go before the jury, the other side may break the force of that as best he may. Much of this testimony was inadmissible, but, as presented by the bill of exceptions and explained by the court, it seems not to present reversible error.

It occurs to the writer that the testimony is hardly sufficient to convict, but he does not care to enter into a discussion of the matter or state the evidence. Appellant, if the

various witnesses can be believed, was not at Union Grove gathering at the time indicated by the state's witness Weaver. If he had been at Union Grove at that time, some one ought to have seen him besides this witness. There are several witnesses who testify positively that he was not at Union Grove, and had gone from his home to Mineral Springs and spent the day, arriving there about 8:30 in the morning, or about that time, and was seen by various parties there during the day and as late as 4 o'clock in the evening in swimming. Those witnesses who accompanied him from his home to Mineral Springs testify that he had no whisky; they were horseback, and they saw no evidence of his having any whisky, and none was exhibited by him during the day. They exclude the fact that he was at Union Grove. This is the opinion of the writer.

The judgment is reversed, and the cause remanded.

SCHULTZ v. STATE. (No. 3908.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. HOMICIDE \S 310—INSTRUCTIONS—AGGRAVATED ASSAULT—EVIDENCE.

Where the evidence showed that A. resisted the attack of defendant with his fists, but at no time sought to use any weapon upon defendant, that defendant then tried to get A. to come out of a saloon and renew the difficulty, that A. declined, that defendant left saying that he was going to get his gun and shoot him, that he waylaid A. on his way home with others, reminded him that he was going to shoot him, and shot away his hand and put out his eye while he was dodging behind his horse, there was no error in refusing to submit the issue of aggravated assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 657-661; Dec. Dig. \S 310.]

2. HOMICIDE \S 230—ASSAULT TO MURDER—INTENT—SUFFICIENCY OF EVIDENCE.

Evidence held to show that defendant, when he shot and injured another, had a specific intent to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 478; Dec. Dig. \S 230.]

3. HOMICIDE \S 90—NATURE OF INSTRUMENT USED—"DEADLY WEAPON."

A gun used as a firearm within carrying distance and at such range that it shot off a hand of the prosecuting witness and put out one of his eyes, was a "deadly weapon."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 119; Dec. Dig. \S 90.]

Appeal from District Court, Goliad County; John M. Green, Judge.

Fred Schultz was convicted of assault to murder, and he appeals. Affirmed.

G. E. Pope and Fowler & Fowler, all of Goliad, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment assessed at five years' confinement in the penitentiary.

The evidence would show that appellant,

Frank Zalontz, D. C. O'Neill, Oliver Magrew, Arthur Hardt, Hugo Speiss, and appellant's brother, Albert Schultz, all met at the saloon of Henry Dobsky, at Dobskysville, in Goliad county. Hugo Speiss called Frank Zalontz a "rabbit." Words followed, when appellant offered to loan Speiss a knife, saying he had two knives. Words then ensued between appellant and Zalontz, and appellant started towards Zalontz, and Zalontz knocked him down. They were separated, the saloon keeper telling them they could not fight in the saloon. Appellant went out in front of the saloon and dared Zalontz to come out there. Zalontz did not go, when appellant left, and in leaving said to Zalontz he had better go on home as he, appellant, was going home and get his gun and shoot him, or kill him. About an hour after this O'Neill, Magrew, Albert Schultz, and the prosecuting witness, Zalontz, started home; O'Neill and Magrew being in a buggy, while Albert Schultz and Zalontz were horseback. While on their way home they came across appellant, who stepped from behind a tree and said to Zalontz, "Frank, did I not tell you I was going to shoot you?" Zalontz got off his horse and endeavored to keep his horse between him and appellant; appellant endeavoring to get in position to shoot. He finally shot over the horse, and shot off the right hand of Zalontz; some shot striking him in the face and putting out one of his eyes.

Appellant, on cross-examination of the state's witnesses, endeavored to prove that Zalontz undertook to use an axe handle, but all the witnesses say that the axe handle was tied to Zalontz's saddle, and he made no effort to use it.

Appellant introduced no evidence, except to show a good reputation, and that he had not theretofore been convicted of a felony, in an effort to secure a suspension of the sentence.

[1] No exceptions were reserved to the introduction of testimony, but appellant excepted to the court's charge because he failed to submit aggravated assault, and because the court refused to give appellant's special charge presenting that issue.

Appellant having brought on the difficulty between himself and Zalontz, some saying with a stick drawn, at the time Zalontz knocked him down, it would be very doubtful if aggravated assault would have been raised if he at that time shot Zalontz. A man cannot himself raise a difficulty and then have the offense reduced to manslaughter because of the state of his mind, unless he is driven to the extremity of killing to save his own life. Certainly all Zalontz did in this instance was to resist the attack of appellant with his fists, and at no time sought to use any weapon upon appellant. Appellant tried to get him to come out of the saloon and renew the difficulty. Zalontz declines, and appellant leaves, telling him he is going to

get his gun and shoot him. He waylays Zalontz, and while Zalontz is on his way home with others shoots him at a time when all Zalontz is doing is dodging behind his horse.

[2] The facts do not raise the issue that if Zalontz had been killed appellant might not have been guilty of any higher grade of offense than manslaughter, and the court did not err in refusing to submit the issue of aggravated assault. *Cole v. State*, 35 Tex. Cr. R. 385, 33 S. W. 968. There is no evidence raising the issue that appellant did not intend to kill, but the evidence and circumstances attendant upon the shooting show a specific intent to kill.

[3] Neither was there error in the court instructing the jury, "A gun used as a fire-arm within carrying distance is a deadly weapon," under the facts in this case. Mr. Branch, in his work on Criminal Law, correctly states the rule to be:

"Not error to define a deadly weapon as a gun used within carrying distance, if proof shows that defendant shot the injured party at close range." *Juley v. State*, 45 Tex. Cr. R. 391, 76 S. W. 468; *Kosmoroski v. State*, 59 Tex. Cr. R. 296, 127 S. W. 1056.

The judgment is affirmed.

SOLAN v. STATE. (No. 3887.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. WITNESSES \Leftrightarrow 48—COMPETENCY—CONVICTION OF MISDEMEANOR.

A conviction for a misdemeanor did not render the convict incompetent as a witness for the state in a criminal case.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 100-115; Dec. Dig. \Leftrightarrow 48.]

2. WITNESSES \Leftrightarrow 49—COMPETENCY—CONVICTION OF FELONY—PARDON.

The granting of a pardon eight years after a witness for the state had served his full term on conviction for a felony, on the state's request and to relieve him of disabilities so that he might testify for the state, was a matter for the Governor, over which the Court of Criminal Appeals had no control, so that it could not hold, on defendant's objection, that such witness was incompetent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 116-118; Dec. Dig. \Leftrightarrow 49.]

3. CRIMINAL LAW \Leftrightarrow 1120—APPEAL—EXCLUSION OF EVIDENCE—SETTING OUT TESTIMONY.

In a prosecution for robbery, where a bill of exceptions showed that a witness was an officer, that he had arrested the prosecuting witness and another on a charge of intoxication on the night before the alleged robbery, that the prosecuting witness had spent the night in the city jail, that, after such witness had testified that they had been searched before being locked up, and about \$5 and a quantity of liquor found on prosecuting witness, that they always searched prisoners, defendant attempted to prove by such witness that if the prosecuting witness had some \$55 on him when arrested it would have been found, that objection thereto was sustained, but did not show the object of such testimony, nor the evidence that the witness would

have given thereon, the court could not determine whether its exclusion was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. ☞ 1120.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

Pat Solan, alias Bert Williams, was convicted of robbery, and he appeals. Affirmed.

Ralph P. Mathis, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of robbery, his punishment being assessed at five years' confinement in the penitentiary.

[1, 2] There are two bills of exception incorporated in the record. Charles Johnson was the alleged injured party and witness on the trial. The bill of exceptions recites that he was permitted to testify in regard to the robbery over appellant's objection because Johnson's testimony shows he was in jail at the time of the trial on a misdemeanor charge of swindling, and had pleaded guilty. He testified that he was an ex-convict, and that he had served two years in the penitentiary, and that he had not been pardoned until eight years after he had served his full term, and then only for the purpose of being permitted to testify against defendant; and, further, that the pardon of this witness did not reach the county of trial, nor was it filed with the papers in this case until the 2d day of September, one day after this cause was set for trial; and that the pardon was issued not for good behavior of the witness, and not to restore the witness' rights, but because the state had so requested such pardon in order that he might be permitted to testify against defendant, and that because the state had so requested such pardon, and had secured such pardon, he, Charles Johnson, was biased in his testimony in favor of the state and against the defendant. These matters did not render Johnson incompetent. The misdemeanor conviction did not render him incompetent as a witness. The granting of the pardon to Johnson in the felony for the purpose of relieving him of disabilities so that he might testify in the case was a matter for the Governor, over which this court has no control. This question was decided in *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430. The matter is thoroughly discussed in the *Martin* case. It is unnecessary to go into a further discussion of it.

[3] There is another bill of exceptions which shows that the witness Roll was an officer of the city of Wichita Falls, and that he and another officer arrested Johnson, the prosecuting witness, and one of his friends, on charges of drunkenness, and after the defendant had proved that this arrest was made the night before the alleged robbery, and

after the defendant had proved that said Charles Johnson spent that night in the city "cooler," and was not given his liberty until the morning of the alleged robbery, and after the witness Roll had testified that these men had been searched before they were locked up, and had found only about \$5 and a quart of booze on Johnson, and after he had testified that they always search the prisoners, "then it was that the defendant attempted to prove by this witness if the said Charles Johnson had some \$55 on him at the time he was arrested would he have found it; then it was that the state objected, and the court sustained the objection." The object and purpose of this testimony is not stated, nor is the evidence that Roll would have given in regard to the matter stated. What the witness Roll would have testified as to whether he would have found the money or not if it had been on him should have been stated, or something to show that he would have been in position to have found the money on the party, if it was on him, at the time they searched him as well as the purpose for which it was introduced and the connection shown so as to make it material in order that this court might decide the question as to whether there was error or not.

The evidence, we think, is sufficient to sustain the verdict of the jury, and for this reason it will not be disturbed.

The judgment will be affirmed.

EITEL v. STATE. (No. 3896.)

(Court of Criminal Appeals of Texas. Jan. 19, 1916.)

1. CRIMINAL LAW ☞ 1099—APPEAL—STATEMENT OF FACTS—APPROVAL AND FILING.

Where within the 20 days after adjournment allowed by the court for filing statement of facts appellant and the county attorney, being unable to agree, the judge undertook to prepare and file one, and one was filed, though it was not specifically certified or approved by the judge till later, it will be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. ☞ 1099.]

2. ASSAULT AND BATTERY ☞ 64—GUARDIAN AND WARD—EMANCIPATION.

A guardian having for a long time had no care or custody of his ward, but having emancipated her, as concerns care, custody, and control of her, cannot justify an assault and battery on her, on the ground of the relationship and the right to punish.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 90-92; Dec. Dig. ☞ 64.]

3. ASSAULT AND BATTERY ☞ 66 — VERBAL PROVOCATION.

By express provision of Pen. Code 1911, art. 1016, verbal provocation does not justify an assault and battery, but can be considered only in mitigation of punishment.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 94, 95; Dec. Dig. ☞ 66.]

4. CRIMINAL LAW §364, 368—RES GESTÆ.

What defendant, and his wife in his presence, said immediately after his assault was res gestæ thereof, and admissible as original testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 806, 808-810, 812-818, 821; Dec. Dig. §364, 368.]

Appeal from County Court, Upshur County; W. H. McClelland, Judge.

W. M. Eitel was convicted, and appeals. Affirmed.

Warren & Briggs, of Gilmer, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant, an adult male, was indicted and convicted of an aggravated assault and battery upon Katie Lee Carrington, a female, and his punishment assessed at the lowest allowed by law, a fine of \$25 only.

[1] The case was tried at the May term of the county court, which adjourned on May 29th. The court by proper order allowed 20 days after adjournment to file the statement of facts and bills of exceptions. The bills were filed within that time.

The statement of facts is in the record. The appellant has made a motion in this court to strike out and not consider it and then reverse the case because he was deprived of it. His attorney made an affidavit in the court below, which is contained in the transcript, and also makes substantially the same affidavit in this court, as a part of his said motion. Without reciting the full contents, it shows this state of fact: That in about ten days after the court adjourned he prepared a statement of facts in duplicate and sought the county attorney for the purpose of getting an agreement thereto. There was some delay in seeing the county attorney, and after he did see him there was some other delay caused by the county attorney desiring time to consider his statement. However, within the 20 days he and the county attorney went over the statement of facts he had prepared and did not agree thereto. The county attorney within the 20 days took the copy left with him and made erasures and interlineations therein to conform to his contention of what the testimony was. The county judge was informed by appellant that he and the county attorney could not agree upon a statement of facts, and thereupon requested him to prepare such statement and file it within the time. It seems the judge undertook to do that, and we gather that he took as a basis for his statement of facts that which the county attorney had prepared. Either he or the county attorney—perhaps the county attorney—filed that statement with the clerk, who placed his file mark thereon within said 20 days. At the time it was filed the county

judge had not certified nor approved the same. He did so specifically, however, some weeks later, all of which appears in the transcript.

Under these circumstances, this court cannot strike out the statement of facts and reverse the case, because appellant was deprived thereof, but will consider it. It has been the uniform holding of this court in a great many cases that, under such circumstances as detailed, this court will consider the statement of facts. *Gibbs v. State*, 70 Tex. Cr. R. 278, 156 S. W. 687; *Jones v. State*, 147 S. W. 587; *Villa v. State*, 63 Tex. Cr. R. 537, 141 S. W. 104; *Mansfield v. State*, 62 Tex. Cr. R. 631, 138 S. W. 591; *Johnson v. State*, 71 Tex. Cr. R. 392, 159 S. W. 848; *Solis v. State*, 174 S. W. 343. See, also, section 41, Branch's Crim. Law, where a considerable number of other and earlier cases which are in point are cited. Also see note 20, p. 887, of Vernon's Ann. C. O. P., for a large number of other earlier cases in point.

This rule is not in conflict with the statute and the other large number of decisions by this court where statements of facts or bills of exceptions are filed too late through the negligence of the appellant or his attorneys. The two rules are equally applicable to the given state of facts to which they apply.

We think it necessary to give the substance of the material testimony. Some of the facts are established by uncontroverted testimony. Other of the material facts are sharply disputed. Miss Katie Lee Carrington and her young brother, Troy, were left orphans when she was 6 years of age. For several years she lived with, and was taken care of by, her grandparents. When she was about 15 years old, her uncle Lark Carrington was appointed guardian for both the persons and estates of herself and brother. This uncle soon afterwards died. Thereupon appellant, another uncle, by marriage, was appointed guardian of their persons and estates. She was sent off to school by her respective guardians until about June, 1911, when she went to appellant's to live with him and his wife. Appellant and his wife both, in substance, testified that Miss Carrington was hard to get along with, and they both soon saw that they could not get along with her. Appellant thereupon told her brother Troy that he thought it was his duty to take her and try to get along with her. Thereupon both of them left his house and lived together, housekeeping, and made a crop for themselves. Appellant refused to longer keep her. He claimed she and her brother soon fell out and could not get along together; that her brother went off and got a job and stayed until he got sick, when he returned to appellant's, where he remained sick until he died; that Miss Carrington,

when she and her brother separated, went off to herself and got a job. The uncontradicted testimony shows that thereafter she looked out for herself exclusively, appellant having nothing to do either with her control, maintenance or support, and that she never at any time after she left his house about a year and a half before the alleged assault therein and never thereafter lived with him at all. When appellant and his wife realized that Troy was very sick and would doubtless soon die, his wife telephoned to Miss Carrington at Terrell, where she was then working for herself and making her own living, the condition of her brother, and that, if she wanted to see him before he died, to come and do so. Miss Carrington thereupon accepted this invitation, went to appellant's as a visitor to her sick brother, and remained with him for a few days until he died and was buried. Appellant was not at his home, but was at work away therefrom, when she reached his home, which was Thursday before her brother died the following Wednesday. Appellant did not reach his home after she arrived there until Saturday evening, about night.

The case was tried May, 19, 1915. Miss Carrington testified, and this was not disputed, that she was 21 years of age in February before. This would make her nearly 19 years of age when the alleged assault and battery was committed upon her. She testified that for the 2 years prior to this trial she had taught school. Some time before her brother died appellant wrote her a letter when she was at Terrell, telling her, in substance, that the doctor advised him to send her brother to a sanitarium for tubercular patients. She answered this letter at the time, and said to him therein, in substance, that, if her brother had not been beaten out of his property by appellant, he would have had plenty of money to have gone to a higher altitude or to some other place for his health, and not have been a charge upon the state in a tubercular sanitarium. After supper the night of the assault appellant went to a lodge meeting, and did not return home until 10 o'clock that night. Miss Carrington testified that he was drinking. She and others said they smelt whisky on his breath. Mr. Petty, who was at the lodge hall with him, testified that appellant was drinking; that he smelt his breath, and on going back home he staggered. Appellant and his wife denied that he was drunk. His wife testified that she fixed him a whisky toddy before he went to the lodge, and that he drank no more. Miss Carrington said: That, after he returned from the lodge, she, his wife, and he were sitting in the room across the hall from where her brother Troy was, engaged in conversation. That he asked her why she had written him such an insulting letter. She replied that he might be all right, but she had no confidence in her aunt, his wife, and would not believe anything she

would say. He thereupon caught her by the arm, pulled her out of the chair, and slapped her. That she then screamed, ran out of the house, and went to a neighbor's about a quarter of a mile away. That in running out of the room to escape him she ran over a chair or something. All the testimony by appellant and his wife, as well as all the watchers with the sick man, shows, in substance, that appellant and his wife pursued Miss Carrington and attempted to find and catch her. Mr. Howell testified: That he was in the room with the sick man, and, when he heard the racket, went out into the hall and met appellant and his wife and inquired of them what was the matter. Mrs. Eitel said to him: "This is my business. Go on back in the room and wait on the sick." That she also then said appellant slapped Katie, and, if he had caught her, he would have stamped her through the floor. That they all then went out into the yard looking for Miss Carrington, and that appellant then said that, if he could find her, he would "kick her damned ass over the fence." Mr. Moore, another one of the watchers with the sick man, said that, when he heard the racket, he went out to see what was the matter, and, while appellant and several of the others were out in the yard looking for Katie Lee, appellant stated, if he could find her, he would "kick her damned ass off of the place." Mr. Petty, another one of the watchers, who also went out at the time, said: That, when he got to the door of the hall, appellant said to him: "This is not your affair. Go back and attend to the sick." That, while out in the yard, appellant said, if he could find her, he would "stamp the fatal sh—t out of her." Appellant and his wife denied that he slapped Katie, and his wife denied that she told Howell that, if appellant caught her, he would stamp her through the floor, she claiming that she told him appellant and Katie had had a spat, and she denied telling Mr. Moore that appellant said he would stamp her through the floor. Appellant himself testified that he must have lost his head and guessed he used some language that was improper. He admitted he got mad, but did not think he used the language the witnesses said he used, but he was mad when she ran out and screamed without any cause. The testimony further shows that, when all this occurred, her brother was agitated and cried about it and sent some of the friends to the neighbor's for Katie and induced her to return, saying that he would protect her as long as he lived.

The court's charge was in no way objected to at any time by the appellant so far as this record shows. After charging what an assault and battery was in substantially the language of the statute, and, which is usual in such cases, further told the jury that an assault and battery becomes aggravated when committed by an adult male upon the person of a female. Then gave this paragraph:

"Violence used to the person does not amount to an assault or battery in the following cases: When committed in the moderate restraint of parent upon a child, guardian upon the ward, or teacher upon the pupil. Whether the punishment is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child or ward, taken in connection with all the attending and surrounding circumstances, as well as the intent of the one inflicting the punishment."

Next told the jury the punishment for an aggravated assault and battery, and then submitted the case to them, requiring that, if they believed from the evidence beyond a reasonable doubt that appellant at the time alleged committed an aggravated assault and battery upon Miss Carrington, to find him guilty and assess the proper punishment. He also told the jury the burden of proof was on the state, and that the defendant was presumed to be innocent until his guilt was established beyond a reasonable doubt, and that, if they had a reasonable doubt, to acquit him.

[2, 3] Appellant complains that the court erred in refusing to give two special charges requested by him. In one of these he would have told the jury that the proof showed that at the time of the assault appellant was the legal guardian of Miss Carrington; that violence used to the person of another does not amount to an assault and battery in the exercise of the right of moderate restraint or correction of the parent over the child and the guardian over the ward; that a guardian has the same right of restraint or correction over the ward as the parent over his child; then that, if appellant took hold of or slapped Miss Carrington, yet, if they find he did so in the exercise of his right of moderate restraint or correction, to acquit him, or, if they had a reasonable doubt whether he did so in the exercise of his right of moderate restraint or correction, to acquit him, and, in determining this issue, that appellant is not presumed to be guilty from the commission of the offense, but the law presumed that he had the right to inflict the punishment, and they would judge of his guilt by his acts, conduct, and statements made at the time, taking into consideration the acts and conduct of Miss Carrington, and that his guilt is not measured alone by the severity of the punishment, but by his intention in inflicting it, and, although they find the punishment was more severe than it should have been, yet, if done in good faith by him, without intention to injure, but to compel respect for his rightful authority as guardian, then they must acquit him. The other of his requested charges would have told the jury that an aggravated assault and battery committed in the moderate restraint of a parent upon a child, guardian upon the ward, or teacher upon the pupil is no offense; then, if they believed from the facts that the appellant at the time he pulled Miss Carrington from the chair and slapped her, if he did

slap her, was the legally appointed guardian, and if they further believed, viewing the facts and circumstances from his standpoint at the time, his restraint or correction of Miss Carrington was moderate, or if they had a reasonable doubt that it was moderate, and that he used no more force or violence than was necessary to subject her to submission or chastisement for disobedience, if any, that said chastisement or slapping would not be a violation of the law and acquit him; further, that in this class of cases his intention is the principal ingredient of the offense, and, if he had no intention of using more restraint or punishment than was necessary viewed from his standpoint, or if they had a reasonable doubt that he used no more restraint than was necessary, to acquit him. In our opinion, neither of these charges was the law of this case nor applicable thereto, and neither of them should have been given.

The Revised Civil Statutes (arts. 4122, 4123) prescribe that the guardian of the person is entitled to the charge and control of the person of his ward and the care of his support and education, "and his duties shall correspond with his rights"; that it is the duty of the guardian to take care of the person of such minor and "to treat him humanely." The converse of this is equally true, that, where the guardian does not have charge and control of the person of his ward, he has no right of moderate restraint or correction of his ward. Mr. Bishop, in section 885, vol. 1, of his Criminal Law, says:

"Not every guardian has the custody of the ward, and no reason appears why one without it should have the right to chastise."

Mr. Wharton, in his Criminal Law, vol. 2, § 828, in treating of the right of even a parent to chastise his child, says:

"The same doctrine applies to persons standing in loco parentis. But a 'child' in this sense is not merely a minor, but must be a minor under tutelage. *A minor who is emancipated cannot thus be brought into subjection.*" (Italics ours.)

Judge Moore, in *Gorman v. State*, 42 Tex. 222, said:

"If the minor children of the wife are recognized and treated as members of the family of their stepfather, and are supported and maintained by him, there can be no doubt that he stands to them in loco parentis, and may exercise the control and authority of a parent over them."

Chief Justice Roberts, in *Stanfield v. State*, 43 Tex. 168, in discussing an aggravated assault of an adult male upon a child, of the right of moderate correction said:

"If it was not moderate, but excessive, he was guilty as charged of an aggravated assault and battery by having exceeded the boundary of his legal right as guardian under the law, and placed himself in the attitude of a stranger, and not a parent to the child."

Judge Roberts also, in *State v. Stephenson*, 20 Tex. 153, said:

"It has ever been held that it is incumbent on the parent, guardian, and master of an apprentice to show the circumstances and relations

which would justify an act of violence. And from this it would necessarily follow that they need not be negated by averments in the indictment."

Our Statute (article 1009, P. C. 1911) on the subject of assault and battery says:

"When an injury is caused by violence to the person, the intent to injure is presumed; and it rests upon the person inflicting the injury to show the accident or innocent intention."

In *Inglén v. State*, 36 Tex. Cr. R. 473, 37 S. W. 861, it was shown that Inglén got drunk, went to his house, and at night drove therefrom his stepdaughter, 13 years of age, and other members of his family. This child, thus driven from home, went to a grocery store about 150 feet away and was standing on the steps of the store, when Inglén approached her and ordered her to return home. She refused. He thereupon slapped her in the face with his open hand. The girl testified he did not slap her down. Others saw it. One testified that he did slap her down. He and others also testified that the lick caused blood to flow from the child's mouth. The jury convicted him, and assessed his punishment at a fine of \$500 and 15 months' confinement in the county jail. He attacked the verdict as excessive and claimed under the statute he had the right to correct and punish her as a parent. Judge Hurt said:

"While defendant may have had the right to order her home, under the circumstances of the case, he had no right to assault her because she did not obey him, for, by his own conduct, he justified a refusal on the part of the girl to go home."

And further:

"Appellant was guilty of an unprovoked, violent assault and battery upon the girl. It was unnecessary, and, in fact, conceding that he had a right to chastise her, it was clearly and unquestionably more severe than the law would permit."

And he affirmed the case.

The unquestioned testimony by appellant, his wife, Miss Carrington, and others all show appellant had no care nor custody whatever of Miss Carrington at the time of the assault and battery, nor for more than a year and a half continuously prior thereto, that, in fact, he had emancipated her so far as his care, custody, and control of her was concerned, and that she was looking out for herself, making her own living and support, was not in his household as a member of his family at the time, and under the facts and circumstances of this case he had no right whatever as her guardian or otherwise, to punish her. The statute (article 1016, P. C. 1911) says:

"No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense."

The jury assessed the lowest punishment possible.

[4] The court committed no error in refusing appellant's special charge restricting

their consideration of the testimony of some of the witnesses to what Mrs. Eitel said in appellant's presence, as shown by the statement of the testimony above, nor his requested charge limiting the testimony of the several witnesses as to what appellant at the time said of what he would do to Miss Carrington if he caught her, as shown by the statement above. Clearly all this testimony was *res gestae* of the assault and battery, and all admissible as original testimony, and it would have been improper for the court to have limited it as requested by appellant's said special charges.

The judgment is affirmed.

VILLAREAL et al. v. STATE. (No. 3838.)

(Court of Criminal Appeals of Texas. Dec. 1, 1915. Rehearing Denied Dec. 22, 1915. Dissenting Opinion, Jan. 19, 1916.)

1. HOMICIDE \S 30—PARTIES TO OFFENSES—"PRINCIPAL."

Pen. Code 1911, art. 75, provides that when an offense is actually committed by one or more persons, but others are present and knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act or who not being actually present, keep watch so as to prevent the interruption of those engaged in committing the offense, such persons so aiding, encouraging, or keeping watch are principal offenders. Article 87 provides that the persons therein specified, including the relations of an offender in the ascending or descending line cannot be accessories. *Held*, that mere presence at the time and place of a homicide will not alone constitute one a principal offender, though such presence is a circumstance tending to support a finding that one is a principal, and hence a person could not be convicted of murder on proof that he was present when his son killed deceased, and that he concealed the fact that his son had committed the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 48-51; Dec. Dig. \S 30.]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. CRIMINAL LAW \S 59—PARTIES TO OFFENSES—"PRINCIPAL."

To make one a principal offender he must be shown to have been guilty of some overt act or conduct prior to or at the time of a homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 71, 73, 74, 76-81; Dec. Dig. \S 59.]

3. HOMICIDE \S 250—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for murder, evidence *held* sufficient to support a conviction, though the reputation of the state's principal witness for truth and veracity was severely assailed and he was strongly contradicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 515-517; Dec. Dig. \S 250.]

4. CRIMINAL LAW \S 1120—APPEAL—BILLS OF EXCEPTIONS—SUFFICIENCY.

Bills of exception complaining of the exclusion of questions asked witnesses should show what the witnesses' answers would have been.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2931-2937; Dec. Dig. \S 1120.]

5. WITNESSES \Leftrightarrow 337—IMPEACHMENT OF ACCUSED IN CRIMINAL PROSECUTIONS.

Where accused on trial for homicide testified in his own behalf, it was permissible as affecting his credit as a witness to elicit from him that he was under indictment for horse theft.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. \Leftrightarrow 337.]

6. CRIMINAL LAW \Leftrightarrow 957 — VERDICT — IMPEACHMENT BY AFFIDAVITS OF JURORS.

Where jurors on a trial for murder had been discharged and permitted to mingle with the outside world, one of them could not be permitted to impeach his verdict by his affidavit that he and most of the others believed a witness for the state committed the crime, and that they voted to find defendants guilty believing that defendants knew something about the crime and would tell what they knew if convicted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2392-2395; Dec. Dig. \Leftrightarrow 957.]

Davidson, J., dissenting in part.

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Gorgonio Villareal and another were convicted of murder, and they appeal. Affirmed as to the defendant named, and reversed and remanded as to the other defendant.

Pope & Sutherland, of Corpus Christi, for appellants. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Both appellants were convicted of murder, and their punishment assessed at five years' confinement in the penitentiary each.

[1, 2] The most serious question in the case is the one contending that the evidence is insufficient to sustain the conviction, and as to the defendant Praxedis Villareal, we think such contention must be sustained. Mere presence at the time and place of the homicide will not in and of itself alone constitute one a principal offender. Such presence is a circumstance tending to support a finding that one is a principal, but there must be other facts and circumstances in evidence tending to show that one aided by acts or encouraged by words or gestures the person who actually committed the unlawful act before a conviction can be sustained. Article 75, P. C. 1911; *Burrell v. State*, 18 Tex. 713; *Golden v. State*, 18 Tex. App. 637; *Noftsinger v. State*, 7 Tex. App. 302; *Alford v. State*, 31 Tex. Cr. R. 299, 20 S. W. 553. In this case the most the evidence would tend to show is that Praxedis Villareal may have been present when his son Gorgonio Villareal fired the fatal shot, if he shot James Rowland, but all the evidence, both for the state and for the defendants, would show the most kindly and friendly relations existing between deceased and defendant Praxedis Villareal, and would exclude the idea that he for any reason would participate in the murder. All the state can insist that the evidence would suggest is,

that perhaps he was present and witnessed the homicide, afterwards concealing the fact that his son Gorgonio had shot Rowland.

By article 87 it is provided that a father, by concealing the fact that his son has committed a crime, is not guilty as an accessory. To make one a principal offender he must be shown by circumstantial evidence or otherwise to have been guilty of some overt act or conduct prior to or at the time of the homicide.

[3] As to Gorgonio Villareal, the record presents a wholly different case. By the witnesses Refugia Rodriguez, Toribia Ortiz, and Mariana Guzman, it is shown that Gorgonio Villareal not only desired the death of deceased, but besought Refugia Rodriguez and Mariana Guzman to obtain poison for him, offering to pay them \$25 to do so, in order that he might have it administered to Rowland. All three of the witnesses testify to a state of facts that would show that appellant Gorgonio Villareal was intimate with the wife of deceased, and desired to have him killed that he might secure his wife. A sufficient motive is shown by the state's testimony for him to have committed the crime, and that he had it in contemplation. Appellants' own witnesses testify that ill will existed, but they place it on a different ground. They say that Gorgonio formerly was a frequent visitor at the home of James Rowland, but that Rowland had stopped him from coming to his home. They gave as a reason for this that a mule or a horse had been stolen from Rowland, and he believed that appellant, with another, had stolen the animal, and for this reason had stopped appellant from coming to his home. Appellant Gorgonio says he had not been at Rowland's home for some months. However, a state's witness, Annie Rowland, testifies to seeing him at her father's home on two occasions shortly before the homicide, when her father was not at home. Lawrence Morris testifies that he was staying at the home of appellants, and that on Wednesday before the homicide occurred on Sunday, that Gorgonio in a conversation with him said that he wanted to get Jim Rowland out of the way so that he could have Rowland's wife. Morris was a cousin of Gorgonio by marriage, and detailed the conversation, but the above is the substance of it. He also says that on the day of the homicide Gorgonio told him he was going to Ricardo (the home of Jim Rowland) and get deceased out of the way. That he saw Gorgonio when he left home and that he went in a buggy, and carried with him his Winchester rifle—a 44 caliber rifle. Morris says Jesus Gallardo was horseback, and went along with Gorgonio. On Monday morning he had a conversation with Gorgonio, in the presence of Gallardo, and that Gorgonio told him he had gone to Ricardo and got Jim Rowland

out of the way. The other testimony shows that Jim Rowland on that Sunday night had been killed, being shot with a rifle ball of 44 caliber. Morris testifies that appellant drove off in a buggy, and this buggy was by the sheriff traced into the yard of deceased, and back to appellant's home.

Appellant by his testimony seeks to explain why the buggy was sent to Rowland's home. He denies driving it, and says that Gallardo drove it after his father, Praxedis Villareal, and he is supported in this testimony by his father, mother, and other witnesses. He also testifies that state's witness Morris had borrowed his 44 caliber Winchester rifle, and had it in his, Morris', possession on the Sunday that Rowland was killed. In this he is supported by the testimony of his mother and other relatives. The jury evidently accepted the testimony of Morris, and did not believe the alibi testimony of appellant Gorgonio, and the explanation of why the buggy was driven to Rowland's home, and did not believe that Morris was in possession of the rifle on that Sunday night, and while Lawrence Morris' reputation for truth and veracity was severely assailed, and he was contradicted by appellants' witnesses, are we authorized to hold that such evidence is unworthy of belief, when the jury who tried appellant Gorgonio and the district judge who presided at the trial evidently thought it worthy of credence? If the testimony of Lawrence Morris is true, with the other facts and circumstances in evidence, the testimony authorized the conviction of Gorgonio Villareal, and we will not disturb the verdict as to him. Another strange circumstance in the case is that Jesus Gallardo, who was jointly indicted with appellants, charged with this murder, and who Lawrence Morris says went with appellant Gorgonio when he, Morris, was told by appellant that he was going to Ricardo and get deceased out of the way, and was with appellant when appellant told Morris the next morning that he had gotten deceased out of the way, disappeared on that Monday morning and has not been seen nor heard of since that time.

[4] The court permitted a sufficiently broad scope in the cross-examination and impeachment of the witness Refugia Rodriguez, and there was no error committed in sustaining the questions propounded as shown by bills of exception Nos. 1 and 2, and the same may be said as to the witness Toribla Ortiz in bills Nos. 3, 4, and 5. These bills are very incomplete, some of them showing the questions which were not permitted to be propounded, do not show what the answer would have been, nor, where the questions were permitted to be propounded, what answer the witness really would have made.

As to the questions propounded to the witness Lawrence Morris and questions propounded to Mrs. James Rowland on cross-examination, the answers of the witnesses

are not given, nor is it stated what could have been proven by them, nor the substance of what was proven or expected to be proven.

As presented in this record, bills Nos. 6, 7, 8, and 9 present no error, and if they were more full and complete, under the record before us no error would be presented.

[5] It was permissible to elicit from appellant Gorgonio Villareal that he was under indictment for horse theft as affecting his credit as a witness, he having testified in his own behalf.

[6] The only other question presented by the record is an affidavit of one of the jurors, S. L. Cotten, seeking to impeach the verdict. He says that the jury when they first retired stood 7 for conviction, and 5 for acquittal. That after the case was discussed they all voted for conviction. That what induced him to vote for conviction was that he and most of the jurymen believed that Lawrence Morris killed the deceased, and that the defendants in this case knew something of the crime, and if they were convicted they would tell what they knew, and in such event a pardon could be secured. He states that he voted guilty by ballot, and also when the jury was polled, but he did not believe the defendants guilty. A jurymen will not be thus permitted to impeach his verdict after being discharged and permitted to mingle with the outside world. Such has been the unbroken rule of decision in this court. *Johnson v. State*, 27 Tex. 758; *Weatherford v. State*, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828; *Pilot v. State*, 38 Tex. Cr. R. 515, 43 S. W. 112, 1024; *Henry v. State*, 43 S. W. 340; *Montgomery v. State*, 13 Tex. App. 74, and other cases cited in section 1151 of White's Ann. Code Cr. Proc.

The judgment is reversed and remanded as to Praxedis Villareal, and affirmed as to Gorgonio Villareal.

DAVIDSON, J. (dissenting). I concur in the reversal as to the elder Villareal, and I further believe that the judgment ought to have been reversed as to Gorgonio Villareal. The evidence places the elder Villareal in the vicinity of where the homicide occurred and shortly prior to the tragedy, in company with Jesus Gallardo. The state sought to show, and largely predicated its case upon the fact, that the parties who did the killing were in a buggy. The elder Villareal and Gallardo were in a buggy, and are supposed to have left the ranch where the homicide occurred shortly prior to the killing the same evening. The state's case as to Gorgonio Villareal is made by the testimony of Lawrence Morris. In substance his testimony is: His wife was related to the Villareals; that he and his wife were on a visit to the Villareal ranch, and had been a day or two prior to the homicide; that that ranch was 8 or 10 miles or something like that from the scene of the homicide. His testimony is further

that Gorgonio Villareal left the Villareal ranch at about 3 o'clock on Sunday evening, and returned during the night. That when he left the ranch he was horseback and carried a rifle. This was the only rifle on the Villareal ranch. He further testified that on Monday morning Gorgonio told him that he had made away or gotten rid of the deceased, calling him by name. This is the substance of the state's case, except by the same witness introduced some evidence showing a motive on the part of appellant Gorgonio to do the killing. He says this grew out of an affection or love for the wife of the deceased, and that is the motive relied upon by the state, or at least seems to be. Of course, all those things were met on the trial and by some of the state's evidence, that there was evidence to show the motive alleged by this witness was false; that there was nothing improper, and had not been between defendant Gorgonio and the wife of deceased, and that they had not been together to amount to anything for quite a while. So all the facts disconnected appellant Gorgonio with the buggy. All the facts put the elder Villareal and Gallardo in the buggy. To meet Morris' testimony that Gorgonio Villareal absented himself from the ranch, carrying the gun mentioned by Morris, as well as to disprove the confession stated to have been made by Villareal to Morris, the witnesses at the Villareal ranch were introduced, and every one of these placed upon the stand testified that there was but one rifle on the ranch, and it had a screw missing which had to be fixed; that Morris left the ranch, leaving his wife at the ranch on Sunday evening about 3 o'clock, and rode away horseback, carrying this gun with him to have it fixed, and that he was gone from the ranch until perhaps Tuesday, or at least until late Monday evening. All of these witnesses testify that the defendant Gorgonio did not leave the ranch after 12 o'clock on Sunday; that he was working about the place during Sunday evening, they going into detail as to what the work was and what he was doing; that he was also at home the next day working and remained about there; that Morris was not at the ranch Monday morning, which rendered it impossible that any confession should have been made as he swore. In fact, the testimony of all of the witnesses at the ranch by each side placed on the stand testified positively that Morris took the gun and left the ranch Sunday evening, and did not return to the ranch until late Monday evening or Tuesday; that he carried the gun away with him to have a screw fixed, and brought it back with the screw fixed. In addition to this, other state witnesses, among them the constable and a Mexican woman, Refugia Rodriguez, testified they saw him Monday morning about 10 o'clock in Falfurrias, 20 miles away from the Villareal ranch. They talked with him. These were state's wit-

nesses, but were not at the ranch. If Morris' testimony is eliminated, the state would not have had evidence enough to have gone to the jury with any hope of a conviction. Morris accounts for himself only by stating that he spent Sunday night at the Villareal ranch. Every witness testifies to the contrary, and his wife, who was at the ranch, was not even placed on the stand to sustain him. So he stands with every witness, state and defendant, who testifies to the facts with reference to what has been above stated contradicting, and the state stands alone upon the testimony of this witness Morris. The writer does not understand how any jury would have convicted on the testimony of Morris.

On the motion for a new trial one of the jurors filed an affidavit in line with the matters I have just stated. The facts show a complete alibi for Morris from the ranch, but not from the scene of the homicide; he leaving the ranch in possession of the gun that is supposed to have been used, and the state relied on as being used to commit the homicide. He was not accounted for from the time he left the ranch until Monday morning about 10 o'clock 20 miles away at Falfurrias; 10 o'clock or about 10 o'clock is the time he states defendant Gorgonio made the confession to him at the Villareal ranch. At that hour the constable, Mr. With, and Refugia Rodriguez testify they saw and talked with Morris at Falfurrias. They were state witnesses. Every witness except Morris proves an alibi for the defendant Gorgonio from the scene of the homicide, and his presence at the ranch 10 or 12 miles from where the homicide occurred. In addition to this, the affidavit of the juror is filed and appended to the motion for a new trial, in which it is stated that he and most of the jurors did not believe defendants guilty, but did believe Morris guilty, giving various reasons for such belief, and why a verdict was finally reached convicting the defendants; that by convicting appellants "the state might get the right man," and in that event the jury "would sign up a petition to free these defendants, * * * though I never believed the defendants were proven guilty, and did not then believe them proven guilty when I agreed to verdict of guilty, and do not now believe that the defendants are guilty under the evidence on the trial, but do believe that by finding the defendants guilty that the guilty party might be found, and that the defendants thereafter can be released." The rule is invoked that the jury are the exclusive judges of the facts proved and the weight to be given the testimony. This is the general proposition asserted by the statute, and marks the dividing line between the authority of the jury as to the facts and that of the court as to the law. Article 734 of the Revised Code Criminal Procedure 1911, so provides, and further that

the jury are not the judges of the law in any case, but must take the law from the court. Practically the same rule is laid down in article 786, Revised Code of Criminal Procedure, 1911. This, however, does not mean that the jury may arbitrarily convict, nor do these articles annul the fundamental principle of the law which provides that the presumption of innocence and reasonable doubt shall be the law of every criminal case. In finding a verdict and passing on the facts, the verdict must be in consonance with the presumption of innocence and reasonable doubt. These presumptions are binding fully on the jury, and require that body to weigh the facts from these standpoints. It is a clear limitation on the exclusive power of the jury deciding the facts and the weight of the testimony. The jury must receive the law from the court and be governed by it. See article 734, *supra*. The court must charge these presumptions, and the jury must be governed by them. They furnish the criterion by which facts are to be solved. This is a statutory rule that is to be read into and considered with the statute with reference to the province of the jury in passing on the facts. They have no right, no authority in law or good conscience to convict a man until the presumption of innocence and reasonable doubt have been overcome. They do not become arbitrarily the judges to set aside the presumption of innocence. This must be done by the facts, and the state cannot ask in good conscience a verdict of conviction until the presumption of innocence, to the exclusion of reasonable doubt, has been overcome by facts. These are fundamental rules fixed by law and cannot be ignored by the jury any more than by the court. The jury is practically prohibited from viewing the facts from any other standpoint than from the presumption of innocence and reasonable doubt, and no verdict ought to be permitted to stand that does not overcome these basic principles of the law. These presumptions, or rather presumptions of innocence, must be overcome. It is not what we call a conclusive presumption, but still it is a presumption in favor of innocence that must be overcome by facts, and because the jury are the exclusive judges of the facts does not abolish the statutory rule of the presumption of innocence and reasonable doubt. It may be overcome, but it must be overcome by evidence of a trustworthy nature. Though it is the province of the jury to find the facts, that body cannot deduce from the facts an unfavorable deduction or conclusion, unless the favorable conclusion or deduction is excluded as unreasonable. *Cromeans v. State*, 59 Tex. Cr. R. 611, 129 S. W. 1129. That is a sound and correct rule. That opinion is a clear enunciation of the law—in full harmony with the statutes.

Applying this rule then to the facts of this case, and the record as it comes to this

court, the finding of the jury is not correct. It does not speak a true verdict either in law under the evidence, or viewed from the standpoint of the uncontradicted affidavit of the juror that they did not believe appellants to be guilty. The accused is entitled to a fair trial and on competent evidence. He should never be convicted when the jurors who convict him admit his innocence, but convict him, not because he is guilty, but in order, by doing so, they might reach somebody else who was guilty. He should not be the "scapegoat for the sins turned loose in the wilderness." That is not the rule under our law. The man who is on trial and convicted must be proved guilty. He is not made the innocent "victim for the sins of the people." While this court should be cautious in setting aside a verdict on the question of fact, yet it has power to do so, and on proper occasion should rise to the emergency. This court is empowered to reverse on the facts, and it becomes its solemn duty to do so to prevent unjust convictions. This court should not lend itself to the affirmance of a case that comes to us in the shape this record does. It is said that a juror will not be heard to impeach his own verdict. That may or may not be correct, owing to circumstances, and the manner in which it comes. I am of opinion that a verdict may be impeached whenever that impeachment carried corruption with it on the part of the jury. The verdict is admitted to be an illegal conviction, stating the want of belief on the part of the jury from the facts of the guilt of the man they are incarcerating in the penitentiary. This juror stands uncontradicted as to his statements in this matter. Our court has power to investigate this matter and award a new trial, even on the facts, as is plainly stated in the statutes of our state. See articles 938 and 939, Revised Code of Criminal Procedure 1911. The court has the power to reverse for want of sufficient evidence, and in this case, in my judgment, the conviction against Gorgonio should have been reversed as well as that against the elder Villareal. In fact, in my judgment, the case is more favorable to Gorgonio than it is to his father. If Morris had been placed on the stand for perjury, his guilt would not have been the subject of debate, if this record is true, and this by the state's own testimony, and he was the man they were relying upon to incarcerate two men who the juror swears that the jury believe are not guilty. Perjury ought never to be regarded as sufficient to justify a conviction in the trial court, and certainly not of an affirmance by this court. This unfavorable verdict is a deduction most unfavorable on a state of facts from which no legitimate deduction of guilt can be inferred or ought to be inferred, as I understand this record.

For these reasons I concur in the reversal as to the elder Villareal, and dissent from the affirmance of Gorgonio Villareal. I do

not believe these men to be guilty, and I think the evidence shows beyond any question that fact and conclusion.

Since filing this dissent Judge HARPER has called my attention to the fact that I was in error in stating that Gorgonio left his ranch on horseback and Gallardo in the buggy. This I find to be correct. I should have stated that Gorgonio was in the buggy and Gallardo on horseback. This correction is made so as to conform to the evidence of Morris.

WARREN v. STATE. (No. 3924.)

(Court of Criminal Appeals of Texas. Jan. 19, 1916.)

CRIMINAL LAW §1090 — STATEMENT OF FACTS—BILLS OF EXCEPTION—NECESSITY.

Where the indictment charges an offense under the law, no questions are reviewable without a statement of facts or a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2853, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.]

Appeal from Lamar County Court; Tom L. Beauchamp, Judge.

Will Warren was convicted of vagrancy, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of vagrancy, and his punishment assessed at a fine of \$200.

No statement of facts nor any bill of exceptions accompany the record. The indictment charges an offense under the law, and under such circumstances no question is presented for us to review.

The judgment is affirmed.

WILLIAMS v. STATE. (No. 3919.)

(Court of Criminal Appeals of Texas. Jan. 19, 1916.)

1. CRIMINAL LAW §351—EVIDENCE—RELEVANCY—LIGHT.

In a prosecution for burglary, evidence that the defendant had been in several states since the alleged burglary was admissible as a circumstance tending to show guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.]

2. CRIMINAL LAW §1120—APPEAL—EXCLUSION OF EVIDENCE—EXCEPTION.

Upon a bill of exception not disclosing what the testimony alleged to have been erroneously excluded would have been, the Court of Criminal Appeals is unable to judge whether it would be material, if admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.]

3. CRIMINAL LAW §829 — TRIAL—INSTRUCTIONS.

In a criminal trial the refusal of defendant's special charge was not erroneous, where it was fully covered by the court in its charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

Arthur Williams was convicted of burglary, and he appeals. Affirmed.

Ralph P. Mathis, of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the state penitentiary.

[1] Bill No. 1 shows that appellant objected to the "defendant being compelled to testify on cross-examination that he had been in several states since the alleged burglary." Evidence as to flight immediately after the commission of crime is always admissible as a circumstance tending to show guilt. Benavides v. State, 31 Tex. 585; Mathews v. State, 9 Tex. App. 140; Sebastian v. State, 41 Tex. Cr. R. 249, 53 S. W. 875, and cases cited in section 350, Branch's Crim. Law.

[2] The P. B. M. department store at Wichita Falls was burglarized on the night of the 19th of May. Melvin Dwight, constable at Childress, was on the train that night, and testified he saw appellant and another negro get on the train about a quarter of a mile from the Wichita Falls station, with five grips. Three of these grips and a portion of the stolen property was afterwards recovered in Ft. Worth.

Defendant in bill No. 2 says the court erred in refusing to permit him to testify to what the other negro told him why the goods were to be placed on the train at the point testified to by the constable. The bill does not disclose what the testimony would have been; therefore we are unable to judge whether or not it would be material, if admissible.

[3] The other bill in the record complains of the failure of the court to give special charge No. 1 requested by appellant. As it was fully covered by the court in his charge to the jury, there was no error in refusing to give it.

The judgment is affirmed.

COLLINS v. STATE. (No. 3904.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

1. INDICTMENT AND INFORMATION §111 — LANGUAGE OF STATUTE—NEGATING PROVISIO.

Code Cr. Proc. 1911, art. 474, provides that the words used in a statute to define an offense need not be strictly pursued in the information, and that it is sufficient to use other words having the same meaning; article 453 provides that the certainty required is such as will enable the accused to plead the judgment in bar of another prosecution, and article 460 provides that an indictment for any offense shall be sufficient if charging its commission in ordinary and concise language so as to enable a person of common understanding to know what is meant, and to enable the court, on conviction, to pronounce the

proper judgment. Rev. Civ. St. art. 7355, imposes on traveling persons selling patent medicines, etc., a \$100 occupation tax annually, and, by subdivision 2, exempts commercial travelers selling or soliciting trade for merchants "engaged in the sale" of drugs or medicine by wholesale. *Held*, that an indictment thereunder alleging that defendant was not a traveling salesman for merchants "selling" medicines, etc., sufficiently negated the proviso.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.]

2. HAWKERS AND PEDDLERS § 7—LICENSES—OFFENSES.

Rev. Civ. St. art. 7355, provides for the levy and collection from every traveling person selling patent medicines, etc., of a \$100 occupation tax annually and exempts salesmen for merchants engaged in the sale of medicines, etc. Pen. Code 1911, art. 130, makes it an offense for any person to follow any occupation, or do any act taxed by law without first obtaining a license therefor, and fixes a penalty. In a prosecution for pursuing the occupation of peddling medicine without paying the occupation tax, it appeared that defendant ordered goods from a wholesale establishment in another state at wholesale prices, which were delivered on his payment of the freight; that he took and opened the goods and sold them at retail prices from his wagon, sometimes on trial, and returned the unsatisfactory and unsold goods to the seller. *Held*, that a conviction was authorized.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 16-19; Dec. Dig. § 7.]

Appeal from Callahan County Court; W. R. Ely, Judge.

W. F. Collins was convicted of pursuing the occupation of peddling medicine without paying the occupation tax provided by law, and he appeals. Affirmed.

F. S. Bell and J. Rupert Jackson, both of Baird, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for pursuing the occupation of peddling medicines without paying the occupation tax prescribed by law.

[1] The information strictly follows the statute and alleges properly everything necessary as a proper pleading, unless it be what we will now state.

Our statute (article 7355, Rev. Civ. Stats.) enacts that there shall be levied on, and collected from, every traveling person selling patent and other medicines \$100 occupation tax annually to the state, and that no traveling person shall so sell until said tax is paid. Our statutes further authorize the commissioners' court to levy one-half of such amount for the state in favor of the respective counties. Subdivision 2 of said article 7355 adds as a proviso:

"That this tax shall not apply to commercial travelers, drummers or salesmen making sales, or soliciting trade for merchants engaged in the sale of drugs or medicine by wholesale."

The information negatives this proviso in this allegation:

The said Collins "not then and there being a commercial traveler or salesman making sales or

soliciting trade for merchants selling drugs or other medicines by wholesale."

It will be noted that the proviso is, that the tax shall not apply to commercial travelers, etc., in making sales or soliciting trade for "merchants engaged in the sale of drugs, etc., by wholesale." The allegation does not use this identical language, but instead negatives the proviso as such commercial traveler, etc., for "merchants selling drugs by wholesale." In other words, the statute is, engaged in the sale, and the allegation is selling, etc.

Our statute (article 474, C. O. P. 1911) prescribes that words used in the statute to define an offense need not be strictly pursued in the indictment or information; it is sufficient to use other words having the same meaning, or which include the sense of the statutory words. The allegation negating the proviso clearly does so, and, if anything, is broader in appellant's behalf than the words of the statute itself. Clearly the information was sufficient. Articles 453 and 460, C. O. P.

[2] Our statute (article 130, P. C. 1911) makes it an offense for any person to pursue or follow any occupation, etc., or do any act taxed by law without first obtaining a license therefor, and fixes the penalty at a fine of not less than the amount of the tax and not more than double the same.

Appellant waived a jury and submitted the case to the trial judge, who found him guilty and assessed his fine at \$150.

It was admitted by both sides that the county tax for said county had been duly levied by the commissioners' court, and that it was one-half of the state tax. We will give the balance of the statement of facts in full:

"It is agreed by the state and defendant that the following is in substance a part of the contract which was introduced in this case and under which said defendant Collins was working April 15, 1914:

"(2) That for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the parties hereto, the company, unless prevented by fires, strikes, accidents, or other causes, beyond its control, agrees to sell and deliver to the second party f. o. b. cars at Freeport, Ill., or at its option at any other regular place of shipment, in such reasonable quantities only as the second party may from time to time desire to purchase, all medicines, extracts, and other products manufactured or sold by it, such goods to be sold and delivered to the second party at the usual customary wholesale price, such prices to be shown by invoice of each shipment. And said second party agrees to purchase such goods on the above-prescribed terms and conditions; but the company may at any time suspend such sales and shipment if said party fails to make the payments as hereinafter provided, or for any other omission or neglect by said second party.

"(3) The company will at its option also sell second party for cash or partly or wholly on credit, a medicine wagon, such as said second party may choose from current catalogues, circulars, or other descriptions, and charge said wag-

on to his account at its customary cash price or part cash and part credit price.

"(4) The company further agrees to purchase from said second party at any time during the term of or promptly after the termination or expiration of this contract, and at the wholesale list prices then current, such medicines, extracts, and other products of its manufacture as second party may have on hand and unsold, provided that these products are in as good and salable condition when received by the company as when purchased by said second party; and pay or credit second party therefor on the return of such products promptly by prepaid freight to Freeport, Ill., or such other shipping point as may be designated by the company in writing, and provided that second party shall pay the company its actual expense of receiving, inspecting, and overhauling such goods.

"(5) The second party agrees and promises to pay to the company at its wholesale list prices f. o. b. cars at Freeport, Ill., or at any other regular place of shipment as aforesaid, for all medicines, extracts, and other products sold to him from time to time, including any balance due from him on wagon as hereinbefore provided, by ample cash weekly payments until this account shall be fully paid, and that upon the termination of this contract for any cause whatsoever, or by its expiration by limitation as hereinafter provided, second party promises and agrees to pay in cash the balance due said company for all medicines, extracts, other products and wagon sold and delivered to him as hereinbefore provided, but the time of making such payments or any or all of them may be extended by said company without notice of the guarantors of this agreement, and without prejudice to any of the interest or rights of said company."

Appellant testified:

"I am the defendant herein. I live in Callahan county and do business in said county for W. T. Rawleigh & Co., which is a wholesale establishment, and is in Freeport, Ill. I order the goods that I sell, at wholesale prices from this company, and said goods are delivered to me at wholesale prices at the depot in Baird, Callahan county, Tex., and I pay the freight on them. I take and open these goods and sell them out at retail prices. I take them around in my wagon in this county, and sell and deliver them to the purchaser. I sell these goods on three months' trial if they desire such time, and if they desire to pay cash, I accept it. If, after the three months, the goods are satisfactory to the purchaser, they then pay for them, and if they are not satisfactory, I am to return these goods to this company. The wholesale price at which I purchase these goods is remitted to this company by me. When any of these goods are left over, I always send them back to this company. These goods are not mine until paid for. This company has no office in Texas, and never had any office in Texas. I was engaged in this work on the 15th day of April, 1914, in Callahan county, Tex., and also prior to the 15th day of April, 1914, and I had not at that time paid any occupation tax either to the state of Texas or to the county of Callahan. I am employed by this company to sell these goods, and I am its agent."

We have so often and thoroughly considered in former opinions this offense and the questions raised by appellants attacking the law and convictions thereunder, that we think it wholly unnecessary to again discuss the law or any questions raised thereunder in this case. We will, therefore, merely cite some of the cases. They are entirely on all fours with all questions raised in this case,

and uniformly hold against appellant and all his contentions. *Shed v. State*, 70 Tex. Cr. R. 10, 155 S. W. 524; *South v. State*, 72 Tex. Cr. R. 381, 162 S. W. 510; *Saulsbury v. State*, 43 Tex. Cr. R. 90, 63 S. W. 568, 96 Am. St. Rep. 837; *Camp v. State*, 61 Tex. Cr. R. 229, 135 S. W. 146.

The judgment is affirmed.

MESSNER v. STATE. (No. 3875.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. Rehearing Denied Feb. 2, 1916.)

1. CRIMINAL LAW §433—EMBEZZLEMENT—DOCUMENTARY EVIDENCE—LETTERS.

Where, in a prosecution for embezzling money sent defendant to pay the amount due the state to get a patent to public school land purchased by the sender and defendant's charges and expenses in connection therewith, it appeared that the sender's correspondence to defendant relative to the money consisted of letters written by a bank cashier for him, defendant's replies to these letters, wherein he acknowledged receipt of the money and agreed to apply it as directed, were properly admitted in evidence, where there was evidence authenticating defendant's signature to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1022; Dec. Dig. §433.]

2. CRIMINAL LAW §1169 — HARMLESS ERROR—EVIDENCE.

In a prosecution for embezzling money sent defendant to use in getting a patent to school land, the admission of evidence that a third person had written defendant to get certain school land patented, if error, was harmless, where defendant's letters introduced in evidence showed that he had agreed to get the land patented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 3088, 3130, 3137-3143; Dec. Dig. §1169.]

3. INDICTMENT AND INFORMATION §132 — ELECTION—SUBMISSION TO JURY.

Where an indictment contained two counts, one charging embezzlement of a check and the other embezzlement of the money represented by the check, both counts being based on the same transaction, the court properly refused to require the prosecution to elect on which count to ask for a conviction, and did not err in submitting both counts to the jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-447, 449-453; Dec. Dig. §132.]

4. CRIMINAL LAW §814 — INSTRUCTIONS — EVIDENCE—RETURN OF MONEY.

Where, in a prosecution for embezzlement, there was no evidence that defendant returned the money, the court properly refused to instruct on that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. §814.]

5. EMBEZZLEMENT §47 — PEREMPTORY INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for embezzling money, the evidence showed that defendant had agreed to use the money as agent to secure a patent for school land, and that he received the money, deposited it to his credit, checked it out in small quantities, and made no attempt to secure the patent, the court properly refused peremptory instructions for defendant.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. §47.]

Appeal from District Court, Hartley County; R. C. Joiner, Judge.

W. S. Messner was convicted of embezzlement, and appeals. Affirmed.

Reeder & Dooley, of Amarillo, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of embezzlement, and his punishment assessed at two years' confinement in the penitentiary.

[1] The evidence would show that P. C. Madson lived near Sheffield, Ill., and that he had purchased section 6, block A-7, public school land, and there was a balance due the state on the purchase price of about \$900, which must be paid before a patent could be obtained for the land; that Madson was desirous of having the land patented, and had the cashier of the Sheffield Bank, C. W. Boyden, to send to appellant a draft for \$950 to pay appellant's charges and expenses, and to pay the remainder due the state to get a patent to the land. The evidence shows appellant received this draft and deposited it at the First State Bank of Channing, having it credited to his account in the name of W. S. Messner, guardian; that he appropriated this money to his own use, and did not pay the balance due the state, nor any part thereof, and made no effort to have the land patented. The evidence shows that Mr. Madson had the bank cashier do all the writing to appellant, and appellant's letters were addressed to the bank cashier, Mr. Boyden. Appellant objected to the introduction of some four letters alleged to have been written by him to Mr. Boyden. The first letter states:

"I am in receipt of papers from Judge D. B. Hill, in re to that part of section 6, block A-7, public free school land, in Dallam county, Texas, owned by Mr. Peter C. Madson. * * * This land was sold at \$2 an acre, I presume; hence the amount due on it is \$897 for the 460 acres, or \$898.56 for the 460.8 acres. The fees in the land office, if it has to be patented separately, will be about \$17, and it will have to be resurveyed, which will be an additional expense; but I will cut that out, and also one patent fee, by getting a straight deed from Olifton Egerton direct to Mr. Madson, covering the whole survey, and if I can succeed in doing this, which I think I can, it will cut the land office fee down to about \$10, and my fee will be about \$20, and in this case the surveyor's fee will be entirely cut out. I will do the work, however, in the cheapest possible way that will be consistent with getting it absolutely correct in all things. You may remit \$950 in any Eastern exchange, which I can use here and will be at no expense for exchange, and I will procure Austin exchange here. I am certain that this amount will cover, and probably will be a little more than enough. I write you thus fully in regard to the matter that Mr. Madson may fully understand the situation, and by to-morrow I will have a complete abstract of the land before me and will get it in shape as rapidly as possible. Very truly yours,

"[Signed] W. S. Messner."

The next letter, among other things, states:

"I am in receipt of yours of 29th, with inclosure of draft for \$950, and will advise you if any hitch arises in patenting the land, which I do not anticipate," etc.

The other two letters are directly relevant to the transaction, and all are admissible, if properly proven up. Mr. Madson testifies that Mr. Boyden received these letters at Sheffield, Ill., and he read them to him; that he and Mr. Boyden came to Texas together, and he was present when Mr. Boyden delivered the letters to the district attorney. The letters are written upon letter heads bearing the following words:

"Hartley County Abstract Company, Incorporated. W. S. Messner, General Manager."

The letters are dated at Channing, Tex., and the banker at Channing, who testifies that appellant deposited the \$950 draft in his bank, also testifies that the signature to the letters—

"looks like W. S. Messner's signature. I was familiar with his signature several years ago. In my opinion that is his signature."

The draft that was deposited was also indorsed "W. S. Messner." There was no error in admitting these papers in evidence, and the bills complaining of their admissibility present no error. The banker also testified that appellant checked the money out of the bank, and appropriated it. Commissioner of the Land Office J. T. Robison, testified:

"As Commissioner of the General Land Office I have charge and custody of the records and archives of that department. The balance of the purchase money due the state of Texas on section 6, block A-7, public free school land, Dallam county, Texas, was never sent to the land office by Mr. Messner or any one else. This land has never been patented. The defendant never did request a patent to that land, nor did he ever send the requisite amount of money or fees there to have it patented."

Thus the evidence clearly shows that appellant received the money of Mr. Madson to have the land patented, made no effort to patent the land, and appropriated the money to his own use. He did not testify in the case, nor seek to explain in any way why he did not make an effort to secure the patent for the land, nor what he did with the money after receiving it.

[2] While Mr. Madson was testifying, he stated that Mr. Boyden did all the corresponding with Mr. Messner; that he would write for him; that he saw the letters, sealed in an envelope, and addressed to appellant at Channing; that they were then deposited in the box at the bank where all letters for mail were deposited; that he did not personally see the letters deposited in the post office. As none of these letters were introduced in evidence, nor the contents of them, the bills complaining of these matters present no error, unless it be the bill which states that the witness was permitted

to testify that he had Mr. Boyden write to defendant to have the land patented; that Boyden had written appellant, "You get the land patented." If there was no other evidence in the record that appellant contracted and agreed to get the land patented, this bill would probably present error. The contents of the letters written by Boyden to appellant would perhaps not be admissible without a more specific showing that he received the letters, and a demand had been made on him to produce the letters on the trial, or secondary evidence of their contents would be introduced. But this statement, in the light of the statements contained in appellant's letters, which were properly proven up and admitted in evidence, renders the admission of the above testimony immaterial. In all of his letters he admits he had agreed to have the land patented. After writing as he did in the letters above copied, in other letters he writes:

"The patent may be a little slow in coming out of the land office, but that will be on account of waiting its turn. I have sent all necessary papers. I have gotten all necessary matters in shape to transfer the land and have the whole survey patented in one patent to Mr. Madson."

Other similar statements are contained in appellant's letters, and the isolated statement of Mr. Madson, above recited as being admitted in evidence, under such circumstances, presents no reversible error.

[3] The indictment contained two counts—one charging embezzlement of the check, and the other charging embezzlement of the money. Both counts were based on the same transaction, and there was no error in refusing to require the prosecution to elect on which count they would ask for a conviction, nor in submitting both counts to the jury. *Gonzales v. State*, 12 Tex. App. 657; *Green v. State*, 21 Tex. App. 64, 17 S. W. 262; *Morgan v. State*, 31 Tex. Cr. R. 1, 18 S. W. 647.

[4, 5] There is no proof nor suggestion in the evidence that appellant returned the money; therefore there was no error in refusing the special charge on that issue. The evidence shows he received the money, deposited it to his credit, and checked it out in small quantities. The evidence sufficiently shows that appellant had agreed as agent to secure a patent for the land for Mr. Madson, and the court did not err in refusing the peremptory instructions requested. In one letter he says:

"I will do the work in the cheapest way possible that will be consistent with getting it absolutely correct in all things. You can remit \$950 in Eastern exchange. I am certain that this amount will cover, and probably will be a little more than enough."

As the letters disclose there was a specific agreement on the part of appellant to obtain a patent for the land, there was no error in refusing special charges Nos. 3 and 4. His letters disclose he knew he was acting for

and on behalf of Mr. Madson, and he was not acting for Boyden.

The charge of the court fully and fairly submits all the issues in the case, and the judgment is affirmed.

FRY v. STATE. (No. 3878.)

(Court of Criminal Appeals of Texas. Jan. 5, 1916.)

1. FORGERY — 29 — FORGING CHECK — INDICTMENT.

An indictment charging accused with forging a check drawn by P., the county treasurer, by forging the indorsement of the payee thereon, was not insufficient for failure to allege facts showing P.'s authority to act as treasurer and to issue checks against the funds of the county, since accused was guilty of forgery if he in fact forged the payee's name to a check valid on its face, though there existed facts not appearing on the check which rendered it invalid.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 77-81; Dec. Dig. — 29.]

2. CRIMINAL LAW — 372 — FORGING CHECK — OTHER FORGERIES — ADMISSIBILITY.

In a prosecution for forging the payee's name to a check issued by the county treasurer in payment of a warrant issued for road work, it was admitted that a large number of checks introduced in evidence were issued by the treasurer, and that the indorsement of accused's name thereon was accused's signature. The evidence tended to show that accused, as presiding judge of the commissioners' court, O. K.'d an account made out for road work, which was presented to the county clerk who issued a warrant on the treasurer therefor, the treasurer issuing a check; that the check came into accused's hands, who indorsed the payee's name, as well as his own, thereon; that all the other checks introduced were obtained and indorsed with accused's name in the same way, and accused cashed many of them; and that the names of the payees were in the handwriting of accused. Nearly all of the payees were fictitious, those who were not swearing that they did not receive or indorse the checks. *Held*, that such other checks were admissible in evidence, as showing a system which tended to prove the crime in question.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 833, 834; Dec. Dig. — 372.]

3. CRIMINAL LAW — 636 — JURY DISAGREEING — REMARKS BY COURT IN ACCUSED'S ABSENCE.

Where, in a prosecution for forgery, the jury after retiring came into court announcing that they could not agree, and requesting to be discharged, and accused having left the court, the judge made remarks to the jury to the effect that trials were expensive, that they, and not the court must decide the case, and that while not wishing to punish them or extort a verdict, he desired them to return and deliberate further, such action was not error, since under his bond given as authorized by statute for remaining until verdict is returned, it was accused's duty to remain in court while the jury was out, and his voluntary absence therefrom did not require the court to delay proceedings until his return.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. — 636.]

4. FORGERY — 16 — PASSING FORGED INSTRUMENT — SUBMISSION TO JURY.

Where accused indorsed the payee's name to a check issued by the county treasurer for a

road warrant, and indorsed his own name thereon in order to cash it at the county depository bank whose officials testified to the custom of requiring the person collecting a check to indorse his name thereon, and accused's indorsement was the last appearing on the check, it was not error for the court to submit to the jury the count in the indictment charging accused with passing a forged instrument.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 51-53; Dec. Dig. ¶16.]

5. CRIMINAL LAW ¶351—FORGERY—ATTEMPT TO SUPPRESS EVIDENCE—ADMISSIBILITY.

In a prosecution for forgery, evidence that accused, a county judge, after his indictment for forging the name of the payee to a check issued by the county treasurer, visited the courthouse to get possession of a number of other checks, together with that in question for the purpose of suppressing evidence, was admissible where the court limited the evidence to showing the visit, its purpose and the seriousness of the effort to suppress.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. ¶351.]

6. CRIMINAL LAW ¶857—ACCUSED'S FAILURE TO TESTIFY—JURY DISCUSSION.

Where, after their retirement in a forgery prosecution, the jury discussed the failure of accused to testify in his own behalf, saying they thought it would be right for him to so testify, and that if he was not guilty he could have got up and said he was not, and such discussion occurred a number of times, it was ground for a reversal of the judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. ¶857.]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

E. W. Fry was convicted of forgery, and he appeals. Reversed.

Edgar Scurry, of Wichita Falls, Arnold & Taylor and Fred Arnold, all of Henrietta, and Ramsey, Black & Ramsey, of Austin, for appellant. P. A. Martin, Jno. C. Kay, and Leslie Humphrey, Dist. Atty., all of Wichita Falls, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was tried under an indictment charging him with forgery and passing a forged instrument. The conviction was applied to the count charging forgery. The instrument alleged to be forged by alteration is as follows:

"I. B. Padgett, County Treasurer of Young County.

"No. 3515. Graham, Texas, 10-21-1913.

"Pay to J. M. Watson or order \$154.00, one hundred and fifty-four & no/100 dollars.

"To the Graham National Bank, County Depository.

"[Signed] I. B. Padgett, County Treasurer."

That appellant altered said instrument by indorsing thereon the name of the payee, J. M. Watson, thus making the check payable to bearer.

[1] Appellant moves in this court to quash the indictment on the ground that the in-

dictment does not show that the instrument, prior to the alteration, was an instrument possessing legal efficacy and obligation, in that there is no allegation of the facts showing the authority, if any, of I. B. Padgett to act as county treasurer, and as such, to issue this check against the funds of the county; the contention being that there should have been a specific allegation that I. B. Padgett was the duly qualified and acting county treasurer of the county, and that in the issuance of said check he acted in the performance of his duties under the law—that all the facts which would render the county legally liable for the amount of the check should have been affirmatively alleged. Appellant was not charged with forging the name of Padgett, but forging the name of J. M. Watson by indorsing his name on the check. If the check on its face purported to be a check issued by Padgett, county treasurer, on the Graham National Bank, as it did, if there were extrinsic matters not appearing on the face of the check that would render it invalid, this would render it none the less forgery for appellant to indorse the name of J. M. Watson on the check. If Watson had in fact received the check and indorsed it over to a third person, he would certainly be liable to such person, for the check on its face purported to be a valid check for the amount named. We do not care to take up and review the authorities again, as we did so quite exhaustively in the case of Dreeben v. State, 71 Tex. Cr. R. 341, 162 S. W. 501. In the case of King v. State, 42 Tex. Cr. R. 108, 57 S. W. 840, 96 Am. St. Rep. 792, the authorities are also reviewed, and under the authority of those two cases the instrument in this case, on its face, being a valid instrument, would make appellant guilty of forgery if he indorsed the name of J. M. Watson thereon. It is not customary for a check to bear on its face that it is issued by virtue of article so and so of the Revised Statutes, and the person who signed it is the duly elected, acting, and qualified treasurer of a given county, and no person would look for such averments in the face of a check.

[2] Appellant contends that it was error to admit certain other checks in evidence, which it was contended appellant had also forged, in a similar manner in which it was alleged he committed this forgery; that evidence of other crimes committed by him, if he did do so, should not have been admitted. Usually this is the rule, but the exception to the rule is as well recognized as the rule itself. In the statement of facts it is alleged that some 500 or 600 of these other checks were admitted in evidence, while in the bills of exceptions complaining of the matter it is recited that there were about 150 of these other similar checks admitted. The number is immaterial. If one was ad-

missible, then all were admissible, under the agreement we find in the record. It reads:

"It is agreed by counsel and it is admitted by the defendant that the entire bunch of warrants purporting to be issued by the county clerk of Young county and his deputies and the entire bunch of checks purporting to be issued by I. B. Padgett, county treasurer of Young county and drawn on the Graham National Bank, are each and all the genuine warrants, so issued by the clerk, and that the checks are the genuine checks of I. B. Padgett, drawn by him or by his authority, and that the indorsements appearing on the back of said checks, as E. W. Fry, are the genuine indorsements and signatures of the defendant, E. W. Fry."

Thus it is seen that after this admission was made, about the only issue left for the jury to decide was: Was the indorsement of J. M. Watson forged, and, if so, did appellant forge that name? Appellant introduced evidence tending to show that if the name was forged, he did not forge it. At his instance J. P. McKinley testified:

"I have seen some of Judge Fry's [appellant's] handwriting. From having seen his signature and having seen his handwriting, I think I would know his handwriting if I were to see it. I could not swear that the 'J. M. Watson' up there is in Judge Fry's handwriting. From my observation and experience with Judge Fry's handwriting, I do not see any similarity. I do not see anything that would impress me that he wrote that name."

He had other witnesses testify in substance the same thing. On the other hand, J. S. Oglesby testified for the state he was an expert accountant; that he had made a study of handwriting for 19 years. He goes into detail as to the way he identifies signatures, and says that in his opinion appellant wrote the indorsement "J. M. Watson" on the check. He also testified he had examined all the checks introduced in evidence, and that in his opinion "E. W. Fry wrote the indorsements upon each of the checks" introduced in evidence. Other witnesses gave testimony that would authorize the jury to believe that appellant wrote the indorsements. Thus it is seen the issue was squarely drawn as to whether or not appellant forged the name of J. M. Watson on the check, and all evidence which would legitimately tend to show that he did do so would be admissible. The evidence for the state would tend to show appellant was county judge of Young county; that an account was made out for road work for the amount of this check in the name of J. M. Watson, and it was marked "O. K." by Judge Fry as presiding judge of the commissioners' court; that it was then presented to the county clerk, who issued a warrant on the treasurer for that amount, and the treasurer gave the check payable to the order of J. M. Watson upon which this charge of forgery was presented. This warrant issued by the county clerk, and the check issued by the treasurer, is traced into the hands of appellant, and in addition to the indorsement of "J. M. Watson," it has his name indorsed thereon, which indorsement appellant admitted to be genuine. All the

other checks introduced in evidence, issued to various people, are shown to have been obtained in the same way, and bear the genuine indorsement of appellant. The evidence shows where he used and cashed many of them. The testimony for the state is that the indorsements made on all the checks, the various names of the payees, are in the handwriting of appellant, but whether indorsed by him or not, it is shown he passed many, if not all, of them, and received the proceeds. Thus a system is shown of presenting accounts for road work against the county, extending over 2 years or more, for which the evidence would justify a finding that no work had been done on the roads; that in nearly every instance they were issued in the names of persons whom the road superintendent says did not work on the road; that persons by such names could not be found in the county, except in four instances, and in these four instances the men swear they did not receive the checks and did not indorse them; yet they are all indorsed with the name of the person appearing on the face of the check as payee, and Mr. Oglesby says indorsed in the handwriting of appellant, and in addition thereto are indorsed "E. W. Fry," which indorsement appellant admits to be genuine. In our opinion if there ever was a case where other crimes became admissible as tending to show a system of forgery being practiced, this is such a case. Such evidence would enable the jury to pass on the question of whether or not appellant wrote the name of J. M. Watson on the check in this case and passed the same. It would be a circumstance tending to show that he did so. *Dugat v. State*, 72 Tex. Cr. R. 40, 160 S. W. 376, and cases cited; *McGlasson v. State*, 37 Tex. Cr. R. 620, 40 S. W. 503, 66 Am. St. Rep. 842; *Taylor v. State*, 47 Tex. Cr. R. 101, 81 S. W. 933.

Of course, when the state offered this proof, appellant should be, and was, permitted to offer proof that the signature on none of the checks was in his handwriting. The court in his charge limited the purpose for which such checks could be considered by the jury, and instructed them:

"You cannot consider for any purpose any of such checks, other than the J. M. Watson check, except such [if any] as you may find and believe from the evidence, beyond a reasonable doubt, were altered by the defendant, without lawful authority and with intent to injure and defraud."

Therefore it was unnecessary to give the special charge requested on this issue.

[3] By a bill it is made to appear that after the jury had been considering the case for some 40 hours, they came into court and requested that they be discharged—that they did not think they could agree on a verdict. The appellant was not present at this time, and the court in answer to such request stated to the jury:

"Gentlemen, all jury trials are attended with considerable expense. This matter has to be

decided by a jury. The court cannot decide it, and it seems to the court that you are just as capable of deciding it as any other jury. The court is not keeping you together as a matter of punishment, nor to try to extort from you a verdict either way. I don't want any juror to render a verdict that he does not consider fair and honest, or one that is against his conscience, and if a juror should return a verdict that he did not consider fair and honest, or one that was against his conscience, the court would not receive it if he knew it. It might be that by a further deliberation of this case you could arrive at some conclusion one way or the other, and I will ask that you retire and further consider of your verdict."

Appellant contends it was error for the court to make any such remarks to the jury in his absence. This might be such a matter as appellant could complain of, as occurring in his absence, prior to the enactment of those provisions of the statute authorizing him to remain on bond until the verdict of the jury is returned, and authorizing the court to receive the verdict in his absence if he intentionally absents himself from the court. A person on trial is supposed to and should have as much interest in a case as the trial judge, and it is his duty under his bond to remain in attendance on the court while the jury is out considering his case. If he intentionally and deliberately walks out of the courtroom and remains away, he cannot and should not expect the court to delay the proceedings to await his pleasure in returning to the courtroom. The above remarks are not of a character that could have been injurious to appellant, but were proper to be made to the jury when they asked to be discharged.

[4] We think there was ample evidence authorizing the court to submit to the jury the count charging appellant with passing a forged instrument. The check was indorsed by him, and paid at the bank, and the bank officials testify it was their custom to require the person to whom they paid a check to indorse his name thereon. Appellant's indorsement was the last appearing on the check, and the court did not err in submitting this count, and refusing the special charges instructing the jury not to consider that count. The verdict was applied to the count charging forgery.

[5] It appears that after appellant was arrested he and some friends went to the courthouse to get possession of the checks on which the indictments were based—the state's contention being that it was an effort to destroy and suppress testimony. On this visit appellant is shown to have been present, and a shooting occurred in which two men were killed, and another injured. No effort was made to show that appellant was guilty of murder on that occasion, but on the other hand it was in evidence that he had been tried and adjudged not guilty of that offense. No details on another trial should be gone into further than to show the visit, the pur-

pose of the visit, and the seriousness of the effort. This much of the testimony was admissible, and the court did not err in so holding. The court properly limited the purpose of the testimony. Mr. Wharton, in section 748, says the suppression or destruction of pertinent testimony is always a prejudicial circumstance of great weight; for, as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence if it were adduced would operate unfavorably to the party in whose power it is. Evidence to suppress testimony is admissible as a circumstance of guilt the same as flight, evading arrest, etc.

[6] The only other question discussed in appellant's brief, and the only one we deem it necessary to discuss, is the one which contends that the jury discussed appellant's failure to testify while considering the case, and this bill, we think, presents error. The only case the state cites as holding that the bill presents no error is *Cooper v. State*, 72 Tex. Cr. R. 266, 162 S. W. 365. We think the *Cooper Case* correctly announces the law, but the facts in this case are wholly different from the facts in that case. In this case one juror, Mr. Dodson, testified:

"Q. State to the court whether or not you heard anybody refer to his failure to testify while you were in the jury room. A. Yes; I did. Q. State to the jury what was said. A. Well, they said that they thought that it would be right for him to testify in his own behalf. Q. Do you know who it was that said that? A. There were three or four said it, but I could not get up and point out the men. Q. Could you tell us how many times you heard mention made about his failure to testify in his own behalf? A. Well, every day. Q. About how often would you think that occurred? A. Well, I would not like to say how many times a day, but mighty near every time we would get to arguing it was brought up."

Another juror, Mr. Roland, testified:

"Q. Mr. Roland, state whether or not upon the trial of this case you heard anybody refer to the fact that E. W. Fry did not testify and what they said. A. Oh, I do not know what they did say; they said that if he was not guilty, he could have got up and said that he wasn't, etc."

Every juror who testified says that the fact that appellant did not testify was mentioned. Some say they heard it only once and it was suppressed. Others testify they heard it mentioned four or five times.

For the reasons indicated, the judgment is reversed, and the cause remanded.

DAVIDSON, J. I agree to the reversal on ground stated, and believe there are other grounds for reversal, and may add some reasons.

I do not believe either the extraneous alleged offenses or the details thereof should have been admitted; also that, having admitted these matters, appellant was entitled to his witnesses to meet and counteract the force of such admitted alleged offenses.

WILLIAMS v. STATE. (No. 3885.)

(Court of Criminal Appeals of Texas, Jan. 12, 1916. On Motion for Rehearing, Feb. 2, 1916.)

1. CRIMINAL LAW §448 — EVIDENCE — TRACKS—CONCLUSION OF WITNESS.

In a prosecution for theft of peas, a witness' testimony that he found wagon tracks and mule tracks in the road near where the peas were taken and traced the tracks and found peas spilled on the ground and walked on and saw similar tracks was admissible, over objection that it was a statement of a conclusion and incompetent in the absence of any measurement of the tracks having been made by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. §448.]

2. LARCENY §51 — EVIDENCE — IDENTIFICATION OF STOLEN PROPERTY — PRESENCE OF OFFICER.

In a prosecution for the theft of two bushels of black-eyed peas, the complaining witness was properly permitted to testify that, when he went to defendant's house and identified the peas found there as belonging to him, the sheriff was with him.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 144-146; Dec. Dig. §51.]

3. CRIMINAL LAW §417—IDENTIFICATION OF STOLEN PROPERTY—EVIDENCE—PRESENCE OF DEFENDANT.

That defendant was not present when the complaining witness identified property found on defendant's premises as being the stolen property did not render inadmissible such witness' testimony as to his identification of the property.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. §417.]

4. WITNESSES §387—CROSS-EXAMINATION—WIFE OF ACCUSED.

Where, in a prosecution for the theft of two bushels of peas, defendant's wife testified that she saw her husband buy the peas found at their home, the state was properly permitted to ask her, on cross-examination, whether she did not tell the sheriff, at the time the peas were found that all she knew about it was that her husband told her he had bought them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. §387.]

5. WITNESSES §391—IMPEACHMENT—WIFE OF ACCUSED.

Where defendant's wife testified that she saw her husband buy peas identified as those stolen, it was competent to impeach her by testimony of the sheriff that she told him that all she knew about the peas was that her husband told her he bought them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1248; Dec. Dig. §391.]

6. CRIMINAL LAW §889 — CORRECTION OF VERDICT—ASSESSMENT OF PENALTY.

Where, in a prosecution for theft of two bushels of black-eyed peas, the verdict returned assessed defendant's punishment at a fine only, the court properly directed the jury to return to their room and, if they found defendant guilty, assess a jail penalty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109, 2110, 2112; Dec. Dig. §889.]

On Motion for Rehearing.

7. WITNESSES §188—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.

Where defendant's wife testified that she saw her husband buy peas identified as those stolen, permitting the sheriff to testify that she told him all she knew about the peas was that

her husband told her he had bought them was not error, as permitting her to be contradicted by a confidential communication made to her by her husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 734, 736; Dec. Dig. §188.]

8. CRIMINAL LAW §1043—APPEAL—PRESENTATION BELOW.

Objections, other than those made below, to the court's refusal to receive a verdict of guilty until it had been corrected by the jury, could not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. §1043.]

Appeal from Johnson County Court; B. Jay Jackson, Judge.

E. W. Williams was convicted of theft—a misdemeanor—and appeals. Affirmed.

W. B. Featherston and W. E. Myres, both of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft—a misdemeanor—and his punishment assessed at a fine of \$25 and 30 minutes' confinement in the county jail.

[1] Z. C. Jones testified to having lost two bushels of black-eyed peas. In the first bill, it is shown he testified:

"On the next morning I was again at the house, and the sack of peas were gone. At the side of the road I saw where a wagon had turned out of the road in front of said house. The tracks of the wagon and horses were in the soft dirt on the side of the road, and I noticed that where the wagon had stopped at the side of the road some cotton seed hulls had been spilt on the ground, and I also found some of the black-eyed peas on the ground. I walked up the road in the easterly direction to Morgan Peacock's pasture, and I saw the track of some horses and a wagon in Morgan Peacock's pasture; the tracks of the horses in Morgan Peacock's pasture were the same as the tracks of the horses that I saw where the wagon turned out of the road in front of the house from which the peas were taken. The horses were shod. I did not measure any of the tracks nor the hoofs of the defendant's horses."

Appellant objected to this testimony because it called for the conclusion of the witness; that in the absence of measurement having been made by the witness he should not be permitted to testify that the tracks about which he first testified and the tracks he found in Morgan Peacock's pasture were the same tracks. The testimony, in fact, would show the witness found the wagon tracks and mule tracks in the road near the house from where the peas were taken, and he traced those tracks and found where some cotton seed hulls and black-eyed peas had been spilled on the ground, and he walked on and saw similar tracks in Morgan Peacock's pasture. Such testimony was held to be admissible in the case of *Porch v. State*, 50 Tex. Cr. R. 341, 99 S. W. 102, wherein it was said:

"Witness stated that he observed these tracks, and that they looked to him to be the same tracks; that is, made by the same person both coming and going. We believe that this testi-

mony was admissible, and any objection urged thereto would go to the weight, and not to its competency. As we understand it, this is not a comparison between a track on the ground where the homicide occurred and a track found somewhere else, or between the appearance of a track made by defendant and a track found on the ground. But it is a comparison by the witness of tracks going and coming, found in juxtaposition to each other, and in the immediate vicinity of the spot where the homicide was committed. *Gill v. State*, 38 Tex. Cr. R. 595 [38 S. W. 190]; *Weaver v. State*, 46 Tex. Cr. R. 617 [81 S. W. 89]."

[2, 3] The next bill complains that Mr. Jones was permitted to testify that, when he went to appellant's house, and identified the peas there found as his peas, the sheriff was with him. Appellant objected to the witness being permitted to testify who was with him. This was clearly admissible, and such testimony would have no tendency to cause the jury to believe the sheriff thought appellant guilty. At any rate, there was no error in permitting the witness to state who accompanied him. It is also contended that it was improper to permit the witness to testify he identified the peas as the peas stolen from him; defendant not being present. This has been clearly settled adversely to appellant's contention in *Davis v. State*, 55 S. W. 341.

[4, 5] Defendant placed his wife on the stand as a witness, and had her testify that she was in Cleburne and saw her husband buy the sack of black-eyed peas found at their home from a man; that her husband paid \$3 for the peas. These were the peas Jones claimed to identify as his peas, and on cross-examination, the state asked her if she did not tell Sheriff Cooper, while Cooper and Jones were at their house, "that all you knew about the peas was that your husband told you he had bought them." She denied making this statement. Appellant objected to this question, as he had asked his wife nothing about what she had told the sheriff. The question was proper cross-examination, as appellant's wife, at his instance, had testified she saw him purchase the peas and pay a man \$3 for the peas. She could be impeached on that testimony, the same as any other witness and there was no error in permitting the sheriff to testify that Mrs. Williams had told him "that she knew the peas belonged to them, because her husband told her he had bought the peas."

[6] After they had retired and considered the case, the jury returned into court the following verdict:

"We, the jury, find defendant guilty as charged in the indictment and assess his punishment at a fine of \$25.00."

When this verdict was read by the clerk, the court requested the clerk to hand the papers to him, when the court instructed the jury they must retire to their room, and if they found appellant guilty, under the law, they must assess as part of the punishment a jail penalty. Appellant objected to this proceeding, contending that, as the verdict

as at first returned did not assess a jail penalty, but only assessed a pecuniary fine, the defendant should be discharged. The court acted properly in refusing to receive the verdict and instructing them, under the law, to return to their room, and if they found appellant guilty, they must assess some imprisonment in the jail. As the verdict first returned found appellant guilty, he was not entitled to be discharged from custody, and until the jury had been discharged, the court could, and properly did, require them to return a verdict in accordance with law.

The evidence is conflicting, but under the testimony of Mr. Jones appellant would be guilty, and the jury so find, and we are not, under such circumstances authorized to disturb it.

Affirmed.

On Motion for Rehearing.

[7] Appellant has filed a motion for rehearing and insists the court erred in holding that there was no error in permitting the sheriff to testify as to what Mrs. Williams told him, contending that this was permitting her to be contradicted by a confidential communication made to her by her husband. Mrs. Williams was not asked what her husband told, nor asked if her husband told her anything. She testified she was present when her husband bought the peas. On cross-examination, she was asked if she did not tell the sheriff, at the time the peas were found, "that all she knew about the peas was that her husband told her he had bought them." As she had testified she was present when her husband bought the peas at his instance, it was permissible to show she had made a different statement to the sheriff, if she did so, as tending to impeach her. The sheriff was only permitted to testify to what he said Mrs. Williams had told him. This was her statement made to the sheriff, and was in no sense a confidential communication between the husband and the wife. The husband was not even present when she made the statement.

[8] The only other ground in the motion is appellant contends that the court erred in what he said to the jury when he refused to receive the verdict first brought into court. The only objection urged at the time, as shown by the bill, is as follows:

"That the defendant then and there objected to the remarks as made by the court because same were made orally and were highly improper, and further objected because the jury had returned the verdict, which each juror said was the verdict of the jury; and it was improper for the court to again instruct the jury to retire because the verdict as read by the jury was tantamount to his acquittal, and the court should have discharged the defendant."

Appellant seeks in this court to make other objections, not then made to the trial court. If he desired to make such objections as he now seeks to make, he should have made them at the time, and doubtless the trial

judge would have conformed the proceedings in accordance with such request. It is too late to raise such matters in this court for the first time.

The motion is overruled.

DAVIDSON, J., not present at consultation.

SMITH v. STATE. (No. 8917.)

(Court of Criminal Appeals of Texas. Jan. 19, 1916.)

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

George M. Smith was convicted, and appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant appealed from a conviction for bigamy, but has neither a statement of facts nor a bill of exceptions. No question is presented which can be reviewed in the absence of these. Therefore the judgment must necessarily be affirmed.

ARMSTRONG v. STATE. (No. 3884.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

Appeal from District Court, Shelby County; W. C. Buford, Judge.

Henry Armstrong was convicted of violating the local option law, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of violating the local option law and his punishment assessed at two years' confinement in the state penitentiary.

No statement of facts nor bills of exception accompany the record. Under such circumstances there is no question presented by the motion for a new trial we can review.

The judgment is affirmed.

OZMENT v. STATE. (No. 3906.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916.)

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

E. L. Ozment was convicted of crime, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of an aggravated assault and assessed the lowest punishment, a fine of \$25.

There is no bill of exceptions nor statement of facts; hence, nothing presented which can be reviewed.

The judgment is affirmed.

GULF NAT. BANK v. SHELTON et al. (No. 5657.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916.)

1. GARNISHMENT ~~§~~61—OBLIGATIONS SUBJECT TO GARNISHMENT.

One who would garnish assets derived from or through an executor or administrator must

show that the original title by which the executor or administrator holds the property has changed, and that he now holds the property in some capacity other than as a representative of the decedent.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 119; Dec. Dig. ~~§~~61.]

2. GARNISHMENT ~~§~~61—MONEYS SUBJECT TO GARNISHMENT—STATUTES.

Rev. St. 1911, art. 8447, provides that, when the court has passed upon a claim against the estate of a decedent, its action shall be entered upon the claim docket and indorsed on the claim, together with the classification, while article 3452 declares that such action shall have the force of a final judgment. Articles 3458, 3459, define the classes of claims, and provide that, when there is a deficiency of assets to pay all claims of one class, they shall be prorated, while articles 3464, 3466, require the executor or administrator to file after 12 months an exhibit setting forth a list of all claims presented, specifying those rejected and allowed, and provide that upon the return of the exhibit, if it shall appear that the estate is solvent, taking into consideration all claims presented on which suit has been or yet can be instituted, it shall be the duty of the county judge to order immediate payment. Articles 3467, 3470, declare that, if the funds on hand are not sufficient for the payment of all claims, the court shall order payment of claims having a preference, and that in all cases where an order shall be made by any county judge for an executor or administrator to pay over money such executor or administrator shall for failure be liable on his official bond for damages at the rate of 5 per cent. a month. An order was made allowing and classifying a claim in favor of a judgment debtor as a claim of the second class. Held, that as, in view of article 3466, payment by the executor need not be made for 12 months, funds in the hands of the executor are not during that time subject to garnishment, though it be averred that the estate is solvent.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 119; Dec. Dig. ~~§~~61.]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by the Gulf National Bank against T. H. Bass and others, in which H. H. Shelton and others were garnished. From a judgment for garnishees, plaintiff appeals. Affirmed.

Terrell, Walthall & Terrell, of San Antonio, for appellant. James Routledge, of San Antonio, for appellees.

MOURSUND, J. On March 27, 1913, in cause No. 88 in the district court of Jefferson county, styled Gulf National Bank v. T. H. Bass, C. L. Bass, and Mally Bastham, the plaintiff recovered a judgment against all of the defendants for \$3,468.83, with interest thereon at the rate of 8 per cent. and for foreclosure of lien on 25 shares of stock in the Union Trust Company. On November 22, 1914, plaintiff filed its affidavit for a writ of garnishment against H. H. Shelton, Dwight E. Potter, and Luisa Wilhelmi, as executrix of the estate of Dolores G. Wilhelmi. The writ of garnishment was issued and served. Luisa Wilhelmi answered on

December 24, 1914, by certain exceptions to the affidavit and writ of garnishment, and prayed that the application be quashed. On December 24, 1914, she answered that she was not, and had not been at the time the writ was served upon her, indebted to C. L. Bass, and that she had no effects belonging to him, etc. On December 31, 1914, the Gulf National Bank filed an affidavit controverting Luisa Wilhelmi's answer, in which it was alleged that defendant C. L. Bass had performed legal services for the estate of Dolores Wilhelmi, deceased, of which Luisa Wilhelmi is executrix, which estate is pending in Bexar county, Tex., and for which services Hon. J. R. Davis, judge of said court, has approved and allowed a fee to said C. L. Bass amounting to \$7,500, and duly entered an order of which a copy was attached to the controverting affidavit. It was further alleged that the approximate value of the estate is \$60,000; that plaintiff is informed and believes that all first-class claims against the estate have been paid and satisfied, and that in due course of time the claim of said Bass, being a second-class claim, will be paid; that the total sum of all second-class claims against said estate outside of the sum due Bass does not exceed \$5,000; that no part of said fee has been paid by said executrix, but that she, as executrix of said estate, is still indebted to the defendant Bass in the said sum of \$7,500. The order by the probate court, after reciting the finding that the amount of \$7,500 was the reasonable value of the services of Bass, provides as follows:

"Wherefore it is considered, ordered, adjudged, and decreed that C. L. Bass do have and recover the sum of \$7,500, together with 6 per cent. interest per year from date hereof, from the estate of Dolores Gonzales Wilhelmi, and that same be classified as a second-class claim as defined under article 3458 of Revised Civil Statutes of the state of Texas, and that said sum shall be paid to said Bass by Luisa Wilhelmi, as executrix of the will of Dolores Gonzales Wilhelmi, or by any successor of said executor, out of any funds available and that may become available for such purpose."

The cause was transferred to the district court of Bexar county, fifty-seventh district. C. L. Bass filed his amended petition of intervention, and Luisa Wilhelmi her answer to the controverting affidavit. The court sustained the general demurrers urged by Bass and Mrs. Wilhelmi to the garnishment proceedings and the controverting affidavit, and the plaintiff having failed to amend, and announced that it would not do so, judgment was entered that plaintiff take nothing against the garnishee Luisa Wilhelmi, as executrix of the estate of Dolores G. Wilhelmi. The proceedings were dismissed as to Shelton and Potter.

The only question to be decided is whether, under the allegations of the controverting affidavit, the claim of Bass evidenced by the order of the county court can be subjected to the payment of appellant's judg-

ment by means of garnishment proceedings instituted against Luisa Wilhelmi, executrix.

[1] The rule formerly was that executors and administrators were not subject to garnishment at all unless the right was given by statute. But, as this rule was based upon the proposition that one court could not be permitted to interfere with or encroach upon the jurisdiction of another, and not upon the theory that persons justly indebted to others should have assets exempted from the payment of their just debts because they collected them through an officer of the probate court, it was found by many courts that some modification of the original rule was called for. It was therefore held that, when a decree of distribution has been made whereby each share is finally and definitely determined, such share may be reached by garnishment on the theory that a cause of action exists in favor of the distributee in his individual capacity. *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *Re Verac*, 35 Cal. 392, 95 Am. Dec. 111. Mr. Woerner, in his work on the American Law of Administration, vol. 1, § 177, says:

"And, since the ownership is in the first place always that of executor or administrator, it is incumbent upon any one who would attach a right to the assets derived from or through the executor or administrator personally to show that the original title has been changed, and that he holds the property in some other capacity, which may be done by proving a sale, conversion, or merger in any of the methods by which a personal representative may divest the title of his testator or intestate. Hence, since an order of distribution, or to pay debts or legacies, operates to change the representative's official to a fixed personal liability, it follows that he may thereafter, and before payment, be summoned as garnishee by an attaching or execution creditor of the beneficiary to whom the executor or administrator is ordered to pay. Conversely it is generally held that, while holding in his representative character, he is not subject to garnishment process, unless he is made so by express statutory provision, as is the case in a large and increasing number of the states."

In section 411 the author describes the order to pay debts meant by him in the above quotation. Briefly stated, it is an order made after the time for proving debts has expired, or the time for proving the preferred class has expired, and the administrator or executor has made a complete statement of the condition of the estate. The author says:

"The court will thereupon decree the payment of the debts which have been proved, in the order of the classes to which they were assigned, each class to be paid in full before the next inferior class receives anything; and when the assets are sufficient to pay a part, but not the whole, of the debts of any one class, the creditors of that class will be payable pro rata. The order or decree of payment so made corresponds in some measure to the judgment de bonis propriis at common law, because, having ascertained the amount of assets in the administrator's hands available for the payment of debts,

and also the amount to which each creditor is entitled, the court, by its order or decree, renders judgment against the administrator, making him liable personally to the creditor for the specified amount, which is enforceable by execution against him, and by suit on the bond of his sureties, and subjecting him thereafter, in most states, to garnishment by a creditor of the creditor whom he is ordered to pay."

Mr. Freeman, in his work on Executions, in section 131, says:

"When the share of a creditor, heir, legatee, ward, or other person entitled to moneys in the hands of an administrator, executor, or guardian has been settled by the court and ordered to be paid, it is no longer regarded as in custody of the law. The right to it has become fixed, absolute, and capable of enforcement by action at law. It may therefore be garnished."

This statement of the rule is a brief statement of the same rule announced by Mr. Woerner, as is shown by the construction placed thereon by Mr. Justice Bonner, in *Pace v. Smith*, 57 Tex. 561.

Mr. Shinn, in his work on Attachments, apparently limits the exceptions to the old rule to cases in which a change has been made by statute, and makes the following succinct statement of the rule to be applied in determining when garnishment will lie, which is a substantial repetition of the rule announced by Mr. Woerner and Mr. Freeman, viz.:

"In states permitting an executor or administrator to be made a garnishee, he may be held as such whenever the person to whom he is to pay the legacy or distributive share may maintain an action at law against such executor or administrator. After a court has decreed a distribution of the proceeds in the hands of the administrator, such administrator may be held as garnishee."

It has never been held that the rule announced by these authors, and in the cited cases, was the law in this state, and in fact there are expressions in some of the opinions indicating an intention to adhere strictly to the old rule. However, our Supreme Court has recently held, in the case of *Turner v. Gibson*, 106 Tex. 488, 151 S. W. 798, that a balance in the hands of a sheriff, after satisfying an execution, was subject to garnishment; that it was held in a private, and not an official, capacity, and the opinion of the court shows that said court does not favor a rule to the effect that all funds which come into the hands of an officer of the court remain in the custody of the law as long as in his hands, but one which limits the custody of the court to such time as is necessary to protect its jurisdiction from invasion by another tribunal or officer. In the opinion of the Court of Civil Appeals, approved by the Supreme Court, reported in 152 S. W. 840, the case was distinguished from the cases of *Pace v. Smith*, 57 Tex. 555, and *Loftus v. Williams*, 24 Tex. Civ. App. 398, 59 S. W. 291, on the ground that the sheriff held it under a statute, and not subject to the order of any court, and there

was no order of any court directing its payment. We will not pause to inquire whether this distinction is well founded; for the statute relating to the duty of the clerk in such matters and the rules applicable differ from the statutes relating to estates of decedents and the construction of such statutes by our courts.

We conclude that the rule stated by Mr. Woerner, and followed in the cases first cited herein, correctly states the test to be applied in determining when the custody of the court ceases in the administration of estates of decedents, and, there being no case in our state in which the contrary has been directly held, it will be applied by us in this case.

[2] In this connection we find that our statutes relating to the estates of decedents contain nothing inconsistent with such rule. We will state the substance of the articles deemed material, and then discuss the question whether the order approving Bass' claim was such a one as made the executrix liable to garnishment. Article 3435 requires claims to be presented within 12 months, or payment thereof will be postponed until after those presented within that time. Article 3436 requires claims for funeral expenses and those of the last sickness to be presented within 60 days, or else property set apart as exempt or for allowances made the widow and minor children will not be liable for the payment thereof. Article 3446 provides that all claims allowed by the executor or administrator shall be acted upon by the court at a regular term, and either approved in whole or in part or rejected, and shall at the same time be classified. Article 3447 provides that, when the court has passed upon a claim, its action shall be entered upon the claim docket and indorsed on the claim, together with the classification. Article 3452 provides that such action of the court shall have the force and effect of a final judgment, from which an appeal may be taken. Article 3458 defines the classes of claims. The first class comprises claims for funeral expenses and those of the last illness, while the second class comprises expenses of administration and those incurred in the preservation, safe-keeping, and management of the estate. The other classes need not be mentioned. Article 3459 provides that, when there is a deficiency of assets to pay all claims of the same class, they shall be paid pro rata; and no executor or administrator shall be allowed to pay any claims, whether the estate is solvent or insolvent, except with their pro rata amount of the funds that have come to hand. Article 3460 provides that executors and administrators, whenever they have funds in their hands, shall pay: (1) The first-class claims presented within 60 days; (2) allowances made to the widow and children or either; and (3) second-class claims above defined. Article 3462 provides

that, whenever the executor or administrator has funds sufficient to pay a claim or any part thereof, and fails to make payment when required to do so by the owner of the claim, such owner may obtain an order directing such payment to be made, upon proof that there are funds which should be paid thereon. Article 3464 requires the executor or administrator, after 12 months to file an exhibit setting forth a list of all claims presented within 12 months, specifying those allowed by him and those rejected, and the date of their rejection, also those sued upon, and shall state the condition of the suit, also setting forth fully the condition of the estate. Article 3466 reads as follows:

"Upon the return of such exhibit, if it shall appear therefrom, or from any other evidence, that the estate is solvent, taking into consideration as well the claims presented before the expiration of twelve months from said granting of letters testamentary or of administration on which suit has been, or can yet be, instituted, as those so presented, allowed and approved, or established by judgment, and that the executor or administrator has in his hands sufficient funds for the payment of all the aforesaid claims, it shall be the duty of the county judge to order immediate payment to be made of all claims allowed and approved or established by judgment."

Article 3467 provides that, if the funds on hand are not sufficient for the payment of all the claims, or if the estate be insolvent, the court shall order the funds to be applied to the payment of all claims having a preference, in the order of their priority, if they or any of them be still unpaid, and then pro rata to the payment of the other claims. Article 3470 provides that in all cases where an order shall be made by any county judge, under the provisions of title 52, for an executor or administrator to pay over money to any person, and such payment is not made when demanded, such executor or administrator shall be liable on his official bond for damages at the rate of 5 per cent. a month for every month he shall neglect payment.

It appears from the articles of the statutes referred to that claims of the first class presented within 60 days may be paid at the end of that time, and should be paid then if there are sufficient funds on hand; that claims of the first class presented after 60 days fall into a class subordinate to allowances to the widow and minor children, but still having preference over claims of inferior grade, if filed within 12 months; that all other claims must be filed within 12 months in order to be entitled to payment according to classification. There is no provision made for payment under order of court until after 12 months, although it is contemplated that the executor or administrator will pay the first-class claims filed within 60 days as soon as he has sufficient funds on hand without an order of court directing such payment. The court is required to make an order allowing or rejecting each claim, and classifying those allowed. This order is noted on the

claim docket and on the claim, but it is not contemplated that it shall be entered in the minutes. After the 12 months have expired and the exhibit has been filed the court makes an order directing the payment of claims, which order is entered on the minutes. This order is made in contemplation of the funds on hand, and when it is made the claimants are entitled to their money, and, if not paid, can sue on the bond for a penalty, and the money due them.

The order made in favor of C. L. Bass was entered on the minutes, but it is evident it was merely an order allowing and classifying a claim, and that it did not require the immediate payment of the amount; for it provides that it is to be paid out of any funds available and that may become available for the purpose. Instead of indorsing on the claim docket and on the claim the action of the court, it was entered as an order or judgment, but it is clear that it was not such an order as would subject the executrix to suit on her bond for failure to pay at once. The provision that the sum is to be paid out of any funds available or that may become available has no place in an order allowing a claim, and may be treated as surplusage; for the statutes provide the course to be pursued and the rights of the parties whose claims are allowed. It cannot be contended that the order constitutes a judgment directing the payment of money under article 3466 as well as an order allowing and classifying a claim; for it fails to disclose any intention to enter an order of such character as to require the immediate payment of the money under the penalty of paying 5 per cent. per month as damages. The court did not make a single statement which indicates that it had examined into the condition of the estate and determined that there was sufficient money on hand to pay the claim, and that under the law such money was required to be applied to the payment thereof. We do not think the order could be aided by proof of the circumstances under which it was made, but, if it could, the allegations in the controverting affidavit fail to show that 12 months had expired from the date of granting letters testamentary, and that an exhibit had been filed showing that the court was warranted in ordering the money paid at once. On the contrary, the allegations only show that the value of the estate is some \$60,000, that plaintiff is informed and believes that all first-class claims have been paid, and that in due course Bass' claim will be paid, and that the total amount of second-class claims, besides that of Bass, does not exceed \$5,000.

As the order was not one which had the effect of making the executrix liable to a suit against her individually for failure to pay at once, the rule approved by us does not apply, and the judgment must be affirmed, unless it is the law that, when a claim has been allowed by the executrix and approved by the

court it can be reached by garnishment, provided it is alleged and proven that the condition of the estate is such that it is certain the claim will eventually be paid. Such a rule would mean that whether the claim was subject to garnishment depends upon the decision of a question of fact in each case. We are sure that this cannot be permitted; for representatives of estates of decedents would be subjected to suits in their representative capacity to determine whether ultimately they would become liable individually, and much expense would be incurred not properly taxable against the administrator individually, nor against the estate. Besides, a claim not at once payable is not such a claim as our garnishment statutes contemplate may be reached.

The trial court was correct in sustaining the demurrers.

The judgment is affirmed.

GOODRICH et al. v. WEST LUMBER CO.
et al. (No. 13.) *

(Court of Civil Appeals of Texas. Beaumont.
Oct. 21, 1915. On Rehearing,
Jan. 6, 1916.)

1. BOUNDARIES \S 37 — LOCATION OF LINE AND CORNER OF SURVEY — SUFFICIENCY OF EVIDENCE.

In trespass to try title, evidence held to show the location of the northwest corner of a certain survey, and that a boundary line should run north 43 degrees east from such corner to the northeast corner of the survey, unless arrested.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 184-184; Dec. Dig. \S 37.]

2. EVIDENCE \S 460 — DESCRIPTION OF LAND — CALL OF SURVEY — CONTROL BY PAROL EVIDENCE.

Where a call in the field notes of a survey makes no reference to objects upon the ground indicating the footsteps of the surveyor, such call cannot be controlled by parol evidence of the existence of such objects, except in actions to correct mistake; but the rule does not apply when the evidence of facts and surrounding circumstances, extraneous to the call, is simply in aid of a call found in the field notes, to remove an ambiguity, and determine which of two or more conflicting calls shall prevail.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2115-2128; Dec. Dig. \S 460.]

3. EVIDENCE \S 83 — DESCRIPTION OF LAND — PRESUMPTION OF MARKING OF CORNER.

It will be presumed that a surveyor marked a corner which his notes state he established on a tree locating it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 105; Dec. Dig. \S 83.]

4. BOUNDARIES \S 38 — DESCRIPTION OF LAND — EVIDENCE — EXISTENCE OF BEARING TREES — PRESUMPTION.

In trespass to try title, where nothing was shown to arrest the established northwest line of a survey over lands which had been cleared of timber, the presumption was that the bearing trees at the points called for by the field notes were there once, and, even in their ab-

sence, the boundaries of the survey would be fixed in accordance with the notes.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 146-152; Dec. Dig. \S 33.]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Trespass to try title by Cornelia G. Goodrich and others against the West Lumber Company and others. From a judgment for defendants, plaintiffs appeal. Reversed, and judgment rendered for plaintiffs.

Crook, Lord, Lawhon & Ney, W. D. Gordon, and Thos. J. Baten, all of Beaumont, and Campbell & Campbell, of Houston, for appellants. Hill & Hill and S. H. German, all of Livingston, and Baker, Botts, Parker & Garwood, of Houston, for appellees.

BROOKE, J. This is a suit in trespass to try title, filed on December 29, 1913, by Cornelia G. Goodrich, Mary W. Montgomery, Margaret M. Montgomery, Edward L. Montgomery, Jr., Helen M. Krasicka, and Jeann Krasicka, as plaintiffs, against the West Lumber Company, P. R. Roe, J. W. Cochran & Co., J. W. Cochran, Alice Cochran, W. B. Cochran, and Arthur L. Blessing, as defendants. The suit was for the recovery of four leagues of land in Polk county, granted to Augustine Viesca by the government of Coahuila and Texas in 1833, and for the value of timber cut by defendants on a portion of said four leagues of land alleged to contain 2,027 acres, more or less. The land sued for is described as follows:

Situated in the county of Polk and said state of Texas, on the east bank of Trinity river, beginning on said bank of said river above the old Coashatta Indian village at pecan 14 inches in diameter, and it stands on a line 200 varas from the bank of the river Trinity, and is to the north 23 degrees east 3 varas from another pecan 18 inches in diameter, and to the north 62 degrees west $4\frac{1}{2}$ varas from a hackberry 24 inches in diameter, and to the south 71 degrees west 1 vara from another hackberry 9 inches in diameter, and also marked an elm 12 inches in diameter, and it stands to the north 68 degrees west 100 varas from the above described corner, being the first landmark; thence north 43 degrees east 15,833 varas to a white oak 15 inches in diameter, and it stands to the north 16 degrees west 4 varas from another white oak, and to the north 5 degrees east 3 varas from an ash 12 inches in diameter, and to the south 76 degrees east 9 varas from a white oak 15 inches in diameter, being the second landmark; thence south 47 degrees east 7,500 varas to an oak 4 inches in diameter, being to the north 84 degrees east 11 varas from another oak 12 inches in diameter, and to the north 84 degrees west 10 varas from another oak 9 inches in diameter, being the third landmark; thence south 43 degrees west 10,830 varas to an ash 4 inches in diameter on the east margin of the aforesaid river, and it extends to the north 63 degrees west $7\frac{1}{2}$ varas from a sycamore 36 inches in diameter, and to the north 20 degrees 31 minutes west 16 varas distant from a sugar tree 14 inches in diameter, and to the north 21 degrees 30 minutes west at 24 varas distance from an elm 24 inches in diameter, and also stands to the north 68 degrees east 13 varas

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

from a sycamore 24 inches in diameter, being the north and last landmark of this survey; and thence following the meanders of the aforesaid river up to the beginning point, containing four leagues of land, or an area of 100,000,000 square varas, and being part and parcel of eleven leagues of land granted to Augustine Viesca by the government of Coahuila and Texas.

Upon the trial the plaintiffs in open court dismissed their suit as to the defendant Arthur L. Blessing. There was also filed the following agreement:

"It is agreed that this is a boundary case, involving the true location of the lines of what is known as the A. Viesca four-league grant, situated in Polk county, Tex. The plaintiffs assert no claim to any part of this grant lying west or southwest of the line described as follows: Beginning at the southeast corner of J. S. Garner league, in Polk county, Tex., the same being also the southeast corner of a 38-acre tract of land owned by the defendant West Lumber Company out of said Garner league; thence north 49 degrees west with the east line of said Garner league 2,400 varas to the most northern corner of said Garner league; thence south 41 degrees west with the said Garner upper line 385 varas to the southeast corner of a 100-acre survey owned by the defendant West Lumber Company, known as the C. D. Martin survey; thence north 47 degrees west, at 1,128 varas across the Livingston and Patrick Ferry road, 1,979 varas Tempe creek, 2,800 varas Tempe creek, about 5,093 varas in all, to a stake in which a red oak bears south 10 degrees west 3 varas, a pine stump 36 inches in diameter bears south 81 degrees east 4.3 varas marked X; thence south 43 degrees west 765 varas to the north corner of a 75-acre survey, made for Mrs. Sarah M. Smith, a stake from which a 16-inch sweet gum bears south 60 degrees west 9 varas, a pine 8 inches in diameter bears north 86 degrees east 10 varas; thence north 47 degrees west to the upper line of said Viesca four-league grant, wherever the same may be located.

"The plaintiffs own all of said Viesca four-league grant, if any, lying east and north and northeast of the line above described. The defendants own all of said Viesca survey lying west or southwest of the above-described line. The defendants, in addition, own the following surveys, all of which is junior in point of location to the A. Viesca four-league grant, and defendants' title to said surveys is junior to any part of said land found to be within the boundaries of A. Viesca four-league grant; said surveys of land being as follows: Geo. W. Miles, one-third of a league; D. W. Smith, one-third of a league; Wm. White, one-third of a league; W. C. Hicks survey of 640 acres, which survey contains 522½ acres, patented to L. C. McMicken, assignee of Buffalo Bayou, Brazos & Colorado Railway Company; I. F. Haynes 160-acre survey, 316¼ acres patented to L. S. McMicken, assignee of Buffalo Bayou, Brazos & Colorado Railway Company; survey of 68.43 acres patented to P. R. Rowe.

"This agreement is made without prejudice to the questions of limitation pleaded by the defendants, or any questions of warranty that may be involved in this case."

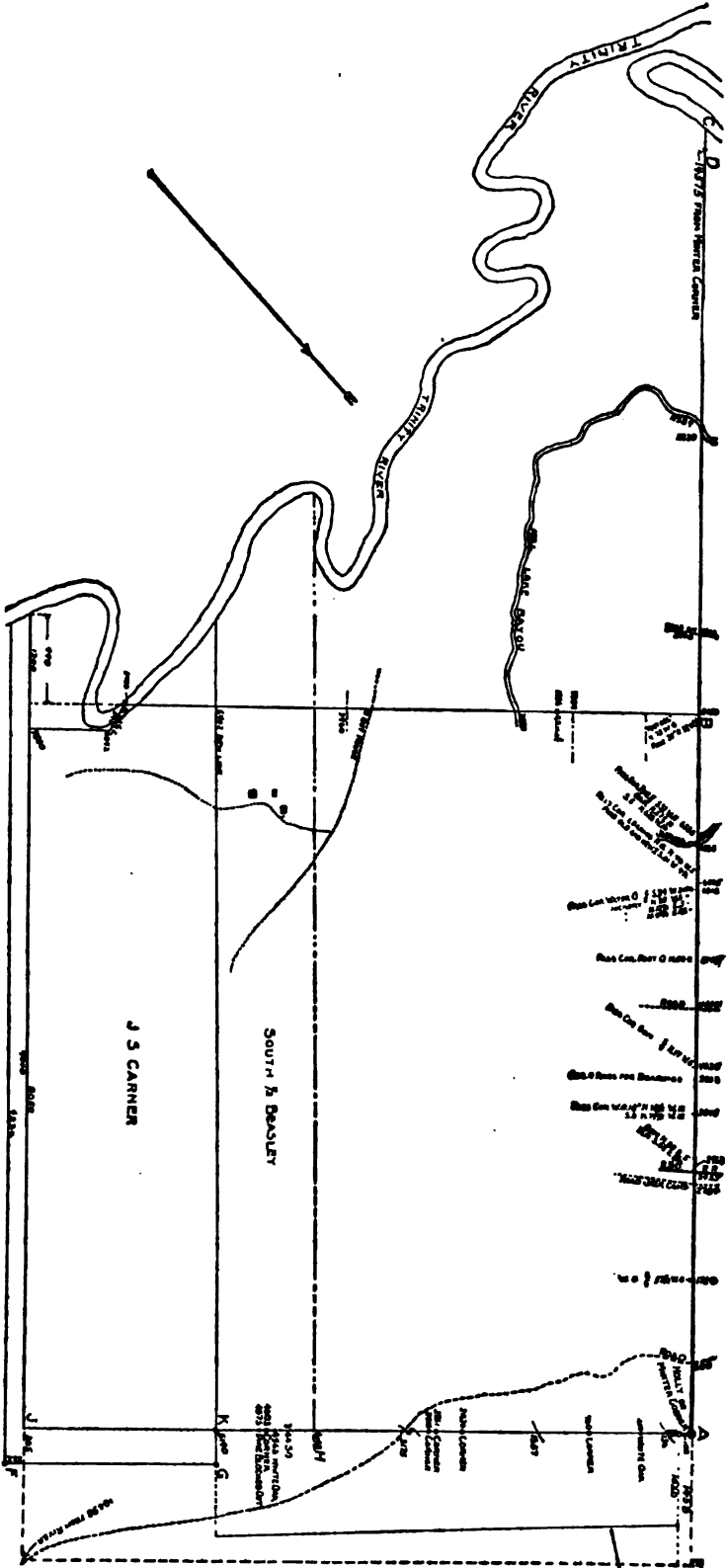
During the progress of the trial the following agreement was entered of record:

"It is agreed by and between the plaintiffs and defendants J. W. Cochran & Co., J. W. Cochran, W. B. Cochran, Alice Cochran, and P. R. Roe that judgment shall be entered in the above entitled and numbered cause that these defendants have judgment for the lands described in their respective answers, except the 50 acres in the most eastern corner of the Buffalo Bayou,

Brazos & Colorado Railway Company survey of 316¼ acres, which 50 acres was conveyed by the defendants J. W. Cochran & Co., J. W. Cochran, W. B. Cochran, and Alice Cochran to Mrs. Emmeline D. Taylor and M. M. French by deed dated October 10, 1903, and which is of record in Volume 21, pages 522 to 524, of the Deed Records of Polk county, Tex., and it is further agreed that these defendants recover of plaintiffs all costs incurred by reason of their being made parties herein. This December 16, 1914."

There was some controversy, real or apparent, as to the beginning corner of the four-league grant, and also apparent dispute as to the location of the first line called for in the grant, which was the north line, or northwest line, running from the river out to what is referred to in this record as the "holly corner." All of the corner trees and bearing trees have disappeared. It was the contention of the plaintiffs that such corner trees and bearing trees should be presumed to have been located at the distances called for in the grant. The field notes of the original grant called for the north line running north 43 degrees east 15,833 varas from the pecan, which is a line and bearing tree at beginning corner, to a white oak 15 inches in diameter standing to the north 16 degrees west 4 varas from another white oak, and to the north 5 degrees east 3 varas from an ash 12 inches in diameter, and from a white oak to the south 76 degrees east 9 varas 15 inches in diameter, the second landmark. But the defendants contend that said corner was not in fact located at 15,833 varas from said bearing tree, but at 14,670 varas from the place of beginning, and at a place called in this record the "holly corner." The defendants introduced evidence of an old marked line running off from the point referred to in the record as the "holly corner," and running south 47 degrees east from said place, and they relied upon this, among other things, to arrest the call for distance as given in the original grant, and assert that the old line referred to was the east line of the original grant. The plaintiffs contend that the four leagues should be located according to course and distance called for in the original grant. If the four-league grant should be located by course and distance called for in the original field notes, the plaintiffs would be entitled to recover against the defendant West Lumber Company all of the junior survey, Buffalo Bayou, Brazos & Colorado Railway Company, comprising 522½ acres; also all of the Isaac F. Haynes, Jr., survey, comprising 160 acres; also the G. W. Smith, Jr., survey of 170 acres; also the Wm. White survey of 163.8 acres, and the W. C. Hicks, Jr., survey of 105 acres, and the G. W. Miles survey of 34 acres.

The following sketch shows the location of the land and the extent and amount of each junior survey in conflict with the Viesca four-league grant, when located according to course and distance called for:



The case was submitted to the jury by general charge of the court, special issues not having been requested, and the jury returned a verdict for the defendant West Lumber Company, and judgment was entered thereon that the West Lumber Company recover against the plaintiffs all of the land in controversy and that the plaintiffs recover nothing by their suit. Plaintiffs duly excepted to the charge of the court in many particulars, presented their special charges, and timely filed their motion for new trial, pointing out errors which they say were committed upon the trial of the case, and which said motion for new trial was by the court overruled. Plaintiffs duly excepted to said action of the court, perfected their appeal, and the case is now before us for disposition.

Our first inquiry will be whether it is shown there is a real dispute with reference to the location of the beginning corner, and with reference also to the north or northwest line of this league. There are no bearing trees to be found now standing where the appellants claim the beginning corner of this grant to be. Appellants say that the beginning corner should be and is on the bank of the river and in what is known as the Scarborough field, which said field is cleared and cultivated, and continues along the line of what appellants claim is the north line of this grant, for a distance of about 2,000 varas, and in all of that distance it being (as said) through cleared and cultivated land, and there are no objects on the ground to identify the place where appellants claim said north line to be. Appellants say that they have established the beginning corner of this grant and the northwest line of same by the uncontroverted evidence submitted on the trial, and by the admissions of appellees in their pleadings in court below, and cite us to the following testimony produced upon the trial of this case in support of their contention:

They say that appellees in their second amended original answer and cross-bill used the following language:

"The Minter northwest line, as shown by the Minter plat, is the northwest line of the A. Viesca four-league grant, and well marked on the ground."

They say, further, that the Minter plat introduced by appellees fixes the beginning corner on the Trinity river, and the northwest line of the Viesca grant precisely as claimed by the appellants in this suit; the only difference being that Minter stopped at what is designated the "holly corner." It is claimed that the West Lumber Company, appellee herein, holds directly under Wm. Carlisle & Co., and that Wm. Carlisle & Co. hold directly under the appellants in this suit by their deed a large portion of this Viesca grant, and that in this deed, under which the West Lumber Company, appellee, claims title, the same boundary lines are

called for as contended by appellants; that in said field notes the northwest boundary line of said Viesca grant is called for, and that the next call starts south 43 degrees west with the said Viesca line 521 varas to the corner made for I. Jackson. The appellants also contend that in the West Lumber Company's answer it is alleged as follows:

"Defendant further alleges that the lands owned by defendant West Lumber Company are described by reference, first, as all the lands described in the deed of Cornelia G. Goodrich and others, and that by the allegations then made this deed was intended to and did convey to Wm. Carlisle & Co. all of the lands at that time owned by the grantor on the Viesca four-league grant, whether expressed in said deed or not, and that all of the lands on the Viesca four-league grant owned by the plaintiffs in this suit, or by any other through whom they claim, as shown by the plat made by Civil Engineer Minter for Wm. M. Goodrich, deceased, for plaintiffs in this suit, or those under whom they claim."

And it was also alleged by the appellees that these identical lands described by metes and bounds in the Goodrich deed to Carlisle had by deed been conveyed by the Goodrich heirs, and that the defendant in this suit was the owner of said land. Thus appellants contend that the West Lumber Company affirmatively pleaded the boundary lines of the Viesca grant, and its location precisely as claimed by the appellants, the only difference being as to whether the Goodrich heirs did convey all of their land in the Viesca grant, and that if the line running out from the river north 43 degrees east is required to be stopped at what is known as the "holly corner," instead of going to its full limit, then the plaintiffs had conveyed their land to the defendant through the deed to Carlisle & Co. The appellants claimed further that the contention resolved itself into a question, not where the Viesca grant lay, and not where its northwest boundary line actually was, and not where its beginning corner on the river was, for they claimed that these were admitted in the pleadings, and were undisputed by any litigant in the case; but they say that the question raised and the issue litigated was whether that line from the Trinity river north 43 degrees east should run out its complement or stop at what is known as the "holly corner," and they refer to the agreement which has been heretofore set out in support of their contention.

Appellants further say: That, in addition to the allegations of the West Lumber Company's answer to the suit above set out, there were a number of exhibits describing by metes and bounds certain surveys of land upon and adjacent to the Viesca grant, and calling for its boundary lines. That the West Lumber Company alleged that it claimed under the boundary specified in these exhibits. That Exhibit C, in describing the Beasley land, and the Garner conflicting survey with the Viesca, expressly says:

"The above two tracts of land set aside to F. A. Garner and others by decree of the United States Circuit Court at Galveston in cause 1003, Wm. M. Goodrich, Deceased, Revived in the Name of Cornelia G. Goodrich, Executrix, v. F. A. Garner and Others."

And Exhibit J reads:

"Part of the four-league grant of Augustine Viesca eleven-league grant"

—then describing the beginning corner to be on the east bank of the Trinity river, between the Goodrich and Garner surveys. And they claim that said Exhibit J expressly calls for and identifies the northwest boundary line of the said Viesca grant, and that the beginning corner on the river is in Scarborough's field, that Scarborough got his deed from a man named Poitevent in 1892, and that the first descriptive call is:

"Also one other tract from off the A. Viesca tract, situated in Polk county, Texas, beginning at the northwest corner of said grant, on the east bank of the Trinity river, thence north 43 degrees east with the northwest line of said grant," etc.

—and that Poitevent got this land from Goodrich in 1876, and the first call is:

"Beginning at the northwest corner of the four-league section of the said Viesca eleven-league grant," etc.

We confess that the contention of appellants seems to be borne out by the record, and in addition thereto the testimony of J. W. Cochran, one of the appellants' witnesses, only a part of the same being set out, is as follows:

"I own a part of the A. Viesca four-league grant. I own a part of the Scarborough, Jennings tract, George Davis tract, as I call it, and a part of the Garner. Mr. Scarborough is the man who bought it about 40 years ago from Mr. Poitevent, and he lived on this land until he died, 3 or 4 years ago. He stayed there somewhere about 35 to 40 years. Mr. Scarborough bought that land from June Poitevent. This north line of the Viesca is supposed to run through the Scarborough field some place, and that north line crosses Mill Lake bayou somewhere northeast of my farm. Mill Lake bayou is about 2,000 varas, possibly more, northeast of the river there. It is 2,000 varas from the river to where the north line of this land crosses Mill Lake bayou, and that north line has the old bearing trees on it. As to whether that old line I am talking about comes right through there: Well, the line I told you had the blazes on it comes through the field, or near the field. As to whether it comes down and corners on the river: Well, I don't know where it comes to; if it come down to the bend, and strikes the river about Geneva bend, it would. If it didn't change its course, it would strike the river at or near Geneva bend. It would go through the Scarborough field. I guess it will cross Mill Lake bayou about 2,000 varas, or possibly more, from the river. I have followed this line out as far as my land goes, and it goes to Mill Lake."

L. F. Sloan's testimony was as follows: That he and one of defendants' witnesses named Garvey went on the land to locate the lines, and they found the northwest line of the Viesca, and ran it according to course and distance called for in the field notes back from what is called the "holly corner" to the river. And Sloan says he

found the usual marks that are marked in the woods on old land lines, and they were old marks. Continuing he said:

"I continued that course until I arrived at the river. After crossing Mill Lake bayou we went to Mr. Scarborough's field, and, of course, there was no line there, as that was all cleared land. Mr. Scarborough was living there—that is, just outside the four-league grant—and the line went through his field, and he was cultivating both sides of this line."

Continuing he says:

"I went right through the Scarborough field, which was cultivated land, and wound up at the bank of the river. My recollection is there was a tree we found there at that time with an X on it; I think it was a pecan tree. It was, as I recall, just over the edge of the bank, about stood say 5 or 6 feet lower—that is, the ground at the tree 5 or 6 feet lower—from the top of the bank. I should say it was about 25 or 30 feet from the water's edge. Of course, now, we did not make any measurements, or anything of that sort. Mr. Scarborough was living there—that is, just outside of the four-league grant—and the line went through his field, and he was cultivating both sides of that line. I don't recollect whether he claimed to be the owner of the land, but it was known as the Scarborough field."

Continuing he says:

"At that time, when I was there with Mr. Garvey [one of the defendants' witnesses], and with Mr. Scarborough, and showed Mr. Scarborough where this line, the point where the line, strikes the bank of the river, Mr. Scarborough said that when he came to that place, which as I remember had been some 20 years ago, the tree called for in the field notes—is the way he put it, and the way we understood it—stood there on the bank of the river, at that point; but the tree that was this tree he referred to had fallen down, was gone, but I think there was a mark there of some sort, as I remember."

The testimony of Mr. Sloan and Mr. Garvey shows that from this point they traced out the Viesca line according to calls and distance, finding on the said course the old marks of the line. Mr. Garvey, appellees' witness, recounted the work done by him when he located these lines in 1900 for Wm. Carlisle & Co., who were then trading for the Goodrich land, and Mr. Garvey uses the following language:

"In 1900 I followed this line that I took to be, and that I now swear is, the original line of the Viesca grant on the northwest, and I traced that line out from the river 14,400 and some odd varas."

Dave Green, another witness for appellees, testified that he was with Garvey in 1900 when he ran the line from the river out to what is called the "holly corner." He said:

"I followed the line north 43 degrees east from down about Elbert Smith's place up to the holly corner. We followed the line from the bank of the river up to that tree."

Mr. Cochran, one of appellees' witnesses, testified that he had known the Scarborough place ever since he could recollect, and that he could safely say for 40 years; that there had been no appreciable change as to the river at the Scarborough house, but below the house there has been a considerable change.

"There is a high bend there, and there has been no change for the 35 or 40 years since I have known it. Where this Viesca line strikes the river, there has been no great change since I have known it."

A great many maps have been submitted to the court from the land office, and these maps show the location of the Viesca grant, and its relative position with reference to the river from the year 1841 down to the present time, and they locate the northwest line as being at the place contended for by the appellants; that is, these maps all show the location of said northwest line up to what is known as the "holly corner," and many of them show a continuation of the line from the holly corner. Mr. Omohundro, a civil engineer, after having testified that he went to all four corners, and went to the four places in doing his work down there and seeking to run the lines of the Viesca survey, testified that at none of those four points did he find a single tree that is called for in the grant. He says he did not find a single object on the ground—that is, at the place where these corners were called to be—by which this grant could be identified. The only thing that is called for in the grant, with reference to said corners, was the Trinity river. He then further testified that two of these corners were in an old field, one on the river at the northwest corner (the beginning point), and the other on the south line in the southeast corner. Both of these were in an old field. He further said that the timber had been cut all through that country and around where he would expect to find the northeast corner. He further testified that in that section of East Texas, in dealing with surveys in reference to Mexican grants made in the '30's, only a very few of the original bearing trees from his experience could be found. He further testified that he ran the line out from the corner on the river north 43 degrees east and—

"I found old Mexican ground marks fore and aft. Well, I found one, or two, or three, perhaps, that I judged to be the old lines, the oldest that I saw anywhere else in this country."

Summarizing, appellants claim that they have established the northwest corner of the Viesca grant and the northwest line of the same by the admissions of the appellee in its pleadings, by the calls for the line in repeated conveyances, by the oath of Mr. Garvey, appellees' witness, who positively swore that it is the line of the Viesca grant, by the original marks on the line found by Garvey, by Green, and by Cochran, witnesses for appellees, and by Sloan and Omohundro, by the records of the general land office from the earliest time to the present time, and by the identification of the spot where Scarborough said the original pecan tree stood when he first acquired the land.

[1] We have burdened this record with copious extracts from the testimony of the various witnesses, and used and adopted the

argument in appellants' brief, for the purpose of demonstrating whether or not there is a *real* dispute between the plaintiffs and defendants as to the point of beginning and of the northwest line of this grant, up to what is known as the "holly corner." There is no testimony in the record which discloses any fact which would lead us to believe that the beginning corner of said league and the location of the north or northwest boundary line of the league was and is not now at the place where the appellants contend same to be; that is to say, that the north or northwest line runs up to what is known as the "holly corner," and in our judgment all of the testimony which is available does show, or tend to show, that the line began at a point on the river, the pecan being on the line, at a point 200 varas from the Trinity river, and that said tree was within the field of Mr. Scarborough, who is now dead, and said pecan tree was standing at the place called for in the grant, but has since fallen down, and is not now to be found. Therefore we conclude that this record discloses testimony which shows conclusively to our mind that said northwest corner of the Viesca league should begin at the point in Scarborough's field on the bank of the Trinity river, and that a pecan tree formerly stood in the line which was called for in the field notes of the original surveyor, and that said line should be run north 43 degrees east, as is found upon the ground by old marks upon trees after you pass Mill's Lake and out of the clearing of Scarborough, continuing to the northeast corner of said survey its complement of varas, if not arrested.

The settlement of this question removes many difficulties in the further adjudication of this case, for after we have a definite beginning point, and have a definite north or northwest line running in a definite direction, it only remains to be decided whether or not this line should run to its complement of varas, or whether it was arrested before it reached 15,833 varas.

It is earnestly contended by the appellees, and with apparent force, that if the beginning point be fixed as above decided, and if the northwest line be fixed as above, there was sufficient testimony upon the trial of this case to arrest the call for distance in said grant, and they say that said northwest line, when it reached what is known as the "holly corner," intersected an old marked line running south 47 degrees east, and they claim that this line is the east boundary line of the Viesca grant, and they, in support of their contention, introduced a great mass of testimony with reference to what they refer to as the "holly corner," and the old line running south 47 degrees east approximately 5,200 varas. In this connection it is not disputed that the original field notes do not at the northeast corner of the grant call either for a holly or for any of the trees near what

"The descriptive matter offered in evidence by the appellant, and which is relied upon to control the express description stated in the deed, is not, by the terms of the right of way deed, called for as a matter of description, or as a part of the field notes tending to identify the land. The contention is that the footsteps of the surveyor who located the right of way could be found at places other than that called for in the descriptive matter contained in the deed, and to go to this point would extend the right of way some distance further north than 25 feet from the center of the track. The difficulty that lies in the way of supporting this contention is that the objects sought to be established by the appellant as found upon the ground, as indicating the boundaries of the right of way according to its theory, are not called for in the field



notes of the deed under which it holds; and in cases of this character the rule seems to be well established that lines and boundaries cannot be construed with reference to objects that may be found upon the ground as indicating the footsteps of the surveyor, when there are no calls in the grant for such objects. *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094; *Anderson v. Stamps*, 19 Tex. 460; *Ratliff v. Burleson*, 7 Tex. Civ. App. 624, 25 S. W. 983, 26 S. W. 1004, and cases there cited."

In *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48, it was said:

"*Anderson v. Stamps*, supra, *Rest v. Donald*, 19 S. W. 795, and *Coleman County v. Stewart*, 65 S. W. 385, and like cases, announce the correct doctrine that the call in the field notes of a survey cannot be controlled by parol evidence of the existence of objects which are not called for, that the boundaries are to be determined and extended from some of the calls of the grant, and that parol evidence, except in actions to correct mistake, is not admissible to correct a call. But this rule does not apply when the evidence of extraneous facts and surrounding circumstances is simply in aid of a call found in the field notes, when the purpose is by such evidence to remove an ambiguity, and to determine which of two or more conflicting calls shall prevail. This is made apparent in the case of *Booth v. Upshur*, 26 Tex. 71, and *Duren v. Presberry*, 25 Tex. 517, where, in each case, *Anderson v. Stamps* is explained. The uncertainty or ambiguity in the calls of the deed from *Thaxton* to *King* and from *Thaxton* to *Hoover* did not arise upon the face of these instruments, but arises when the effort is made to apply them to the land intended to be conveyed. In applying the calls contained in these deeds, it is found that the call for the northeast corner of survey No. 64 conflicts with the call for course and distance 975 varas north 57 degrees east from the known corner 200 varas from the river. The jury adopted the last call as the correct and controlling one, acting evidently upon the theory that the call for the northeast corner of survey No. 64 was a mistake, and we have no doubt as to the correctness of this conclusion. There is no evidence, as said before, that *Thaxton*, in locating and surveying the land intended to be surveyed, ever ran the line from the corner 200 varas from the river on the course north 40 degrees east to the northeast corner of survey No. 64, and there established a corner as contended for by appellant; but there is evidence to the effect that from the corner 200 varas from the river he ran a line and marked the same on the course north 57 degrees east, and established a corner on the east line of survey No. 64, and, such being the case, we have evidence of his footsteps which is consistent with the call in the grant, and which may be considered as evidence identifying this call, and giving to it a superiority over the call for the northeast corner of survey No. 64. *Oliver v. Mahoney*, 61 Tex. 612."

In the case of *Johnson v. Archibald*, 78 Tex. 102, 14 S. W. 266, 22 Am. St. Rep. 27, the court uses this language:

"If the calls in a grant, when applied to the land, correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they are not the calls of the survey as actually made. But if, when so applied, they disclose a latent ambiguity—that is to say, if they conflict with each other—then extrinsic evidence may be resorted to in order to determine the conflict and show the land actually intended to be embraced by the calls of the survey. Certain calls, such as for natural objects, marked lines, and corners, being less likely the result of mistake, in the absence of other evidence, prevail over calls for course and distance; but the survey actually made is in legal

contemplation the true survey, and is always competent to show by any legal evidence where the lines were in fact run upon the ground. It follows, therefore, that whenever the evidence is sufficient to induce the belief that the mistake is in the call for natural or artificial objects, and not in the call for course or distance, the latter will prevail, and the former will be disregarded."

We find this doctrine recognized in *Gregg v. Hill*, 82 Tex. 405, 17 S. W. 838; *Booth v. Upshur*, 26 Tex. 65; *Boon v. Hunter*, 62 Tex. 588; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530; *Lilly v. Blum*, 70 Tex. 710, 6 S. W. 279; *Oliver v. Mahoney*, 61 Tex. 612; *Jones v. Andrews*, 62 Tex. 652; *Jones v. Burgett*, 46 Tex. 291; *Shelton v. Bone*, 6 S. W. 225; *Busk v. Mangum*, 14 Tex. Civ. App. 621, 37 S. W. 459; *Castleman v. Pouton*, 51 Tex. 87; *Hubert v. Bartlett's Heirs*, 9 Tex. 103; *Bigham v. McDowell*, 69 Tex. 106, 7 S. W. 815; *Colonization Co. v. Filppen*, 29 S. W. 813; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *Green v. Barnes*, 9 Tex. Civ. App. 660, 29 S. W. 547.

In the case of *Sloan v. King*, supra, continuing, the court said:

"In many of the cases cited course and distance was made to prevail over objects found upon the ground, as called for in the field notes. This upon the theory, as so frequently stated in some of the cases, that when the facts and surrounding circumstances indicate that course and distance is the most reliable of the two calls, and that the call for the object was by a mistake, the latter will be made to yield to the former."

In *Hamilton v. Blackburn*, 43 Tex. Civ. App. 162, 95 S. W. 1098, it is said:

"There being no evidence of any uncertainty or ambiguity in the calls of the chalk deed, it was not proper to consider, in establishing the south line of that survey, anything found on the ground that was not called for in the deed, as indicating the actual footsteps of the surveyor. In such a case his work must be tested by the actual calls of the grant, and under the authorities cited, and in view of the rule there stated, we are clearly of the opinion that there is no evidence in this record controlling the call in the Chalk deed for course and distance south of the Polk survey, and that the verdict of the jury to the contrary was not supported by the evidence, and the court should not have submitted that issue to the jury."

In the case of *Brodhant v. Carper*, supra, the court says:

"It is held that, where the deed calls for certain well known and established objects, such calls will not be controlled by objects found upon the ground as indicating the footsteps of the surveyor, * * * when not called for in the deed."

In the case of *Guill v. O'Bryan*, 121 S. W. 593, which is somewhat like the instant case—that is to say, the suit was brought in ordinary form of trespass to try title, but by agreement of the parties the controversy was made to depend on the true location of a certain boundary line, and the case became one of boundary strictly, as in this case—the Sixth Court of Civil Appeals, speaking through Judge Levy, in the course of the opinion in that case, says:

"It is a settled rule of law, in determining the true dividing line between surveys, as in this case, that if from a definite beginning point

(italics ours) course and distance alone will with reasonable certainty locate and identify the line, as in this case, that will be held sufficient. Course and distance will control, then, under the surrounding and connecting circumstances. They are the most certain and reliable evidences of the true locality of the grant [citing *Robinson v. Doss*, 53 Tex. 506]. Where no marked trees are on the ground identified by the evidence as those of the grant, as in this case, the true boundary must be ascertained by course and distance given in the patent [citing *Lockett v. Scruggs*, 73 Tex. 519, 11 S. W. 529]. Where a survey has been made calling for the southwest corner and northwest corner of a patented survey, as in this case, the west and north lines of the latter survey must be run according to the courses and distances laid down in the original field notes, and cannot be varied in order to reach trees which cannot be clearly identified as the original corner, as in this case (italics ours)" —citing *Williams v. Beckham*, 6 Tex. Civ. App. 739, 26 S. W. 652.

Without unduly prolonging the citation of authorities, we will refer to the case of *Key-stone Mills Company v. Peach River Lumber Company*, 96 S. W. 64, in which a boundary question was under consideration. The court says:

"At the southeast corner of the Hinch the trees called for by its surveyor were two pine trees marked H. This witness saw no pine trees there, only gum and oak, and he saw no trees marked H. It is very plain that the testimony of this witness did not identify the southeast corner of the Hinch survey at this place by anything he saw there as conforming with the description given for that corner by the surveyor who made the Hinch corners. His testimony is equally imperfect in identifying the bearing trees called for to witness the southwest corner of the Hinch. He says he saw these original trees standing on the north line of the Beach survey. He says they were also blown down in the storm of 1875, that their remains are still lying there, and that he pointed them out to Luttrell. But he testified that these trees were red oaks, while the surveyor designated them as a black oak and a white oak. The witness also testified they were marked by hacks, such as surveyors give (three hacks, the witness believed), and by hacks only. This falls short of what can be called an identification of the witness trees as described in the field notes. This witness testified to the general reputation of the line he was testifying to as being the north line of the Walker county school land. His testimony was not such as would authorize the Hinch lines to be stopped short of their distance at the points he described. The testimony of Surveyor Luttrell is no better in this respect than that of Duke. His work in connection with these surveys appears to have been done in preparation for this trial, and all he knew concerning the identity of the bearing trees spoken of he obtained from Mr. Duke. The testimony of neither of these witnesses was sufficient to locate the Hinch bearing trees; consequently it affords no reason in law or in fact for stopping the Hinch east and west lines short of the distance they called for. * * * The proof was that the call for distance for the south line of the Hinch makes it include the land in controversy, as against the adjoining junior survey. There being in our judgment no evidence that could have had the effect of identifying the said bearing trees called for in the Hinch, there was nothing to limit the force and effect of the call for distance in fixing its south line. We are therefore led to the conclusion that plaintiff's proof was insufficient and that judgment should have been rendered for defendant."

[3] It is urged by the appellants, and with reason, that this four-league grant was the first survey made in this section of the country, and that the other surveys in that vicinity are junior to it, and that no cause existed for the Mexican surveyor to make the survey short, and that, if the point designated in the record as the "holly corner" should be taken as the true northeast corner of the four leagues, the north line will be shortened 1,363 varas, and an area of land 7,500 varas long by 1,363 varas wide will be excluded from the field notes as given in the original grant. The Mexican surveyor says that he ran north 43 degrees east 15,833 varas from a line tree, which he says stood 200 varas from the bank of the Trinity river, and that he established the second landmark on a white oak standing to the north 16 degrees west 4 varas from another white oak, and to the north 5 degrees east 3 varas from an ash, and to the south 76 degrees east 9 varas from another white oak. We believe that it should be presumed that the surveyor marked this corner. *Harkrider v. Gaut*, 167 S. W. 164; *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317.

[4] Without the landmarks and bearing trees called for in the original grant can be found at a different point, we believe that the first line must be extended 16,033 varas from the beginning point at the river, and 15,833 varas from the pecan tree, shown now to have disappeared, which was 200 varas from the Trinity river. To our minds, nothing has been shown of sufficient gravity to arrest the distance. No tree has been found, or bearing tree, called for in the original field notes. The surveyor does not say that any line was marked, but the contention is made that the old line found running south 47 degrees east is the east boundary line of the grant. The objection to this, and we think that same is conclusive, is that to accept this old line does not satisfy the quantity of land, that the length of the line is not satisfied, that no landmark referred to by the original surveyor can be found, and that in addition this old line, claimed to be the eastern boundary line of the grant, is found to extend only about two-thirds of the way across the four-league grant, or to about the Beasley corner, and cannot be found running any further south, although its course, as testified to, runs through virgin timber.

The appellees' surveyor, Garvey, admits that the holly tree, standing at the point designated as "holly corner," does not stand at the corner as made at the second landmark by the original surveyor, and he says that the words "A. Viesca" appearing on said tree were put there at a comparatively recent date, at least, not cut in the tree by the original surveyor, and he thinks that the marking was probably done by Surveyor Minter. From what has been said, we deem it

unnecessary to quote further from the authorities, but refer to the following in support of our views, and in support of the propositions above announced: *Anderson v. Stamps*, 19 Tex. 460; *Browning v. Atkinson*, 37 Tex. 633; *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. 315; *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170; *Sanborn v. Gunter*, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72; *Reast v. Donald*, 84 Tex. 653, 19 S. W. 795; *Blackwell v. Coleman*, 94 Tex. 216, 59 S. W. 530; *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. 44; *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003; *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48; *M., K. & T. Ry. Co. of Texas v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781; *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094; *Keystone Mills Co. v. Peach River Lbr. Co.*, 96 S. W. 64; *Brodbeck v. Carper*, 100 S. W. 183; *Guff v. O'Bryan*, 121 S. W. 593; *Runkle v. Smith*, 123 S. W. 745; *Hermann v. Thomas*, 168 S. W. 1037.

Therefore we are persuaded to believe, nothing having been shown to arrest or stop the north or northwest line of this grant, shown to definitely begin at the river and continuing by a pecan 200 varas from the bank of the Trinity river, that the line should from said point at the pecan tree have run 15,833 varas to its northeastern corner, and, no bearing trees being found there now, they are presumed to have been there; that the line then runs south 47 degrees east 7,500 varas to the southeastern corner of the grant, and, no bearing trees being found on the ground now corresponding with those of the grant, the same will be presumed to have been at that point; and thence running south 43 degrees west to the bank of the Trinity river, and thence with the river to the beginning point; and thus we fix the boundaries of this grant.

What has been said above disposes of the case, as we see no reason under the facts to return this case to the trial court for a new trial. In view of the decision and the disposition made of the case, we have not discussed the many propositions raised by appellants with reference to the introduction of testimony, and the action of the trial court in admitting and excluding said matters, as the same is unnecessary.

There seems to be no dispute about either the amount of the timber cut or the value of the same. Therefore, after fixing the boundaries of the grant as above stated, we here render judgment reversing and rendering this cause in favor of appellants, and awarding judgment against the appellees, in favor of appellants, for 10,313,000 feet of timber, at \$3 per thousand feet, making an aggregate of \$30,936.

Judgment is rendered accordingly.

On Rehearing.

A correction is desired to be made in the opinion heretofore handed down in this case,

on page 20 of said opinion (182 S. W. 350). The court was made to say in the opinion as follows:

"In view of the decision and disposition made of the case, we have not discussed the many propositions raised by appellants with reference to the introduction of testimony and the action of the trial court in admitting and excluding said matters."

It should read:

"The many propositions raised by appellants with reference to special charges and the action of the trial court in admitting and excluding said matters."

A further correction is made in the description of the land on the first page of the opinion (182 S. W. 341) where it is made to say:

"Beginning on said bank of said river above the old Coashatta Indian village at pecan."

It should be "a pecan."

We desire also to reform the opinion originally handed down in this case in this respect: That the judgment in the case should be that the north or northwest line of the grant should begin on the bank of the Trinity river and continue by a pecan 200 varas from the bank of the Trinity river; from thence run north 43 degrees east 15,833 varas to its northeast corner, and that the line shall run thence south 47 degrees east 7,500 varas to the southeastern corner of the grant, and thence running south 43 degrees west to the bank of the Trinity river, and thence with the said Trinity river to the beginning point, and thus the boundaries of the grant are fixed.

It follows, from the decree as modified, that the east boundary of the Viesca grant is 200 varas further west than fixed in the original judgment. The judgment for damages is accordingly modified, and an inspection of the record shows that there should be deducted the following amounts, to wit: 85.45 acres of the D. W. Smith, Jr., survey, having 6,000 feet to the acre, at a valuation of \$3 per thousand; 102.16 acres of the Wm. White, having 10,000 feet to the acre, at \$3 per thousand; 28.32 acres of the Wm. Hicks, having 10,000 feet to the acre, at \$3 per thousand—aggregating \$5,452.50. This amount should be deducted from the original award of \$30,936, and the judgment is accordingly reformed for the sum of \$25,483.50, with interest at 6 per cent. from December 5, 1911, the date of the filing of the original petition.

At the earnest insistence of appellees, who have filed a very able and exhaustive motion for rehearing, we have again gone over the record, but find nothing that has caused us in any way to change our views, otherwise than as above, as expressed in the opinion heretofore handed down in this case.

The judgment will be reformed, in accordance with the views above expressed, and the motion for rehearing is in all things overruled.

TEXAS CO. v. CHARLES CLARKE & CO.
(No. 6974.)

(Court of Civil Appeals of Texas. Galveston.
Nov. 4, 1915. Rehearing Denied
Dec. 10, 1915.)

1. MASTER AND SERVANT — TORT OF SERVANT — FACT OF EMPLOYMENT — SUFFICIENCY OF EVIDENCE.

In the owner's suit for destruction of his oil barge by fire, evidence held insufficient to sustain a finding that one who carried a lantern near the oil flowing from a hose into the barge was in defendant's employ and in the performance of his duties at the time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. ¶330.]

2. EVIDENCE — PRESUMPTION — FAILURE TO PRODUCE PROOF.

The failure of a defendant to produce evidence particularly within his knowledge raises a presumption against him only when a plaintiff, having the burden of proof on the point, has produced evidence sufficient to raise an issue as to the truth of his claim, because to hold otherwise than that plaintiff's case cannot be sustained when it depends wholly upon the failure of defendant, who is shown to be in possession of the facts, to disprove such claim, would be to abrogate the rule placing the burden upon a plaintiff to make his case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. ¶87.]

3. MASTER AND SERVANT — TORT OF SERVANT — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In a suit by the owner of an oil barge for its destruction by fire while loading, evidence held sufficient to support a finding that the fire was started by one claimed to be defendant's servant carrying a lighted lantern near the oil that was flowing from a hose into the barge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. ¶330.]

4. APPEAL AND ERROR — QUESTIONS REVIEWABLE — FINDING.

A finding unexcepted to in the trial court and not challenged on appeal must be taken as conclusive for purposes of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. ¶265.]

5. MASTER AND SERVANT — TORT OF SERVANT — SCOPE OF EMPLOYMENT — BURDEN OF PROOF.

In an owner's suit for destruction of his oil barge by fire, where the person was shown whose negligence in carrying a lighted lantern near the oil caused the fire, the burden was on plaintiff to show that such person was defendant's servant acting in the scope of his employment in going upon the barge with the lighted lantern.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. ¶330.]

6. NEGLIGENCE — RES IPSA LOQUITUR.

In an action by the owner of an oil barge for its destruction by fire, where the court found that the fire was caused by the negligence of a specified person, and such finding was sustained by the evidence, the doctrine of res ipsa loquitur could not be applied to uphold the court's alternative finding of negligence generally on the part of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. ¶121.]

7. NEGLIGENCE — ACTION — JUDGMENT — SUPPORT BY FINDING.

When the evidence in a suit for negligence is sufficient to show that the injury of which plaintiff complains was due to one or another act or omission of the defendant, and that either of such acts or omissions was negligent, the trial court can properly find that plaintiff's injury was due to defendant's negligence in one or the other respects shown by the evidence, and render judgment for plaintiff on such finding.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400-408; Dec. Dig. ¶142.]

8. JUDGMENT — SUPPORT BY FINDING.

When the alternative finding of the trial court, in a suit for negligence, that either of two acts or omissions of the defendant was negligent, is conditioned upon the insufficiency of the evidence to sustain the first finding, and such first finding is supported by the evidence, the alternative finding cannot be considered in support of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. ¶256.]

9. NEGLIGENCE — LOADING OIL BARGE.

Where defendant was having plaintiff's oil barge pumped full of oil at 3 o'clock in the morning at a wharf from its pumping station through a pipe line, ordinary care on its part did not require that it keep some one constantly on the barge to guard against the approach of strangers near the flowing oil who might ignite it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. ¶55.]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Suit by Charles Clarke, doing business as Charles Clarke & Company, against the Texas Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. J. Lawhon, of Houston, for appellant.
James B. & Charles J. Stubbs, and Marion J. Levy, all of Galveston, for appellee.

PLEASANTS, C. J. Appellee, Charles Clarke, who conducts his business under the name and style of Charles Clarke & Co., brought this suit against appellant, a corporation, to recover damages in the sum of \$8,000, the alleged value of an oil barge owned by appellee and which was destroyed by fire which appellee alleges was caused by the negligence of appellant. The barge, which was known as the "Hopper," was destroyed by fire on March 13, 1913, while being loaded with oil by agents of appellant at Pier A, Southern Pacific Docks at Galveston. Plaintiff's petition contains the following allegations of negligence on the part of defendant and its employees upon which he relies for recovery:

"That as plaintiff is informed, believes, and therefore alleges, the agents and employees of defendant performing said work were H. L. Stewart, E. C. Whitehead, A. Fleming, R. Hayden, and others whose names are unknown to this plaintiff, and which he has been unable to ascertain after diligent inquiry. That while loading said barge with oil, the defendant and its said agents and employees negligently caused, or permitted, the oil in said barge to catch fire, thereby causing the complete destruction of said

barge, which was of 280 tons gross burden and was of the fair and reasonable value of \$8,000.

"(2) That defendant was also negligent in not using or requiring its employes to use in and about the loading of said barge one or more electric lights, or other lights of such character or so screened and sheltered as not to set fire to said oil, or the gases or vapors thereof, which plaintiff avers were caused to ignite by the negligent failure on the part of the defendant, its servants and agents, to exercise proper care in the selection and use of reasonably safe lights. That but for such negligent failure the gas proceeding from said oil and the said oil would not have ignited and have destroyed said barge.

"(3) That the said fire was also proximately caused by the careless use or management on the part of said defendant, its said servants and agents, of one or more lights or lanterns, which were used by them on the night of March 12th and early morning of March 13, 1913, in coupling the hose, through which the oil was conducted from the tank or tanks on shore, into the body or hull of the barge, and which lights or lanterns, or not less than one of them, was also used by one of said employes in inspecting the said work and the progress of the loading, or allowed to be placed or remain on or near said barge and the oil being loaded thereon.

"(4) That plaintiff does not know which of the said employes of defendant held or placed the said light or lantern, or permitted the same to be done, but alleges that it was one of them, and that while not holding said light or lantern the same was placed on the barge, or near the barge on the wharf by said employe, or permitted to be placed there, and while being carried, or at rest, was in dangerous proximity to the cargo of oil being loaded and the gases proceeding therefrom.

"(5) That one or more of said lights was negligently brought or placed by said defendant, its servants and agents, or one of them, or allowed to be placed, so near to said oil and said barge that the gas or vapor from said oil, or the oil itself, came in contact with the flame of the light or lantern, and, being highly inflammable, caught fire, which fire was at once communicated to the entire cargo and the barge and it was impossible, by the exercise of any diligence whatever, to have extinguished the flames and have prevented the destruction of the barge, which plaintiff, however, succeeded in removing from its position at the pier so as to prevent probable loss or damage of cotton on the wharf and injury to other vessels, which were near by.

"(6) That defendant was charged with the duty of exercising reasonable care in the fulfilling its contract and undertaking to load said barge with oil, and if said care had been exercised by defendant, the fire would not have occurred, but defendant and its servants and agents failed to use ordinary care in the performance of their duty, and the occurrence of such fire, while defendant was loading such barge, primarily places the responsibility upon said defendant. That defendant's agents were negligent in bringing or allowing the fire or flame to be in too close proximity to the oil in the barge and to the oil, vapor, or gas emanating therefrom.

"(7) That defendant is a dealer in fuel oil, and was undertaking in the course of its business the loading of said barge, and was in the exclusive charge and control of said loading."

The defendant's answer contains special denials of each of the allegations of negligence contained in the petition. It also specially denies the allegation that E. C. Whitehead was its agent or employe and as such went upon or was engaged in the work of loading said barge, and the further allegation that the barge while being loaded was in the exclusive possession and control of defendant.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff for the value of the barge with interest, amounting in the aggregate to the sum of \$8,707.

The evidence shows that, while the barge Hopper was being loaded with oil by defendant's agents and employes, the gases arising from the oil became ignited, and the fire thus started destroyed the barge and its contents. There is no direct evidence as to how the ignition of the gas and oil occurred. The oil was being pumped into the barge from defendant's reservoir, which is situated about one mile from the pier at which the barge was lying. A pipe line extended from the reservoir to the wharf, and a flexible hose about 30 feet in length carried the oil from the end of the pipe line into the hold of the barge. At the time the oil became ignited, there was no opening into the hold of the barge except the manhole through which the oil was being pumped. The work of loading the barge began about 9 o'clock at night, and the explosion and fire occurred about 3 o'clock the next morning, shortly before the loading was completed.

The captain of the barge, who was in the cabin at the time the explosion caused by the ignition of the oil gas occurred, testified that just before the explosion he heard some one step on the barge from the wharf. Just after the explosion, E. C. Whitehead was rescued from the water alongside the barge and was found to be badly burned. After the fire a switchman's lantern was found in the wreck of the barge below the manhole through which the oil was being pumped at the time of the explosion. No lantern of this kind was used or kept on the barge. An employe of the defendant named Stewart had charge of the work of loading the barge. When he attached the hose to the hydrant at the end of the pipe line to start the flow of oil into the barge, he was assisted by two other men, the name or identity of neither of whom is shown. One of these men had a switchman's lantern similar to the one found in the bottom of the barge after the fire. After the hose had been properly adjusted and the oil began to be pumped into the barge, Stewart went from the barge to the pumping station and procured an electric flashlight for use in examining the progress of the loading. He was frequently on the barge for this purpose and made several reports by telephone to the engineer at the pumping station as to the progress of the work. Shortly before the fire occurred, he made an examination, and, finding that the loading was nearly completed, he went to the telephone, which was about 2½ blocks from the barge, to inform the engineer of this fact and advise him to "slow down" his pump. While Stewart was away from the barge for this purpose, the explosion occurred and the fire started.

The only evidence as to the employment of Whitehead by the defendant is the following

testimony of defendant's employé who was operating the engine at the pumping station on the night of the fire:

"Q. Were you working for the Texas Company in March last year? A. Yes, sir. Q. Did you know Mr. E. C. Whitehead? A. Yes, sir. Q. Was he working for that company? A. Yes. Q. Did you know what kind of work he was doing that night, yourself? A. No, sir; I don't know exactly what he was doing that night. Q. Do you know he was employed by the company? A. I know he was employed; I don't know whether he was employed by the company that night or not. Q. Did anything happen to him that night? A. He got burned that night. Q. Did you see him after he got burned? A. I seen him after he got burned. Q. Had he been working for the company, the Texas Company, so far as you know? A. As far as I know, he had been working for the Texas Company. Q. When was the last time you saw him working for the Texas Company before he got burned? A. I don't remember; I worked nights at that time. I don't know where Whitehead was working that night, if he was working; I don't know what Whitehead was doing that night."

This is the only testimony in the record bearing upon Whitehead's employment by the defendant, or the character and scope of the duties of his employment. Upon this evidence the trial court made the following findings of fact:

"The said Whitehead was employed by the Texas Company at the time of the destruction of said barge. While the evidence does not directly reflect that the said Whitehead was working, in the line of his duty at the time of such explosion, for the defendant, yet no evidence was offered by the defendant that he was not so employed by it and acting in the line of his duties at the time of such fire, when such knowledge was and should have been especially within the possession of defendant, and therefore the inference and presumption fairly obtains that, if he had not been in defendant's employ at such time and acting in the line of his duty, defendant would have offered testimony to such effect, and that defendant's failure to do so is attributable only to the fact that he was then in the defendant's employ and acting within the scope of his duties. * * *

"From all the foregoing facts found, and other evidence and circumstances in the case, I find that said cargo of oil was set on fire and said vessel burned up and destroyed through the negligence, severally and collectively, of the defendant to exercise proper care in the selection and use of reasonably safe lights in and about said vessel while being loaded, and in the careless use, and permitting of such use, by defendant's servant, Whitehead, of an oil-burning switchman's lantern in or about the manhole through which the flexible pipe projected into the vessel and discharged its cargo of oil while such Whitehead was acting within the scope of the duties of his employment.

"But if for any reason it should be held that such specific facts and other evidence and circumstances in the case should not be sufficient to support a general finding that said vessel was set on fire through the act of said Whitehead negligently bringing a lighted switchman's lantern in dangerous proximity to the inflammable vapors and gases given off by the cargo of oil being loaded on said barge, and that said Whitehead was at the time an employé of the defendant acting within the scope of his duties as such employé in and about the loading of said vessel. I find that said vessel was destroyed by fire through ignition of the vapor or gases thrown off from such oil communicating such fire to the cargo of oil and destroying the vessel, but find that it does not appear from the evidence just

what was the cause or causes of the ignition of such gases and vapors from said oil, though I further find that the occurrence was such as in the ordinary course of things does not happen if those who have the management of the loading use proper care, and that the defendant in this case having had exclusive control of the loading of such vessel and of the vessel also, in so far as in any wise connected with such loading, and the fire in said vessel having occurred in connection with such loading, during and at the time thereof, while being supervised and directed by defendant and its servants, and no explanation being offered by defendant, I conclude that said fire and the destruction of the vessel was proximately caused by the want of proper care and the negligence generally of the defendant."

By its second and third assignments of error the appellant assails the judgment on the ground that the findings of the court that Whitehead, at the time he caused the fire by bringing his open lantern near the manhole through which the oil was being pumped in the barge, was in the employment of the defendant and was acting within the scope of his employment, are without any evidence to support them.

[1, 2] We think the assignments should be sustained. There is no evidence, direct or circumstantial, sufficient to sustain the conclusion that Whitehead was in the employment of defendant and in the performance of the duties of his employment at the time he negligently set fire to the oil in plaintiff's barge, and the finding of the court that he was is based upon inference and presumption arising from the facts that defendant must have known whether or not he was in its employ and was performing the duties of his employment and offered no evidence showing that he was not. When a plaintiff has produced evidence sufficient to raise an issue as to the truth of his claim, and it appears from the nature of the case and the circumstances disclosed by the evidence that defendant is in possession of evidence which will show whether or not the inferences which can legitimately be drawn from plaintiff's evidence are true, and does not offer it, it is a fair and legitimate inference that the evidence so withheld by the defendant would, if produced, confirm the inferences arising from plaintiff's evidence. In such a case, the failure of defendant to produce the evidence can properly be considered in determining the issues raised by plaintiff's evidence, and for this purpose it may be said to have affirmative probative force. Pullman Car Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624. But plaintiff's case cannot be sustained when it depends wholly upon the failure of defendant, who is shown to be in possession of the facts, to disprove plaintiff's claim. To hold otherwise would be to abrogate the rule which places the burden upon a plaintiff to make out his case. Until this burden is discharged by evidence produced by plaintiff sufficient prima facie to make out the case alleged by him, the defendant is not required to offer any evidence,

and his failure to do so cannot, under any circumstances, be regarded as any evidence of the truth of plaintiff's claim. *Railway Co. v. Butcher*, 98 Tex. 462, 84 S. W. 1052; *Railway Co. v. Leuschner*, 166 S. W. 417; *Railway Co. v. West*, 174 S. W. 292.

The only evidence that Whitehead was an employé of defendant is the testimony of the defendant's engineer, which we have before set out in full. All that this testimony shows is that Whitehead worked for the defendant company in the month of March, 1913, the month in which plaintiff's barge was burned. There is not a word in the testimony indicating the duration of his employment or the character of the work he was employed to perform, and the witness expressly states that he does not know whether Whitehead was in the employment of the defendant on the night the fire occurred. We think it clear that this testimony does not raise the issue of Whitehead's employment by the defendant on the night of the fire, nor of the character and scope of his employment. The only other facts relied on by appellee to show such employment are that Whitehead, as found by the court, went upon the barge with a lighted lantern and set the oil afire, and that one of the unidentified men who assisted defendant's servant Stewart in coupling the hose to the hydrant at the end of pipe line had a lantern similar to the one found in the bottom of the barge after the fire, and which it may be fairly inferred was the lantern carried by Whitehead and which started the fire.

It seems to us that the inferences to be drawn from these facts do not rise to the dignity of evidence, but at most can only be regarded as surmises and suspicions, and cannot sustain the finding of the trial court.

[3, 4] We think the finding of the trial court that the fire was started by Whitehead carrying a lighted lantern near the oil that was flowing from the hose into the hold of the barge is sustained by the evidence. Neither party excepted to this finding in the court below, and it is not challenged in this court, and for the purposes of this appeal it must be taken as conclusive.

[5] It being shown that Whitehead was the person whose negligence was the proximate cause of the fire, the burden was upon plaintiff to show that he was defendant's servant and was acting within the scope of his employment in going upon the barge with the lighted lantern. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Henefy*, 99 S. W. 885; *Christensen v. Christiansen*, 155 S. W. 997.

[6] Appellant's sixth assignment of error is as follows:

"The court erred in its fifth finding and conclusion of fact in finding and concluding that the defendant being in exclusive possession of said barge when the same was destroyed, and offering no explanation as to the cause of said

destruction, is guilty of negligence generally, because the court seeks to find a state of facts from which negligence would be presumed against the defendant under the rule of *res ipsa loquitur*; and plaintiff by his evidence having proved that said barge was destroyed by the act of E. C. Whitehead in going thereon with a lighted lantern, and the court having found that the said barge was so destroyed, is precluded from finding negligence generally based on the rule of *res ipsa loquitur*."

The court having found that the fire was caused by the negligence of Whitehead, and this finding being sustained by the evidence, the doctrine of *res ipsa loquitur*, upon which the court's alternative finding of negligence generally on the part of the defendant is based, cannot be applied.

In the case of *Washington v. Railway Co.*, 90 Tex. 320, 38 S. W. 764, Judge Gaines explains the doctrine of *res ipsa loquitur* as follows:

"While the naked fact that an accident has happened may be no evidence of negligence, yet the character of the accident and the circumstances in proof attending it may be such as to lead reasonably to the belief that without negligence it would not have occurred. *Railway Co. v. Suggs*, 62 Tex. 323. 'Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care.' *Scott v. Dock Co.*, 3 H. & C. 596. See, also, to same effect, *Transportation Co. v. Downer*, 11 Wall. 129 [20 L. Ed. 160]. In such a case the question of negligence should be submitted to the jury."

We agree with appellee's counsel that the undisputed evidence shows that defendant had exclusive charge and control of the work of putting the oil in the barge. If the evidence only showed that the fire was caused by the ignition of the oil during the progress of the work, it may be that the doctrine of *res ipsa loquitur* would apply, because in the ordinary and natural course of things the oil would not have become ignited if those in charge of the work of putting it in the barge had used proper care; but the evidence, as we have before stated, sustains the finding of the trial court that the oil was ignited by the negligence of Whitehead in placing a lighted lantern near the flowing oil. When this fact is shown, there is no room for presumption or inference as to the cause of the fire, and the doctrine of *res ipsa loquitur* cannot be applied. Under this state of facts, the liability *vel non* of the defendant depended entirely upon the question of whether Whitehead at the time he caused the fire was a servant of defendant and engaged in performing the duties of his employment, and the burden was upon plaintiff to prove these facts. *Sweeney v. Erving*, 228 U. S. 232, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; *Parsons v. Iron Works*, 186 Mass. 221, 71 N. E. 572; *Dentz v. Railway Co.*, 75 N. J. Law, 893, 70 Atl. 165; 29 Cyc. 592.

[7.] When the evidence in a case is sufficient to show that the injury of which plaintiff complains was due to one or another act or omission of the defendant, and that either of such acts or omissions was negligent, a trial court might properly make a finding that plaintiff's injury was due to the negligence of the defendant in one or the other respects shown by the evidence, and render judgment for plaintiff on such findings. But when, as in the instant case, the alternative finding of the court is conditioned upon the insufficiency of the evidence to sustain the first finding as to the cause of the accident, and the first finding is supported by the evidence, the alternative finding cannot be considered.

Appellee by an independent counter proposition presents the theory that, regardless of the question of whether Whitehead was an employé of defendant and was performing the duties of his employment at time he negligently set fire to the oil, under the general allegations of negligence contained in plaintiff's petition the court could have found for plaintiff on the ground that defendant, being in exclusive control of the work of loading the barge with oil, and knowing the inflammable character of the oil, was negligent in permitting a stranger to go upon the boat and near flowing oil with a lighted lantern.

[8] It cannot be reasonably inferred from the evidence that ordinary care on the part of the defendant required that it keep some one constantly on the boat to guard against the approach of strangers near the flowing oil. The barge itself was in the custody and control of the master, who was plaintiff's employé. No one other than the servants of plaintiff or defendant had any business on the barge, and we think it conclusively appears from all of the circumstances shown by the evidence that it could not have been reasonably anticipated by the defendant's servant Stewart, who had charge of the work of loading the barge, that during the short time he was absent to report the progress of the work to the engineer at the pumping station a stranger would go upon the barge and negligently ignite the oil. To hold that he should have anticipated such an occurrence, especially at 3 o'clock at night, would be to require of him a much greater degree of care and precaution than is possessed by ordinary men.

It follows, from the conclusions stated, that the judgment of the court below must be reversed. There is nothing in the record which explains the failure of appellee to offer any evidence upon the question of whether Whitehead was an employé of defendant and acting in the scope of his employment at the time he caused the fire. Nor is there anything in the record which indicates or suggests that the evidence upon this question was not as accessible to appellee as to appellant.

In this state of the record, it may be we would be authorized, under our view of the law as before expressed, to here render judgment for the appellant; but, because it is apparent that the facts were not fully developed upon the trial in the court below, we think the cause should be remanded for a new trial, and it is so ordered.

Reversed and remanded.

CHICAGO, R. I. & G. RY. CO. et al. v. LIBERAL ELEVATOR CO. et al. (No. 889.)

(Court of Civil Appeals of Texas, Amarillo.
Jan. 5, 1916. Rehearing Denied
Jan. 26, 1916.)

ACTIONS \S 57—CONSOLIDATION—MULTIPLICITY OF SUITS.

Defendants, who received many shipments of coal from the mine over plaintiffs' railroads, claimed numerous shortages, there being differences between the mine weights and the weight of the coal when received. Plaintiffs claimed that the differences were in most cases due to evaporation of the water in the coal or to differences in scales. *Held*, that as a judgment in one action would in no wise be conclusive in another, defendants will not be by injunction required to consolidate their several suits on the principle that a multiplicity of suits should be avoided.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 632-675; Dec. Dig. \S 57.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by the Chicago, Rock Island & Gulf Railway Company and another against the Liberal Elevator Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

C. E. Gustavus, of Amarillo, and N. H. Laster, of Ft. Worth, for appellants. Reeder & Dooley, of Amarillo, for appellees.

HENDRICKS, J. The appellee the Liberal Elevator Company sued the appellants, the Chicago, Rock Island & Gulf Railway Company and the Chicago, Rock Island & Pacific Railway Company, in the justice court of Potter county, Tex., on five different alleged causes of action, ranging in amounts involved from the sum of \$2.75, the smallest, to \$7.17, the maximum, and in each suit asked for \$10 attorney's fees. Each of said suits is based upon an alleged loss and shortage of coal shipped by the elevator company as consignor, and received by it as consignee. Four of the said shipments have a common origin, to wit, Koehler, N. M., and one from Van Houten, N. M.; said shipments being transported over the lines of said railway company as connecting and delivering carriers. Two of the shipments from Koehler had a common destination, to wit, Kingsdown, Kan.; another was consigned to the elevator company at Tyrone, Okl.; and the fourth to the same consignee, at Liberal, Kan. The shipment from Van Houten, N. M., was also destined to the elevator company at Tyrone,

Okl. One of said suits was for an alleged loss and shortage of 1,180 pounds of coal; another for 1,780 pounds; two for 2,600 pounds each; and one alleging a loss of 3,300 pounds. The appellants railway companies made a motion in the justice court to consolidate said suits, which was overruled by the justice of the peace. This particular suit is instituted by the appellants, alleging in detail the character of the justice court cases filed against them, seeking to restrain the prosecution of the five separate suits until consolidated, asserting that said cases should be tried as one; that economy of time, expenses, and costs of said suits would result; and that the appellee herein the Liberal Elevator Company, by filing said separate suits, was seeking to annoy, "harass, and duress the appellants into a settlement of said pretended claims." Quoting from appellant's brief, it is alleged that the plaintiff in the justice court suits—

"was relying for recovery upon the difference in the mine weights and weights at destination, and that any such difference in weights could be due to difference in scales, evaporation of dampness after the coal was taken from the mines, and that no part of the coal was taken from the car. * * * The Liberal Elevator Company answered, denying that there would be any saving in consolidating the cases, and that instead of simplifying, there would be confusion, and that no fraud was attempted against appellants."

At the trial upon the merits it was shown that the claims of loss are based upon the difference in weights exhibited in the bills of lading, and what the contents of each car weighed at destination. It is not clear, but we infer that these weights at the origin of shipment were mine weights adopted by the railway company and incorporated into the bills of lading, and that the weights at destination were made by the Liberal Elevator Company, thus exhibiting the difference and loss contended for. A coal dealer, as a witness for the appellants, testified that he had been in the coal business in Amarillo for about 12 years, and was acquainted with the New Mexico mines and knew how the coal was there weighed up; that in accordance with his experience, not one in 20 would hold out in weight with the mine weights, and that the usual shortage was from 1,000 to 2,000 pounds on each car. He also said that when the coal comes out of the mines some of it is dry, and some of it is damp, and ordinarily is loaded and transported in open top cars, usual with such shipments.

Each of the litigants, plaintiffs and defendants in the justice court, in the separate suits mentioned, expected to maintain their rights in that court with reference to the evidence, by deposition testimony, except that the railway companies expected to use personal testimony of two or three witnesses, but for what purpose is not shown. The theory of appellants, of course, is based upon the proposition of a multiplicity of suits, and cites

the case of *Railway Co. v. Dowe*, 70 Tex. 6, 7 S. W. 368, as sustaining authority for the maintenance of the action. In considering this case in connection with another case between the same parties (70 Tex. 2, 6 S. W. 790), it seems that a contractor of the railway company issued quite a number of time checks to his employes, and which were indorsed in blank by them, and came into the possession of Dowe. Dowe had instituted a number of suits in the justice court and obtained judgment thereon, all of which were nonappealable, and the railway company had previously sought to restrain the execution of those judgments. This particular injunction, though stating the case as one of a great hardship, was denied by the Supreme Court, on the theory that a court of equity would not interfere to control the proceedings of other courts where there had been mere errors of law or judgment.

In the second suit for injunction, restraining Dowe from instituting 30 separate suits, each of which, but one, was under \$20, we assume that the issues in each of the threatened suits were the same; that is, the liability of the railway company for the different checks issued by the contractor and the defense of the statute of limitations interposed by said railway company. Justice Gaines said:

"It is * * * laid down that where one party holds several claims against another, growing out of the same or similar transactions, and depending for their determination upon the same questions of law and fact, equity will enjoin separate suits upon the demands, provided one suit has been tried and determined in favor of the complainant in the bill."

The element of a favorable determination, to be shown by the complainant in the bill as to one suit, Justice Gaines thought unnecessary, but, as we interpret the opinion, the remaining enunciation of the principle was the controlling one applicable to the issues that would have been contested in the threatened suits.

Justice Gaines cites section 254, Pomeroy's Equity Jurisprudence, as authority for that principle, which is stated by the latter as follows:

"In the second branch of the same class, [where] the single defendant has brought a number of simultaneous actions at law against the plaintiff, all dependent upon similar facts and circumstances, and involving the same legal question, so that the decision of one would virtually be a decision of all the others, a court of equity may then interfere and restrain the prosecution of these actions, so that the determination of all matters at issue between the two parties may be brought within the scope of one judicial proceeding and one decree, and a multiplicity of suits may thereby be prevented."

We have here the same plaintiff and the same defendants. The Carmack Amendment (Act June 29, 1906, c. 8591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]), in effect when these contracts matured, and rights accrued, makes the defendants liable, if the negligent loss has occurred.

irrespective of any other considerations. The application of legal principles for the purpose of ascertaining the liability, or the defenses, in issue in the justice court, are probably simple. The fact remains, however, that the demands are independent, and that the facts based upon each individual shipment, while probably similar as to some phases, are distinct. The petitioners say the loss is not due to any of the negligence of the railway companies, and if the difference in weights is not attributable to the difference in scales, affording a different test as to weights, there has been an evaporation of dampness in the coal after the same had been weighed at the mines and before the weight of same at destination. In the justice court plaintiff will have to prove the facts as applied to each separate shipment, and the contest injected by the defendant's defenses is based upon an alternative condition of facts, one or the other, which might be proved as to one or two, but not as to all, of the shipments; or one shipment may be dry coal and another of damp, which exhibits in this action a showing of a variation of testimony and difference in results as applied to each individual demand which might ensue, and as to which a jury might, to some extent at least, become confused. A judgment in each separate suit, if not consolidated, would certainly not be *res adjudicata*, which, however, we, of course, do not apply as a test, except argumentatively as presenting the individuality, in law, of the separate actions. We think the *Dowe Case* does not apply.

The case of *Piano Co. v. MacMaster*, 51 Tex. Civ. App. 527, 113 S. W. 337 (writ of error denied by the Supreme Court), which is the next nearest case, apparently similar, or apparently analogous, cited by appellant, was a suit to enjoin five separate suits pending in two courts, of different justices of the peace, each, however, we assume, involved issues of law and fact dependent upon an entire contract, and whether the plaintiff or defendant in each of said separate suits had breached said contract. The case of *Street Ry. Co. v. Mayor*, 54 N. Y. 159, 162, 163, cited by Justice Gaines in the *Dowe Case*, was one where a city brought 77 actions in a justice's court to recover penalties for the violation of a city ordinance concerning the running of cars, each action for a separate penalty. The court said:

"The decision made in the one which is to be prosecuted will in effect be a decision of all of them."

There are other cases concerning a community of interest, and common violations, existing among a numerous body of persons, involving nuisances, riparian rights, fisheries, matters of taxation affecting the public, and other public burdens, and at times involving matters of private interest illustrated by the case, *Fraternal Lodge v.*

Ray, 166 S. W. 48, where separate actions were brought by different members of the lodge solely to test the right of the lodge to put in force an increased assessment—all arising from a common source, involving similar facts and governed by the same rule of law, which, though different parties are affected, the rule against multiplicity may be invoked. There is no question but that the district courts of this state, by virtue of their residuary power, granted by the Constitution, where a power is not possessed by any other court, with the power to administer equitable rights, and apply equitable rules, would have the right, after the suits are filed, in a proper case, to compel the litigation in one suit, notwithstanding the statute with reference to consolidation of suits; but we do not think this is the character of cause in which it should be exercised. We are not attempting to declare a test, but we are convinced that if the rule depends for its successful application to cases, "depending for their determination upon the same questions of law and fact," as Justice Gaines said, it had been laid down; or, as Pomeroy expressed it, that the causes must be upon such similar facts and circumstances as "that the decision of one would virtually be a decision of all the others"—that plaintiff has not made such a case.

The judgment of the trial court is affirmed.

TEXAS & N. O. R. CO. v. TURNER. (No. 28.)

(Court of Civil Appeals of Texas, Beaumont, Nov. 27, 1915. On Motion for Re-hearing, Jan. 20, 1916.)

1. RAILROADS ⚡446 — INJURY TO STOCK—QUESTION FOR JURY—OWNERSHIP.

In a suit against a railroad for damages for killing three mules and injuring another, evidence held to make the plaintiff's ownership when they were killed or injured a question for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. ⚡446.]

2. APPEAL AND ERROR ⚡1002 — VERDICT — CONCLUSIVENESS.

It is not the province of the Court of Civil Appeals to disturb the jury's finding on conflicting evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. ⚡1002.]

3. TRIAL ⚡352 — INSTRUCTIONS — ASSUMPTION AS TO FACTS.

In a suit against a railroad for the killing of mules, where the plaintiff's ownership was in issue, defendant's special issue as to whether, under an agreement between plaintiff and another the mules become the property of such other, was properly refused, as assuming a sale and indirectly requiring the jury to find a sale.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. ⚡352.]

4. RAILROADS ⚡443 — INJURY TO STOCK — ACTION — BURDEN OF PROOF.

Plaintiff, in a suit against a railroad for killing mules, was required to show by a pre-

ponderance of the testimony, that he owned them when they were killed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1608-1620; Dec. Dig. ¶443.]

5. TRIAL ¶307—DOCUMENTARY EVIDENCE—TAKING TO JURY ROOM.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1957, providing that the jury may take with them any written evidence, refusal of the court, in an action for the killing of mules, where plaintiff's ownership was in issue, to allow the jury to take plaintiff's written statement conflicting with his oral testimony as to ownership, was error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 732-737; Dec. Dig. ¶307.]

6. APPEAL AND ERROR ¶1069 — HARMLESS ERROR — TAKING DOCUMENTARY EVIDENCE TO JURY ROOM.

Such error was prejudicial, as it denied defendant the statutory right as to a writing bearing upon the material issue in the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4136, 4138, 4139; Dec. Dig. ¶1069.]

On Motion for Rehearing.

7. APPEAL AND ERROR ¶1170 — HARMLESS ERROR — TAKING DOCUMENTARY EVIDENCE TO JURY ROOM—RULE OF COURT.

Such error could not be regarded as harmless error, within Court of Civil Appeals rule 62a (149 S. W. 2d) that no judgment shall be reversed on the ground of trial error, unless the appellate court is of the opinion that it was such a denial of right, or was calculated to cause, and probably did cause, the rendition of an improper judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4066, 4454, 4543; Dec. Dig. ¶1170.]

Appeal from Orange County Court; D. C. Bland, Judge.

Action by J. S. Turner against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hightower, Orgain & Butler, of Beaumont, for appellant. Bisland & Bruce, of Orange, for appellee.

MIDDLEBROOK, J. This is a suit by the appellee, J. S. Turner, against the Texas & New Orleans Railroad Company, for damages for the killing of three mules, alleged to be worth \$275 each, alleging that one mule was killed on the 27th day of September, 1914, and that two mules were killed on the 1st day of October, 1914, that the railroad company negligently permitted its fence to be down and out of repair where the mules entered upon the right of way of the company, and that the appellant railroad company negligently and carelessly, on the dates above mentioned, ran its locomotives and cars against and over said mules and thereby killing them. There was also damages alleged to a fourth mule on the same grounds, alleging the injury of the mule, and that he was damaged thereby in the sum of \$150, and that his total damages was the sum of \$975. Appellant answered by general demurrer and general denial, except as to the

plaintiff's residence, his ownership of the mules, and in these connections answered that, not having sufficient information, it neither affirmed nor denied; admitted that it was a railroad corporation, and that it owned and operated a line of railroad through Orange county, Tex.; denied specially that it negligently permitted its right of way at the place where the mules were killed to become unfenced, and to be unfenced at the time the mules were killed; denied specially that it negligently and carelessly ran its engine and cars against and over the mules, as alleged by plaintiff; and denied specially that it was indebted and liable to the plaintiff for damages, in the sum of \$975. The case was tried in the county court of Orange county on the 20th day of January, 1915, resulting in a verdict and judgment in favor of the plaintiff in the sum of \$212.50 each for the value of the three mules killed.

The case was submitted to the jury by the trial court on special issues, substantially as follows:

Was the plaintiff the owner of the mules killed at the time they were killed?

Were the mules killed at the time and place alleged?

Did the railroad company negligently permit its right of way to become unfenced, as alleged, so as to permit stock to come upon the right of way?

Did the railroad company negligently and carelessly run its engine and cars on and against plaintiff's mules, wounding and killing them, as alleged?

What was the reasonable value of each of the mules killed?

The jury answered the special issues, finding appellee, Turner, to be the owner of the mules at the time they were killed; that the mules were killed at the time and place alleged; that the railroad company was negligent in permitting its right of way fence to be out of repair at the time and place the mules were killed, as alleged, and that it negligently and carelessly ran its engine and cars against and upon the mules and killed them, as alleged; and that the value of each mule killed was \$212.50.

Appellant requested a special charge, instructing the jury to return a verdict for the defendant; also a special charge, instructing the jury that the burden of proof was upon appellant to establish the negligence of appellant in the maintenance of its right of way fence, and defining negligence, designated as "special charge No. 1." It also asked several special issues, which were given by the court to the jury, embodying, substantially, the following:

Had the right of way fence been down a sufficient length of time that a person of ordinary care should have repaired it (defining ordinary care)?

Did the private fence of the Higgins Oil Company substantially take the place of the defendant's right of way fence?

Was the breach in the fence permitted to exist for the benefit of George Harmon, who was using the mules at the time they were killed?

What was the market value of the mules killed at the time and place they were killed?

What was the age of each mule killed?

The jury answered that the right of way fence had been down a sufficient time that a person of ordinary care should have repaired it.

The record does not show whether the court gave appellant's requested charge No. 1, but no error is assigned, and we suppose it was given, that the Higgins Oil Company fence did not take the place of the right of way fence; that the breach in the fence was not permitted to exist for the benefit of George Harmon, but that he did use it in hauling timbers upon the right of way; that the market value of the mules killed was \$212.50 each; and that the age of each mule was nine years.

[1] Appellant assigns 11 errors in his brief, substantially, that the court erred in not instructing a verdict for it; that the verdict of the jury was contrary to the vast preponderance of the evidence, and not supported by the evidence, stated from different viewpoints; that the evidence was not sufficient to warrant the value of the mules as found by the jury; that the court erred in not submitting its special issue No. 6, this special requested issue instructing the jury to find when the mules became the property of George Harmon; that the court should have permitted the jury to take with it in its retirement the owners' stock claim signed by George Harmon, the statement made by Jerome Turner, and the plat drawn by the witness, A. Long. This is the eleventh and last assignment by appellant, and is abandoned by it, except as to the statement made by Turner to the railroad claim agent, S. M. Gordon. Hence we do not incur the case with the other written statement, or documentary testimony. The statement of Mr. Turner is as follows:

"T. N. 2025, Orange Co. 10-27-14.

"I live six miles southeast of Terry, Tex. Am a farmer by occupation. About three months ago I sold to George Harmon, who lives four miles west of Orange, four mules for the consideration of \$1,100, to be paid on November 1, 1914. Two of these mules were black mare mules, 16½ hands high, weighing 1,250 pounds each, one bay horse mule 16½ hands high, six years old, and weighing 1,250 pounds, one bay horse mule, seven years old, 16½ hands high, weighing 1,250 pounds. The mules I bought during the month of February, 1915, from a dealer in Houston, Tex., his name I do not know; buying mules for the purpose of rice raising, which I did last year, but on account of being unable to get water this year for irrigating purposes, concluded to dispose of the mules. First cost of mules was \$450 per span, and freight to Terry was about \$33, for the four

head. Mr. George Harmon told me, a short time ago, the mules I had sold him had been killed by a train near Tulane, and two he had purchased from his father. I had seen the two mules he bought from his father, R. M. Harmon, and were mules I considered would have weighed 1,050 pounds each, and I should judge 13½ hands high, and were mules of middle age. Am not posted on mule values now, and therefore cannot state just what the last two mentioned mules were worth. Mr. George Harmon also stated one of his was also injured when the others were killed, but did not state which mule it was. And in conclusion will state that I did not take Harmon's note for the purchase money for these four mules. Merely sold him the mules, and taking only his word when he would pay me, and do not even hold a mortgage on these mules. [Signed] Jerome Turner."

It is certain that George Harmon put in his claim to the railroad company for the value of the mules killed, which Mr. Turner is suing for in this suit.

Upon the trial of the case, J. S. Turner, among other things, testified:

"Mr. Gordon first asked me when Mr. Harmon had bought those mules. I said Mr. Harmon hadn't bought those mules; I didn't consider them sold to Mr. Harmon until they were killed; he surely stood good for them for \$550 per span should the mules be killed or disabled while in his possession. * * * He asked me again when those mules were to be paid for. I said I didn't sell those mules; he simply merely stood good for them in case the mules were disabled. * * * Mr. Gordon said, 'Have you ever offered those mules for sale?' I said, 'Yes.' I told him I had, and he asked me my reason for selling the mules. I told him to meet my financial obligations. He said 'When are they due?' so I said, 'November 1st.' As to when the mules are to be paid for, I signed no statement or note to that effect; I wasn't ready to. I did not read the statement. I stated my obligations were to be met on November 1st; that was my object for selling the mules. I owned the mules when they were lost. I don't think I made the statement, 'I did not trade Harmon for, or reserve mortgage for, these four mules, but merely sold him the mules by taking only his word as to when he could pay me, and do not even hold a mortgage on those mules,' to Mr. Gordon, not in that way. I stated that I had never held any mortgage or note on the mules. He said, 'That's a great way to do this business.' Considering Mr. Harmon was man enough to live up to his word. Then I did make substantially the statement that I have no mortgage or note. Mr. Gordon asked me, and I did tell him, he was a man of his word; I judged him to be. I don't remember just exactly when I turned these mules over to Mr. Harmon—about two months from the time they were killed. I didn't keep any date. He was paying me for the hire of these mules \$25 per month, straight time, and feed. He hasn't paid me anything. He was to pay me \$25 per pair for the entire bunch of mules; I don't know as there was anything further said about any later pay. He was to pay me for them until he got his wood contract up; there was no specified time. If he had paid me that \$25 per month each month until he had fully paid the purchase price of \$275 in case they were not killed or disabled, they would have been my mules. Mr. Gordon did not show me the statement that Mr. Harmon made. I don't remember whether he made the statement to me that Mr. Harmon had stated to him that he (Harmon) was the owner of the six mules killed by the train on the Texas & New Orleans right of way track. He did tell me that Mr. Harmon had in a claim for the value of those mules. * * * It was understood between me and Mr. Harmon that he was

to feed the mules and pay me \$25 per pair per month for them, and if the mules were killed and destroyed during the time he was to pay me for the mules at a stated bargain. My agreement with Mr. Harmon was that if these mules were killed, he was to pay me \$275, and they were to be his mules; yes, sir, that was the price agreed upon."

George Harmon testified substantially, as to his trade with Turner, as Turner testified.

The testimony is in sharp conflict as to the ownership of the mules at the time they were killed; and therefore it would have been error for the court to have instructed a verdict in accordance with appellant's special charge No. 1, and appellant's first assignment of error is overruled.

[2] Appellant's second, third, and fourth assignments of error are each to the effect that the verdict of the jury is not warranted by the evidence as to ownership of the mules; that the evidence is not sufficient to support the finding of the jury; that the vast preponderance of the evidence is contrary to the finding of the jury, and are disposed of under one head. There being conflict in the evidence on this issue, and the jury having answered the same, it is not the province of this court to disturb its finding. The second, third, and fourth assignments are overruled.

The fifth, sixth and seventh assignments of error are abandoned by the appellant.

Appellant's eighth and ninth assignments are properly grouped in its brief in one assignment, and we so consider them. They are that the verdict of the jury for \$212.50 each for the mules killed is not supported by the evidence, and contrary to a vast preponderance of the evidence. The evidence is conflicting as to the value of the mules. The jury found their value, under proper issues submitted to it, and it is not the province of this court to disturb such finding, and appellant's eighth and ninth assignments are overruled.

[3] The tenth assignment is:

"The court erred, to the prejudice of the defendant, in refusing to submit to the jury special issue No. 6, requested by defendant."

Special issue No. 6, asked by appellant, reads as follows:

"Gentlemen of the jury, when, under the agreement between plaintiff and George Harmon, were the mules sued for to become the property of said George Harmon? Answer this question in your own language, and write your answer on the back hereof."

It would have been error for the court to have given this special requested issue to the jury. It assumed a sale, and required the jury to find a sale, indirectly.

The tenth assignment is overruled.

[4, 5] The eleventh assignment of error is fatal, and requires a reversal of this case. Article 1957, Vernon's Sayles' Civil Statutes, provides:

"The jury may take with them in their retirement the charges and instructions in the cause, the pleadings and any written evidence, except the depositions of the witness. * * *

[6] Before the plaintiff could recover in this case, he had to establish the ownership of the mules and show, by a preponderance of the testimony, that he was the owner of the mules at the time they were killed. In his written statement he said positively that he had sold the mules to Harmon for \$275 each, and that he had made this sale about three months before the mules were killed. Appellant insisted upon that written statement being delivered to the jury for their consideration in their retirement. It was proper matter for the jury to take with them, in their retirement, as when appellant's counsel made the request that the jury should take such statement, the court refused this statutory right. The only answer made by appellee to this proposition is that the error committed by the court is harmless error. It is difficult, sometimes, to say just what constitutes harmless error, but we are soundly of the opinion that in this case it could not be considered harmless error. The burden was upon appellee, Turner, to establish the property as his own before he could recover. His written statement and his oral testimony are in conflict with each other. Can it be said that the jury would have rendered the same verdict, as to the ownership of the mules, it did render if it had been permitted to take Mr. Turner's written statement with it, to consider in its retirement. We cannot say whether such would have been the case. The right is statutory, appellant insisted upon this right, and it was refused by the honorable trial court, and for the error committed the case must be reversed and remanded. In addition to the statute above cited, see S. A. & A. P. Ry. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 129; Sargent v. Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075; Davis v. M., K. & T. Ry. Co., 17 Tex. Civ. App. 199, 43 S. W. 44; Blard & Squares v. Tyler Building & Loan Ass'n, 147 S. W. 1168; Curtsinger v. McGown, 149 S. W. 303.

Reversed and remanded.

On Motion for Rehearing.

[7] Appellee's counsel ardently insists that we have committed error in reversing and remanding this case, on the ground that the trial court refused to permit the jury to take with them in their retirement certain evidence, and cites with confidence rule 62a (149 S. W. x), governing the Courts of Civil Appeals, and the following authorities under said rule: T. & B. V. R. Co. v. Voss, 160 S. W. 663; So. Kans. Ry. Co. v. Shinn, 153 S. W. 640; I. & G. N. Ry. Co. v. Walters, 165 S. W. 525; Owens v. State Bank of Bronte, 165 S. W. 793. The last citation is an error. We have carefully read all of the authorities cited, but we fail to find such authorities supporting appellee's contention, and, so far as we have been able to ascertain, there is no decision by any of the appellate courts of this state which holds that

a plain violation of a statutory right is harmless error; indeed, we think the authorities cited are rather against appellee's contention than supporting it. A quotation from, perhaps, the strongest authority presented by appellee in his motion for rehearing will prove this view. In the case of Southern Kansas Railway Company of Texas et al. v. Shinn, 153 S. W. 640, it is to be noted that the appellate court, in passing upon motion for rehearing, used the following language:

"Of course, in no event would this court apply the right where a plain and palpable error had been committed in violation of a statute affecting the substantive rights of a litigant; and, where such a condition is presented, the fundamental law necessarily would overcome the rule" (citing Schuette v. Bishop, 153 S. W. 877).

We think the trial court could have, with as much propriety, refused the jury the privilege of taking with them, in their retirement, the charge of the court, or the pleadings of the parties, or, as to that matter, both. The statute is plain and unmistakable that the documentary evidence was proper matter for the jury to have in its retirement. The appellant asked that the jury be permitted to take such evidence with it in its retirement. The trial court refused appellant's request, and did not permit the jury to take with it, in its retirement, a paper that the plain letter of the law says it may have.

The ownership of the mules was a closely contested issue in this case. George Harmon, at the very time of the trial, had a claim pending for damages for these very mules. Such being the case, we are unable to see any force in appellee's contention that the error was harmless.

The motion for rehearing is overruled.

SOUTHERN KANSAS RY. CO. OF TEXAS et al. v. HUGHEY. (No. 881.)*

(Court of Civil Appeals of Texas. Amarillo.
Jan. 26, 1916.)

1. APPEAL AND ERROR  1033 — REVIEW — HARMLESS ERROR.

In an action to recover the value of hogs, which died in transit, and for damages to the remainder, admission of evidence as to the value of the hogs at the point where the dead ones were removed is harmless, though erroneous, where evidence showed the value of such animals at the point of destination was greater than their value at such intermediate point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.    4052-4062; Dec. Dig.    1033.]

2. CARRIERS  228 — CARRIAGE OF LIVE STOCK—ACTIONS—ERROR.

In an action to recover for the death of hogs in transit and injury to remainder of the shipment, the measure of damages is the market value, if there be one, at the point of destination; but testimony of the weight of the dead hogs which were removed at an intermediate point, together with the testimony of the value

at that point, and the value at point of destination, which was greater, is admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.    957-960; Dec. Dig.   228.]

3. CARRIERS  229 — CARRIAGE OF LIVE STOCK—ACTIONS—MEASURE OF DAMAGES.

Where hogs died in transit, the measure of damages is their market value at point of destination, or, in case there was no market value, their intrinsic value at such point.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.    930, 963, 964; Dec. Dig.   229.]

4. EVIDENCE  474 — OPINION EVIDENCE — ADMISSIBILITY.

Plaintiff, who had shipped hogs a number of times, may testify as to the normal shrinkage of hogs resulting from shipment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig.    2196-2219; Dec. Dig.   474.]

5. PLEADING  412 — REPLY — FAILURE — WAIVER.

In an action for the death of part, and injury to the remainder, of a shipment of hogs, where the railway company, which pleaded that it was the duty of the shipper to properly feed, water, and care for the hogs en route, went to the trial without objecting to the shipper's failure to controvert the answer, its right to insist that the averments of the answer should be taken as confessed was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.    1387-1394; Dec. Dig.   412.]

6. CARRIERS  218 — CARRIAGE OF LIVE STOCK—DEFENSES.

The agreement that a shipper should care for animals in transit is no defense to an action for damages to the same, unless the railroad company showed adequate facilities were provided, and the agreement was reasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.    674-696, 927, 928, 933-949; Dec. Dig.   218.]

7. APPEAL AND ERROR  664—BILL OF EXCEPTIONS—STATEMENT OF FACTS.

Where there is a conflict between a bill of exceptions and statement of facts as to the proceedings at trial, the statement controls.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.    2856-2859; Dec. Dig.    664.]

8. CARRIERS  218 — CARRIAGE OF LIVE STOCK—AGREEMENTS—REASONABLENESS.

A stipulation in a contract for shipment of live stock that the shipper would load the stock, care for and attend them while they were in the stockyards, and that the carrier should not be liable for any loss or damage while the stock were in the shipper's charge, is invalid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.    674-696, 927, 928, 933-949; Dec. Dig.   218.]

9. CARRIERS  218 — CARRIAGE OF LIVE STOCK—DEFENSES.

An agreement requiring the shipper to inspect the cars, and accept them if in good condition, and declaring that, in the event of failure, it shall be conclusively presumed that the cars were suitable, is void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.    674-696, 927, 928, 933-949; Dec. Dig.   218.]

10. CARRIERS  218 — CARRIAGE OF LIVE STOCK—STIPULATIONS—VALIDITY.

Under Rev. St. arts. 708, 710, forbidding a carrier from limiting its responsibility otherwise than it existed at common law, a stipulation in a contract of shipment that the shipper could not hold the railroad company liable for

injuries to live stock because of heat, suffocation, or other results of being overcrowded in the cars, and that any injury should be presumed to have resulted from overloading, is invalid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ¶218.]

11. CARRIERS ¶218—CONTRACTS OF PARTIES.

An agreement in a contract for the shipment of live stock that suit should not be brought after 6 months is invalid, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5713, declaring that it shall be unlawful for any corporation to enter into any contract by reason whereof the time in which to sue is limited to less than 2 years.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ¶218.]

12. CARRIERS ¶218 — CARRIAGE OF LIVE STOCK.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, declaring that no stipulation in any contract requiring notice to be given of claim for damages as a condition precedent to the right to sue shall be valid, unless the stipulation is reasonable, a stipulation in a contract for the shipment of live stock, requiring presentation of claim to be made within 91 days is no defense, and cannot be relied on, unless its reasonableness be pleaded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ¶218.]

13. CARRIERS ¶227 — CARRIAGE OF LIVE STOCK—ACTIONS—PRESUMPTIONS.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, declaring that it will be presumed that notice of claim has been given, unless want of notice has been specially pleaded under oath, evidence that notice of claim for injuries to a shipment of live stock had not been given within the time fixed in the contract of shipment cannot be received, where a want of notice was not especially pleaded under oath.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. ¶227.]

14. CARRIERS ¶227 — CARRIAGE OF LIVE STOCK—EVIDENCE—ADMISSIBILITY.

In an action for injury to shipment of live stock, a contract of shipment, part of the stipulations of which were void, and the other portion of which were not properly pleaded, is properly rejected.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. ¶227.]

15. CARRIERS ¶230 — CARRIAGE OF LIVE STOCK—ACTIONS.

Where a shipper of live stock sought recovery for negligent delay, as well as mishandling, a charge that, if the shipment was forwarded on the first train, there could be no recovery, is erroneous, because disregarding other negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. ¶230.]

16. CARRIERS ¶213 — CARRIAGE OF LIVE STOCK.

Though the market price was higher on the day the shipment reached the point of destination than on the day it should have reached there, the carrier is not entitled to a peremptory instruction, where the shipper sought recovery, not only for depreciation of the market, but on account of shrinkage of animals by reason of delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. ¶213.]

17. APPEAL AND ERROR ¶930 — REVIEW — PRESUMPTION.

Where the verdict was general, and it appeared that, as to some of the claims of recovery, plaintiff was not entitled, it will be presumed on appeal that no part of the recovery was on account of such claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. ¶930.]

Appeal from Gray County Court; Siler Faulkner, Judge.

Action by I. D. Hughey against the Southern Kansas Railway Company of Texas and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hoover & Dial, of Canadian, Turner & Rollins, of Amarillo, and Terry, Cavin & Mills, of Galveston, for appellants. Kimbrough, Underwood & Jackson, of Amarillo, for appellee.

HALL, J. Appellants call our attention to the fact that in disposing of the sixth assignment we announced the rule with reference to the admission of the shipping contract in evidence as it has been declared in the motion for rehearing in *G. C. & S. F. Ry. Co. v. Winn Bros.*, 178 S. W. 698. The correct rule is stated in the original opinion of that case, as is held in *Scott v. Townsend*, 166 S. W. 1138, and *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780. The original opinion is therefore withdrawn, and this is substituted:

Appellee sued the Southern Kansas Railway Company of Texas and the Ft. Worth & Denver City Railway Company of Texas, for damages growing out of the shipment of two cars of hogs, from Pampa to Ft. Worth, Tex. It is alleged that four hogs of the first shipment and three of the last died in transit, and damages are claimed to the remainder, by reason of rough handling, delay, and decline in the market. The Southern Kansas Railway Company denied that it was guilty of any negligence, and by way of special answer pleaded that the shipments moved under written contracts, the fourth paragraph of which provided that the shipper should, at his own cost and expense, properly bed the cars in which the hogs were to be transported; that the carrier should not be responsible for any loss or damage that might result because of heat, suffocation, or other results of being crowded into the cars; that by the fifth paragraph of the contract it was provided that the shipper would, at his own risk and expense, load the stock, take care of and attend the same while they were in the stockyards awaiting shipment and while being loaded, and agreed that the company would not be liable for any loss or damage to said stock while being in the shipper's charge, or so cared for and attended to by him. The stipulation providing for notice in writing within 91 days after the damage accrued was

also set up, and the ninth paragraph of the contract, limiting the right to sue to 6 months after the loss or damage had accrued. Plaintiff did not file any supplemental petition.

The Ft. Worth & Denver City Railway Company also pleaded that it forwarded both said shipments on the first through train from Amarillo after the receipt of the car from its codefendant, that they were forwarded to Ft. Worth as promptly as same could be done, and that there was no decline in the market from the 8th day of September to the 9th of September, the date of the first shipment, or from the 24th of November to the 25th of November, the date of the last shipment.

[1] It is urged under the first assignment of error presented in the brief of the Southern Kansas Railway Company that the court erred in not sustaining the defendant's objection to the testimony of the plaintiff with reference to the market value of the hogs at Amarillo on their arrival. Reference to the statement of facts shows that the market value of the hogs at Ft. Worth, the destination of the shipments, was also established, and, so far as we know, the verdict is based upon the market value at Ft. Worth. No injury is shown by the admission of this evidence. Appellants could not have been injured, since the uncontradicted testimony shows that the value at Ft. Worth was greater than, as stated by the witness, the market value at Amarillo.

[2, 3] Under the second assignment it is urged that the court erred in not sustaining the objections to plaintiff's testimony with reference to the value of the hogs which died at Amarillo. It is true that the measure of damages is the market value if there is one, and if not then the intrinsic value of the hogs at the point of destination, and not at any intermediate point where they may have died. This was not an action for conversion. *I. & G. N. Ry. Co. v. Parke*, 169 S. W. 397; *Railway Co. v. Chittim*, 40 S. W. 23. Reference to the statement of facts shows that the witness testified as follows:

"I was acquainted with the value of hogs at that date. I was acquainted with the market value of hogs on or about the 7th day of September, 1913. The hogs would have brought a little less in Amarillo than at Ft. Worth on that date. At Amarillo they were worth about \$8.75 a hundred. I know what they would have been worth at Ft. Worth. We sold other hogs similar to these that were in the same shipment at Ft. Worth. The market value of these hogs at Ft. Worth was \$8.95 a hundred. The four dead hogs were weighed in Amarillo. They weighed 925 pounds."

We think this testimony was admissible, and the second assignment is also overruled.

[4] The third assignment is that the court erred in admitting the testimony of the plaintiff with reference to the usual amount of shrink in a run from Pampa to Ft. Worth. It is insisted under this assignment that the witness was not qualified. He testified that he had heretofore engaged in shipping hogs

from Pampa to Ft. Worth and other places; that in a shipment over that distance they naturally suffered a certain amount of shrinkage; that he had made between six and ten shipments previous to the one in question, and based upon his experience he knew the usual and necessary shrinkage of a hog shipped from Pampa to Ft. Worth, over the two lines of railway involved in this suit; that an ordinary 200-pound hog would shrink about 5 pounds. We think this witness was qualified to testify on this point. Appellants' own witness, Curtis, placed the usual amount of shrink at a larger figure.

[5, 6] It is urged by the fourth assignment that the court erred in permitting the plaintiff to testify that the reason he did not properly prepare the cars for shipping was because the railway company did not furnish bedding and proper facilities for doing so, when that issue was not raised by a supplemental petition. Under this assignment it is insisted that the allegations in the answer should have been taken as confessed. It is too late to insist upon such a course in this court. The failure of appellee to answer under oath and controvert the facts alleged by appellants was waived by proceeding to trial in the county court. *Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 300. It was the duty of appellant to not only plead that term of the contract requiring plaintiff to feed, water, and care for hogs en route, but their allegation should have shown that adequate facilities were provided, and that the stipulation under the circumstances was reasonable. Having failed to do so, this term of the contract was void. *G. & S. F. Co. v. Cunningham*, 51 Tex. Civ. App. 308, 113 S. W. 767.

[7] Appellants assert that the court erred in permitting the witness Curtis, on cross-examination, to testify that he had made a shipment, had put in a claim for damages for excess in shrinkage and for delay, and that appellants had paid the same. We find no such evidence in the statement of facts, though the bill of exception recites that it was submitted. In a conflict between a bill of exceptions and the statement of facts signed by both parties and duly approved by the court, the latter controls. *Coker v. Cooper's Estate*, 176 S. W. 145.

[8] It is insisted under the sixth assignment that the court erred in excluding from evidence the written contracts of shipment. Plaintiff's petition seeks to recover upon the common-law liability of the carriers. In their answers they set up that the shipments were made under written contracts. The fifth paragraph, which provides that at his own risk and expense the shipper will load the stock, take care of and attend the same while they are in the stockyards and being loaded, and that the company shall not be liable for any loss or damage while the stock are in the shipper's charge, and so cared for and attended by him, has been declared to be

a void stipulation. *P. & N. T. Ry. Co. v. Brooks*, 145 S. W. 649.

[9] The fourth paragraph of the shipping contract, which binds the shipper at his own cost to bed the cars, and put them in proper condition for shipment, and inspect and accept them if in good condition, and if not to report the fact to the station agent in writing, and in the event he should fail to do so then that it shall be conclusively presumed that the cars were suitable, has been declared to be a void stipulation. *I. & G. N. Ry. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066. The plaintiff testifies without contradiction that the company furnished no facilities for bedding the cars or watering the hogs. The answer does not allege that the appellee was given an opportunity to bed them. In this state of the pleadings, the fourth paragraph of the shipping contract is unquestionably void. *G., C. & S. F. Ry. v. Boger*, 169 S. W. 1095; *Texas Central Ry. Co. v. McCall*, 166 S. W. 925; 4 Elliott on R. R. § 1548b.

[10] The fourth paragraph has intermingled with the other provisions a stipulation that the shipper will not hold the company responsible for any damage that may result because of heat, suffocation, or other results of being crowded in the cars, and that any injury or damage to said stock while in transit shall be presumed to have resulted from overloading, for which the company shall in no respect be liable. This stipulation is clearly a violation of the statute (Rev. St. arts. 708 and 710), which forbids a carrier from limiting its liability otherwise than as it exists at common law. *Pecos & North Texas Ry. Co. v. Brooks*, 145 S. W. 649; *I. & G. N. Ry. v. Parish*, supra; 4 Elliott on R. R. § 1511.

The fifth paragraph, binding the shipper at his own risk and expense to attend to the stock while in the stockyards of the company awaiting shipment, or while they are being loaded, clearly has no application to the facts of this case.

[11] The eighth paragraph, which appellant attempted to plead, bound the shipper to give notice in writing of claims for damages to some officer of the company or nearest station agent before the stock were removed from the place of destination, and before they were slaughtered or intermingled with other stock, and not to remove the stock from the stockyards until the expiration of three hours after giving of such notice, and further provided that no damages should be recoverable unless a written claim therefor had been presented to the company within 91 days after the damage occurred. The ninth paragraph provides that no suit shall be sustained in any court unless it has been commenced within 6 months after the loss or damage occurred. Article 5713 of Vernon's Sayles' Civil Statutes provides that it shall be unlawful for any corporation to enter into any contract by reason whereof the time in

which to sue thereon is limited to a shorter period than 2 years. This article of the statute disposes of the ninth paragraph of the shipping contract.

[12-14] Article 5714 provides that no stipulation in any such contract, requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon, shall ever be valid unless such a stipulation is reasonable. Appellant failed to allege that the 91-day stipulation was reasonable. It is further provided in said article 5714 that in any suit brought under this and the preceding article it shall be presumed that notice had been given, unless the want of notice is especially pleaded under oath. The appellant in this case did not plead the want of notice under oath, and the presumption that notice was given is conclusive, and any evidence in relation thereto was inadmissible. By reason of the defective pleadings of the appellant, and the fact that the stipulation contained in the fourth and fifth paragraphs of the shipping contract have been declared void, the court did not err in sustaining the appellee's objection and excluding the contract.

The brief of the Southern Kansas Railway Company presents no reversible error.

By reason of the fact that the assignments presented in the brief of the Ft. Worth & Denver City Railway Company raise in several instances the same questions presented in the brief which we have just considered, it will not be necessary to discuss all of the Ft. Worth & Denver City Railway Company's propositions.

[15] It is insisted by this appellant that the court erred in refusing to instruct the jury that if they should find from the evidence that the Ft. Worth & Denver City Railway Company forwarded the car of hogs in question on the first through train from Amarillo to Ft. Worth after the receipt of the shipment from its connecting carrier, and that each of said cars of hogs reached the first market that same could have reached after the time for the departure of this defendant's first train after the receipt of such hogs, to return a verdict for the defendant. This is not a correct charge, because appellee would be entitled to recover if appellant was guilty of negligence, even though the shipments did move to Ft. Worth on the first scheduled train after their arrival in Amarillo. *K. C., M. & O. Co. of Texas v. Beckham*, 152 S. W. 228. The charge would have further been erroneous because delay in transporting the cars was not the only ground upon which recovery was sought. They may have been injured by delays and rough handling at intervening points on the line of this appellant's road. *G., C. & S. F. Ry. Co. v. Ideus*, 157 S. W. 173.

[16, 17] It is further contended by appellant that because the market price at destination was higher on the day in which the re-

spective shipments arrived at Ft. Worth than it was on the previous day, when they should have reached the market, that the court should have peremptorily directed a verdict for appellants. The effect of this evidence was to deny appellee a right to recover upon his allegation that the market declined during the delay, but in no way affected his right to recover for shrinkage and loss of weight by reason of the delay, and a peremptory instruction should not therefore have been given. The verdict is a general one in favor of appellee for a stated amount against each of the appellants, and we must presume in support of the judgment that no part of the recovery was by reason of a decline in the market.

The judgment is affirmed.

BARTON v. JACKSON. (No. 8297.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 18, 1915.)

1. JUSTICES OF THE PEACE §127—SETTING ASIDE VOID JUDGMENT.

A justice's judgment being void, he can set it aside at any time; the statutes prescribing the conditions on which a justice may set aside a judgment and grant a new trial having no application.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. §127.]

2. JUSTICES OF THE PEACE §127—SETTING ASIDE JUDGMENT—FURTHER PROCEEDINGS.

A justice having rightfully set aside a judgment by default, the case is properly before him for further proceedings.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. §127.]

Appeal from Denton County Court; Fred M. Bottorff, Judge.

Action by Shell Jackson against E. C. Barton for injunction. Judgment for plaintiff, and defendant appeals. Judgment vacated, and suit dismissed.

Robt. H. Hopkins, of Denton, for appellant. Luther Hoffman and Sullivan & Hill, all of Denton, for appellee.

DUNKLIN, J. E. C. Barton, justice of the peace of precinct No. 2, Denton county, has prosecuted this appeal from a final judgment in favor of Shell Jackson perpetually enjoining appellant, as such justice of the peace, from issuing any process for the enforcement of a judgment rendered by him against Jackson in favor of one J. F. Biggerstaff in cause No. 723 in said justice court, also restraining the justice of the peace from again trying that suit or entering any further order pertaining thereto. No statement of facts is contained in the record before us; but, according to the allegations in Jackson's original petition, the suit in the justice court was for forcible entry and detainer instituted by Biggerstaff against Jackson, and judgment was rendered in plaintiff's favor by default, in defendant's absence, without

any answer from him, without proof, at a special term of the court and not on the first day of the regular term to which the service upon defendant was returnable. Jackson alleged that by reason of those facts the judgment against him was void. After service of a temporary writ of injunction upon him restraining him from issuing a writ of restitution on that judgment, the justice of the peace filed an answer admitting that the judgment was void and alleging that he had since set it aside, and had reset the case for trial. By supplemental petition in reply to the answer, Jackson admitted that the judgment had been set aside, but alleged that such order was made in the absence of any motion for a new trial or appeal, some 12 days after the date of judgment when the justice had lost jurisdiction over the case and was without legal authority to vacate the judgment. By reason of those facts, Jackson contended that the judgment by default was final, and he prayed that upon final hearing the justice be perpetually restrained, not only from issuing process upon the judgment, but also from taking any further action or making any further orders in the case.

[1] If the judgment was void, as contended by both parties, then the same was a nullity and could be set aside at any time; and the statutes prescribing the conditions under which a justice may set aside a judgment and grant a new trial have no application. This is a well-settled rule as shown by our decision in G. C. & S. F. Ry. v. Wilshire, 178 S. W. 43, and authorities there cited. See, also, Milam County v. Robertson, 47 Tex. 222.

[2] The justice having rightfully set aside the judgment by default, the case is properly before him for further proceedings, and the final judgment of the county court perpetually restraining him from taking any further cognizance of the case was erroneous.

Accordingly, the judgment from which this appeal is prosecuted is vacated, and the suit is dismissed.

KANSAS CITY, M. & O. RY. CO. OF TEXAS v. ADAMS. (No. 7569.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 15, 1916.)

1. COURTS §247—APPELLATE COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—CONSOLIDATION.

Where, on appeal to county court from justice court, an action in which appellee was sole plaintiff was by agreement of parties consolidated with another action in which a third person was interested, it will be presumed that such third person assigned his interest to appellee, the action being carried on in appellee's name, and the amount involved after the consolidation will be considered as the amount involved for the purpose of determining the jurisdiction of the Court of Civil Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 984-993; Dec. Dig. §247.]

2. CARRIERS \S 207—CARRIAGE OF LIVE STOCK—SHIPPERS—CONTRACTS.

Where a shipper of live stock, knowing that he would sign a written contract, orally contracted for cars for shipment, *held*, that the written contract later executed governs the carrier's liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 129-239; Dec. Dig. \S 207.]

3. CARRIERS \S 219 — CARRIAGE OF LIVE STOCK—LIABILITY OF INITIAL CARRIER.

Notwithstanding Vernon's Sayles' Ann. Civ. St. 1914, art. 731, declaring that all common carriers over whose lines property is received for through carriage shall be deemed connecting carriers and one the agent for the other, the initial carrier may by contract limit its liability for negligence to negligence on its own line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. $\S\S$ 950, 951; Dec. Dig. \S 219.]

4. APPEAL AND ERROR \S 1175—DETERMINATION—REMAND.

Where the case was fully developed below, and the evidence showed defendant was not liable, judgment for plaintiff should be reversed on appeal without remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 4573-4587; Dec. Dig. \S 1175.]

Appeal from Knox County Court; J. H. Milam, Judge.

Action by Tom Adams against the Kansas City, Mexico & Orient Railway Company of Texas, begun in justice court and appealed to county court, where it was consolidated with another action. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

D. J. Brookreson, of Benjamin, for appellant. Coombes & Coombes and J. A. Stephens, all of Benjamin, and J. S. Kendall, of Munday, for appellee.

BUCK, J. [1] The transcript in this case was filed in this court June 10, 1912. The appellee, plaintiff below, filed November 13, 1912, what he terms a "suggestion by appellee," in the form of a motion to dismiss appeal, setting up the fact that two suits were originally filed in the justice court of Knox county, one styled Tom Adams v. Kansas City, Mexico & Orient Railway Company of Texas, alleging damages arising from a shipment of cattle in the sum of \$37.65, and the other styled Brannin & Adams v. Kansas City, Mexico & Orient Railway Company of Texas, also for damages arising out of a shipment of cattle in the sum of \$81.50. Plaintiffs having recovered in the justice court for the full amount sued for, the defendant appealed to the county court, where it appears that by agreement of all parties the two said suits were consolidated, and thereafter prosecuted under the name of Tom Adams as the plaintiff. Upon a preliminary consideration of the case by this court, it was thought that it involved practically the same question as presented in cause No. 7503 on the docket of this court, styled G. W. Rust v. Texas & Pacific Railway Company. In the latter case, three suits had been filed by

the same plaintiff in the justice court against the same defendant railway company, and upon motion of the defendant in the justice court two of the cases were consolidated, and upon appeal to the county court, upon motion of the defendant, the consolidated case was consolidated with the third case, thereby placing the amount sought to be recovered within the jurisdiction of this court. The defendant having secured judgment in the county court, plaintiff appealed. Appellee filed in this court its motion to affirm on certificate, no transcript having been filed within the time allowed by law. In the consideration of said motion, as well as the questions raised by reason of the appeal, this court was in some doubt as to its jurisdiction, inasmuch as in each of the three cases originally filed in the justice court the amount to be recovered was \$99.95. If the amount involved in the appeal was not determined by the consolidations granted both in the justice court and in the county court, then this court would be without jurisdiction. Therefore we certified to the Supreme Court the question as to our jurisdiction. On November 17, 1915, the Supreme Court, in an opinion by Chief Justice Phillips, answered the question certified by holding that the amount involved was determined by the consolidations and that this court had jurisdiction. 180 S. W. 95.

We therefore conclude that appellee's motion, if it may be so styled, to dismiss the appeal, should be overruled.

It is urged by appellee that in the instant case the plaintiffs in the causes consolidated were not the same, in that in one Adams and Brannin were the plaintiffs, while in the other Adams alone was plaintiff. But since the consolidation in the county court was by agreement, we think this contention without merit. While it is true that jurisdiction may not be conferred by agreement of parties, yet we can assume, and we think properly, that by such agreement Brannin assigned his interest in the cause of action to Adams, and that thereafter Adams, in fact as well as in name, was the sole plaintiff.

Treating the two justice court suits as consolidated in the county court as one cause of action, we will briefly set out the facts and pleadings in so far as we may find it necessary for this opinion. On December 19, 1909, plaintiff shipped from Benjamin, Tex., two carloads of cattle, 50 in number, with destination, Ft. Worth. Plaintiff in his amended petition alleged that such shipment was made under an oral contract by and between the agent of the defendant and the plaintiff, by the terms of which defendant agreed to transport his (plaintiff's) said cattle over the lines of the defendant and its connecting lines from Benjamin to Ft. Worth, and to deliver same to plaintiff at Ft. Worth in time for the market of the 21st day of December, 1909, or December 20th; both dates being

alleged in different portions of the petition; that, in pursuance of the terms of said contract, plaintiff, by direction of said agent of defendant, delivered to defendant in its shipping pens at Benjamin on the 18th day of December said cattle. It was alleged that the shipment was negligently and carelessly handled, and delayed, and that by reason of said negligence said cattle were greatly shrunk and drawn and sold for much less than they would have brought had they been shipped with due care and despatch. Defendant answered, among other defenses, that said shipment was made under and by virtue of a written contract executed by plaintiff and defendant's local agent at Benjamin, by the terms of which contract defendant limited its liability to injuries received while on its own line, and that, if any injuries were suffered by said cattle, the same were not received while on the line of the defendant. The shipment was carried over the line of the defendant from Benjamin to Chillicothe, and there delivered to the Ft. Worth & Denver City Railway Company for further transportation to Ft. Worth. Plaintiff recovered judgment, and the defendant appealed.

For the purpose of this opinion, we do not find it necessary to take up seriatim the ten assignments presented in appellant's brief, but will only discuss the following questions:

(1) Was the shipment made under an oral contract, as pleaded by plaintiff, or under the written contract, as pleaded by defendant?

(2) The right of defendant to limit its liability to injuries received on its own line.

(3) Does the evidence show that any injury to said shipment was received while on defendant's line?

[2] Upon the question of whether the shipment was made under a written or an oral contract, we will refer to some of the evidence of plaintiff, Tom Adams, who testified on direct examination, in part, as follows:

"I made an oral contract with the agent of the Orient here at Benjamin a few days before the 19th of December, 1909, for the shipment of two cars of cattle from Benjamin to Ft. Worth, Tex. I think I first phoned the agent, a Mr. Glass, and asked him when I could get the two cars for this purpose, and he said I could get them right away, for he had plenty of cars on the siding here at Benjamin. I brought the cattle in during the 18th of December, 1909, which was Saturday, and left them in the stock pens by permission of the agent during that night. He told me there would be a train through the next day which would make the Ft. Worth market for Monday, and I made the oral agreement with him to ship them on the 19th. * * * We loaded the cattle about 8 o'clock p. m. on that day, the 19th day of December, 1909, and left Benjamin shortly afterwards, and arrived at Ft. Worth about 3:15 a. m. December 21, 1909."

Upon cross-examination the witness was shown a written contract, and identified his signature to same, and said it was a contract he made with the Kansas City, Mexico & Orient Railway Company of Texas to ship these cattle. The witness was also shown a

written contract which he identified as a contract signed by him with the Ft. Worth & Denver City Railway Company at Chillicothe for these same two cars of cattle. The witness was also shown a written report of the condition of these cattle at Wichita Falls, and admitted his signature to same, and, in answer to questions, testified:

"Yes, I knew at the time that I talked to the agent at Benjamin about shipping these cattle that we would sign up a written contract before we left with them. I have been shipping cattle to the market for years and knew that we always have to sign up a written contract. Yes, we always sign a new contract at Chillicothe with the Denver agent."

On redirect, Mr. Adams was asked by his attorney if he had ever shipped any cattle from here to Ft. Worth when he did not go with them, and he answered that he had done so, and he was then asked if they required him to sign a contract, and he said, yes, he had always signed up a written contract whether he went, or sent any one with them, or not.

We believe from the evidence quoted that it is patent that it was contemplated by the plaintiff and the agent of the defendant, from the time of the first conversation between them, with reference to the shipment, that said shipment would be made under a written contract to be signed by both parties. In *T. & P. Ry. Co. v. Byers Bros.*, 73 S. W. 427, the Court of Civil Appeals for the Fourth District held that where shippers, at the time they delivered cattle to the carrier, expected to sign a written contract, which they afterwards signed, said written contract governs on the question of the carrier's liability. In *C., R. I. & P. Ry. Co. v. Halsell*, by this court, 36 Tex. Civ. App. 522, 81 S. W. 1243, the same principle is announced. See, also, *Railway Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *Id.*, 27 Tex. Civ. App. 198, 64 S. W. 1001; *Railway Co. v. Harris*, 30 Tex. Civ. App. 179, 70 S. W. 335; *H. & T. C. Ry. Co. v. Smith*, 44 Tex. Civ. App. 299, 97 S. W. 836. Therefore we hold that the terms of the written contract control in this case.

[3] The second question presented, that is, as to whether a railroad may limit by contract its liability to damages received on its own line, is determined, that is, as to an intrastate shipment, upon the issue as to whether the contract is for a through shipment or only for a shipment over the initial carrier's line. Without attempting to set out in this opinion said contract in full, it will only be necessary to state that by the terms thereof appellant company undertook to ship the two cars of cattle from Benjamin to Chillicothe "consigned to French Webb Commission Company, Ft. Worth, Tex." The second paragraph of said contract reads as follows:

"That the first party is exempt from liability for loss or damage arising from derailment, collision, fire, escapement from cars, heat, suffo-

cation, overloading, crowding, maiming—or other accident or causes not arising from the negligence of the first party.”

The eleventh paragraph is to the following effect:

“That in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the first party shall be released from liability of every kind after said live stock shall have left its road, excepting to protect the through rate of freight named herein. It is expressly agreed, however, that the conditions of this contract shall insure (inure) to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.”

In *G., H. & S. A. Ry. Co. v. Jones*, 104 Tex. 92, 134 S. W. 328, the Supreme Court, speaking through Judge Brown, held that article 831a, Revised Statutes 1895, article 731, Vernon's Sayles' Texas Civil Statutes, did not apply to contracts specially limiting the liability of the initial carrier to damages received on its own line, but only to through shipments. Upon this question the opinion, in part, reads as follows:

“Upon its face the contract of shipment expresses the agreement to be that the first company is to transport the cattle to the end of its line at Placedo, and there to deliver the same to the Galveston, Harrisburg & San Antonio Railroad Company, limiting the liability of each company to damages arising upon its own line. To bring a contract of this character within the terms of article 331a, the contract entered into by the first carrier must be for carriage from the point of shipment to the destination, and the shipment must be received and carried by the connecting carriers under that contract. There being in this case no contract for through shipment, the fact that the second company received and transported the cattle is not sufficient to create the joint liability declared by article 331a, and the Court of Civil Appeals erred in so holding. In order to bind the second or subsequent companies jointly with the first, or with any of the other companies, there must be something more than receiving and transporting the goods, or property, because the law requires the carrier to so receive and transport such freight when tendered to it. *Ft. Worth & D. C. R. R. Co. v. Williams*, 77 Tex. 125, 13 S. W. 637.”

See, also, *S. A. & A. P. Ry. Co. v. Chittim*, 135 S. W. 747. Hence we must decide the second question raised adversely to appellee.

Plaintiff, who accompanied the shipment, testified:

“We left Benjamin shortly after 8 o'clock that evening perhaps about 8:30 p. m., and went right through to Chillicothe. Do not remember of stopping to pick up any more stock, to set out any cars while on the Orient road.

We stopped at Medicine Mound a short while to meet a train. It is about 53 miles from Benjamin to Chillicothe. Yes, I have said that the Orient road gave us a good run and that I had no complaint to make of its run or handling. The delays and jolts were on the Denver.”

As will be seen, there is no evidence to support the allegation of negligence of the defendant or injuries to the cattle while the latter were on defendant's line.

[4] The question discussed above having been properly presented by assignment in appellant's brief, we hold that said assignments should be sustained, and this judgment reversed.

It further appearing the evidence was fully developed in the trial court, and that no good purpose could be subserved by remanding this cause for another trial, the judgment is hereby reversed, and judgment here rendered for appellant.

CRAVER et al. v. GREER et al. (No. 1434.)
(Court of Civil Appeals of Texas. Texarkana.
Dec. 16, 1915.)

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Action by D. C. Craver against T. A. Greer and others, in which the National Bank of Daingerfield and others intervene. From a decree of sale plaintiff and certain others appealed. Affirmed (178 S. W. 609) and certified to the Supreme Court. Questions answered (179 S. W. 862) and affirmed in part, and reversed and remanded in part, with instructions.

Lacy & Bramlette, of Longview, Henderson & Bolin, of Daingerfield, and Beard & Davidson and Carter & Strength, all of Marshall, for appellants. F. H. Prendergast and A. G. Carter, both of Marshall, for appellees.

LEVY, J. The controlling points in the case were certified to the Supreme Court, and they have decided, very correctly, as we think, that the respective liens of the appellants, except the National Bank of Daingerfield, should not have been subordinated to the indebtedness of the receivers. *Craver v. Greer et al.*, 179 S. W. 862. The statement of the case and the facts as they appear in the opinion of the Supreme Court are correct and are here adopted in whole. Wherefore the judgment of the trial court is reversed, except as to the National Bank of Daingerfield, and, in order that the proper judgment in accordance with the opinion may be entered, the cause is remanded with instructions to enter judgment as decided by the Supreme Court. One-fourth of the costs of appeal will be taxed against the appellant the National Bank of Daingerfield, and three-fourths thereof taxed against the receivers.

Affirmed in part, and reversed and remanded in part, with instructions.

ILLINOIS CENT. R. CO. v. FREEMAN et al.*
(No. 5557.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 15, 1915. On Motion for Rehearing, Jan. 19, 1916. Rehearing Denied Feb. 16, 1916.)

1. CARRIERS \hookrightarrow 131—CARRIAGE OF GOODS—ACTION FOR DAMAGE—PETITION—DESCRIPTION OF PROPERTY.

In an action for damage to a shipment of bananas, where the petition described the property only as "four cars of bananas loaded in cars M. K. & T.," giving their numbers, such allegation was too indefinite as to the number of bunches or the value, and open to special exception.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 569-577, 593; Dec. Dig. \hookrightarrow 131.]

2. EVIDENCE \hookrightarrow 543—VALUE.

In an action for damage to a shipment of bananas, one saying that he was a practicing physician was improperly allowed, over defendant's objection, to testify as to the market value of bananas by the hundred pounds at the point of shipment, where he had previously stated he could not say he had ever seen the bananas in controversy, did not know how many bunches were in a car, and did not know their grade.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. \hookrightarrow 543.]

3. CARRIERS \hookrightarrow 133—CARRIAGE OF GOODS—ACTION FOR INJURY—EVIDENCE.

In an action for damage to a shipment of bananas with which a messenger traveled to watch the weather and request that they be housed when it was cold, testimony as to the condition of the bananas before they were delivered was admissible against the carrier, as the messenger had no control over the cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. \hookrightarrow 133.]

4. CARRIERS \hookrightarrow 133—CARRIAGE OF GOODS—ACTION FOR INJURY—EVIDENCE.

In an action for damage to a shipment of bananas which a carrier had agreed to place in its roundhouse on request of the messenger who traveled with them, testimony as to roundhouses on other roads than those of the contracting carriers was inadmissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. \hookrightarrow 133.]

On Motion for Rehearing.

5. APPEAL AND ERROR \hookrightarrow 1040—HARMLESS ERROR—PETITION—RULING ON EXCEPTION.

In an action for damage to a shipment of bananas, error in overruling a special exception to the petition, which insufficiently described the property as "four cars of bananas loaded in cars M. K. & T.," numbering them, was harmless, where defendant railroad admitted receiving four carloads and in a cross-action sought to recover freight charges for which the jury allowed an amount at a fixed rate per hundred, thus rendering certain the quantity of the bananas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. \hookrightarrow 1040.]

6. APPEAL AND ERROR \hookrightarrow 1052—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for damage to a shipment of bananas from Galveston to Chicago, the improper admission of testimony as to the value of bananas in Galveston was harmless, where it was fully shown what their market value would have been in Chicago in good condition, and that they were valueless when delivered, and

under proper instructions the jury based the verdict on value at Chicago.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. \hookrightarrow 1052.]

7. CARRIERS \hookrightarrow 121—CARRIAGE OF GOODS—LIABILITY.

A carrier of bananas under contract whereby a messenger traveled with the shipment to advise regarding its protection against cold, which carrier twice disregarded the messenger's request en route to house the bananas, could not escape liability on the ground that the messenger did not ask that the fruit be protected at destination after they had been exposed to low temperatures and were frozen.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 531-536; Dec. Dig. \hookrightarrow 121.]

8. CARRIERS \hookrightarrow 114—CARRIAGE OF GOODS—DUTY TO PROTECT.

A carrier of bananas, independent of the contract of shipment, owed the owner the duty to preserve the property after it reached destination until it was delivered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. \hookrightarrow 114.]

9. APPEAL AND ERROR \hookrightarrow 1053—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for damage to a shipment of bananas which the carrier contracted to protect against cold by housing, where the charge rendered the fact that defendant's roundhouse could not accommodate the cars of fruit not a valid defense, the erroneous admission of testimony as to another roundhouse was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. \hookrightarrow 1053.]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by the Southern Banana Company against T. J. Freeman, receiver of the International & Great Northern Railroad Company, and others. Judgment for plaintiff against defendants Illinois Central Railroad Company and Freeman, and against the plaintiff as to the remaining defendants. Defendant Illinois Central Railroad Company appeals. Affirmed.

Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellant. Frank H. Booth and H. M. Aubrey, both of San Antonio, for appellees.

FLY, C. J. The Southern Banana Company, one of the appellees herein, sued T. J. Freeman, receiver of the International & Great Northern Railroad Company, that company, the St. Louis, Iron Mountain & Southern Railway Company, and appellant to recover damages in the sum of \$1,800, alleged to have accrued by reason of improper handling of four cars of bananas, by reason of which negligence they were chilled and frozen while being transported from Galveston, Tex., to Chicago, Ill. It was alleged that the receiver's railroad company was the initial carrier, and that said receiver gave the banana company a receipt or bill of lading in which it was provided, "If temperature drops low enough, in messenger's opinion, cars must be stopped and roundhoused if at station where one located," and that, although requested by

the messenger to comply with that stipulation, the defendants refused to do so, and the bananas were frozen and rendered worthless. The cause was tried by jury, and a verdict was rendered in favor of the banana company as against appellant and the receiver for \$1,039.20 and against the banana company as to the other two railroad companies, and judgment was accordingly so rendered. No one is complaining of the judgment except appellant.

The bananas were delivered in good order to the receiver at Galveston as alleged and were frozen at some place, either at St. Louis, or some point between that city and Chicago while in the care of appellant. It is admitted that the clause hereinbefore copied was in the bill of lading or receipt given by the receiver to the Southern Banana Company. It was in proof that the messenger accompanying the bananas requested appellant, at East St. Louis, Ill., to put the cars of bananas in the roundhouse, as stated in the contract, and told appellant that the bananas would be lost if they were not protected. Appellant failed to place the fruit in the roundhouse, but started to Chicago with them, and they were frozen and their value destroyed.

[1] The first assignment of error assails the action of the court in overruling a special exception to the petition on the ground that the description of the property was insufficient. The only description given of the property is, "four cars of bananas loaded in cars M. K. & T. 3375, 3395 and 3077 and A. T. 10785." The pleading was attacked because there was no allegation of the number of bunches or the price thereof. The allegation was too indefinite, and the special exception should have been sustained. There is no allegation of the value even of each car; the only allegation as to value being that, if they had arrived in Chicago in good order, "they would have been worth on the market and would have had a market value of \$1,800." There is nothing alleged upon which a contest as to the quality, quantity, or value of the bananas could be predicated. The bananas may have been in good order, but of such a quality and variety that a carload of them would not have been half as valuable as a carload of another quality. What constitutes a carload of bananas? Neither the pleadings nor the evidence gives an answer to the question. The allegations as to quantity, quality, and value were too vague and indefinite. *Pierce v. Waller* (Tex. Civ. App.) 102 S. W. 1173; *Houston Packing Co. v. Dunn* (Tex. Civ. App.) 176 S. W. 634.

[2] After overruling the exception to the description given of the property, a man who says he is a "practicing physician" was allowed over the protests of appellant to testify as to the market value of bananas in Galveston by the hundred pounds, although he had previously stated that he could not say that he had ever seen the bananas in controversy, did not know how many bunches were in a

car, and did not know their grades. His testimony showed plainly that he knew nothing about the four carloads of bananas and was not qualified to testify. His testimony should have been excluded. The second and third assignments of error are sustained.

[3] The fourth, fifth, and sixth assignments of error are overruled. The testimony as to the condition of the bananas before they were delivered was admissible. The messenger had no control over the cars and they were not delivered to him in Chicago. All the authority he had in connection with the cars was to watch the state of the weather and request that they be housed. He did that several times, but no attention was paid to his request.

[4] The seventh and eighth assignments of error complain of certain testimony as to roundhouses on other lines of railway than those of the contracting carriers. Testimony as to such roundhouses should have been excluded. The assignments of error are sustained.

The ninth assignment of error is overruled. There was no evidence of repudiation of the clause in the contract as to placing the bananas in a roundhouse. The evidence tends to show that appellant accepted the contract and that the only excuse it had to offer for failing to protect the fruit from the extreme cold weather was a lack of room in its roundhouses.

The eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments of error are without merit and are overruled.

The charge, the refusal of which is complained of in the seventeenth assignment of error, was properly denied by the court. There was no testimony tending to show that appellant repudiated the special clause in the contract and that it accepted the shipment merely because compelled by law to do so. No unwillingness was evinced to receive the shipment, and the testimony tended to show an acknowledgment and recognition of the validity and binding force of the contract. This also disposes of the twentieth assignment of error.

The charges complained of in the eighteenth and nineteenth assignments of error are not open to the criticisms urged against them, and the assignments are overruled.

The twenty-first assignment of error contains matter disposed of adversely to appellant in connection with other assignments of error, and it is overruled.

The judgment is affirmed as to the receiver and the other railway companies, but as to appellant the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

[5] We adhere to the opinion that the court erred in overruling the special exceptions, but on reconsideration have reached the opinion that the error was harmless in view of the testimony. Appellant admitted receiving

four certain carloads of bananas, and in a cross-action sought to recover freight charges on the cars, and the jury allowed the freight charges. The account for freight specifically named the rate of 56 cents a hundred, and claimed, at that rate, \$414.40 freight, and proved that there were 74,000 pounds of bananas in the four cars. The evidence showed that the bananas were worth in Chicago, the point of destination, \$1,182.38, with \$40 commissions added, making a total of \$1,222.38. The jury found that the market value of the bananas in good condition was \$1,214.48, which was \$7.86 less than the testimony justified. If the lowest value a hundred pounds, \$1.60, be taken as the basis of the market value of the bananas, we have \$1,184, to which if the commissions are added we have \$1,224. The bananas had no value when delivered in Chicago. Under the ruling in the cited case of *Houston Packing Co. v. Dunn*, the error in overruling the exceptions did not injure appellant, and such error cannot form the basis for a reversal.

[6] The evidence as to the value of bananas in Galveston did not injure appellant, as it was fully shown what the market value of the bananas would have been in Chicago had they been delivered in good condition, and that they were valueless when delivered in Chicago. The jury was properly instructed as to the measure of damages and evidently followed the charge in rendering a verdict based on the market value in Chicago.

[7, 8] The messenger endeavored to protect the bananas by having them "roundhoused" in St. Louis and East St. Louis, and he was justified in not asking that the bananas be protected in Chicago after they had been exposed to very low temperatures and were frozen. The requests made to appellant to protect the fruit was sufficient to arouse some consideration for the rights of the shipper, and, if it allowed the bananas to remain unprotected after they reached Chicago, it cannot escape liability on the ground that it was not requested to perform a duty it owed the shipper. The clause of the contract requiring the cars to be placed in a roundhouse if the temperature of the weather, in the opinion of the messenger, required it applied only while en route to Chicago. Appellant knew that it was the opinion of the messenger that the cars should be protected in St. Louis, and, as the weather was still extremely cold when the bananas reached Chicago, they knew his opinion could not have changed. Independent of the clause in the contract, the carrier owed the duty to preserve the property after it reached its destination until it was delivered. The evidence of Vaughan tended to show that the bananas were frozen before they reached Chicago.

No objection was made to Higgins' testimony, because it gave the market value of bananas at Galveston. The evidence was not injurious.

[9] The charge made the liability of appellant absolute under the contract if it failed to protect the bananas, and no complaint is made of the charge on that score. The charge having rendered the fact of the roundhouse of appellant being unable to accommodate the four cars of fruit not a valid defense, the testimony as to a roundhouse being at Rose-dale was of no consequence whatever.

There was no evidence of repudiation of the contract as to storage, but appellant ratified it by making some effort to perform the clause in the contract.

The motion for rehearing is granted, our former judgment set aside, and the judgment of the lower court is affirmed.

SPAULDING MFG. CO. v. KUYKENDALL. (No. 7464.)

(Court of Civil Appeals of Texas. Dallas. Jan. 22, 1916. Rehearing Denied Feb. 5, 1916.)

APPEAL AND ERROR \Leftrightarrow 387 — PERFECTION OF APPEAL—TIME—JURISDICTION.

Where the motion for a new trial was overruled on January 29th, and the court adjourned on the following day, and the time of the filing of the appeal bond was not shown, the clerk's approval of it on March 3d, more than 30 days after the order overruling the motion, would be assumed to have been on its filing, so that it was not filed in time for perfecting the appeal, which would therefore be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2064–2070; Dec. Dig. \Leftrightarrow 387.]

Appeal from Van Zandt County Court; R. M. Lierley, Judge.

Action by the Spaulding Manufacturing Company against B. H. Kuykendall. Judgment for defendant, and plaintiff appeals. Dismissed.

See, also, 151 S. W. 1122.

L. Davidson and C. L. Stanford, both of Canton, for appellant. T. R. Yantis, of Canton, and W. H. Allen, of Dallas, for appellee.

RAINEY, C. J. We conclude that this court has no jurisdiction of this case, for the reason that the record shows the appeal was not perfected in time.

It appears from the record before us that the motion for new trial was presented and overruled by the court below on the 29th day of January, 1915, and the court adjourned on the 30th day of January, 1915. The appeal bond was approved by the clerk on March 3, 1915, which was more than 30 days after the order overruling the motion for a new trial. The time of filing the bond is not shown, but assuming that the clerk's approval was not made until he received it for filing, as he had no right to do so until then, we conclude that the bond was not filed in time for perfecting the appeal.

The appeal is therefore dismissed.

KOCH v. NOSTER. (No. 5583.)
(Court of Civil Appeals of Texas. San Antonio.
Jan. 26, 1916.)

1. APPEAL AND ERROR ⇨1003 — REVIEW — FINDING.

The mere fact that more witnesses gave evidence on one side than on the other does not authorize the Court of Civil Appeals to disturb a jury's finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. ⇨1003.]

2. APPEAL AND ERROR ⇨1003 — REVIEW — FINDING.

The Court of Civil Appeals cannot say whether it thinks the evidence preponderates one way or the other, when it is conflicting on the points at issue, the conflict has been determined by the jury, and such finding is not so clearly against the great weight of the evidence as to show prejudice, bias, or that manifest injustice has been done.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. ⇨1003.]

3. APPEAL AND ERROR ⇨742—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment of error, which refers to no paragraph of the motion for new trial, is not a copy of any part thereof, and is not followed by any proposition or statement, as provided by the rules governing briefs before the Court of Civil Appeals, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ⇨742.]

4. APPEAL AND ERROR ⇨1170—REVERSAL—RULE OF COURT.

Under rule 62a of the Court of Civil Appeals (149 S. W. x), prohibiting reversal for harmless error, the Court of Civil Appeals cannot reverse for error from which no substantial injury resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4093, 4101, 4454, 4540-4545; Dec. Dig. ⇨1170.]

Appeal from Victoria County Court; J. P. Pool, Judge.

Action by John Koch against F. J. Noster. From a judgment for defendant, plaintiff appeals. Affirmed.

R. L. Daniel, of Victoria, for appellant.
J. L. Dupree, of Victoria, for appellee.

CARL, J. John Koch sued F. J. Noster in the justice court of precinct No. 1, Victoria county, to recover \$104.43, with interest from January 1, 1914, alleging that he had expended that sum in a certain suit to clear the title to 10 acres of land which Noster had sold appellant. It was alleged that after Koch had bought the land appellant contracted to sell the land to one certain George, and upon examination of the title it was ascertained that there was an outstanding title, and that Koch thereupon called upon Noster in reference thereto; that Noster agreed that, if Koch would go ahead and pay the expense of clearing the title, Noster would repay him said sums paid out, which was estimated would be about \$100; that the

suit was filed and judgment obtained, and the cost which Koch paid was \$104.43. This amount Noster refused to pay when called upon for it.

Appellee denied the allegations, and contended that, as the land he still owned was in the same condition, he told appellant that he would pay his part; but the suit was only as to the part sold. In the justice court, judgment was for the plaintiff; but in the county court, on appeal, the case was tried before a jury, and resulted in a judgment in Noster's favor.

[1, 2] The first assignment is that the court erred in refusing plaintiff's motion for a new trial because the verdict was contrary to the preponderance of the evidence. The evidence was conflicting as to the contract alleged, or as to whether it was made as charged. The mere fact that more witnesses gave evidence on one side than did on the other would not authorize us to disturb the jury's finding. Appellant and his witnesses swore to one set of facts, and appellee swore to a different set of facts. The jury see the witnesses and determine where the greater weight lies. It is not for this court to say whether we think the evidence preponderates one way or the other, when it is conflicting on the points at issue and has been determined by a jury, and such finding is not so clearly against the great weight of the testimony as to show prejudice or bias, or to show that manifest injustice has been done. This rule is so well established that it ought not to be necessary to cite authorities; but litigants appear still to doubt it, because the question is so often presented to this court. That being true, we give a few only of the many cases so holding. *Anderson v. Schumm*, 172 S. W. 1121; *Smith v. Guerre*, 175 S. W. 1093; *Nat'l Surety Co. v. Silberberg Bros.*, 176 S. W. 97; *Lisle-Dunning Const. Co. v. McCall*, 167 S. W. 810; *Mo. Pac. Ry. Co. v. Brazzil*, 72 Tex. 236, 10 S. W. 403. The assignment is overruled, and the second assignment, raising the same question in a different form, is also overruled.

[3] The third assignment will not be considered, because it does not refer to any paragraph of the motion for a new trial, is not a copy of any part of the motion for a new trial, and is not followed by any proposition or statement as provided by the rules governing briefs before this court.

[4] The fourth assignment does not refer us to the record where same may be found; but even if we give full consideration to the same as it is set out in the brief, still the matters complained of would not justify us in reversing the judgment, under rule 62a (149 S. W. x), because we do not believe any substantial injury resulted therefrom.

The judgment is affirmed.

BILLINGSLEY v. HOUSTON OIL CO. OF TEXAS. (No. 6849.) *

(Court of Civil Appeals of Texas. Galveston. Dec. 2, 1915. Rehearing Denied Jan. 6, 1916.)

1. ADVERSE POSSESSION **§16**—**WHAT CONSTITUTES.**

Where land lay in a sparsely settled community and was available only for lumbering purposes, defendant's predecessor, who built a logging railroad across the land, cut timber therefrom and at times maintained feed sheds and pens for its oxen, and small cabins for its workmen, had adverse possession of the land within Rev. St. art. 5674, prescribing a 5-year period of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. **§16**.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

2. ADVERSE POSSESSION **§82** — **COLOR OF TITLE—RECORDATION OF DEED.**

Rev. St. arts. 6786, 6789, 6790, respectively, declare that county clerks shall be recorders, that when any instrument authorized to be recorded shall be deposited, the recorder shall enter it, and that the recorder shall, without delay, record every instrument deposited with him for record. Article 6791 declares that every instrument in writing shall be considered as recorded from the time that it is deposited for record; and article 5674 declares that every suit to recover real estate as against any person having peaceable and adverse possession shall be instituted within 5 years after the cause of action accrues, but that this article shall not apply to one in possession of land who would deraign title through a forged deed. *Held*, that a deed, duly deposited with the recorder for record, must be considered as recorded within the 5-year statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-471; Dec. Dig. **§82**.]

3. APPEAL AND ERROR **§169**—**ASSIGNMENTS OF ERROR—CONSIDERATION.**

An assignment, not presented in trial court, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. **§169**.]

4. ADVERSE POSSESSION **§112**—**EVIDENCE—BURDEN OF PROOF.**

One relying on adverse possession has the burden of proving it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. **§112**.]

5. ADVERSE POSSESSION **§85** — **PRESUMPTIONS.**

Adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination to the rightful owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. **§85**.]

6. ADVERSE POSSESSION **§57**—**ACTION—EVIDENCE—SUFFICIENCY.**

Where defendant set up adverse possession under the 5-year statute (Rev. St. art. 5674), evidence *held* insufficient to show that defendant or its predecessor had for any continuous period of 5 years held the land adversely.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687; Dec. Dig. **§57**.]

Appeal from District Court, Jefferson County; John M. Conley, Judge.

Action by W. A. Billingsley against the Houston Oil Company of Texas. From the judgment, plaintiff appeals. Reversed and rendered.

Minor & Minor, of Beaumont, and Wilson, Dabney & King, of Houston, for appellant. H. O. Head, of Sherman, and Parker & Kennerly, of Houston, for appellee.

LANE, J. This suit was originally instituted by plaintiff, W. A. Billingsley, in the district court of Hardin county, against the Houston Oil Company of Texas, and was transferred to and tried in the district court of Jefferson county. This suit was in the ordinary form of trespass to try title, to one league and labor of land, originally granted by the Mexican government to Eduardo Arriola in 1835, situated in Hardin county, Tex. Judgment was rendered by the trial court for the defendant, Houston Oil Company of Texas, for the league of land sued for, less 100 acres out of the northwest corner of said one league survey, upon its plea of the 5-year statute of limitation, and for plaintiff, Billingsley, for the labor of land sued for, and for all costs of suit. The case was tried before a jury upon two special issues submitted by the court which it answered, in substance, as follows: First, plaintiff, Billingsley, holds title to the land sued for under Eduardo Arriola, to whom the same was granted by the Mexican government; second, the Houston Oil Company of Texas has matured its title to the league of land sued for, less 100 acres out of the northwest corner of said league survey, under the 5-year statute of limitation. The court having withdrawn from the jury any consideration of limitation as to the labor of land sued for by plaintiff, it was not considered in the last answer. Upon such answers the trial court rendered judgment as hereinbefore stated. From which judgment W. A. Billingsley has appealed.

All of appellant's complaints may be stated in four assignments, the substance of which are as follows: First. That the trial court erred in holding, and in rendering judgment for appellee upon, the theory that the construction of a tramroad, with switches and turnouts every 200 or 300 yards, upon and across the land sued for, for the purpose of taking and removing the timber from said land; the cutting and removing of such timber; the building and using of small stock pens on said land for the care of the teams used in hauling said timber, so cut and taken; the building of small feedhouses about 10 by 12 feet in size, said pens and feedhouses being moved from one point to another on said land as the work of cutting the timber progressed, is such "adverse possession" of said lands as that term is used in article 5674, Rev. St. 1911, defining the 5-year statute of limitation; and that such

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acts of possession for the requisite number of years would ripen into title by limitation. Second. That the trial court erred in holding, and in rendering judgment for appellee, upon the theory that the deposit of a deed for record with the proper officer for filing and record, and its subsequent filing by said officer as required by law, and as provided by article 6791, Rev. St. 1911, does constitute a deed "duly registered," as that term is used in article 5674, supra, which defines the 5-year statute of limitation, and that it is not necessary that a deed should be actually recorded to meet the requirements of said article 5674. Third. That there was no proof that appellee had paid all taxes due on said land which he seeks to hold by limitation under the 5-year statute of limitation, and therefore he cannot hold under said statute. Fourth. That if it be held that such possession as appellee held to said land was such "adverse possession," as that term is used in said article 5674, supra, still it has no title to the land sued for, as there is no sufficient evidence to show that such possession was continuous for the full term of 5 years. We shall consider these assignments in the order named.

[1] The defendant, Houston Oil Company of Texas, in its answer and cross-bill pleaded that prior to the filing of plaintiff's suit it, and those under whom it claims, had had peaceable, continuous, and adverse possession of the league of land sued for, less 100 acres out of the northwest corner thereof, claiming the same under deeds duly registered, using and enjoying the same, and paying all taxes due thereon, for a period of more than 5 years. The nature of the possession of appellee was shown by the undisputed proof to be as follows: By a warranty deed, not dated, but which was acknowledged December 29, 1891, George W. Hooks and others conveyed to the Hooks Lumber Company, a corporation, 4,328 acres, being all of the league of land originally granted to Eduardo Arriola, less 100 acres belonging to W. B. Kline, situated in Hardin county, Tex. This deed was filed for record in Hardin county December 29, 1891, but not actually recorded until the 12th day of January, 1895, about 3 years after it was filed for record. About 1½ or 2 years from November 17, 1890, the Hooks Lumber Company, a corporation, began the construction of a tramroad, built of cross-ties and steel or iron rails, upon said league of land, and also constructed switches or turnouts every 200 or 300 yards to said tramroad, for the purpose of hauling the timber which it was cutting upon and taking from said land to its sawmill, situated near said land. It also, about the same time, built a stock pen and a small feed-house on said land near its tramroad and switches, to hold its oxen, which it was using in hauling timber from the land, and for storing feed for said oxen. That said tram-

road and switches were extended from time to time as the timber was cut, until they extended entirely across the league of land. The pens and feedhouses were removed and rebuilt upon the land as the work of removing the timber progressed. Appellee contends that such uses as shown from these facts constituted such "adverse possession," as that term is used in article 5674, supra. Appellant, Billingsley, insists that such uses do not constitute such possession. We think it is shown that the only practicable uses to which the land involved could have been put, or to which such, or similar, land was being put from 1892 to 1897, by those owning the same, was to take the timber therefrom for manufacturing it into lumber. The country in which this land was situated seems to have been a sparsely settled country from 1892 to 1897 or 1898, the period of time during which appellee claims possession by the acts before stated. In volume 1, Ruling Case Law, pages 694 and 695, it is said:

"No particular act, or series of acts, is necessary to demonstrate an intention to claim ownership. Such a purpose is sufficiently shown where one goes upon the land and uses it openly and notoriously, as owners of similar lands use their property, to the exclusion of the true owner. The owner is, of course, chargeable with knowledge of what is openly done on his land, and therefore calculated to attract attention. But a mere passive possession, without intending to claim the property, is insufficient, regardless of the length of time it continues, or however open, notorious, or exclusive it may have been.

"From what has been stated heretofore it is evident that, in determining what will amount to an actual possession of land, considerable importance must be attached to its nature and the uses to which it can be applied, or to which the claimant may choose to apply it. What is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village. So what will constitute adverse possession of land not susceptible of being devoted to any profitable use might not necessarily of agricultural land or any other susceptible of being so devoted. What would be effective for that purpose as to lands wholly or partially overflowed by water might not as to a building lot in a city. What would satisfy such purpose in respect to a marsh or swamp, not usually put by the owner to any other use than that of a hunting and fishing ground, might not as to premises of any other character. The governing questions of law, regardless of the character of the premises, are the same in every case; but the question of fact may be presented by evidence in a great variety of ways, according to the circumstances. Thus, while the mere occupancy of pine land would not amount to a possession of it, it is easy to understand that such occupancy, coupled with the making of turpentine on the land, might be a sufficient possession on which to predicate an adverse claim.

"* * * As a general rule, it will be sufficient if the land is so used by the adverse claimant as to apprise the community in its locality that it is in his exclusive use and enjoyment, and to put the owner on inquiry as to the nature and extent of the invasion of his rights; and this is especially true where the property is so situated as not to admit of permanent improvement. In such cases, if the possession comports with the usual management of similar lands by their owners, it will be sufficient. Neither actual occupation, cultivation, nor residence is neces-

sary where neither the situation of the property, nor the use to which it is adapted or applied, admits of or requires such evidences of ownership."

In the case of *Ford v. Wilson*, 35 Miss. at page 505, the High Court of Errors and Appeals of Mississippi makes the following recital:

"The doctrine of the Supreme Court of the United States is that, to constitute an adverse possession, there need not be a fence, building, or other improvement made, and that it suffices, for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute. That much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it. That it is difficult to lay down any precise rule, in all cases, but that it may be safely said that, when acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption or an adverse entry by him, such acts are evidence of an adverse possession, for the consideration of the jury, etc."

In *Morrison v. Kelly*, 22 Ill. at page 623, 74 Am. Dec. 169, it is said:

"The doctrine is well recognized and established that a man may have the actual possession of real estate without a residence upon it. And it may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaption to use; constructive, as when a person has the paramount title, which in contemplation of law draws to, and connects with it the possession. But to be adverse, it must be a *pedis possessio*, or an actual possession. And to constitute such a possession, there must be such an appropriation of the land to the individual as will apprise the community in its vicinity that the land is in the exclusive use and enjoyment of such person. Trifling acts, doubtful and equivocal in their character, and which do not clearly indicate the intention with which they are performed, cannot be regarded as amounting to possession. But it has been held that neither actual occupancy, cultivation, or residence are necessary to constitute actual possession. *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624. And where the property is so situated as not to admit of any permanent, useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim, has been held to be such possession as will create a bar under the statute of limitations. *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624. What acts may or may not constitute a possession are necessarily varied, and depend, to some extent, upon the nature, locality, and use to which the property may be applied, and the situation of the parties and a variety of circumstances necessarily have to be taken into consideration in determining the question. They must necessarily be left to the jury, whose peculiar province it is to pass upon the question of possession. *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624."

After an examination of the many authorities from other states, the majority of the court has reached the conclusion that the acts of appellee, hereinbefore stated, under the conditions shown by the facts to have existed in the locality or vicinity of the land in question from 1892 to 1898, may constitute "adverse possession," as that term is

used in article 5674, Revised Statutes of 1911, which constitutes the 5-year statute of limitation of this state, and we therefore overrule appellant's first complaint.

[2] As before stated, appellant also contends that the filing of a deed for registration by the proper officer should not be held to be "duly registering" said deed, as that term is used in article 5674, supra, which defines the 5-year statute of limitation; that article 6791, Revised Statutes of 1911, which provides that "every such instrument of writing shall be considered as recorded from the time it was deposited for record," does not apply to the deeds mentioned in said article 5674. We are unable to see any reason why such construction as contended for by appellant should be made. The registration of such instruments are made in every case, to give notice, and we can see no reason why the filing of such instruments with the proper officer should be held to be a registration, and be notice to one class of persons dealing with the lands affected by such registration, and not to another class dealing with such lands, though in a different manner from the first class. The articles of the statutes pertinent to the question of registration, and consequent notice, are as follows:

Article 6786:

"The county clerks of the several counties shall be the recorders for their respective counties; they shall provide and keep in their offices well-bound books in which they shall record in a fair and legible hand all instruments of writing authorized or required to be recorded in the recorder's office of their respective counties, in the manner hereinafter provided."

Article 6789:

"When any instrument of writing authorized by law to be recorded shall be deposited in the recorder's office for record, if the same shall be acknowledged or proved in the manner prescribed by law for record, the recorder shall enter in a book to be provided for that purpose, in alphabetical order, the names of the parties and date and nature thereof, and the time of delivery for record; and shall give to the person depositing the same, if required, a receipt specifying the particulars thereof."

Article 6790:

"Each recorder shall, without delay, record every instrument of writing authorized to be recorded by him, which is deposited with him for record, with the acknowledgments, proofs, affidavits and certificates written or printed on the same, and all other papers referred to and thereto annexed. In the order and as of the time when the same shall have been deposited for record, by entering thereon word for word and letter for letter, and noting at the foot of such record all interlineations, erasures and words visibly written on erasures, and noting at the foot of the record the hour and the day of the month and year when the instrument so recorded was deposited in his office for record."

Article 6791:

"Every such instrument of writing shall be considered as recorded from the time it was deposited for record; and the recorder shall certify under his hand and seal of office to every such instrument of writing so recorded, the hour, day, month and year when he recorded it, and the book and page or pages in which it is

recorded; and when recorded deliver the same to the party entitled thereto or to his order."

Article 6842:

"The record of any grant, deed or instrument of writing authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."

Article 5674, defining the 5-year statute of limitation, is as follows:

"Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years * * * after the cause of action shall have accrued, and not afterward; provided, that this article shall not apply to any one in possession of land, who in the absence of this article would deraign title through a forged deed; provided, further, that no one claiming under a forged deed, or deed executed under a forged power of attorney, shall be allowed the benefits of this article."

We have searched in vain to find a reported case wherein the identical question here presented has been decided in this state, or elsewhere. In the case of *Harrison v. McMurray*, 71 Tex. 122, at page 128, 8 S. W. 612, at page 615, the identical question was squarely presented to our Supreme Court, and Justice Walker, speaking for that court, disposed of the question in these words:

"Whether the filing, which for some purposes is equivalent to the actual record, is sufficient as a basis for the claim under the 5-year statute of limitations, or whether the testimony be sufficient to establish the registry of the deed by circumstantial evidence, * * * need not be determined. The jury could not have found against her upon the 10-year statute without a total disregard of the testimony."

Since article 6791, *supra*, provides that "every such instrument of writing shall be considered as recorded from the time it was deposited for record," and article 6842, *supra*, provides that the record of any such instrument which shall have been duly recorded in the proper county shall be taken and held as notice to all persons of the existence of such instrument, we do not see how the question can be an open one. We think the language of the statute clearly provides that the filing of such instruments shall be notice of the existence of such deed, to all persons thereafter dealing with lands affected by such instruments, for all purposes.

The case of *Carlisle & Co. v. King*, 103 Tex. 620, 133 S. W. 241, is one in which Carlisle & Co. were claiming under a deed which had been filed for record with the proper officer in 1892, but which was not actually recorded until the year 1906. King brought suit for the land involved, claiming to be an innocent purchaser for value without notice, contending that the filing of the deed under which Carlisle & Co. held in 1892 was not notice of its existence to him. In that case Chief Justice Brown uses this significant language:

"At first view of the question it would appear that the long time elapsing between the

filing of the deed and the purchase by the plaintiff in error in this case would indicate negligence on the part of the person who claimed the land, under the deed from Burns, in failing to see to the recording of his deed properly in due time. When, however, we turn to article 4605 of the Revised Statutes, we find that the Legislature provided for just such conditions as existed here by the enactment of that section in the following words: 'Art. 4605. When any instrument of writing authorized by law to be recorded shall be deposited in the recorder's office for record, if the same shall be acknowledged or proved in the manner prescribed by law for record, the recorder shall enter in a book to be provided for that purpose, in alphabetical order, the names of the parties and date and nature thereof and the time of delivery for record; and shall give to the person depositing the same, if required, a receipt specifying the particulars thereof.' Thus it will be seen that the duty is imposed upon the clerk, upon the filing of each instrument for record, to place it upon a memorandum book, in alphabetical order, so that any person who desired to ascertain whether there was a conveyance of, or an incumbrance upon, any tract of land in the county could readily ascertain that fact by reference to the memorandum book. But the Legislature did not stop there in its provision for the protection of subsequent purchasers, but enacted article 4660, whereby it provided that, 'if any recorder shall neglect or refuse to provide and keep in his office such indexes as required by law, he shall forfeit and pay any sum not exceeding five hundred dollars,' and be liable to the party injured by such neglect for all damages sustained.

"We find no provision of the statute which requires that a party who deposits an instrument for record in the clerk's office of the county shall pay the recording fees before the record is made. Under the provision of the statute which we have before cited, we believe that *Throckmorton v. Price* was properly decided, and that the filing of the instrument in this case operated as notice to the subsequent purchaser, notwithstanding the fact that a great length of time had elapsed between the filing of the instrument and the purchase. If the clerk did his duty and placed the instrument upon the memorandum book in alphabetical order, then it was no less accessible to the subsequent purchaser in 1906 than it was in the year 1892, and if he failed to keep that memorandum as required by law, he was guilty of negligence for which the defendants in error are not responsible" (citing *Throckmorton v. Price*, 28 Tex. 606, 91 Am. Dec. 334).

Appellant's second contention is overruled.

[3] No assignment was presented in the trial court upon the question of payment of taxes, and therefore cannot be presented for the first time in this court. We, therefore, are not at liberty to consider such assignment in appellant's brief, and will not do so.

[4-6] We now come to a more serious question, that is, was the possession of appellee, and those under whom it holds, continuous for any period of 5 years prior to the filing of plaintiff's suit? Appellee claims title under the 5-year statute of limitations; that he held possession of the land under two periods of time of more than 5 years each, the first, beginning at the indefinite time of 1½ or 2 years after the execution of a certain deed, of date November 17, 1890, and ending June, 1897, and the other beginning in —, 1900 and extending 5 years from said date. In support of the possession of

appellee for the first period it relied upon the testimony of the witness G. W. Hooks, who was active in the use of the land for the first period of the possession claimed by appellee. Appellant has, we think, made a fair statement of the substance of the testimony of said witness, in so far as it tends to show the length of time the land was in possession of those under whom appellee claims during the said first period, and we also think that it does not materially conflict with the statement of such testimony as presented in appellee's brief, and we therefore adopt the same as the testimony of said witness, which is as follows:

"G. W. Hooks was called by the defendant, having been associated with Strickland, J. L. Hooks, and others, first as a partnership operating the Hooks Lumber Company, afterwards incorporated. This company had a sawmill, which ultimately cut 50,000 feet, and employed teams and carts, wagons, and had a steel tramroad. This mill was at Hooks' switch, now called Arriola, on the Texas & New Orleans, and was built in 1888, and was situated, with the mill-houses, etc., on the Rogers league 250 or 300 yards from the northeast corner of the Arriola league, which the Hooks Lumber Company claimed. This mill was built before the Hooks Lumber Company took the conveyance for 1,107 acres from the Beaumont Lumber Company in 1890, and the deed from A. H. Irvin for 3,221 acres, but the company did nothing at that time to take possession of the league, but that in the course of a year or two built a tramroad on it, and eventually two houses on it, and ox lots and barn. That it must have been in the latter part of '91 or the early part of '92 that the tramroad was started, which ran a little southwest from the mill, and crossed onto the Arriola league, about a mile from the mill, south of the league's northeast corner. The witness could not state when the tram cut across the league, but said that it was pretty well across it in a year and a half or 2 years, during which time the Hooks Lumber Company was cutting timber on the league, and the tram was gradually being extended as the timber was cut, and timber was brought from beyond the league. The tram mostly used pine ties, and the first iron was 30 pounds steel rail, but some of it heavier, with a bridge across Boggy creek. A 10-ton engine was used, and spurs put out to cut into the timber, and that it must have taken 3 years or better, or about 3 years, to cut the timber. After timber beyond the league had been cut, then they came back and finished cutting on the league. The two houses built by the Hooks Lumber Company on the Arriola league were 'built about 1895 or 1896, somewhere, that these houses were built. Somewhere along there, I don't remember positively, and were occupied; not continuously, however. The one in particular that was occupied first by Frank Middleton. He lived in it a few months, and moved out, and it was then occupied by a negro by the name of Jim Holt. Frank Middleton was the engineer. These houses were near where the tram crossed on the line of the league.'

"Hooks further testified: These houses were built for the work people of the company, which had an ox lot near them, and a little feedhouse in connection with it, which ox lot and feedhouse must have been built about the time the tram was built. The work oxen were kept there until the work got more remote, and then an ox lot had to be built further out, near the work. 'I do not know how long that house (feedhouse) was used by the Hooks Lumber Company. We never used any one very long at a time, because we were moving from place to place, and were using one all the time we were cutting lumber.'

Witness said: 'We must have put that tramroad in there about 1893, and it stayed there until 1897 or 1898. I do not remember how long it was after the date of the two deeds to the Hooks Lumber Company in 1890 before the laying of the tramroad was begun. It might possibly have been a year and a half, possibly 2 years, a year and a half, about, I think. Yes, sir, a year and a half or 2 years.' The operation was continuous until about the time the tram was taken up, which was in about 1897 or 1898. The mill cut logs from other sources. Logging crews were kept in the woods. When the company was incorporated, he became president, and it was incorporated shortly before December 29, 1891, and the Hooks Lumber Company claimed the survey. The witness knew Tobe McKinney, and it must have been about 1896 that McKinney first moved on the Arriola league, but the witness corrected this by saying that McKinney may have moved on after Turner was appointed receiver of the Hooks Lumber Company. McKinney lived in one of the little houses on the league described. 'I think he got permission from Turner to go there, but if I know, I have forgotten. McKinney stayed in one of these houses until his death. He was killed. He was a maker of ox bows.' Apparently trees had been cut on the league before witness' company claimed it.

"Cross-Examination by Plaintiff.

"Hooks testified that there had been a suit between the receivers of the Houston Oil Company, the defendant here, as defendants, and a Mrs. McKinney and others as plaintiffs, taken up before the master in chancery, Gov. Sayers, in which witness Hooks had testified at Houston as to the same matters of possession and occupancy to which he now testifies, and had been asked very much the same questions he was now asked, and had given this testimony before Gov. Sayers as master perhaps over 5 years ago, when he said his recollections would be more precise, because he was closer to the event, and that his testimony had been taken down; that he had testified before Gov. Sayers as master that McKinney did not move onto the Arriola league while the Hooks Lumber Company was operating, and that that is correct, to the best of his recollection, and that he had testified before the master, and that with the exception of the tram, feedhouses, and ox houses, and the two little houses, the Hooks Lumber Company never had anything on the Arriola league except the tram, ox lots, feedhouses and two little houses. These two little houses were about 30 feet long by 24 feet wide, regular mill-hand houses. Fountain moved one of them off. Middleton, who ran the tram engine, lived in one of them—it might have been six months, it might have been a year, but the witness thought not less than six months. In the other a negro named Holt lived 'up to a few months before McKinney moved in.' Jim Holt may have lived in one of the houses four, five, or six months. The witness could not find the books of his company showing when he bought the tram iron, etc.

"The testimony of the witness given before Gov. Sayers, which had been preserved, was then read to the witness, and he stated that the feed pens stood only while the tram was in use, verifying his previous testimony, and also, he verified his previous testimony as follows: That there was a feedhouse and lots on the league while the timber was being cut by the Hooks people, and existed only while the tram was in use; that it took something like 3 or 4 years to cut the timber. 'Well, it was something like 3 or 4 years we had a tram on it.' The witness was asked if this statement was correct, and he answered: 'Yes, sir; yes, I said that is correct.' He proceeded with a verification of his testimony before the master: 'Then your actual possession ceased on the Arriola

league at the end of 3 or 4 years? A. Yes, sir; that is, we had put these houses on there. Is that correct? You put those houses on there in 1896, did you not? A. About that time; yes, sir. It was again read to the witness, and he verified his previous statement that the actual possession ceased on the Arriola league at the end of 3 or 4 years. The feed and stock pens were just little box houses, in which the feed was put for the oxen or other live stock, and they were shifted as the operations extended, or new ones would be built. 'Yes, sir; you might call them temporary structures. Yes, they were intended to be shifted. Posts were driven down and planks nailed on there. When we moved them, we knocked the planks off, and the posts were pulled up. The ox pens were about 100 or 150 or 200 feet square. There were no sheds for cattle. The structures to hold the feed were 10 or 12 feet square. One of the houses, the one occupied by Middleton, is still standing, and the previous testimony, given by the witness before the master in the previous litigation, to the effect that nobody lived in that house except from in 1896, is correct.' Middleton lived in it and Holt lived in it, and it was vacant part of the time, and then McKinney lived in it, Middleton, about six months. The Hooks Lumber Company became insolvent, and was placed in the hands of a receiver, the witness thought, in the latter part of 1897, but some time in 1897. He testified before Gov. Sayers that McKinney lived in the Fountain house, but as a matter of fact McKinney lived in the Middleton house. Tobe McKinney told witness that he bought the house from Fountain. Being re-examined by the defendant, witness Hooks said that he testified on direct examination that the tramroad had been begun not exceeding 2 years from the date of the deeds in 1890; that the best way he can state it is that the tram was built about 1½ or 2 years after the land was bought, and torn up in 1897. Being re-crossed by defendant, he stated: 'Q. Then the tram and the stock pens or feed pens you spoke of standing there were used only while the tram was in use? A. Yes, sir. Q. Did that exceed 2 or 3 years? A. Well, we had a feedhouse and lots on it all the time we were cutting the timber off of it, and it took something like 3 or 4 years to cut the timber. Q. Not exceeding 4 years? A. Well, I know other timber extending beyond there—well, it was somewhere like 3 or 4 years we had a tram on it. Q. That is the part you referred to as being substantially correct? A. Yes, sir.'

This testimony, if taken as true, does not establish continuous, adverse possession of the land in question for a period of 5 years next preceding the removal of the tramroad, feedhouses, and stock pens of the predecessors of appellee, with that clear and definite proof demanded in such cases as this, if, indeed, it establishes such possession for a period of 5 years. There was some other testimony upon this issue by other witnesses, but it falls very far short of proving the possession of the land for 5 years, claimed by appellee, and, when taken together with the testimony of Hooks, it falls of the purpose for which it was offered.

"In accordance with a familiar rule the burden of proof rests on him who has the affirmative of an issue, the party relying on a title by adverse possession has the burden of proving all the facts necessary to establish such title. Adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination of the rightful owner. Title by adverse possession, therefore, must be establish-

ed by clear and positive proof. It cannot be made out by inference." Ruling Case Law, vol. 1, page 695.

We do not think appellee has made proof of such adverse, continuous possession of the land involved for the first of said periods as would give it title thereto, under the 5-year statute of limitations. We have carefully examined all the testimony introduced relative to the adverse possession of said lands, claimed by appellee, or those under whom it holds, during the said second period, and have reached the conclusion that such testimony wholly fails to show such adverse and continuous possession as would give title by limitation under the 5-year statute of limitations.

The majority of the court, therefore conclude, that as the trial jury found by their verdict that appellant, W. A. Billingsley, held the legal title to the land sued for, and, as appellee has failed to make such proof of its adverse, continuous possession as would entitle it to hold the land sued for under the statute of limitations, and as it seems that the case was fully developed by the testimony introduced, that the judgment of the trial court should be reversed, and that judgment should be here rendered for appellant, W. A. Billingsley, for the league of land sued for by him, same being the only land involved in this appeal; and it is so ordered.

Reversed and rendered.

EAGLE DRUG CO. v. WHITE. (No. 863.)
(Court of Civil Appeals of Texas. Amarillo.
Dec. 11, 1915. Rehearing Denied
Feb. 2, 1916.)

1. PARTNERSHIP — 48—EVIDENCE.

Declaration which B. made in a contract of sale of a business, drawn up and signed by him in the absence of W., that they were partners therein, is inadmissible against W.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 66, 68-73; Dec. Dig. —48.]

2. PAYMENT — 47—APPLICATION.

Where, pending a sale by B. to defendants of a stock of goods, on which plaintiff had a lien as security for a note given by B., it was agreed by B. and plaintiff that the purchase price should be applied first to payment of certain debts, including said note, but not a later debt of B. to plaintiff, it was plaintiff's duty, receiving a payment from such purchase price, to so apply it, whether or not defendants in making the purchase assumed the payment of the note.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 127, 129; Dec. Dig. —47.]

3. EVIDENCE — 271 — CONVERSATIONS WITH ANOTHER.

Statements and discussions between plaintiff and his attorney in the absence of defendants are inadmissible on the question of the agreement of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. —271.]

4. CONTRACTS — 229 — CONSTRUCTION — PAYMENT OF DEBT.

Defendants merely agreeing that if plaintiff paid off a judgment against a stock of goods

which they were buying of B., he should be paid out of such money as might be due B. after other creditors were paid, were not liable for any more than was so due B.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1045-1037, 1059-1066, 1070, 1077; Dec. Dig. ¶229.]

5. FRAUD ¶11—PRESENTATIONS—OPINIONS.

A representation as to the amount that would be due another, appearing under the evidence to have been only an opinion, the parties understanding that it was doubtful how much would be due, will not support an action of deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. ¶11.]

6. CHATTEL MORTGAGES ¶243 — RELEASE — SIGNING BILL OF SALE.

A mortgage lien on a stock of goods is not released by the mortgagee joining in a bill of sale of the goods, it being agreed with the purchasers that it should not be delivered till the mortgage was paid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 508; Dec. Dig. ¶243.]

7. FRAUDULENT CONVEYANCES ¶182—BULK SALE—LIABILITY OF PURCHASER.

Rev. Civ. St. art. 3972, places no personal liability for the debts of the seller on the purchaser of a stock of goods in bulk.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 568-577; Dec. Dig. ¶182.]

8. FRAUDULENT CONVEYANCES ¶182—BULK SALE—RIGHT OF MORTGAGEE.

Though the purchaser of a stock of goods in bulk does not assume a mortgage debt thereon, the mortgagee, not having waived his lien, may foreclose.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 568-577; Dec. Dig. ¶182.]

9. PARTNERSHIP ¶29—BUYING BUSINESS.

Persons, though agreeing to purchase a business and conduct it as partners, do not become partners, so that one can bind the others by contracts or representations, till the purchase is made and the business delivered them; the agreement between them being till then merely executory.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 30-33; Dec. Dig. ¶29.]

Appeal from District Court, Wilbarger County; J. A. Nabers, Judge.

Action by J. F. White against the Eagle Drug Company and others. From the judgment for plaintiff, certain defendants appeal. Reversed in part, and remanded.

Cook & Tant and Geo. W. Garland, all of Vernon, Seay & Seay, of Dallas, and Dedmon & Potter and W. C. Blalock, all of Ft. Worth, for appellants. Berry, Stokes & Morgan and Bonner & Storey, all of Vernon, for appellee.

HUFF, C. J. This suit was instituted in the district court of Wilbarger county by J. F. White, against S. D. Bettis, J. L. De Pauw, A. S. Ross, and A. B. Garland, alleging that the three last-named parties constituted the firm known as the Eagle Drug Company. White sued on a note for \$1,000, executed by S. D. Bettis, dated the 2d day of July, 1912, due October 2, 1912, payable

to the order of J. F. White, bearing interest at the rate of 10 per cent. from date per annum, and 10 per cent. attorney's fees; and also set up a mortgage on a soda fountain and other fixtures in the drug store, which is alleged was duly recorded. It is alleged: About March 20, 1913, De Pauw, Ross, and Garland purchased the drug store from Bettis, who used the trade-name of Eagle Drug Store while conducting the business, that the parties so purchasing had actual and constructive notice of the above debt and mortgage, and that as part of the consideration for said property De Pauw, Ross, and Garland assumed the above note, and that the above debt was one of the listed debts furnished the proposed purchasers by Bettis during the pendency of the trade and was taken in consideration as part of the purchase price, and that they agreed in writing to pay the same, and that they took charge of the store and proceeded to run the same in the name of the Eagle Drug Company. That about the 26th of March, 1913, an execution was levied on the drug store to collect a judgment of about \$1,415.38, and that at said time the purchasers had in a manner taken charge of the store and were then so in charge, with the view of getting familiar with the business and ascertaining the indebtedness against it in order to finally close the sale. That Bettis was unable to pay the judgment and discharge the execution, and that all of the defendants requested White to pay it, which he did. In order to induce White to do so, "It was agreed and understood by and between the plaintiff and all of the defendants that all of the equity or overplus to the said S. D. Bettis, from such sale of such property, after the payment of the listed debts against the same, should be applied to the payment and reimbursement of the plaintiff of the said \$1,415.38 until the same was fully satisfied, and all of the defendants, as a further inducement to plaintiff to pay said \$1,415.38, represented to him that there would be a balance of at least \$1,500 going to defendant S. D. Bettis, after paying all listed debts against said Eagle Drug Company, and that plaintiff should get his money back in a few days from that time, and that J. L. De Pauw, A. S. Ross, and A. B. Garland, as an inducement to plaintiff to get him to pay said \$1,415.38, represented to him and promised him that if he would pay said amount that they would see that he was repaid his said money within a few days from that time out of the price they were paying for said stock of goods," etc. That plaintiff was unacquainted with the facts and relied on the representations and promises so made and paid the money, as requested, and agreed upon, and that such payment was a material benefit to all the defendants. That there was, after paying all of the listed debts and ex-

penses provided for, an equity, approximately \$1,500, which should have been paid to plaintiff or so much thereof as was necessary to pay the amount advanced, with 6 per cent. interest from the 26th day of March, 1913, which De Pauw, Ross, and Garland failed and refused to pay, except the sum of \$503, paid about the 20th of May, 1913.

There is a prayer for judgment on the note, for interest and attorney's fees, together with a foreclosure of the mortgage lien, and also for the balance on the \$1,415.38, the sum advanced after deducting the sum of \$502 paid, leaving a balance of \$863.38. Plaintiff asked for judgment against all of the defendants.

The defendants, appellants herein, J. L. De Pauw, A. S. Ross, and A. B. Garland, denied specifically the assumption of the debts or either of them, or that there was \$1,500 equity belonging to Bettis and specifically denied the allegations in the petition, setting up liability, and that they or plaintiff knew how much equity Bettis had in the drug store at the time of the trade. They specifically alleged, on information and belief, that White was the owner of the drug store and fixtures, alleging that Bettis had conveyed the same to him by a bill of sale. They further alleged: That about the 5th of April, 1913, White and Bettis sold and delivered to these appellees the Eagle Drug Store, and under the contract of sale therefor they were to accept as correct the list of articles and prices thereof composing said stock, as set forth in a certain inventory of said stock, made after the 20th day of March, 1913, and prior to the contract by Bettis and others. That while making the inventory certain goods and articles were sold, and that the cash realized therefrom amounted to \$1,005.45, which was on hand and held in contemplation of the sale; that these appellants would accept said sum of money in lieu of the articles sold. They agreed that the fixtures which had been purchased from Housells and Fain should be fixed at the price as shown by the inventory made by said parties and upon which same was sold to the Eagle Drug Company, and that the remainder of the fixtures were to be the original cost price to the Eagle Drug Company. That these appellants were to pay plaintiff and the said Bettis for said property as follows: They were to assume a certain debt to the Crowds Drug Company, aggregating the sum of \$2,100.98, in satisfaction of which it was understood the Crowds Drug Company had then agreed to accept notes executed by appellants, payable to said company, in the sum of \$300 each (except the last due), and due respectively monthly after date thereof, and appellants agreed to assume and pay certain debts due the Waggoner National Bank of Vernon, Tex., aggregating the sum of \$840, and agreed to pay the sum of \$5,000 cash, or so much thereof as was necessary to amount to the full of said stock and fixtures, and

agreed that the balance over and above said sum be paid in cash, or, if appellants elected, by delivering to Bettis and White their promissory notes, payable to White's order. It was further agreed that appellee and Bettis were to make, execute, and deliver to appellants a good and valid bill of sale, in due form, transferring the goods, and that these appellants, in connection with one A. S. Brice, and defendant Bettis, were to ascertain the amount due each of the various creditors by said Eagle Drug Company, and apply said cash payment to the payment and discharge of each of said creditor's claims, to the extent thereof, if necessary, or as much thereof as was necessary to pay all of said debts, and any balance of said cash, if any, left after paying said debts, was to be paid over to the appellee in satisfaction of any and all interest or claim he held in or to said property. They alleged that the inventory of said stock amounted to the sum of \$5,760.10; that the amount of said cash held was \$1,005.45; that the total amount of fixtures which were purchased from Housells & Fain, as disclosed by the inventory, made by said parties, amounted to \$2,187; and that the full amount of the remainder of said fixtures was \$563. It is alleged that during the pendency of the negotiations that appellant entered into an agreement in writing with Bettis, stipulating that whatever equity Bettis had after the payment of the indebtedness of the Eagle Drug Company, which existed prior to March 20, 1913, and all expenses incidental to the transaction (meaning the sale of the property to appellant) had been paid; that said equity, if any, was to be deposited in the Farmers' State Bank, to the credit of appellee; and it was further provided, among other things, that the \$5,000 cash payment to be paid should be applied, as far as it would go, to the then present indebtedness of the drug store; that the agreement was made the 27th day of March, 1913. It is then alleged that they applied to Bettis for a list of creditors of the company, and that they sent out notices to the creditors under the Bulk Sales Law. They alleged that they discharged the debt assumed to the Crowds Drug Company, and the Waggoner National Bank, and ascertained the debt due on the list, which amounted to the aggregate sum of \$5,284.84; that they paid, under the agreements, certain expenses incidental to the sale, to appellants, aggregating the sum of \$300; that after adding up the list they believed that there was a balance remaining due on the equity of Bettis of \$502.53, and, so believing, paid that amount to White, the appellee. They set up the fact that Bettis and White executed to them a bill of sale for the stock of goods on the 5th of April, and they allege the execution of the bill of sale aforesaid by White, as in effect a release of any claims or lien on the stock of goods sued upon by appellee.

By supplemental petition, the appellee denied generally the allegations in the answer,

and denied that he had any interest in the drug store, and that if there was a bill of sale, executed by Bettis to him, that he knew nothing of it, and that it had never been delivered to him, and that the bill of sale signed by him April 5, 1913, was signed, but not to be delivered until his claim and indebtedness had been fully satisfied, and that the appellants procured the same fraudulently and without his consent, and he denies that there was any agreement made by him on the 20th of March, 1913; that the appellants tried to induce him to sign such contract as a party thereto, but that he refused to do so.

All of the allegations made by the appellants in their answer are denied by the appellee, and the pleadings are so voluminous that we are unable to set them out more at length than above stated.

This case was tried before a jury upon special issues, and upon their answers returned a judgment was rendered with foreclosure as prayed for on the \$1,000 note, together with interest and attorney's fees against Bettis and the appellants, and also a judgment on the account for the sum of \$872.54. From this judgment the appellant herein appealed.

The evidence in this case shows that S. D. Bettis was in charge of the Eagle Drug Company in the town of Vernon, during the year 1912, up to March 20, 1913; that he drew up a contract, dated March 20, 1913, with the appellants herein, to convey to the appellants the drug store, reciting therein that the Eagle Drug Store, a partnership composed of White and Bettis, entered into the contract with the appellant. At the time he signed the contract White was away from home and did not return for some four or five days, and upon his return he was requested to sign the contract with Bettis, which he declined to do for the reason stated by him, that he was not the owner or interested in the drug store. The appellants proceeded, under the Bulk Sale Law, to call upon Mr. Bettis for a sworn statement of the creditors of the store, which he delivered to them and registered notices were sent out to the various creditors, who were scattered over the state, and the United States. While awaiting the required time under the law for answers from the creditors, an execution was issued out of the district court of Tarrant county, on a judgment in favor of J. D. Hagler, against S. D. Bettis, for the sum of \$1,415.38. Before the levy was made Bettis visited White, who lived in the country some distance, and requested White to prevent the levy being made. White called up the sheriff and told him not to levy on the goods. Just what claim White made in the matter at the time he was talking to the sheriff over the phone is not clear from the testimony. However, the sheriff, after procuring an indemnity bond, proceeded to make the levy on the stock of goods, and afterwards White came in and money was procured from him

to pay off the judgment and release the goods from the levy. The trade was then consummated between Bettis and appellants, and it is contended in this case by appellants that White joined with him in making the trade or sale. A bill of sale was executed for the stock of goods by White and Bettis, to appellant, April 5, 1913, which appellant had in possession, but which White contends, and the jury found, was not to be delivered until the debt and claim sued on by him were fully satisfied and discharged. Some time afterward appellant paid to White \$502 and some cents, by check, which White applied on the \$1,415.38. We find in the record no aggregate amount of the inventory of the goods, and there seems to be no evidence of the creditors named in the list furnished by Bettis to appellants during the negotiations. However, the testimony is that after paying all the other listed creditors, and the amounts which were assumed to be paid by appellants, that there was no equity in the goods except \$502. This amount the appellants contend was more than the equity of Bettis in the stock of goods, for the reason that they made some mistake in their calculation. This is simply a general outline of the facts in the case, and the particular facts, together with the several instruments introduced in evidence, will be noticed more in detail in considering the several assignments.

[1] The first and second assignments complain of the action of the court in charging the jury that they should not consider the contract of March 20, 1913, as any evidence of joint ownership of interest in the business between White and Bettis. The ex parte declaration of Bettis, who purported to be the partner of White, in the absence of White, is not admissible for the purpose of proving the partnership or agency. The trial court, we think, correctly instructed the jury that the recitals in the contract, dated March 20, 1913, to the effect that White was a partner in the Eagle Drug Company, could not be considered as evidence to prove partnership. The evidence in the case is that Bettis drew up the contract and signed it for the company, by himself and as manager. White did not, according to his testimony, authorize him to do so, and refused to sign the contract, asserting that he was not a partner, and that the store was not his. *Robinson v. National Bank*, 98 Tex. 184, 82 S. W. 505. The rule is different where the evidence tends to show liability on the part of the partnership. Such declaration is admissible, if allunde the declaration there is other testimony tending to establish partnership. The court did not withdraw the contract from the consideration of the jury on the question of liability if they otherwise found a partnership, but simply told them they should not consider the contract as evidence of the partnership.

[2] At this time we will consider the sev-

enth assignment which is to the effect that the court erred in rendering judgment for the full amount of the note sued on for the reason that the uncontroverted evidence shows that this note was one of the listed claims furnished which was to be paid, and that the \$502.33 should be applied on the note, instead of on the \$1,415.38 claim.

The facts in this case establish, we think, that appellants purchased the Eagle Drug Company from Bettis, and were to pay for the stock of goods at their original cost, for the fixtures at the price fixed by an inventory thereof in a list known as the Houssels & Fain inventory, and for other fixtures at their original cost. The first written contract, which purports to be made by these appellants on the one part and the Eagle Drug Company, a partnership composed of White & Bettis, on the other part, dated March 20, 1913, provided that the stock was to be invoiced "according to correct price list of wholesale dealers in drugs and druggists' sundries." This contract stipulated the sellers should, when the full amount was ascertained, execute a bill of sale, warranting against every claim or debt that could be made or charged against the stock, or against the parties purchasing. The proposed purchasers agreed to pay, when the bill of sale was executed, \$5,000 cash, and the balance, if any, in monthly installments of \$300. This contract further stipulated that when any of the prices affixed to articles are not in accordance with the original cost of the articles, charge should be made so as to correspond with the original cost. These articles as attached appear to refer to the invoice of certain fixtures, theretofore made by Houssels & Fain. About the 25th day of March, 1913, this contract was presented to White for his signature, which he refused to sign, because, he claimed, he was not the owner of the store or a partner therein. The evidence at this point is very conflicting. Appellants contend that when White was informed he would be liable for the debts if he signed the contract he said he would not sign; the appellants contending that unless he (White) would get behind the deal they would not make the trade and they claim they declared the trade off. But it is certain from the evidence that Bettis was called on for a list of the claims against the business, and that he furnished that list, and it is reasonably certain the note sued on was one of the debts on the list furnished. The evidence is not clear whether the list was furnished and notice registered and sent out to the creditors just before or just after White refused to sign the contract.

It is shown by the evidence that about the 26th of March, 1913, the sheriff received an execution, issued out of the district court of Tarrant county, on a judgment in favor of Hagler against S. D. Bettis, for about \$1,415.38, with instructions to levy on the drug

store. Bettis on notice of this fact visited White, who lived in the country, and while there White phoned the sheriff to let the store alone. The sheriff thinks that White claimed to own the goods, but was not certain as to what was said. White admits that he told the sheriff to let the goods alone, and that he had a lien on the goods. He also admits that he knew his lien would not warrant the sheriff in refusing to make the levy. The sheriff procured an indemnity bond, and the evidence indicates the levy was made on the 27th day of March, 1913. Bettis then got White to come into town, and the money was obtained from him, White, to pay off the judgment and release the store from the levy. On the 27th day of March, 1913, White and Bettis entered into an agreement. It is recited therein that an execution issued on a judgment in the district court of Tarrant county, for the sum of \$1,415.38, was that day levied on the goods, and that White, for Bettis, had paid off the judgment, and that the store was transferred to De Pauw, Ross, and Garland. It was recited and agreed between White and Bettis that after the indebtedness should be ascertained and the contract entered into on the 20th day of March, between the purchasers and the Eagle Drug Company, had been complied with, then that whatever equity, if any, after all indebtedness on and prior to March 20, 1913, and all other expenses incidental to said transaction, has been paid, that the equity of Bettis, if any, was to be deposited in the bank to the credit of White until he is reimbursed for the amount paid on the judgment. Bettis also agreed to deposit the notes and accounts of the store in the bank due prior to March 20, 1913, for collection, and that upon collection the amount should be held in the name of White as trustee; and when it should be definitely ascertained how much equity Bettis had in the store funds, it should be applied as far as it would go to the amount so advanced by White; and in case there was no sufficient amount, the remainder was to be taken out of the trust fund, and the balance, if any, after said indebtedness to White shall be paid, turned over to Bettis. "It is further agreed and understood that the \$5,000 cash payment to be paid the said Eagle Drug Company store shall be applied to the payment so far as it will go [to] the present indebtedness of said drug store." The contract is signed by S. D. Bettis and J. F. White.

White admits that De Pauw was present when he and Bettis made the above contract and knew about it. Mr. Cedil Storey, who drew the contract, says that De Pauw was present when the contract was drawn up between White and Bettis, and requested that the last clause above quoted, with reference to the \$5,000, be added in the contract, which was done. White says at that time he did not know either Garland or Ross, and had no rec-

ollection of having seen them, and that whatever representations were made were made to him by De Pauw. The appellants all testified that they did not assume to pay the creditors of the drug store, except in such amount as the goods would amount to. It does not appear to be a controverted fact that the \$1,000 debt was on the list of claims furnished appellants by Bettis. There is no evidence that the \$1,415.38 was on the list of claims furnished by Bettis to appellants. On the 5th day of April, 1913, Bettis and White signed and acknowledged a bill of sale to the appellants to the store, for the recited consideration of \$10,000, \$8,000 cash and the assumption of \$2,100 indebtedness due the Crowdus Drug Company by appellant. This bill of sale the jury found that White understood was not to be delivered until he was paid. Bettis testified by deposition that appellant agreed to assume all of the indebtedness of the Eagle Drug Company, but he also testifies that the invoice of the goods was taken and the price extended from the regular current jobbers' list, and that there was no written agreement to assume the indebtedness of the store. We are unable to determine from this record just what the total inventory of goods and fixtures were and the total value according to wholesale prices. Neither are we able to determine who of the creditors were in the list and the total amount of the listed debts. The appellants swear, and their testimony is uncontroverted, that after paying the listed debts and the Crowdus Drug Company debt, which they assumed, that there was remaining an equity going to Bettis, of \$502.33, which they paid by check on the 2d day of May, 1913, which was payable to the order of White, and that they indorsed in the corner of the check, "Payment in full of account." The jury make no finding as to the value of the goods sold, or the amount of the listed debts.

We have concluded that the contract made by White and Bettis March 27, 1913, required all the debts prior to March 20, 1913, to be paid out of the sale and the consideration for the store; and if there then should be any equity, it should be applied on the \$1,415.38, paid by White for Bettis. The \$1,000 note, with the lien, being one of the debts so due, should first be paid before applying any part of the consideration on the \$1,415.38. The trial court should have applied the \$502.33, as of the date of its payment. The agreement of March 27th amounted to a direction by Bettis and assented to by White, to apply the proceeds of the sale to the other debts designated in the list, one of which was the \$1,000 note, before any of the sum should be applied to the amount advanced by White to Bettis, to release the goods from the levy; and when this payment was made to him, it was his duty to so apply it as he had agreed it should be done. *Merrick v. Rogers*, 47 S. W. 801; *Rugeley v. Smalley*, 12 Tex.

238; *Bank v. Gibbs*, 96 S. W. 947, *Willis v. McIntyre*, 70 Tex. 34, 7 S. W. 594, 3 Am. St. Rep. 574; 30 Cyc. 1237 (f), 1240 (2), 1248 (7 and 8), 1250 (e).

The application should be so made, whether or not appellants assumed the note as part of the consideration for the store.

[3] The eleventh assignment complains of the action of the court in admitting the testimony of Storey as to the discussion he had with White and his opinion as to the effect of the bill of sale of April 5, 1913, and his advice to White, etc. We do not believe this testimony is admissible. If it was agreed between the parties that the bill of sale should not be delivered until the payment of the indebtedness, such fact was admissible, but in the absence of the appellants or either of them, statements made and matters discussed between the attorney and his client should not be admitted. The appellee herein contends the record shows that appellants were present on that occasion. We do not so read the record. There is a general statement made by the witness that the parties, as he understood, agreed, etc. He does not state who these parties were and when and where it was that he so understood. This evidence, as to the presence of the parties by the witness, was entirely too indefinite to admit the discussion between himself and White. *Chilson v. Oheim*, 171 S. W. 1074. The appellee cites the cases of *Security Trust Company v. Stuart*, 163 S. W. 396; *Britt v. Burghart*, 16 Tex. Civ. App. 78, 41 S. W. 390. The testimony complained of in this case does not fall under the rule announced in the cases cited by appellee and recognized by this court in the case of *Memphis Cotton Oil Company v. Goode*, 171 S. W. 284.

The twelfth and thirteenth assignments relate to testimony of De Pauw, offered and excluded. This testimony was admissible under the circumstances in connection with it. The trial court, however, appends a statement to the bill of exceptions showing this testimony was in fact admitted after appellants offered to show and did show White was present. For this reason the assignment is overruled.

[4, 5] Appellants present several assignments, to the effect that the answers of the jury on issues 3 and 4 are uncertain, and fail to answer the material issue in the case; that the answers of the jury did not warrant the judgment of the court on the \$1,415.38 advance sued for, less the credit applied by White, and that the evidence did not support the answers of the jury. The third issue is as follows:

"If you answer the last question in the affirmative, then say whether White was induced to pay said sum by said Du Pauw, if you find he was, by the promise, if you find there was, that said sum in its entirety would be repaid to him by Garland, Ross, and De Pauw; or did De Pauw represent that they would pay White what was left over after other creditors should be satisfied? State fully whether De Pauw made

either of such representations, if so, which? Answer: De Pauw induced White to pay, believing there was sufficient equity out of equity."

Fourth issue:

"If in answer to the last question you say that De Pauw represented that White would be paid out of such money as might be due to Bettis after the other creditors should be paid, then state whether White was induced to part from his money on that occasion, if you find he was, by such representations, if you find there was. Answer: He was."

The jury, by issue 3, was required to answer two questions: (1) Was White induced to pay the sum by De Pauw by a promise that the entire sum would be repaid to him by appellants? Or (2) did De Pauw represent that they would pay what was left over and after other creditors should be satisfied? The jury's answer to these two questions answered neither. The first question required an answer whether White was induced to pay upon an unconditional promise to pay the entire debt. The jury does not answer this question, but they answer White was induced by De Pauw to pay, believing there was sufficient equity. They do not answer that appellants promised to pay that sum in its entirety. The answer of the jury would simply indicate that White was induced to pay by representations that there was sufficient equity to pay, and not that he was induced to pay because of a promise to repay by appellants. The answer of the jury would give, if anything, White a recovery upon deceit. The question propounded called for an answer as to whether there was a contract by appellants to pay—two very dissimilar causes of action. The answer to the fourth issue would indicate that they found White was induced to part from his money by the representation that he would be paid out of such money as might be due Bettis after other creditors should be paid. If this is their finding, then clearly, if there was no money left after paying other creditors, the court could render no judgment in favor of White, for the money so advanced. All that was left was \$502.33, according to this record, and according to the written agreement between White and Bettis it was agreed this should be applied to the debts owing by the business March 20th, and the equity left, after the application so made, should be paid on the sum advanced, as pointed out by us in considering assignment No. 7.

The first question in issue 3 was not raised by the pleadings. Appellee simply alleged that appellants were to pay this advancement out of the "equity" of Bettis. Now, this equity could only be ascertained by paying off the indebtedness against the store. When that was done, the equity remaining, if any, it was alleged should be paid on this sum. There was no recovery sought by the petition for this item upon an unconditional promise to pay; but it is alleged that the equity of Bettis was to be paid to White, and

out of the price appellants were paying for the goods. White also sought a recovery upon misrepresentations by De Pauw as to the value of the stock and the debts against it, and the amount which would be left, going to Bettis. This issue was not submitted to the jury by either of the above questions. These representations, if made, were clearly expressions of opinion. The contract by White and Bettis, on the 27th of March, shows the amount was not then ascertained. Storey's testimony indicates the parties did not then know what would be coming to Bettis after the debts were paid. In one portion of his testimony White said, at the time he signed the contract of March 27th:

"It was understood and I knew that there might not be enough money coming out of the purchase price of this drug store to pay my debt."

We think all these facts indicate that if De Pauw made this representation it was only an opinion, and was not a representation of a fact, and did not purport to be. We therefore think the trial court, under this state of facts, should not have rendered judgment upon a finding by him that De Pauw falsely represented the facts, and thereby induced White to pay out his money. We are satisfied the trial court did not render the judgment upon such a finding, but that he regarded the findings of the jury as sufficient to authorize the judgment. We think the court was in error in rendering judgment on these findings.

The twentieth, twenty-first, and twenty-third assignments complain of the action of the court in submitting supplemental issues Nos. 1 and 2, and the answers of the jury thereto, for the reason that the evidence did not warrant the submission or the answers thereto. The issues are:

"(1) Did J. F. White, the plaintiff herein, accept the check for \$502.33, as a payment on the \$1,000 note? Answer: No.

"(2) Did J. F. White accept the check for \$502.33, as a payment on the \$1,415.38 matter? Answer: Yes."

What we have said in disposing of the seventh assignment will dispose of the above. Appellee, in answer to these assignments, says the contract of March 27th shows that Bettis' equity should be applied on the \$1,415.38. The contract clearly provides that this balance or equity is not to be so applied until all of the debts owing by the Eagle Drug Company prior to March 20th are paid. Bettis was the debtor in this case, and had the right to direct the application of payments, which he did, by his written contract with White, and White thereby assented to it. Appellants knew of this direction and acted upon it. Bettis had given them a list of the debts to be paid; the \$1,000 due White was one of them; the \$1,415.38 was not on the list, and no claim is made that it was. When White accepted the check he did so under his agreement that the list debts should first be paid, and he could not, upon his own

motion, in the face of his written agreement, place it elsewhere.

[6] The twenty-third and twenty-fourth assignments relate to the delivery of a bill of sale, dated April 5, 1913. Objection is made to the finding of the jury to the sixth issue, which finding is in effect that the bill of sale, which was delivered to Sam Hogsett, was to be delivered only after White should have been paid. This objection by appellant we regard as technical and rather hypercritical. The real issue was whether appellants agreed with White that the bill of sale should not be delivered or have effect until he was paid. The issue submitted this question we think substantially. While the evidence is weak, that any such instruction was given to Hogsett by any one, yet if it was agreed that it should not be delivered, the issue submitted would not likely be misunderstood by the jury. This conclusion disposes of the twenty-fourth assignment, to the effect that the bill of sale was a release of the mortgage lien.

[7, 8] The twenty-fifth and twenty-sixth assignments assert the jury were not warranted in finding that appellants assumed the payment of the \$1,000 note. The jury found that appellants assumed the payment of the note. There is some evidence to support the finding. Bettis says the appellants agreed to assume all of the indebtedness of the drug store. It is true that his bill of sale recites the assumption only of the Crowds Drug Company debt. The appellee, in reply, in support of this verdict, refers to testimony to the effect that this claim was listed as one of the debts of the drug store, and we presume that they contend that because listed, it was thereby assumed. It appears to be the construction by the courts of article 3972, Revised Civil Statutes, that if a party purchase in bulk goods the Bulk Sales Law will not impose a personal liability on the purchaser, by virtue of the law itself. *Bewley v. Sims*, 145 S. W. 1076; *Owosso, etc., v. McIntosh*, 179 S. W. 257. It does not occur to us that it was the purpose of the law to penalize a purchaser, who in good faith procures a list of the debts of the seller and gives the required notice, by making him personally liable for all the debts, whether the goods in value are sufficient to pay them or not. In this case the seller and purchaser agreed to the method of finding the value of the goods; that is, they were to pay the cost price as shown by wholesale dealers' price list. This would give the consideration for the goods. We do not see very well how it can be insisted that appellants should pay more than the contract price, and thereby make them personally liable for the debts, over and above that amount. Of course if the agreement was that as a consideration for the goods the appellants assumed the indebtedness and agreed to pay them, they would be personally liable on their assumption. According to this record, if appellants agreed to pay all the debts, and as claimed by Bettis,

pay in addition the \$1,415.38 due by him to White, the appellants were wanting a second-hand stock of goods very much. If the testimony is true that there was only an equity of \$502.33 after paying the listed debts, except the \$1,000 note sued on, they agreed to pay something over \$2,000 more than Bettis priced the goods and agreed to take. Whether they assumed this debt or not, and became thereby personally liable thereon, if White did not waive his mortgage lien, he was entitled to a foreclosure of the same for the amount of the debt, after allowing proper credits and making proper application of payments. This would be allowed him upon establishing his debts against Bettis.

The twenty-seventh assignment will be sustained for reasons given by us in considering the seventh.

[9] The jury found that, when the levy of the execution was made, appellants were partners. They further answered an issue that appellants entered into an agreement to buy the store as partners and run it as such. Appellants had not bought the store when the levy was made. The bill of sale to them was not made until April 5, 1913, and the cash consideration was not paid until some time about the 9th of April. In the petition White does not allege that appellants had purchased the store when the levy was made, but it is alleged they in a manner had taken charge, with a view of getting familiar with the business in order to finally close the deal.

The case appears to have been tried in the court below upon the theory that from the time appellants agreed to purchase the drug business they were partners. The facts in this case appear to be uncontroverted that appellants agreed to purchase the business and pay the original cost price for the goods, and to apply the price paid on the debts of the drug company. Garland was to have and pay in one-half, and the other two one-fourth each. We think until the purchase was made and the business delivered to appellants, they could not be said to be partners. Until this was done the agreement between appellants was an executory contract to form a partnership, and was not a partnership, though it thereafter ripened into a partnership by being launched. The agreement was to enter into a mercantile business; that is, buying and selling goods. Until the business was acquired, the partnership was inchoate or tentative. Until the partnership was launched, one party to the agreement was not authorized to bind the other upon the contracts entered into by him before the consummation of the partnership. *Bates on Partnership*, § 78; 30 Cyc. 358 (g), 522, 523 (14 and 15); *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138; *Rojers v. Nichols*, 20 Tex. 724.

We make the above suggestion for the guidance of the parties in considering the testimony as to representations made by De Pauw. If it was not then a partnership, or if he was not authorized as an agent to make

such representations, and they were not within the scope of his authority, such representations would not bind Ross and Garland, unless they thereafter knowingly ratified the acts of De Pauw.

The judgment as to appellants Garland, De Pauw, and Ross will be reversed and remanded; as to Bettis, who is not complaining in this court, the judgment will be affirmed. The judgment will not be disturbed as to Bettis. Reversed and remanded.

BEHLES v. BLUM et al. (No. 5562.)
(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. Rehearing Denied Feb. 2, 1916.)

APPEAL AND ERROR—§ 1002—REVIEW—VERDICT.

Where the conditions under which an architect was to receive compensation for drawing plans were in dispute, a verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by Ernest P. Behles against Max Blum and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Templeton, Brooks, Napier & Ogden, and Reagan Houston, Jr., all of San Antonio, for appellant. W. H. Kennon, of San Antonio, for appellees.

CARL, J. Appellant sued Max Blum and Mrs. William Flaxman to recover fees for drawing plans and specifications for a house to be erected for Mrs. Flaxman. He alleged that he was to have, by agreement, 3½ per cent. on an arbitrary cost of \$8,000 and that, when it was found that the house designed could not be erected for that figure, they agreed that he should draw another set of plans for which he was to receive \$124.38. Max Blum was the agent of Mrs. Flaxman, his sister, and carried on the negotiations with appellant. The defendants contended that it was a part of the contract that the building was to cost not to exceed \$8,000, including the architect's fees; that appellant, when it was found that it would cost \$10,500, not including architect's fees, to erect the building, agreed to draw another set of plans which would bring it within the total cost of \$8,000; but that he did not finish this second set of plans; and that they would have called for an expenditure exceeding \$8,000. The case was submitted on special issues and the jury found that appellant was to be paid 3½ per cent. on an arbitrary cost of \$8,000, but that, as a part of that contract, appellant agreed that the total cost should not exceed \$8,000. The jury also found that, while appellant was to have \$124.

38 for drawing the second set of plans, still the maximum limit of \$8,000 in the cost was to obtain, and that the building so designed by the second plans could not have been constructed for that sum. They further found that the second set of blueprints were never completed. It was admitted that the building as designed would have cost \$10,500.

In regard to the first plans, the essential thing is whether appellant agreed to design a house that would not exceed in cost \$8,000, notwithstanding the fees were based upon an arbitrary basis of \$8,000, and this the jury found he did agree to do. And it was found that \$2,500 was a material variation. And so with reference to the second set of plans, for the jury found that the cost was there limited to \$8,000, which the plans did not meet.

There is no dispute as to how much appellant was to receive, but there is a serious disagreement as to the conditions under which he was to receive same. The jury has determined that the plaintiff did not meet those conditions, and that is an end of the matter.

We find no error calling for a reversal, and the judgment is affirmed.

HELDENFELS et al. v. SCHOOL TRUSTEES OF SCHOOL DIST. NO. 7, SAN PATRICIO COUNTY. (No. 5544.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. Rehearing Denied Feb. 2, 1916.)

1. EVIDENCE—§ 441.—PAROL EVIDENCE AFFECTING WRITING—BUILDING CONTRACT.

In an action by the contractor to recover the contract price of a school building, where a change from a tile roof to a metal roof was ordered by the architect in writing, stating that there would be no difference in the cost, it was error to admit parol testimony to show an agreement to pay the difference in value between the roofs in variance of the written order, in the absence of participation by the contractor in the alleged fraud of the architect issuing such order.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.]

2. EVIDENCE—§ 320.—HEARSAY—TESTIMONY OF EXPERT.

In an action to recover for materials used in the erection of a school building by the contractor, it was error to allow a witness as an expert to testify to the value of such materials, where he obtained his information from a traveling man, to whom he submitted the specifications a week before the trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.]

3. TRIAL—§ 350.—SUBMISSION OF SPECIAL ISSUES.

It is improper practice to submit numerous special issues to the jury as to evidentiary facts that merely go to establish or prove some real issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.]

4. TRIAL \S 229—INSTRUCTIONS—UNDUE EMPHASIS.

Undue emphasis of the cause of one party by reiteration of charges as to damages is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 513; Dec. Dig. \S 229.]

5. SCHOOLS AND SCHOOL DISTRICTS \S 86—ERECTING BUILDING—BUILDING TAX—ESSENTIAL ALLEGATION.

Where the petition in a contractor's suit against school trustees for the contract price of a building erected by him failed to allege that a tax had been levied for the purpose of creating a fund out of which the contract price of the building might be paid, the petition failed to state a cause of action.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 203-205; Dec. Dig. \S 86.]

6. PRINCIPAL AND SURETY \S 100—CONTRACTOR'S BOND—SCHOOL BUILDING—NEW CONTRACT—DISCHARGE.

Where a bonding company executed a contractor's bond guaranteeing a school building contract with a provision therein that the company should be notified of changes in plans and materials, and subsequently a new contract was entered into between the contractor and the school trustees, involving changes in materials and plans of which the bonding company was not advised, such company was not liable as the contractor's surety under such subsequent contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 162-165; Dec. Dig. \S 100.]

Appeal from District Court, San Patricio County; W. W. Walling, Special Judge.

Action by C. A. Heldenfels against the Trustees of School District No. 7, San Patricio County. Cross-action by defendants against plaintiff, L. W. Franks, and the General Bonding & Casualty Insurance Company. From a judgment that plaintiffs take nothing and for defendants against L. W. Franks, but without recovery against the bonding company, plaintiff and Franks appeal. Reversed in part, and affirmed in part.

J. J. Carmichael and H. S. Bonham, both of Beeville, for appellants. G. R. Scott, Boone & Pope, Claude Lawrence, and Gowan Jones, all of Corpus Christi, and J. G. Cook, of Sinton, for appellees.

CARL, J. C. A. Heldenfels sued the trustees of school district No. 7 in San Patricio county, they being T. D. Cook, J. D. Ezell, and R. L. Anthony, on a certain building contract, entered into on October 12, 1912, between L. W. Franks as contractor and said trustees, wherein the said Franks agreed to erect a school building according to plans and specifications furnished, for the consideration of \$11,425. Franks did not complete the contract, but assigned the same to C. A. Heldenfels and he alleges that he did finish the building, and therefore sued for \$2,212.37 alleged to be due on the contract price. The school board answered by demurrer and by traverse of every material issue, and, in a cross-action, sued plaintiff L. W. Franks, the original contractor, and the General Bond-

ing & Casualty Insurance Company, which had made the bond of Franks. In this answer the trustees allege that Franks abandoned the building and declined to complete same under his contract, and, without the school board's consent, pretended to assign the contract to C. A. Heldenfels. They say they notified Heldenfels that they would not accept the assignment of the Franks contract, but that, notwithstanding this notice, Heldenfels went to work upon the building. They also charge that the architects Stephenson & Heldenfels were in collusion with Franks and C. A. Heldenfels for the purpose of constructing said building out of inferior and defective material; that F. W. Heldenfels, the architect, was a partner in a lumber yard at Beeville with plaintiff C. A. Heldenfels; and that Franks owed Heldenfels Bros. a large bill for lumber, and it was to the interest of said Heldenfels Bros. that the building be constructed as cheaply as possible so that there would be a greater profit in the contract, to the end that Franks' debt could be collected. They say they did not at the time know that their architects were so interested, and that, in fact, F. W. Heldenfels, in approving work and material on the building, was really not acting for the board, but was acting contrary to their and in his own interest, and for this reason they are not bound by any of his acceptances, etc. Various and sundry items of damage and violations of the plans and specifications are alleged. The board further alleged that, if the assignment of the contract by Franks to C. A. Heldenfels was good, then he breached same by abandoning the building before it was completed, and that the defective material and construction damaged them to the extent of \$2,982. The board had employed Marchant & Roberts, architects, to supervise the corrections and the finishing of the building, and they made the above estimate. It is alleged that the plumbing would cost \$1,000, wiring \$150; and that the reasonable value of material and labor necessary to construct outside walks and toilet buildings is \$645, for which Franks should have credit. Also, that the difference between the cost of the tile roof and metal roof which was put on the building was \$520. Or, that the board was entitled to \$1,670 by reason of such changes, etc., less \$645 due Franks by reason of the toilets and walks—a net balance in their favor of \$1,025. It was alleged that the board had paid Franks \$9,900, and that they did not know of these defects, etc., at the time he was so paid. The contract provided that for each day over the time stipulated for the completion of the building Franks was to pay \$5 and for each day under that time he was to receive a like sum. Therefore the board claimed \$4,008 against Franks and the bonding company. Appellants, Heldenfels and Franks, denied these allegations;

and pleaded that the school board was estopped to deny that the contract was assigned, that it acquiesced therein and could not be heard to complain, and that the building was completed; and denied any fraud or collusion between the architects and Franks and Heldenfels Bros.; and pleaded that such changes as were made in the building were made on written order of the school board. The bonding company pleaded that the contract it guaranteed was dated September 21, 1912, and the one that is alleged to have been breached was dated October 12, 1912, and that it was not liable for the breach of such subsequent contract and for changes of which it was never advised. The cause was submitted on special issues, and the judgment entered was that the plaintiffs take nothing, and that the school board recover as against L. W. Franks the sum of \$446.63; but no recovery was had as against the bonding company and C. A. Heldenfels. Heldenfels and Franks have appealed.

[1] The first assignment of error is directed at the action of the court in admitting testimony as to the difference in cost of the tile roof provided in the contract and the metal roof placed thereon, because the change was ordered in writing in which it was stated that there would be no difference from that provided in the contract. The jury found that the value of the changes was not agreed upon, and the allowance to be made for these changes was \$615. And there was a further finding that the architects were guilty of fraud on the school board in supervising the construction and in passing on and accepting material and workmanship in the construction of the building.

F. W. Heldenfels was one of the architects, and C. A. Heldenfels was the man who took over the Franks contract, and in answer to special issue No. 15 the jury found that there was no fraud as between the architects and L. W. Franks. Nor is there any finding that C. A. Heldenfels participated in the fraud of the architects, if they practiced such, on the school board. And, unless he did participate in the same, he would not be chargeable with the fraud. In trying to hold the bonding company, appellees asserted that they had complied with all the conditions of the contract, one of which was that "changes must be agreed upon in writing." This they claim they complied with, and one of the trustees, Mr. Cook, in speaking of these changes, said:

"They (the architects) didn't talk as if they wanted to change it. The change was finally made with their approval. It was in writing."

And F. W. Heldenfels testified that the change in the roof was made over his protest. Cook says that Franks thought there would be \$500 difference between the tile and the metal roof in favor of the school board, but he says that while Heldenfels, the architect, figured on it, he does not recall what his figures were. Heldenfels says he did not make an estimate of the difference

because they said there would be no change in cost. These changes were made upon written orders of the school board, and it was therein stated that there would be no change in the cost, except that in some an additional amount was fixed. Unless C. A. Heldenfels and Franks participated in the alleged fraud of the architect in the issuance of said orders, they had a right to rely on same, and it would certainly be varying the terms of a written instrument to permit Miner to testify to a different agreement from that expressed in the writing. Cook says: "Franks figured to Mr. Miller and me that there would be something like \$500 difference in costs." And the architect swears it was made over his protest. No trustee says that the architects submitted an estimate of the difference in cost. One trustee, however, does say that they had an understanding that when a change was made the proper party should receive credit for the fair and reasonable difference between the work as actually planned and that performed. This, however, was put down in writing and is not to be supplemented by testimony to show a different contract at the time. The assignment is sustained, and for the same reason the second assignment is also sustained.

[2] We think, also, that the objection should have been sustained to the testimony of the witness Holman, as an expert, because he admitted that he got his price from a traveling man. He says the drummer knew the articles to give him prices on from the specifications, and says that these prices were given him only the week before the trial. He did not ask the gentleman of the road what those prices were a year before or at the time the work was done. Such testimony should have been stricken out when it developed that the witness was merely telling what a man had told him and that not at the time of the alleged breach of the contract.

Upon another trial of this case, if it should be determined that the architects and the contractors were in collusion for the purpose of defrauding the school board and by reason thereof induced the signing of orders which may thereby be avoided on account of such fraud, then, in the event of such finding, it would be proper to submit to the jury to find to what extent the board had been injured by reason thereof; but, unless that fraudulent collusion be established, the contracts or written orders would speak for themselves.

[3] There were 40 special issues submitted to the jury, and they so overlap and conflict that it is a very difficult matter to ascertain just what the jury meant. For instance, the jury finds that deviations were made from the plans and specifications; that these changes were in some instances on written order of the board, and approved

by the architects; that the change in cost was not always stated; that the damage on December 1, 1913, on account of defects resulting from a variance from the original plans, was \$1,975; that the trustees are entitled to liquidated damages at \$5 per day under the contract for 100 days; that the total cost of correcting the defects pointed out by the trustees would have been \$1,175; and then the difference between the value of the building as it was at the time of the trial and when Heldenfels claimed to have completed it is \$995. And, further, that a fair and reasonable allowance for emitting the plumbing and fixtures is \$400, that a fair and reasonable cost of completing the toilets is \$600, and that the difference in cost of the tile roof and metal roof is \$500.

[4] We have heretofore, on different occasions, condemned the practice of submitting a multitude of issues to the jury, especially on those evidentiary matters that merely go to establish or disprove some real issue. *Railway Co. v. Jenkins*, 172 S. W. 984; *Agulnaga v. Medina Valley Irrigation Company*, 168 S. W. 79. Neither should the court, by reiteration of charges as to damages, unduly emphasize the cause of one party. We therefore sustain the sixth assignment.

We cannot write this opinion properly and follow strictly the order of the briefs. What we shall do is to state our views and then the parties may apply them as may be required upon another trial.

The important thing to determine, first, is whether there was collusion between the architects and Franks or C. A. Heldenfels as against the trustees to such an extent as to vitiate such written modifications and changes in the original contract so as to make them not binding on the board. And when this is determined then it becomes material as to the amount of damages resulting therefrom. It would be material, of course, to inquire what the damage was by reason of defective material and workmanship actually placed in the building up to the time the contractors turned it over or quit the building, and what it would cost to complete the same according to plans and specifications. And if the written orders for changes should be found not binding because of fraud as before indicated, then it would be material to inquire as to the agreement with reference to the cost of such changes; but, unless they first be found as obtained by fraud, the contractor participating, they speak for themselves.

If there were deviations from the original plans and specifications, it would be material to inquire whether same were authorized by the board, and, if they were not, then as to the difference in cost, etc.; but this would not apply to that part finished, because that would be covered in the general finding as to the difference between the value of the build-

ing if the work and material had been as specified and that actually placed therein. And as to whether the board unreasonably delayed making complaint if the testimony is such as to make it an issue as to whether the terms in the contract in regard thereto did not apply. Another inquiry might be as to whether the extensions granted by the architects (if they should be in the record) were done in fraud of the rights of the board, for, if they were not, they would be binding on the board under the contract. The contractor claims that he finished the building in December. At any rate, he quit it then, and it occurs to us that the board's damage then was the difference between what they contracted to get and what they actually received.

[5] Appellee school trustees have a cross-assignment of error to the effect that the court erred in overruling a general demurrer to plaintiff's petition because same failed to allege that a tax had been levied for the purpose of creating a fund out of which the contract price of the building might be paid. It has often been held that a petition which fails to make such allegation does not state a cause of action. *School Dist. v. National Bank*, 163 S. W. 340; *McNeal v. City of Waco*, 89 Tex. 89, 33 S. W. 322; *Peck-Smead Co. v. City of Sherman*, 26 Tex. Civ. App. 208, 63 S. W. 340; *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263.

[6] The contract which the bonding company guaranteed was dated September 21, 1912, and the contract upon which recovery was had was dated October 12, 1912. The bonding company knew nothing about the various changes made, and it was provided that it should be advised of such changes. When that company guaranteed the contract or became surety, it did so in reference to the one dated September 21, 1912, as found by the jury, and did not undertake to make good a contract subsequently entered into by the board without its knowledge or consent; nor can it be held liable for changes of which it was not advised.

As between the school board and appellants, the judgment is reversed and the cause remanded; but, as to the bonding company, the judgment is affirmed.

SAN ANTONIO BREWING ASS'N v. SIEVERT. (No. 5563.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. Rehearing Denied Feb. 2, 1916.)

1. MASTER AND SERVANT §101, 102—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES OF MASTER.

It is the master's duty to exercise ordinary care to render the place for work reasonably safe for his servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §101, 102.]

2. MASTER AND SERVANT ⇨226—INJURIES TO SERVANT—LIABILITY OF MASTER—CARE AS TO PLACE OF WORK—ASSUMPTION OF RISK.

While the master is not liable for failure to provide a reasonably safe place for his servants to work where the very progress of the work renders it impossible to supply a safe place, he is still bound to exercise ordinary care, since the servant working in such a place does not assume the risk of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. ⇨226.]

3. MASTER AND SERVANT ⇨235—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES OF SERVANT—INSPECTION.

A servant is not required to inspect the place provided him to work for the purpose of discovering concealed dangers, though they might be disclosed by superficial observation, but he can assume that the master has provided him a safe place and safe appliances with which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. ⇨235.]

4. MASTER AND SERVANT ⇨124—INJURIES TO SERVANT—LIABILITY OF MASTER—INSPECTION.

Where the danger of a place to work arises from the work itself, and there is no evidence that the master had knowledge of the danger, or was, by the length of time it had existed, charged with knowledge of it, the mere failure to inspect does not determine his liability, since it must first be shown that he had an opportunity for inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. ⇨124.]

5. MASTER AND SERVANT ⇨124—INJURIES TO SERVANT—LIABILITY OF MASTER—INSPECTION—SUFFICIENCY.

The duty of the master to inspect the place to work is not a continuing duty requiring inspection from time to time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. ⇨124.]

6. MASTER AND SERVANT ⇨177—INJURIES TO SERVANT—LIABILITY OF MASTER—ACTS OF FELLOW SERVANTS.

Although the master's duty to furnish a safe place to work is nondelegable, he is not liable to an injured servant when the place of work is made temporarily dangerous by the act of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. ⇨177.]

7. MASTER AND SERVANT ⇨107 — INJURIES TO SERVANT—LIABILITY OF MASTER—RISKS OF OPERATION.

The master is not liable for failure to provide a safe place to work when such failure results from a risk of operation, but that liability attaches only on failure properly to construct or provide a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. ⇨107.]

8. MASTER AND SERVANT ⇨201—INJURIES TO SERVANT — LIABILITY OF MASTER — SAFE PLACE.

Where a servant was injured by the falling of a barrel from a stack carelessly piled by a fellow servant, near which he was ordered to work, and there was no evidence as to when the barrels were stacked, or that the master had notice of the danger, or that the utmost diligence

would have disclosed the danger, the court should have instructed that the injury resulted from the negligent act of fellow servants, and not from the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. ⇨201.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Julius Sievert against the San Antonio Brewing Association. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Newton & Newton and Terrell, Walthall & Terrell, all of San Antonio, for appellant. Harris & Newton and Will A. Morriss, all of San Antonio, for appellee.

FLY, C. J. Appellee sued appellant for damages, alleging that he was its employé, and that while in performance of the duty of removing bungs from beer barrels, a barrel fell from a stack of such barrels striking and breaking his left hand. It was alleged that it was the duty of appellant to furnish appellee a safe place in which to work, but that it negligently placed appellee too near where barrels were stacked in a loose, careless, and insecure manner, and that they were stacked at too great a height and could be jarred or shaken down. Appellant denied that it had been negligent, and pleaded assumed risk, contributory negligence, and that the injury was caused by the act of a fellow servant. The cause was tried by jury, resulting in a verdict and judgment for appellee in the sum of \$5,000.

The evidence showed that appellee was an employé of appellant; that he was ordered to a certain place in the building of appellant to remove bungs from certain barrels; that while so engaged a barrel fell and struck and disabled his left hand. No one was working near appellee. The evidence fails to show how long the stack from which the barrel fell had been stacked. The barrels were stacked by fellow servants of appellee.

[1, 2] It is the duty of the master to exercise ordinary care to render the place for work reasonably safe for his servants. This rule applies to this case, but there are facts in the case that tend to bring it within that rule which provides that, when the very progress of the work renders it impossible to supply a safe place in which the servant can work, the master may not be liable. In such a case the master is not relieved from the exercise of ordinary care, and, where the work itself creates danger, the master cannot absolve himself from liability for any dangers arising solely from a failure to exercise ordinary care. In other words, the servant, even while working in a dangerous place, does not assume the risk of the master's negligence. In this case appellee claims that he was not working on the stack of barrels from which the barrel fell, and the evidence does not

show anything to put him on notice that there was any danger from the stacks of barrels standing near where he was working. He had never known a barrel to fall from a stack except when it was knocked down by other barrels being thrown against it, and no one, according to his testimony, was near the barrels when he was injured.

[3, 4] As a general rule, the servant is under no obligation either to inspect the place by which his safety may be affected, or to endeavor to discover concealed dangers, which would be disclosed by superficial observation. He can act on the assumption that his master has put him in a safe place and furnished him with safe instrumentalities with which to perform his work. The duty of inspection did not rest upon him. It was the duty of the master to inspect the premises where he had his servant employed, and ascertain whether there was danger in him working near the barrels. This rule would not apply, however, in a case where the danger arises from the work itself, and there is no evidence that the master had knowledge of the danger, or was, by the length of time the danger had existed or other circumstances, charged with a knowledge of the danger. The duty of inspection rests upon the master, but there must be evidence tending to show that an opportunity for inspection arose before the accident happened.

[5, 6] There is a rule that the master is not under obligation to examine into the condition of his appliances from time to time for the purpose of ascertaining whether they expose the servant to those elements which arise from the manner in which the details of the work are carried out. *Lebatt, Mast. & Serv. § 1066*. It is true that the duty of the master to use reasonable care to furnish a safe place in which his employes can work is nondelegable, but that doctrine does not require the utter overthrow of the rule as to fellow servants and make the master liable to a servant although the place was made temporarily dangerous by the act of a fellow servant. As said by the Supreme Court of Minnesota, in the case of *Fraser v. Lumber Co.*, 45 Minn. 235, 47 N. W. 785:

"When it is considered that, where numerous employes are all engaged in prosecuting the same general object, there is hardly one of them whose duties do not, in part at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically abrogate the whole doctrine of 'common employment.'"

Speaking on this subject, the Court of Appeals of New York, in the case of *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, held:

"Under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts before this have been made to deprive a defendant of another equally well settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the neglect of a competent co-employé."

[7] The cases unite in holding that the nondelegable duty of the master in reference to providing a safe place in which to work is one of construction and provision, and not one of operation, and a master is not liable for a risk of operation, but only for those of construction or provision. *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; *Coal Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *McGrath v. Thompson*, 231 Pa. 631, 80 Atl. 1109; *Ponelli v. Steel Co.*, 64 Wash. 269, 116 Pac. 864; *Henry v. Railroad Co.*, 140 Mich. 446, 103 N. W. 846; *Conner v. Draper*, 182 Mass. 184, 65 N. E. 39; *Durst v. Carnegie Steel Co.*, 173 Pa. 162, 33 Atl. 1102.

It was held, in the case of *Meehan v. Splers*, 172 Mass. 375, 52 N. E. 518, that the master is not bound to protect the servant against transitory perils. This is the theory upon which these cases rest:

"Upon the evidence, the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used."

The law is thus stated by the Supreme Court of Michigan in the case of *Wickham v. Railway*, 160 Mich. 277, 125 N. W. 22, 52 L. R. A. (N. S.) 1082, 136 Am. St. Rep. 436, Ann. Cas. 1913E, 1069:

"The authorities cited by the plaintiff relate to the rule that the master in the performance of the nondelegable duty of providing a safe place for his employes to work cannot invoke the defense of fellow servant to evade liability. This is a sound doctrine when applied to situations where the master has failed to provide a reasonably safe place to work, or has failed to supply reasonably safe appliances. It does not follow, however, that the employer can be held responsible for the transitory negligent act of a coemployé of the plaintiff, which negligence occurs in the use of a proper tool or instrumentality in a negligent manner, where the defendant in the nature of the case could have no knowledge of the condition, or the act of the fellow servant."

The authorities are overwhelming on this subject, and they are practically followed in a recent decision by the Supreme Court of Texas. *Telephone Co. v. Sanders* (Sup.) 173 S. W. 865. To the same effect are the following Texas cases: *Railway v. Farmer*, 73 Tex. 85, 11 S. W. 156; *Wells Fargo Co. v. Page*, 29 Tex. Civ. App. 489, 68 S. W. 528. In the *Farmer Case*, as in this, there was no complaint of any defect in the floor or any other part of the house in which appellee was working, but the negligence consisted in the improper stacking of certain lumber, and the Supreme Court said:

"In the case before us there is no complaint of any defect of machinery, or of a want of care in the employment of any servant whose negligence caused the injury. The car upon which the lumber was loaded was neither defective nor

out of repair. The negligence consisted in loading the lumber in an improper manner."

The court held that Farmer had no cause of action.

[8] In this case there is no allegation or proof that the place furnished by appellant was not a reasonably safe one, and the sole ground of negligence is the improper piling of the barrels. The piling was admittedly done by fellow servants. There is no evidence as to when the barrels were stacked. There is no evidence tending to show that appellant had any notice whatever of the dangerous condition in which the barrels were stacked, or that the utmost diligence would have disclosed such dangerous condition. The only evidence as to the time when any of the barrels were stacked is that the pile upon which appellee was working had been there for about three days, and that it had been there longer than any of the other stacks. Did the master know the unsafe condition of the barrels at the time that appellee was ordered to work near them, if he was so ordered, or were the circumstances such as to charge appellant with knowledge of the condition of the barrels? The evidence fails to answer. It merely shows that appellee was injured by the negligence of fellow servants, and not by any negligence of the master. The court should have so instructed the jury.

The judgment is reversed, and the cause remanded.

SAN ANTONIO, U. & G. R. CO. v. GREEN et al. (No. 5572).*

(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. Rehearing Denied Feb. 2, 1916.)

1. DAMAGES — 173 — PERSONAL INJURIES — EVIDENCE — ADMISSIBILITY — PECUNIARY CONDITION.

A brakeman suing for injuries in coupling cars could show the amount he was capable of earning, and had earned with other companies in the past.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. —173.]

2. DAMAGES — 166 — PERSONAL INJURIES — EVIDENCE — ADMISSIBILITY — PAIN AND SUFFERING.

In a brakeman's suit for injuries in coupling cars, evidence as to what was done to his injured leg after the accident was admissible to show his pain and anguish.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478, 479, 481; Dec. Dig. —166.]

3. TRIAL — 253 — INSTRUCTIONS — IGNORING ISSUES.

In a brakeman's action for injuries in coupling cars, a requested instruction denying his right to recover, if he was contributorily negligent, whether the defendant was negligent or not, was properly refused, since it ignored the state and federal statutes on comparative negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 618-623; Dec. Dig. —253.]

4. APPEAL AND ERROR — 1033 — ERROR FAVORABLE — INSTRUCTIONS.

In a brakeman's action for injuries in coupling cars, where the court instructed that if the injury resulted from plaintiff's negligence he could not recover, defendant could not complain of the refusal of his requested instruction that plaintiff could not recover if he was negligent whether defendant was negligent or not; the instruction given being more favorable than defendant was entitled to have.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. —1033; Trial, Cent. Dig. § 587.]

5. MASTER AND SERVANT — 289 — INJURIES TO SERVANT — VIOLATION OF RULES — QUESTION FOR JURY.

In a brakeman's action for injuries in coupling cars, it is not error to refuse a requested instruction making it negligence for the brakeman to disobey a company rule; such a rule not having the effect of a statute, and its violation not being negligence per se.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. —289.]

6. APPEAL AND ERROR — 1033 — ERROR FAVORABLE — INSTRUCTIONS.

In a brakeman's action for injuries in coupling cars, where the court charged that he could not recover if his negligence caused the injuries, defendant could not complain of the refusal of its requested charge on comparative negligence, which was less favorable than the charge given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. —1033; Trial, Cent. Dig. § 587.]

7. NEGLIGENCE — 101 — INJURIES TO SERVANT — LIABILITY OF MASTER — COMPARATIVE NEGLIGENCE.

A brakeman's action for injuries in coupling cars cannot be wholly defeated by a showing of his greater comparative negligence, unless his negligence alone caused the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. —101.]

8. MASTER AND SERVANT — 203 — INJURIES TO SERVANT — ACTIONS — DEFENSES — ASSUMPTION OF RISK.

Assumption of risk causing his injury will defeat an injured brakeman's action for damages for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. —203.]

9. NEGLIGENCE — 101 — INJURIES TO SERVANT — ACTIONS — DEFENSES — CONTRIBUTORY NEGLIGENCE.

Contributory negligence of a brakeman will not defeat his action for the injuries received in coupling cars, where the company was also negligent, but merely reduces the amount of his recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. —101.]

10. DAMAGES — 182 — PERSONAL INJURIES — EXCESSIVE DAMAGES.

A verdict of \$18,000 damages for loss of a brakeman's leg while coupling cars is not excessive merely on the ground of comparative negligence, where intense suffering is shown, and plaintiff is a young man, especially where a proper instruction on contributory negligence was given and the jury absolved him of such negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 872-885, 396; Dec. Dig. —182.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

Error from District Court, Bexar County; S. G. Tayloe, Judge.

Action by T. H. Green against the San Antonio, Duvalde & Gulf Railroad Company, in which Duval West was made a party by amendment pendente lite, as receiver for the defendant company. From a judgment for plaintiff, defendant brings error. Affirmed.

Williams & Hartman, of San Antonio, for plaintiff in error. C. O. Harris, Perry J. Lewis, Champe G. Carter, Randolph L. Carter, and H. C. Carter, all of San Antonio, for defendants in error.

FLY, C. J. This is a suit instituted by T. H. Green, originally against the plaintiff in error, but afterwards amended to make Duval West a party who had pendente lite been appointed receiver of the railroad by the federal District Court, to recover damages alleged to have accrued to said Green by reason of the negligence of said railroad company in crushing his right leg between two cars, while he was engaged in making an air coupling, which it was his duty to make, as a brakeman, in the employ of plaintiff in error. Plaintiff in error pleaded assumed risk and contributory negligence. The cause was tried by jury, resulting in a verdict and judgment in favor of Green as against plaintiff in error in the sum of \$18,000, and against Green as to the receiver.

The evidence justifies the conclusion that T. H. Green was permanently disabled through the negligence of plaintiff in error, in backing a car upon him while he was engaged in the duty of coupling two cars. He was not guilty of contributory negligence and did not assume the risk.

[1] The first assignment of error is overruled. Green showed that he was a railroad brakeman, and it was proper for him to show what he had received when he worked, as a brakeman, for another railway company. As to that part of the assignment relating to what is denominated "the standard wage," there is nothing in the record to show that any such evidence was admitted. Evidence as to what a man was capable of earning and had actually earned in the past and with other companies would be permissible. *Railway v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666; *Railway v. Murphy*, 49 Tex. Civ. App. 586, 109 S. W. 459; *Wells-Fargo Co. v. Benjamin*, 165 S. W. 120.

[2] The second assignment of error attacks the action of the court in permitting any testimony as to what was done to Green's leg after the accident. There is no merit whatever in the assignment. The testimony did not tend to establish a different case from that alleged, and was perfectly legitimate to show the pain and anguish that was suffered by the injured party. The assignment of error is overruled.

[3, 4] Through the third assignment of error

the plaintiff in error assails the action of the court in refusing to give a special charge presenting contributory negligence on the part of Green. The charge required a verdict for plaintiff in error regardless of whether it was guilty of negligence or not, ignoring the state and federal statutes on comparative negligence, and was properly refused. At the request of plaintiff in error, the court did instruct the jury as follows:

"You are instructed that, if you believe from the evidence that the injury to the plaintiff was caused by his own negligence, then you will return a verdict for the defendant."

Plaintiff in error in that instruction obtained more than it was entitled to under the law, and cannot be heard to complain that the error in its favor was not repeated.

[5] The fourth assignment of error complains of the refusal to give a charge in which it was made negligence on the part of the brakeman to disobey a rule formulated by plaintiff in error. The charge did not embody the law. It is not negligence per se to violate a rule promulgated by a railroad corporation. The rules of a railway corporation do not have the effect of the statutes of a commonwealth. *Railway v. Bodie*, 32 Tex. Civ. App. 168, 74 S. W. 100; *Railway v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441. The charge was in other respects on the weight of the evidence.

[6, 7] The charge on comparative negligence, the rejection of which is complained of in the fifth assignment of error, is in direct conflict with a charge herein copied which was requested by plaintiff in error and given by the court. We fail to see how plaintiff in error could be injured by a refusal to give a charge which, in case of negligence of plaintiff in error greater than that of Green, might permit a verdict against it, when one was given which absolutely precluded Green from a recovery if he was guilty of any contributory negligence. Plaintiff in error presented irreconcilable charges on negligence to the court, and there is no ground for complaint that all were not given, and especially in face of the fact that the court selected the most favorable charge to it and gave it to the jury. The question of whether the negligence of the injured party was the proximate cause or in any way contributed to his injury was completely ignored in the charge. The charge failed to give the proper definition of "comparative negligence." The injured party could not be deprived of all damages because his negligence was greater than that of the railway company. In order to defeat a recovery under the rule of comparative negligence, the contributory negligence must be the sole cause of the accident. *Pope v. Railway* (Sup.) 155 S. W. 1175; *Railway v. Moya*, 173 S. W. 608. In the last-cited case the opinion was written by the Chief Justice of this court, although credited in the report to the Chief Justice of the Third Court of Civil Appeals.

[8, 9] The sixth assignment of error is over-

ruled. The contributory negligence of the injured party did not preclude a recovery. Assumed risk would preclude such a recovery, and the court so informed the jury in his main charge. In a special charge requested by plaintiff in error, the jury was told that Green could not recover if he was guilty of contributory negligence, and under the two charges the jury must have found that he did not assume the risk and was not guilty of contributory negligence. Contributory negligence is not a defense for a railroad company, when it is also guilty of negligence; it merely lessens the damages. This phase of the matter was properly presented in the charge of the court, and the rule of comparative negligence properly given.

[10] The verdict is claimed to be excessive merely on the ground of comparative negligence on the part of Green. The jury found that he was not guilty of contributory negligence, and therefore the contention is without foundation or basis. The court instructed the jury:

"However, if you find from the evidence that plaintiff was guilty of contributory negligence, as alleged by the defendant, then such contributory negligence will not defeat his recovery; but the damages which you may award the plaintiff should be diminished in proportion to the amount of negligence, if any, attributable to the plaintiff."

Of course, that charge was based upon the hypothesis of a finding that plaintiff in error had been guilty of negligence which resulted in injury to Green. No request was made for an instruction that, if the contributory negligence of Green was the sole cause of the injury, he could not recover. Under the facts, the verdict was not excessive. Defendant in error Green, a young man, is maimed for life, and suffered, and is suffering, greatly.

The judgment is affirmed.

BURTON et al. v. STAYNER. (No. 5565.)*
(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. Rehearing Denied Feb. 2, 1916.)

1. USURY § 75—NATURE OF USURY.

Where the original transaction was usurious, that vice will follow a debt based on such usury in whatever form it may assume.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 148; Dec. Dig. § 75.]

2. USURY § 37—AGREEMENTS—WHAT CONSTITUTE—"INTEREST."

Where plaintiff invested a sum of money in a land deal under an agreement providing after deduction of the expenses for payment of the principal and twice the amount thereof as profits, in case there were profits, such agreement is not in violation of the usury statutes, the provision for payment of profits not being for the payment of "interest," defined by Vernon's Sayles' Ann. Civ. St. 1914, art. 4973, as the compensation allowed by law or fixed by the parties for the use of money, for in case there

were no profits plaintiff would be entitled to nothing.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 92; Dec. Dig. § 37.]

For other definitions, see Words and Phrases, First and Second Series, Interest.]

3. CONTRACTS § 32—ACTIONS—DEFENSES.

Where defendants wholly repudiated their agreement to invest a portion of the profits to which plaintiff was entitled in another transaction in a second deal, claiming that plaintiff was entitled to nothing, an action by plaintiff to recover the amount to which he was entitled under the first deal cannot be defeated on the ground that it was not then due.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1511, 1585-1588; Dec. Dig. § 329.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by F. L. Stayner against E. O. Burton and another. From a judgment for plaintiff, defendants appeal. Affirmed.

A. J. Bell and R. L. Robertson, both of San Antonio, for appellants. John De Berry Wheeler, of Aransas Pass, and Gillette & Robertson, of San Antonio, for appellee.

CARL J. Appellee Stayner sued Burton & Danforth, and recovered a judgment for \$5,000 as the principal of an investment made by said firm in what was known as the "Falfurrias Deal." This cause is based upon the following proposition, which was accepted by appellee:

"Burton & Danforth.

"San Antonio, Tex., April 18, 1910.

"Mr. F. L. Stayner, Peoria, Ill.—Dear Stayner: We have invested for you \$5,000.00 on the Aransas Pass account in the Falfurrias proposition on the guarantee of 50 per cent. profit according to the talk we had with Holmes. This will be in lieu of a contract and will cover the matter. I can make a separate agreement if you wish it. It is going pretty well now, and should be closed up this year.

"Yours sincerely, Burton & Danforth,
"E. O. B."

This matter grew out of a prior deal whereby Burton & Danforth induced appellee to invest \$5,000 in what was known as the Aransas Pass deal, whereby he received \$10,000 profits on the investment. That first contract is as follows:

"Burton & Danforth hereby acknowledge receipt of \$5,000.00 (five thousand dollars) from F. L. Stayner to be invested in the Aransas Pass townsite and farm lands in Aransas and San Patricio counties, Texas.

"It is mutually agreed that F. L. Stayner is to have his principal repaid and ten thousand dollars from the profits of the deal, which \$15,000.00 is to be full payment for his interest in the deal.

"The proceeds of sales shall be applied as follows: First, to pay commission to agents and operating expenses; second, the land shall be paid out in full; third, the principal of \$5,000 shall be returned to F. L. Stayner; and, fourth, the \$10,000.00 profits shall be paid him.

"F. L. Stayner is to be agent in Illinois with a commission of 20 per cent. on sales made by him or his agents, payable in full on cash sales, and on installment sales \$10.00 from

first payment and \$5.00 each from second and third payment."

When the Aransas Pass deal was closed, appellants paid Stayner the \$5,000 invested, paid him \$5,000 in stock in the Aransas Pass Channel & Dock Company, and then, by agreement, invested \$5,000 of the profits in the Falfurrias deal, as indicated in the first instrument copied herein.

Appellants contended that: (1) The contract of 1908, whereby the \$5,000 was originally obtained from Stayner, was usurious, and he could not recover any more than the principal, which he had already received; (2) that the agreement to invest \$5,000 in the Falfurrias deal was void because they had no money belonging to Stayner except the usurious interest on the first deal, or Aransas Pass deal, and therefore any contract based on that as an investment was without consideration and void; and (3) if Stayner was entitled to recover said \$5,000 in the Falfurrias deal, he was not entitled to a judgment for his money, but only to an interest in the property, because said property had not been closed out, but was still on hand.

Appellee denied the usury, and alleged that it was an investment he made under a guaranty of certain profits; that he ran the risk of losing his principal invested, and, no matter how much profits were made on the deal, he was limited in the profits he might receive. He further alleged that the Falfurrias deal had been closed and the land sold.

[1, 2] We shall first investigate as to whether the first contract was an usurious interest loan, or simply an investment; because it is immaterial whether the Falfurrias deal was usurious or not, for he only sued for the principal and made no effort to collect the 50 per cent. profit therein guaranteed him. And if the \$5,000 therein invested was not usurious interest, but was legitimate capital, Stayner would have the right to collect the principal even under the usury statutes.

It will be observed that there is no guaranty in the Aransas Pass contract that any certain profit will be made, nor even that the principal will be repaid; but a method is provided whereby appellee is to be paid the capital invested and his profits before Burton & Danforth got anything. The land must first be paid for, and the expenses of sales, before Stayner receives anything, and if the land had not sold for more than enough to pay expenses, commissions, and for the purchase price of the land, there is no provision for the repayment of Stayner's money. He testified that he did not know whether he would have been liable for assessments, if the deal had not been a success; "but it was generally understood, if it did not pay out, we would lose our investment." In other words, if Burton & Danforth did not make a success, he would lose his investment.

It is true that, if the original transaction be tainted with usury, that vice would follow the debt in whatever form it might assume. *First National Bank of Montague v. Wayburn*, 81 Tex. 57, 16 S. W. 554; *Bank v. Ledbetter*, 34 S. W. 1042. But profits are not the same as interest. "Profit" is the gain made on any business or investment when both receipts and disbursements are taken into consideration. It is the net gain over and above the capital invested after expenditures are deducted. As defined by our statute (article 4973, Vernon's Sayles' Civil Statutes:

"Interest is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money."

It contemplates that both the principal and agreed rate of interest shall be returned to the lender.

But in this case there is no element of interest. If the undertaking were a success, and the Aransas Pass deal proved to be such, he was to receive his investment of \$5,000 and profits to the extent of \$10,000 if they made it. This was guaranteed to the extent that Burton & Danforth was to receive nothing until that was paid. But if the real profits on the \$5,000 investment amounted to \$20,000, Stayner did not share beyond \$10,000. If it had been a failure, the testimony is ample to sustain a finding that Stayner would have lost the money invested. He said he was not able technically to define his situation as to his liability for assessments, but they did consider that he would lose his money if the enterprise should not be a success. Under the usury statutes, the principal may be recovered; but in this case the principal could not be recovered unless the proceeds of the enterprise were sufficient to pay it. And so we say that under our statutes this is not an interest transaction, but a mere business venture in which appellee staked his \$5,000 in the hope of reaping large profits therefrom.

The contract says they received \$5,000 to be invested in the Aransas Pass townsite and farm lands. Suppose the venture had been a failure and they had not been able to more than pay expenses and for the land, and Stayner had sued for his \$5,000, would he not have been met with the plea that he had invested his money with them and there was nothing left with which to pay him? And if he had sued for his \$10,000 profits, and no profits had been made, would that not have been a complete defense to his demand? Burton & Danforth could have said that, "Under the contract you have no just claim, because we did not make any profits."

It is admitted that the profits were made on the Aransas Pass deal, and were paid by dock company stock and by the investment of \$5,000 in the Falfurrias deal. This \$5,000 so invested at Falfurrias, then, was legitimate capital invested for appellee, and we need not discuss whether this contract was

usurious, because only the principal was recovered, and no interest was paid on that.

[3] There is nothing in the contention that the debt, if valid, could not be recovered because not due, for the reason that the Falfurrias deal had not been closed; the land still being on hand. Appellants repudiated any interest appellee had in that matter and asserted that he had no interest whatsoever therein. They sold that land and afterwards took it back and received a good deal of property in the transaction in addition. But this we need not inquire into, because appellants denied that appellee had any interest in that deal whatsoever.

The judgment is affirmed.

DEWEES et al. v. NICHOLSON et al.*
(No. 5561.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 5, 1916. Rehearing Denied
Feb. 2, 1916.)

1. TRESPASS TO TRY TITLE — EQUITABLE TITLE—BURDEN OF PROOF.

Where plaintiffs in trespass to try title were asserting an equitable title which they contended was acquired on account of transactions with a defendant who had conveyed the legal title to other defendants, the burden was on plaintiffs not only to prove such equitable title, but also that the first defendant's grantees had notice thereof, or that they did not pay value for the land bought by them.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 53; Dec. Dig. ¶ 58.]

2. EVIDENCE — WEIGHT—TESTIMONY OF PARTY.

In trespass to try title the unsupported testimony of a defendant alone was legally sufficient to sustain a verdict that the tract of land involved, part of a larger tract conveyed to defendant and by him, with the exception of the tract in litigation, conveyed to plaintiffs, did not belong, by way of a trust agreement, to plaintiffs under their agreement with defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. ¶ 589.]

3. TRESPASS TO TRY TITLE — INTENTION OF PARTIES TO CONTRACT—SUFFICIENCY OF EVIDENCE.

In trespass to try title, evidence held sufficient to warrant a finding that a defendant and plaintiffs never intended that the 217-acre tract involved, part of a larger one conveyed to defendant, be turned over to a land corporation in which he and plaintiffs owned stock.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 62, 63; Dec. Dig. ¶ 41.]

4. VENDOR AND PURCHASER — RIGHT OF BONA FIDE PURCHASER.

Parties who purchased tracts of land from the owner of the legal title as shown of record without notice, actual or constructive, of the claim thereto of a land corporation or that of stockholders therein, paying the full and fair value thereof, could hold the land against the stockholders of such corporation, plaintiffs in trespass to try title, claiming equitably in their own right under contract with a defendant, another stockholder, or as successors to the assets of the corporation to which defendant had agreed to convey.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. ¶ 239.]

5. VENDOR AND PURCHASER — ASSUMPTION OF PAYMENT OF PRICE—PARTIES BENEFITED.

Where corporate stockholders assumed payment of the price of land bought for the corporation, such assumption inured to the benefit of purchasers of a part of the land, which, by agreement with the corporation and stockholders, the selling stockholder, in whose name title to the land had been taken for the benefit of the corporation, was to own individually.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. ¶ 239.]

6. VENDOR AND PURCHASER — BONA FIDE PURCHASERS—RIGHTS.

Where, with the assent of stockholders in a land company, title to land purchased for it was taken in the name of one, the other stockholders assuming payment of the price, such others could not recover the price per acre, the payment of which they had assumed, from innocent purchasers for value from the stockholder holding the legal title, but only seek to prevent such stockholder who sold wrongfully from transferring such purchase-money notes as he still owned, asking a judgment declaring themselves the owners.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. ¶ 239.]

7. APPEAL AND ERROR — BRIEFS — ASSIGNMENTS OF ERROR.

Where the rule requiring assignments of error to be copied in the brief is violated to such an extent that a new assignment of error has been created, the one in the brief complaining of the admission of certain testimony of a witness, while the assignment in the motion for new trial complains of the admission of all his testimony, such assignment in the brief will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. ¶ 759.]

8. COSTS — PROPERTY OF AWARD.

In trespass to try title, where the only relief given plaintiffs was the cancellation of a vendor's lien retained in the deed from a defendant to plaintiffs, which relief was not prayed for, and the defendant not aware that it was demanded or desired, the only issue submitted being decided for him by the jury, and plaintiff not requesting the submission of others, the adjudging of costs against the defendant was erroneous.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. ¶ 32.]

Appeal from District Court, La Salle County; J. F. Mullally, Judge.

Action in trespass to try title by S. R. Walker and another against W. I. Nicholson and another, in which A. T. Galloway and another intervened. From a judgment for defendant O'Callaghan and the interveners for the land, that plaintiffs take nothing on their prayers against the named defendant, and that the vendor's lien retained by the named defendant against the named plaintiff be canceled, plaintiffs appeal. Judgment reformed and affirmed.

Mangum & Townsend and Marshall Hicks, all of San Antonio, for appellants. Covey C. Thomas, of Cotulla, for appellees.

MOURSUND, J. This is an action in trespass to try title, instituted by S. R. Walker and O. S. Dewees, suing in their own right

and for the use and benefit of the Nicholson Immigration Company, a private corporation, and as assignees of the same, seeking to recover 217 acres of land in La Salle county, described in the petition by metes and bounds. The suit was originally against W. I. Nicholson and E. E. O'Callaghan, but A. T. Galloway and A. J. Nichols intervened, each claiming a portion of said land, and in the amended petition plaintiffs sought to recover the land from all of said parties. In addition to the formal allegations plaintiffs alleged that said land, with other tracts, was conveyed by F. C. Davis, about August 15, 1908, to W. I. Nicholson, but that Nicholson paid nothing for the same; that the title was taken by him in trust for plaintiffs, and in trust for a corporation to be formed by Nicholson and plaintiffs, which should sell the lands; that it was agreed that all money derived from such sales over and above the expenses was to be paid to Davis in discharge of the vendor's lien notes given by Nicholson, and then to the payment of \$5,000 advanced and paid on the purchase price of said land by plaintiff Dewees and \$2,500 advanced and paid on same by plaintiff Walker, and the sum of \$20 for each lot donated by said company to be paid to said Nicholson, and after the payment of all of said sums the remaining land was to be owned by such corporation; that plaintiffs paid \$5,000 on the purchase price of said 8,220 acres of land conveyed by Davis at the time the deed was made, and have since paid about \$20,000, and Nicholson has never paid anything; that about November 3, 1908, Nicholson, to protect the land from being subject to payment of his debts, executed a deed to plaintiff Walker conveying all of said 8,220 acres except the 217 acres in controversy, and then and there represented to Walker and led him to believe that said deed would, and did, convey to him all the land conveyed to Nicholson by Davis, and recited the same consideration as was provided to be paid by him to Davis; that Nicholson, without delivering the deed to Walker, sent it to Cotulla to be recorded, and after it was recorded it was mailed to Walker, who, believing that it conveyed to him the entire 8,220 acres, without reading it, deposited it in a bank, and he and Dewees paid about \$10,000 on the purchase price of the land; that some time afterwards Walker discovered that the deed did not include the 217 acres in controversy, whereupon he demanded that Nicholson convey said land to him, but Nicholson refused to do so. Plaintiffs alleged that such tract was omitted by mistake, but, if wrong in this, then that Nicholson intentionally made said omission and false representations and promises to deceive and defraud plaintiffs, and that they were deceived thereby, and Walker was induced to assume said obligations, and plaintiffs were induced to pay said money; that it was agreed between Walker and Nicholson that, in consideration of his taking a deed

for all the land conveyed by Davis, Walker should agree to pay all the remainder of the debt due against the land; that about April 14, 1909, Nicholson released to plaintiffs all interest he had in the land in controversy; that at the time interveners received their deeds from Nicholson they had notice of plaintiffs' claim of ownership of said land. Plaintiffs alleged further that there is a vendor's lien on said land held by Davis amounting to \$10 per acre retained in said deed to Nicholson, of which interveners have always had notice; that, although the deed from Nicholson to Walker recites that a note for \$77,200 was given by Walker as part of the consideration, in fact no such note was given.

Plaintiffs prayed that they recover the land in controversy, and that the deed from Nicholson to Walker be reformed so as to include said land, and in the alternative for the establishment of the lien against said land to the extent of \$10 per acre and interest.

Nicholson alleged that he had sold and conveyed 81.51 acres of land to E. E. O'Callaghan, 72 acres to A. T. Galloway, and 60 acres to A. J. Nichols prior to the institution of the suit, and for valuable considerations. As to the remainder, if any, he answered by plea of not guilty, general and special denials, and alleged that it was understood and agreed that the 217 acres was not to be included in the deed to Walker, but was more than offset by 226 acres overplus in the tracts conveyed to Walker; that it was agreed, in consideration of the conveyance made by him to Walker, plaintiffs would assume and pay all indebtedness to Davis, and thereby Nicholson would receive a release of the vendor's lien held by Davis on said 217 acres.

O'Callaghan answered, claiming 81.51 acres of the land sued for, described in his answer, and as to same he answered by plea of not guilty, and by a special plea to the effect that he had, on October 22, 1907, contracted with Nicholson for the purchase of said land, and paid \$150 on the purchase price thereof, and by deed dated August 20, 1908, Nicholson had conveyed such land to him for a consideration of \$1,620, all of which was paid before the institution of this suit; that during all of such time the records of La Salle county showed the fee-simple title to said land to be in Nicholson, and showed no claim of plaintiffs or of any other person except the vendor's lien in favor of F. C. Davis, which would be released upon the payment of \$10 for each acre sought to be released; that the contract was made, the deed delivered, and the payments made in good faith, without any notice, actual or constructive, of any claim by plaintiffs or either of them; that, when Nicholson made the conveyance to Walker, plaintiffs assumed the payment of the entire sum due Davis; and this defendant, in making his payments to Nicholson, relied upon the agreement of plaintiffs to

pay said sum to Davis. Said defendant by cross-action sought affirmative relief, and prayed that the title to the 81.51 acres of land be quieted in him.

The interveners' (Galloway and Nichols') pleadings are the same, in substance, as those of O'Callaghan, except that they alleged that they purchased the tracts of land claimed by them long prior to the institution of the suit, without stating the date; that Galloway agreed to pay \$1,200, all of which was paid prior to the filing of the suit, except two notes for \$267 each, and that Nichols agreed to pay \$1,254.55, all of which had been paid, except a note for \$327.27; that all of said notes had been sold by Nicholson to bona fide purchasers for a valuable consideration before the maturity thereof. The interveners and defendants joined in a trial amendment in which the defensive matter pleaded by Nicholson was alleged more in detail.

The case was submitted upon only one special issue, as follows:

"Did Nicholson tell Walker and Dewees, or either of them, before the deed made by F. C. Davis to W. I. Nicholson, dated August 15, 1908, was taken, that they would have no interest in the 217 acres in controversy in this suit, and being the second tract described in said deed?"

The jury answered: "Yes." Judgment was entered in favor of O'Callaghan, Galloway, and Nichols for the tracts of land claimed by them; that said parties take nothing on their prayers against Nicholson; that the vendor's lien retained in the deed from Nicholson to Walker be canceled; and that plaintiffs recover of Nicholson all costs. The plaintiffs appealed.

Joseph Cotulla conveyed a large body of land to F. C. Davis. During the years 1907 and 1908 Nicholson was in possession of such land, selling portions thereof for Davis. Nichols and O'Callaghan visited the land in 1907, saw Nicholson in possession thereof, and were informed by the county clerk that Nicholson was selling it for Davis. Galloway was also informed as to this. Nichols and O'Callaghan during the year 1907 made a written contract with Nicholson for the purchase of the tracts claimed by them, and made a small payment thereon. At about the same time Galloway contracted to buy 80 acres, and made a small payment thereon, and afterwards, in the summer or fall of 1908, exchanged same for the tract now claimed by him. By deed dated August 15, 1908, filed for record September 10, 1908, and duly recorded, Davis conveyed to Nicholson certain lands described as 8,220 acres, more or less, the second tract being the 217 acres in controversy, for a consideration of \$10 per acre, of which \$5,000 was paid, and the remainder, \$77,200, evidenced by a vendor's lien note payable to Davis and signed by Nicholson.

The statement of facts contains an instrument dated September 4, 1908, purporting to be a contract between Nicholson and the

Nicholson Immigration Company, a corporation, but in fact not signed by said corporation, but signed and acknowledged by Dewees and Walker. This instrument recites that Nicholson owns 8,000 acres of land, more or less, in La Salle county, being a part of the Joseph Cotulla ranch, and particularly described in a deed from F. C. Davis to Nicholson dated the 15th day of August, 1908, and provides that the corporation shall take charge of, subdivide, and sell the land, and apply the proceeds as therein directed, and provides, further, that Nicholson will make deeds to purchasers, etc. This instrument was never recorded. The Nicholson Immigration Company was incorporated with a paid-up capital of \$7,500, which was represented by the \$5,000 put in on the land, and \$2,500 more that Dewees put up for expense money. Nicholson, Walker, and Dewees were the sole stockholders. Nicholson effected the sale of a half interest in 458 acres of the land at a profit of \$40 per acre, and sold other lands at a profit, in the benefits of all of which Dewees and Walker participated. By deed dated November 5, 1908, and filed for record the following day, Nicholson conveyed to Walker all of the land conveyed to him by Davis, except the 217 acres in controversy, which was entirely omitted, the tracts being numbered in each deed, and there being 15 tracts mentioned in the deed from Davis to Nicholson, and only 14 in the deed from Nicholson to Walker, the consideration being described as \$5,000 cash, and a vendor's lien note in the sum of \$77,200, payable at the same time as the note to Davis, and calling for the same rate of interest. At the time Nicholson made the deed to Walker he stated, according to Walker's testimony, that he had become involved in litigation in Oklahoma, and for the protection of Dewees and Walker he thought it best to put the title in the name of one of them. Nicholson testified that he made the conveyance at Walker's solicitation. The deed was written by the stenographer who did the writing for Nicholson, Walker, and Dewees, who used the same offices, and sent by Nicholson to the county clerk for recording, with instructions to mail it back to Walker. Walker received the deed, read it, and put it in his lock box, and testified that he first discovered the omission of the 217 acres about 7 or 8 months afterwards, whereupon he sent a new deed to Nicholson, who refused to sign, giving as his reason his version of the agreement between himself and Dewees and Walker.

On April 14, 1909, Nicholson, Walker, and Dewees entered into an agreement for the purpose of dissolving the corporation and canceling the contract dated September 4, 1908. This agreement provides that Walker and Dewees are to take over and own one half of 458 acres, of which the other half was conveyed to Dewees by Walker, and

they were to receive certain notes and assume certain obligations; that Nicholson is to pay Dewees and Walker within 60 days \$8,750, and upon such payment all other assets and property belonging to the corporation "by virtue of said partnership contract" shall belong to Nicholson, and Walker will deed to Nicholson said assets and property with the understanding that the conveyance is to be subject to vendor's lien notes against the property aggregating \$72,348.44; that the deeds to be executed by Walker "to the said 7,784 acres of land, more or less," shall be for such consideration as shall be named by Nicholson; that, if Nicholson fails to comply with such terms within 60 days, all right, title, and claim held by him in the Nicholson Immigration Company or the stock thereof, or growing out of the contract for the sale of the land, is to be at once forfeited by him to Walker and Dewees, and they are to release him from all claims held by them against him. This instrument was never recorded.

By deed dated August 20, 1908, filed for record February 5, 1909, Nicholson conveyed to O'Callaghan the 81.51 acres claimed by the latter for the sum of \$550 cash and two notes for \$540 each, which notes were paid before the filing of this suit. By deed dated October 29, 1908, filed for record February 4, 1910, Nicholson sold Galloway the 72 acres claimed by him for \$1,200, of which \$666 had been paid before this suit was filed. By deed dated April 21, 1909, filed for record March 12, 1910, Nicholson conveyed to Nichols the 60 acres claimed by him for \$600 cash and two notes aggregating \$654.45, both of which were unpaid at the time he was notified of the claim of Walker and Dewees. O'Callaghan, Nichols, and Galloway are, and have been for many years past, residents of the state of Mississippi. They honestly believed that the title to the land was good when they bought. The price paid by each for the land conveyed to him was a full, fair, and adequate consideration for the same, and at the time each secured his deed the land conveyed therein, so far as was shown by the records, was owned by Nicholson, and neither of them had any notice that Dewees and Walker, or either of them, claimed any interest in the land in controversy until the summer or fall of 1909. Walker did not execute any note to Nicholson as stated in the deed to him, but it was agreed and understood that he was assuming, along with Dewees, the payment of the note to Davis. The \$5,000 cash paid to Davis was furnished by Dewees and Walker, and an agreement was made that the deed should be made to Nicholson, but the testimony conflicts in regard to the terms of their agreement. Nicholson testified that he was very explicit to explain to Walker that he was buying no interest in the land that was contracted for sale (meaning the 217 acres in controversy); that he counted in the excess

of 226 acres, and explained fully to Walker that this excess was in the Rock Water Hole pasture, and that Walker thoroughly understood that he would have nothing to do with the land in survey No. 4, which is the land in question; that in making the trade with Walker and Dewees he laid the map down in front of them and explained that a certain 80 acres had been sold out of 14, and showed that the tract of 77 acres in No. 4 had not been sold, and explained fully to Mr. Walker that he would make a trade and exchange this 77-acre tract in No. 4 for the 80-acre tract in No. 14, and would leave No. 14 in such shape that it would cut in 20-acre tracts; that the deed from Davis, while it stated that it conveyed 8,220 acres, actually conveyed 8,446 acres. Nicholson testified further that it was not the intention in the agreement of September 4, 1908, to describe the land conveyed from Davis to Nicholson. Walker testified that he and Dewees paid off the balance due on the \$77,200 note to Davis. It was admitted that Walker and Dewees assumed the payment thereof when the Nicholson Immigration Company was dissolved about June, 1909. Nicholson's testimony was contradicted by Walker and Dewees, who denied that he ever made any statements to them about the 217 acres being contracted to be sold or being excepted from the trade between them and Nicholson.

Appellant contends that Nicholson testified to an express trust, and that his testimony was in his own interest and uncorroborated, and therefore insufficient to sustain the finding of the jury. As we understand the pleadings, appellants sought to establish a trust in the 217 acres they sued for, while Nicholson and his vendees contended that plaintiffs had no interest in or title to such land. The evidence shows that there was an agreement between appellants and Nicholson by which a deed was to be taken in his name, and a corporation was to be formed for the sale of lands, the profits to be equally divided between Walker, Dewees, and Nicholson after paying the money advanced by Walker and Nicholson. There is, however, a material conflict upon the terms of this agreement; for Nicholson contends that the 217 acres in controversy which he had contracted to sell before the deed was made to him was not to be included in the lands to be sold by the corporation, but was to be his individual property. Walker and Dewees contend that the agreement was to the effect that all of the land conveyed to Nicholson was to be sold by the corporation and the proceeds divided. The legal title was vested in Nicholson, and the 217 acres in controversy was never conveyed to Walker with the remaining lands, but was conveyed by him to O'Callaghan, Nichols, and Galloway. Said parties at the time of the trial held the legal title to the lands respectively claimed by them.

[1, 2] As plaintiffs were attempting to as-

sert an equitable title which they contended was acquired on account of certain transactions with Nicholson, who had conveyed the legal title to O'Callaghan, Galloway, and Nichols, the burden was upon plaintiffs to not only prove such equitable title, but also that Nicholson's grantees had notice of such title, or that they did not pay value for the land bought by them. *Hill v. Moore*, 62 Tex. 612; *Atwell v. Watkins*, 13 Tex. Civ. App. 668, 36 S. W. 103; *Oaks v. West*, 64 S. W. 1033; *Turner v. Cochran*, 63 S. W. 155. The only issue submitted was not an affirmative submission of the issue made by plaintiff's pleadings, but was a submission of Nicholson's theory. The burden of proof was placed on the wrong party, but the affirmative answer amounted to an express finding against plaintiffs' theory; for, if the fact found was true, Nicholson's version of the transaction was correct, and plaintiffs' version incorrect. The jury found, in effect, that the trust agreement did not extend to the 217 acres of land, and that such land was to belong to Nicholson. The testimony of Nicholson fully supports such finding, and no rule of law is applicable which would have the effect of making his unsupported testimony insufficient to sustain the verdict.

[3] Appellants by their third and fourth assignments contend that a verdict should have been instructed for appellants; the contention being that by the contract dated September 4, 1908, the land in controversy was turned over to the corporation for sale and to pay the amounts due Davis, and by the terms of the agreement of April 14, 1909, and the failure of Nicholson to comply with the option given him therein, said land became the property of plaintiffs. The contract of September 4, 1908, does not purport to transfer title to the corporation, and is of no importance, unless it serves to throw light on the original transaction. The description of the lands therein is not as satisfactory as it might be; for it calls for 8,000 acres more or less, while the deed from Davis describes the land therein conveyed as 8,220 acres, more or less, and said contract does not contain the statement that the lands to be sold comprise all those tracts described in the deed from Davis, but the statement is made that such 8,000 acres, more or less, are described in the Davis deed. Nicholson testified that it was not intended in said agreement to describe the land as that conveyed from Davis to Nicholson; that he was so well satisfied that Walker and Dewees knew just what land they were getting, and there would be no hitch in any of the transactions, that he might have been a little careless. We think the description was sufficiently ambiguous to authorize proof of what was meant thereby, and that, in connection with the testimony showing that Nichols had theretofore contracted to sell the 217 acres in controversy, the jury was warranted in deciding that it was never intended to be turned over to

the corporation, and that said contract should not be construed as inconsistent with Nicholson's testimony. If the land in controversy was not included in the contract, it is evident that the agreement of April 14, 1909, did not relate thereto; for it mentions only the assets and property belonging to the corporation by virtue of the contract. The property referred to as held under the contract was treated as the same held by Walker under the deed to him, for it is provided that he shall make the conveyance if Nicholson complies with the terms of the last contract.

[4] But, aside from the fact that the evidence sustains findings to the effect that Nicholson did not agree to hold the 217 acres in trust for plaintiffs, or for the corporation, whose assets and property plaintiffs acquired by virtue of the agreement of April 14, 1909, and that no title was conveyed to the corporation or to plaintiffs by the written instruments relied upon in the assignments of error, there is a good reason disclosed by the record why the court should have refused to give a peremptory instruction for plaintiffs. This reason is that O'Callaghan, Galloway, and Nichols purchased the respective tracts of land claimed by them from the owner of the legal title, as shown of record, without any notice, actual or constructive, of plaintiffs' or the corporation's claim thereto, and paid the full and fair value thereof. This proof was so complete that it would have met the requirements of the law to entitle them to hold their land, had plaintiffs shown a legal title antedating theirs, in which case the burden would have been upon them to establish their good faith, etc.

[5, 6] By the fifth assignment appellants contend that judgment should have been entered that plaintiffs recover from O'Callaghan, Galloway, and Nichols the sum of \$10 per acre for each acre of the land claimed by them, and for foreclosure of lien, because plaintiffs paid off the vendor's lien retained by Davis. If the transaction was as contended by Nicholson, and found by the jury, Walker and Dewees got what they were to receive, and it is admitted that they assumed the payment of the amount due Davis. This assumption would inure to the benefit of O'Callaghan, Galloway, and Nichols. Had the jury found in favor of their contention, they would still be confronted with the fact that their act in vesting title in Nicholson caused the purchasers from Nicholson to obligate themselves to pay full value, and justice would require that they should not be permitted to recover \$10 per acre from such purchasers, but should have their recourse against their trustee, Nicholson, and should seek to stop the transfer of such notes as he still owned, and ask for a judgment declaring them the owners thereof. This was not undertaken. The assignment is overruled.

[7] The sixth assignment will not be considered, because the rule requiring the as-

signments to be copied in the brief has been violated to such an extent that a new assignment of error has been created. The one in the brief complains of the admission of certain testimony of Nicholson, which, by the way, is shown by the statement of facts to have been read as offered by appellants, while the assignment in the motion for new trial complains of the admission of all the testimony given by Nicholson.

[8] By cross-assignment complaint is made by Nicholson because the court adjudged the costs against him. As the only issue submitted was decided in his favor by the jury, and plaintiffs did not request that any others be submitted, he contends the costs should not have been adjudged against him. The only relief given the plaintiffs was the cancellation of the vendor's lien retained in the deed from Nicholson to Walker. This relief was not prayed for, and Nicholson was not apprised of the fact that such relief was demanded or desired, or he could have tendered an instrument correcting the mistake. We think the court erred in adjudging the costs against Nicholson.

The other cross-assignments are based on proceedings not shown in the record, and would have to be overruled were it necessary to consider them.

The judgment is reformed so as to provide that plaintiffs pay all costs, and, as so reformed, will be affirmed.

DECATUR COTTON SEED OIL CO. v. TAYLOR. (No. 8270).*

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 20, 1915. Rehearing Denied Jan. 8, 1916.)

1. MASTER AND SERVANT ⇨270—ACTIONS FOR INJURIES—ISSUES, PROOF, AND VARIANCE.

Where an employé was directed by his foreman to use a running board in oiling machinery, this constituted a furnishing of the board for such use within an allegation that the board was so furnished; and hence evidence as to such direction was not inadmissible, though there was no specific charge of negligence in giving such direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. ⇨270.]

2. MASTER AND SERVANT ⇨235—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—DUTY OF INSPECTION.

An employé directed by his foreman to use a running board in oiling machinery was not compelled by law to make an inspection to see whether or not the board had been fastened to its supports, but had a right to assume that it was secure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. ⇨235.]

3. TRIAL ⇨412—ERRORS—WAIVER.

In an employé's action for injuries, caused by a running board on which he was standing slipping, a witness testified for plaintiff, over objection, that the running board was replaced and fastened after plaintiff fell from it. De-

fendant introduced a photograph made after the accident showing conditions to be exactly the same as at the time of the accident, with certain minor exceptions, and a witness testified without objection concerning the running board as shown in the photograph. *Held*, that any error in admitting the testimony that the board was replaced and fastened after the accident was waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. ⇨412.]

4. TRIAL ⇨120—ARGUMENT OF COUNSEL—PROPRIETY OF REMARKS.

In an employé's action for injuries, he testified on cross-examination that he had refused C.'s request that he submit to a physical examination by physicians other than his own physician, and on redirect examination that the employer never asked him to submit to examination by any other doctor, that C. did not purport to represent the employer, that the representatives of the employer made no such request. In his argument plaintiff's counsel, referring to plaintiff's refusal to submit to an examination by a physician chosen by C., asked who C. represented, stating that the employer did not claim him and was ashamed of him, and that he did not know whom he represented. One of defendant's attorneys remarked that C. was attorney for the defendant; whereupon plaintiff's counsel replied that he was also attorney for somebody else. It was claimed that this was calculated to induce the jury to believe that C. was representing presumably an insurance company. The court refused to restrain plaintiff's counsel or warn the jury not to consider the remarks, but in his written charge instructed them not to consider those remarks. *Held* that, in view of plaintiff's testimony, which was not controverted, the argument was not improper, especially as the jury was instructed not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 285-287; Dec. Dig. ⇨120.]

5. TRIAL ⇨125—ARGUMENT OF COUNSEL—PROPRIETY OF REMARKS.

In an action against a corporation for injuries, plaintiff's counsel, referring to a request that plaintiff submit to an examination by a physician other than his own physician, said that this was a scheme which corporations resorted to, but upon objection by defendant he remarked that he would withdraw the word "corporations" and submit "this corporation." *Held* that, even though these remarks were unsupported by proof, they did not constitute reversible error, where no probable harm was shown.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. ⇨125.]

6. TRIAL ⇨125—ARGUMENT OF COUNSEL—PROPRIETY OF REMARKS.

In an employé's action for injuries, plaintiff's counsel in his argument stated that defendant should apply to the payment of plaintiff's doctor bill, which it owed, money it was paying to a stenographer to take down his argument. *Held*, that the remark that defendant justly owed the bill was not improper, and it was not likely that the mere hiring of the stenographer to report the argument aroused any prejudice against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. ⇨125.]

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Action by A. N. Taylor against the Decatur Cotton Seed Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lockett & Rowe, of Ft. Worth, R. E. Carswell, of Decatur, and H. T. Cooper, of Ft. Worth, for appellant. Sullivan & Hill, of Denton, L. D. Ratliff, of Decatur, and Luther Hoffman, of Denton, for appellee.

DUNKLIN, J. A. N. Taylor was employed by the Decatur Cotton Seed Oil Company in the capacity of oiler of its machinery. While attempting to oil a bearing of what is called the line shaft, one end of the running board upon which he was standing slipped from its support, and thus caused him to fall to the floor beneath, a distance of some 10 or 12 feet. This suit was instituted by him against the company to recover damages for personal injuries sustained as a result of said fall, and from a judgment in his favor, the defendant has appealed.

Plaintiff alleged, in substance, that the defendant had theretofore fixed and used the running board as a support for the oiler while performing the service he was performing when he fell, and that in furnishing the same defectively constructed and insecurely fastened defendant was guilty of negligence which was the proximate cause of his injury.

One of the contentions of appellant is that the evidence conclusively shows that the running board was placed and used for the purpose of repairing a coupling on the line shaft which occasionally got out of order, and was not provided or intended for the use plaintiff was making of it at the time of the accident, that another and safe place convenient and available to plaintiff for performing that service had been provided, and that in voluntarily abandoning that place and resorting to the running board in its stead he was guilty of contributory negligence which was the proximate cause of his injury.

While the evidence introduced by the defendant strongly tended to establish those facts, yet the same was controverted in a material respect by evidence offered by plaintiff, which was, in effect, that Mr. Mitchell and Mr. Fields, two of defendant's employes, had instructed him to so use the running board; that he had used it in that manner for some three weeks prior to the accident, oiling the same bearing three times a day; that the oiler who preceded him had made the same use; and that only one side of the bearing in question could be oiled at the place, which, according to defendant's testimony, was the only place provided for oiling it. According to other testimony, Mr. Mitchell was defendant's foreman in charge of the operation of the mill, and not plaintiff's fellow servant, as further contended by appellant.

[1] If plaintiff was directed by the foreman to so use the running board in the discharge of his duties, that would constitute a furnishing of the board for such use within

the purview of the allegations of plaintiff's petition; and hence we overrule appellant's proposition that such proof was not available to plaintiff, in the absence of a specific charge of negligence in giving such direction to plaintiff. 3 Labatt's Master & Servant, § 923; Williams v. Hennefeld, 57 Tex. Civ. App. 54, 120 S. W. 567.

[2] We are of opinion further that the evidence does not show conclusively, as contended by appellant, that the insecure condition of the running board was so patent and open to common observation that plaintiff must necessarily have known it, and hence should be held to have assumed the risks incident to using the board as he did use it. He was not compelled by law to make an inspection to see whether or not it had been fastened to its supports, but had the right to assume that it was secure, and the absence of nails or some other character of fastenings might well escape the notice of one walking or standing upon it, relying upon the assumption that it was safe for such use.

[3] Complaint is made of the admission of the testimony of W. E. Mitchell that the running board was replaced and fastened after plaintiff fell from it. The ground of defendant's objection to that testimony was that it was irrelevant, immaterial, and prejudicial to defendant, "in that the jury might infer negligence upon the part of defendant because it replaced the plank and fastened it after the accident." In approving the bill of exception reserved to that ruling, the trial judge certified that defendant introduced in evidence a photograph made after the accident, showing conditions to be exactly the same as they were at the time of the accident, except that one or two belts had been removed from the pulleys, and that witness Moss, without objection, had testified concerning the running board as shown in the photograph. Under such circumstances the error, if any, in admitting the testimony of Mitchell last referred to was waived. *Hitson v. State Nat. Bank* (Sup.) 14 S. W. 993; *W. U. Tel. Co. v. Gorman*, 174 S. W. 925; *Jordan v. Johnson*, 155 S. W. 1195.

Another assignment of error presented to the action of the court in admitting testimony of W. F. Reynolds, substantially to the same effect as that of Mitchell last discussed, is overruled for the same reason.

[4, 5] Another assignment is predicated on alleged improper argument shown in a bill of exception contained in the record, from which it appears that, in his closing argument to the jury, Mr. Hill, counsel for plaintiff, said:

"No; we did not advise Taylor to submit to examination by a physician chosen by Mr. Cooper. Who does he represent. The oil mill does not claim him. In God's name who? I don't know. The oil mill is utterly ashamed of him."

Mr. Carswell, for defendant: "He is attorney for the defendant."

Mr. Hill: "He is attorney for somebody else, too."

To which language of plaintiff's counsel defendant then and there objected, on the ground that it was not supported by any evidence in the record, immaterial to any issue in the case, and calculated to induce the jury to believe that Mr. Cooper was not representing defendant, but some one else (presumably the insurance company).

From another bill of exception, upon which a like assignment is based, it appears that during the same argument counsel used this language:

"Why, they sought to show that there was no injury, and yet it was time foolishly wasted, unless you say that Dr. Ingram is a liar. 'Submit him to our physician!' That is a scheme the corporations resort to."

Mr. Carswell, for the defendant: "I object to that remark, your honor, 'That is a scheme that corporations resort to.'"

Mr. Hill: "I recall 'corporations,' and submit 'this corporation.'"

To which defendant objected, because not warranted by any evidence, inflammatory, and prejudicial to defendant, in that it was calculated to induce the jury to doubt the sincerity of defendant in requesting plaintiff to submit to an examination by physicians for the purpose of determining the extent of his injuries.

In each instance mentioned the court was requested to restrain counsel for plaintiff and to warn the jury not to consider said remarks. But those requests were refused, except, when the remarks shown in the first bill were made, the court admonished Mr. Hill to "keep in the record." Later, however, the court by written charges instructed the jury not to consider those remarks of plaintiff's counsel.

Upon cross-examination of plaintiff by Mr. Cooper for the defendant he admitted that he had refused Mr. Cooper's request to submit to a physical examination by physicians other than Dr. Ingram for the purpose of determining the extent of his injuries. On redirect examination by his own counsel he testified as follows:

"The Decatur Cotton Oil Mill never asked me to submit to examination of any other doctor besides Dr. Ingram; never did at any time. This gentleman [referring to Mr. Cooper] did not purport to represent the Decatur Cotton Seed Oil Mill; didn't tell me who he represented. Mr. Moss, representing the Decatur Cotton Seed Oil Mill, never did request me to submit myself to any other physician than Dr. Ingram, nor did Mr. Mitchell. I did not feel that I was under obligation to submit myself to the examination of a physician chosen by Mr. Cooper."

In view of that testimony, we do not think that the argument set out in the first bill of exception referred to was improper, especially as it does not appear that the truth of such testimony was controverted by any other witness, and as the court expressly instructed the jury not to consider the argument.

Even if the court, over defendant's objection, had admitted proof of a custom of de-

fendant to request all persons claiming damages for personal injuries sustained while in its employment to submit to an examination by physicians for the purpose of ascertaining the true nature and extent of such injuries, perhaps the ruling would be held harmless error at all events, since we fail to perceive how such evidence could in any manner tend to prejudice the jury against the company. Its tendency more likely would be favorable to the company. And, while the remarks of counsel objected to and shown in the second bill of exceptions were without proof to support them, we do not think they show probable harm, and therefore reversible error, especially in view of the court's written instruction to the jury not to consider them.

[6] Another assignment of error is predicated on further remarks of counsel in the same argument, in effect, that defendant should apply to the payment of plaintiff's doctor's bill which it owed, money it was paying to the stenographer for taking down that argument; the court failing to sustain defendant's objection thereto made at the time on the ground that there was no evidence to support such argument, and failing to exclude the remarks by any instruction to the jury. It is not likely that the mere fact of hiring a stenographer to report the argument aroused any prejudice against the defendant in the minds of the jury; and the remaining portion of the remarks that defendant justly owed plaintiff his doctor's bill clearly was not improper.

Upon a careful consideration of the evidence, we are unable to say that the judgment was so excessive as to require a reversal, as is earnestly insisted by appellant in another assignment.

For the reasons noted, all assignments of error are overruled, and the judgment is affirmed.

KIMBROUGH et al. v. BEVERING. (No. 8279.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 27, 1915. Rehearing Denied
Jan. 8, 1916.)

1. SHERIFFS AND CONSTABLES \S 157—UNOFFICIAL CHARACTER OF SEIZURE.

Where a constable, under direction of his writ of execution, levied upon and sold 39 bales of cotton as the property of a tenant farmer, making due return, and thereafter he took into his actual possession four bales of the cotton, which had been sold, as specified in his return, such seizure was not an official act and the sureties on his bond as constable, who had bound themselves only for the faithful performance of his official acts, were not liable therefor.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. \S 354-371; Dec. Dig. \S 157.]

2. EXECUTION \S 461—UNAUTHORIZED CHARACTER—LEVY AFTER SALE BY DEBTOR.

For an unauthorized levy of execution against a tenant farmer on cotton which the

latter had sold to the landlord, the landlord was entitled to recover the value of all cotton appropriated by virtue of the execution and levy, whenever and by whomsoever the appropriation was made.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1387, 1388; Dec. Dig. ¶461.]

3. SHERIFFS AND CONSTABLES ¶157 — UNAUTHORIZED LEVY—LIABILITY ON BOND.

Under Rev. St. 1911, art. 5475, giving a landlord a preference lien on his tenant's crop to secure his advances to enable the tenant to make such crop, where execution against a tenant farmer was levied on 39 bales of cotton, to enable him to make which the landlord had made advances, there being \$200 or \$300 yet due him at the time of the levy, such levy and the sale thereunder by the constable was unauthorized as against the landlord, and a later actual seizure of four bales of the cotton by the buyer at execution sale or by his agent, whether the constable who made the levy or another, was unlawful, and amounted to a conversion for which the landlord could recover; the legal wrong relating back to the levy and rendering the constable and his sureties liable.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 354-371; Dec. Dig. ¶157.]

4. EXECUTION ¶191 — LEVY ON PROPERTY NOT WHOLLY THE DEBTOR'S—STATUTE.

By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 3740, levying on and sale under execution of property in which the debtor has merely an interest, without right to exclusive possession, is made by giving notice to the person entitled to the possession, and a levy made by taking actual possession cannot stand as legal on the ground that the debtor had an interest in the property, though not exclusive.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 566; Dec. Dig. ¶191.]

5. EXECUTION ¶268 — LEVY ON PLEDGED CROP—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3744, providing that chattels pledged, assigned, or mortgaged as security may be levied upon or sold on execution against the pledgor, etc., and that the purchaser shall be entitled to the possession, when it is held by the pledgee, on complying with the condition of the pledge, where a tenant farmer pledged his half interest in a cotton crop to the landlord to secure advances, a judgment creditor of the tenant, who levied execution upon the cotton in the tenant's hands, buying thereunder, was not entitled to its possession without a compliance with the conditions of the pledge, since the landlord was at least in the position of a mortgagee in possession under a pledge on the tenant's part that the proceeds of his interest in the cotton should be applied to payment of his debt to the landlord.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762-767; Dec. Dig. ¶268.]

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS ¶52—CHARACTER OF TRANSACTION—STATUTE.

Where a tenant orally agreed with his landlord that the latter should pay for completing and sell the tenant's cotton crop and apply the proceeds to reduction of the tenant's debt to the landlord for advances to make it, accounting to the tenant for any excess, the transaction was not within Rev. St. 1911, art. 91, requiring assignments by insolvent debtors for the benefit of creditors to be in writing.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 212; Dec. Dig. ¶52.]

Appeal from District Court, Clay County; W. T. Allen, Judge.

Action by August Bevering against J. B. Kimbrough and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. M. McFarland, of Wichita Falls, for appellants. Arnold & Taylor, of Henrietta, for appellee.

CONNER, C. J. J. B. Kimbrough, as constable of precinct No. 2, Clay county, and J. M. King, W. A. Duncan, and J. B. Wright, as the sureties on his official bond, suffered a judgment, from which they have appealed, in favor of August Bevering, appellee, in the sum of \$148.83, for the conversion of four bales of cotton. The alleged conversion, as presented in the pleadings and as shown in the evidence, arose in substantially the following way: J. C. Hunt in Wichita county secured a judgment against J. Davis, a farm tenant of appellee in Clay county. By virtue of this judgment an alias execution was issued, and the same was by J. B. Kimbrough, as constable of said precinct No. 2, levied upon some 39 bales of cotton as the property of said J. Davis. In the answer of the defendant it was admitted that the levy and sale was as shown by the return of the constable on his execution. This return recites that the execution came to hand and was executed by taking the cotton, which was specifically described, into his possession, after which—

"he [the constable] sold all of the right, title, and interest of the said J. Davis in and to said property to J. C. Hunt," etc.

The return also stated that after the sale, the cotton had been delivered to the plaintiff in the execution, J. C. Hunt. The record shows that the constable made his return on the 28th day of November, 1914. On the 5th day of the following month it appears from the evidence that Kimbrough, as the defendants alleged and insist, acting for J. C. Hunt in an individual capacity and not as constable, proceeded to take into his actual possession four bales of the cotton which had been theretofore sold as specified in the constable's return, and shipped the same to J. C. Hunt at Wichita Falls. It does not clearly appear in the evidence, other than as recited in the constable's return, that at the time of the sale of the cotton the possession of either J. Davis or of appellee, the landlord, was disturbed. But at all events, it further appears that in some way Bevering had either retained, or had obtained actual possession of the cotton after the constable's sale. Other circumstances will be hereinafter stated in their proper connection.

[1] It is first insisted that the judgment against the sureties on the constable's bond is without any evidence to support it in that, as contended, the uncontradicted evidence shows that in seizing the four bales of cot-

ton in controversy, the constable was acting, not as an officer, but as a representative merely of J. C. Hunt. Appellee earnestly controverts this contention, and insists that in seizing the cotton Kimbrough was but carrying out and completing the official acts by him committed prior to that time. There seems, however, but little, if any, contradiction, of the constable's testimony on this point, and it being undisputed that prior thereto the direction of the writ had been executed and due return made thereof, the constable's duty as an officer was ended, and he could no longer act as an officer by virtue of the writ. This being true, if this was the sole basis of the plaintiff's right to recover, it would certainly seem that the sureties on the constable's bond should be relieved, for it was for the faithful performance of his official acts only that they bound themselves. See Revised Statutes 1911, art. 7141; *Holliman v. Carroll's Adm'rs*, 27 Tex. 23, 84 Am. Dec. 606; *Heldenheimer v. Brent*, 59 Tex. 533; *Brent v. Hohorst*, 1 White & W. Civ. Cas. Ct. App. § 343; *Sneed v. McFadridge*, 43 Tex. Civ. App. 592, 97 S. W. 113; *Stewart v. Gordon*, 65 Tex. 344; *Goldman v. Spann*, 173 S. W. 1015.

[2, 3] We are of opinion, however, that the issue suggested was an immaterial one, and that the judgment must be maintained upon a different theory. The following facts seem to be substantially undisputed, except as hereafter otherwise indicated: J. Davis for the year 1914 was a tenant upon the farm of appellee, Bevering, under a contract by virtue of which Davis was to receive one-half and Bevering the other one-half of all cotton grown upon the premises during the year. Davis and Bevering both testified—and there is no contradiction in this respect—that about the beginning of the cotton picking period Davis contemplated giving up his crop, but he finally agreed, at Bevering's suggestion, that he, Davis, would continue gathering the crop, Bevering to pay for the services of all cotton pickers except that of Davis himself, and continue furnishing him supplies as he had theretofore done; that pursuant to this agreement Davis turned the crop over to Bevering. They both specifically so testified without contradiction, and they further insist that it was a sale of the cotton. In this connection, however, it was further agreed between them that at the conclusion of the season Bevering would sell the cotton, and if Davis' one-half of the proceeds should be more than sufficient to pay Bevering for advances that had been theretofore made, that then he (Bevering) would give to such Davis any excess that existed. If this transaction in fact amounted to a sale, as both Bevering and Davis insisted in their testimony, then it must be admitted, without citation of authority, we think, that the levy of the execution against Davis upon the cotton was an unauthorized levy. In such case, the true owner, Bevering, would be entitled

to a recovery for the value of all cotton that may have been appropriated by virtue of the execution and levy, whenever and by whomsoever the appropriation may have been made. But whether this transaction between Davis and Bevering amounted to a sale or not, in our view of the matter, is immaterial, for it is undisputed that Bevering, as landlord, had made large advances to Davis, and as such landlord, and to secure said advances, Bevering undoubtedly was entitled to the landlord's lien, as provided in our statutes. This lien is a preference lien, having priority over all other liens. See Revised Statutes, art. 5475. Bevering, therefore, at the date of the levy of the execution had a lien (whether in possession or not) upon all of the cotton levied upon in order to secure all advances made by Bevering to enable Davis to make the crop. Bevering testified upon the trial that after the sale of the cotton there yet remained due from Davis to him on account of such advances some \$200 or \$300. So that, whatever view of the facts may be taken, the levy and sale by the constable was unauthorized as against Bevering, and the later actual appropriation of four bales of this cotton, by virtue of said execution sale, whether by J. C. Hunt in person or by any agent, either J. B. Kimbrough or another, was unlawful, and amounted to a conversion for which Bevering was entitled to recover. The legal wrong done Bevering did not have its inception at the time of the actual appropriation, but related back to the unlawful levy and sale under the execution. These acts, which were undoubtedly official, constituted the true basis of Bevering's right to recover. At the time of the levy and sale Bevering was at least in the attitude of lienholder, or mortgagee, in possession, and as such did, at all events, have the right to sue for possession or as for a conversion. See *Jones on Chattel Mortgages*, §§ 447, 448, 449, 452; *Taylor v. Felder*, 5 Tex. Civ. App. 417, 23 S. W. 490, 24 S. W. 813; *Newman v. Ward*, 46 S. W. 868.

[4, 5] Another contention of appellants is that the evidence, to which we have hereinbefore referred, shows that Davis at least had an interest in the property and hence that the levy was an authorized one, but if this construction of the facts be adopted, we will add, in addition to what we have already said as to the effect of Bevering's right under a landlord's lien, that the levy and sale was not made as 'provided by statute, where merely an interest, without right to the exclusive possession, is shown. In such case the statute provides that the levy is made by giving notice thereof to the person who is entitled to the possession. See *Vernon's Sayles' Texas Civil Statutes*, art. 3740. It is not pretended that this was done in the present case. The return of the officer shows that the levy was made by taking actual possession. Another article of the statute (arti-

cle 3744) provides that chattels pledged, assigned, or mortgaged as security for any debt or contract may be levied upon and sold on execution against the person making the pledge, assignment, or mortgage subject thereto, and that the purchaser shall be entitled to the possession when it is held by the pledgee, assignee, or mortgagee on complying with the condition of the pledge, assignment, or mortgage. Bevering was at least in the position of a mortgagee in possession under a pledge on the part of J. Davis that the proceeds of his interest in the cotton should be applied to the payment of his debt to Bevering, and Hunt, the plaintiff in execution, was in no event entitled to the possession of the cotton, or of any interest therein, without a compliance with the conditions upon which Davis pledged the cotton to his landlord. It is not contended that Hunt made any effort to do this.

[8] The contention that the transactions between Davis and appellee, Bevering, amounted to no more than an assignment, which was void under the operation of Revised Statutes, art. 91, because not in writing, we think need not be discussed seriously, inasmuch as it seems to us manifest that the transaction in no event can be construed as an assignment for the benefit of creditors under the statute referred to.

We conclude that the judgment must be affirmed.

DUBLIN FRUIT CO. et al. v. NEELY.

(No. 8278.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 27, 1915. Rehearing Denied Jan. 15, 1916.)

1. PLEADING — 228 — EXCEPTION — EFFECT AS ADMISSION.

An exception, special or general, to the petition admits its allegations as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. — 228.]

2. FRAUDS, STATUTE OF — 16 — PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER — CHARACTER OF TRANSACTION.

Where a seller of apples acted as one of the principals in the transaction, his promise, made before acceptance to the buyer, to save the latter harmless from any defects in the fruit was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 22-26; Dec. Dig. — 16.]

3. APPEAL AND ERROR — 854 — DISPOSITION — AFFIRMANCE — WRONG REASON.

The Court of Civil Appeals will affirm a correct judgment below on special exception to the petition, though the trial court assigned the wrong reason therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3404, 3408-3424, 3427-3480; Dec. Dig. — 854.]

4. PRINCIPAL AND AGENT — 136 — PERSONAL LIABILITY OF AGENT.

An agent, acting for a disclosed principal, may bind himself personally, either by adding his responsibility to that of the principal or by tendering his responsibility instead of that of

the principal, either expressly by words or by implication from words or conduct.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. — 136.]

5. PRINCIPAL AND AGENT — 133 — PERSONAL LIABILITY OF AGENT — QUESTION FOR JURY.

Where the promise of an agent by which he is sought to be held personally responsible on a contract made in his principal's behalf is in writing, its construction and effect are ordinarily questions of law for the court, or, where the promise, though not in writing, is of such a character that only one inference can legally be drawn from the fact, the question is likewise for the court, but where the testimony conflicts as to the nature and extent of the words used or conduct involved, the question is of fact for the jury under all the circumstances, the purpose of the inquiry being to ascertain the intent of the parties, which is conclusive if not conflicting with the law.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 721½-726; Dec. Dig. — 133.]

6. PRINCIPAL AND AGENT — 136 — PERSONAL LIABILITY OF AGENT.

Where one who sold apples as an agent, upon protest as to their quality by the buyer before acceptance, stated that he would be personally responsible for any loss, or his language was reasonably susceptible of such construction, although the agent did not intend to pledge his personal responsibility, but the buyer so understood and acted thereon, the agent was personally liable for any damage, since the fact that an agent did not intend to pledge his own responsibility will not relieve him if the circumstances warranted the construction by the other party that he did so intend.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. — 136.]

Appeal from Erath County Court; A. P. Young, Judge.

Suit by the Dublin Fruit Company and others against R. P. Neely. From a judgment for defendant, plaintiffs appeal. Reversed and remanded for new trial.

Hickman & Bateman, of Stephenville, for appellants. Marshall Ferguson and Pat L. Pittman, both of Stephenville, for appellee.

BUCK, J. Suit was filed in the justice court by the appellants, a firm composed of M. Hoffman and W. H. Novitt, against the Texas Central Railroad Company, the Roswell Fruit Growers' Exchange, and R. P. Neely, for \$188.62, said suit arising out of a shipment of a car of apples from Roswell, N. M., by the Fruit Growers' Exchange through the agency of Neely, who was a broker living at Ft. Worth, and over the defendant railroad company's line. It was sought to hold the Fruit Growers' Exchange liable because of the shipment of apples alleged to be defective and differing in kind, grade, and quality from those ordered; to hold the railroad company liable for delays in transportation, whereby the apples, as alleged, were caused to become rotten and unmarketable, and to hold Neely liable on his special promise and agreement with plaintiffs that, if plaintiffs would accept said apples

and pay the accompanying draft, he, Neely, would save them harmless, etc. From a judgment in the justice court for the amount sued for in favor of plaintiffs and against the railroad company and said Neely, the Fruit Growers' Exchange having been dismissed from the suit, an appeal was taken to the county court. There, by agreement, a judgment was entered in favor of the plaintiffs and against the railroad company for \$75, in full of claim against said defendant, it being specially provided in said judgment that the rendition thereof would not, in any way, affect plaintiffs' cause of action against Neely. Later, plaintiffs amended their petition, alleging that they had bought the car of apples from Neely, and that he had warranted and represented them to be good and merchantable fruit; and that said apples were not as represented, but were inferior and defective in several respects enumerated; and that the difference between the value of the apples as received, and as they should have been under the contract, was \$113.62. They further alleged that before receiving and accepting said apples plaintiffs notified Neely of their condition, and refused to accept the same, but were notified and promised by said Neely that if they would accept the same, he, Neely, would save them from any loss; that plaintiffs relied upon said promises, etc., and accepted the apples. It was further alleged that Neely, in making such promise and agreement, was not agreeing to answer for the default, miscarriage, or debt of another, but had a personal financial interest in said transaction; he receiving a portion of the proceeds of such sale. Upon a trial between plaintiffs and Neely, judgment was rendered upon an instructed verdict in Neely's favor, from which judgment the plaintiffs have appealed to this court. The judgment recites that:

"After hearing the evidence, the court is of the opinion that the special demurrer filed herein should be sustained."

Defendant Neely's answer did not contain any special exception or special demurrer *eo nomine*, but did plead that plaintiffs' cause of action was, as pleaded, an attempt to hold Neely liable upon an oral promise to answer for the debt of another, and therefore in contravention of the statute of frauds.

[1-3] We believe, in sustaining the special exception, if any there were, the court misinterpreted the cause of action stated. If the allegations of the petition are admitted as true, as they must be against an exception, special or general, there is nothing in the pleading to suggest that Neely in said transaction was acting as an agent. According to the recitations in the petition, Neely was the principal, or at least one of the principals, upon whose alleged default the cause of action was predicated. It might be claimed that, even though it should be admitted that the court erred in sustaining

the exception urged, yet from the evidence introduced no other judgment than the one rendered could have been entered, and that therefore it is our duty to affirm the judgment though the wrong reason was given by the court as a basis therefor. *Alexander v. McGaffey*, 39 Tex. Civ. App. 8, 88 S. W. 462, affirmed in 101 Tex. 627; *Staples v. Word*, 48 S. W. 757. The court, it is shown, reserved his ruling on the exception to the pleading until after both parties had rested. But can we say that in this case the evidence would support no other judgment than the one rendered? We think not.

[4, 5] The testimony of Hoffman, one of the plaintiffs, was to the effect that during the year 1913, he received a letter from Neely, stating that he could ship a car of apples from Roswell at \$1.50 delivered; that thereupon he wired said Neely:

"All right, if can ship car good apples at \$1.50 bill car to Dublin, stop at Mingus and Weatherford. As we only handle good stuff, this is first car we handle this year, and want good stuff."

That thereupon Neely wired him that he would ship the apples; that when the shipment reached Mingus and were examined by plaintiffs' agent there, it was discovered that the apples were not of the kind and character ordered, were rotten, wormy, etc., and that thereupon he wired Neely that the apples were sorry, and that they could not handle them. That Neely answered by telephone:

"Hoffman, go ahead and take those apples, they are good."

That he told Neely he would call up his man at Mingus and communicate with him (Neely) later. That in about 20 minutes Neely called again and said:

"Hoffman, go ahead and take those apples and pick out the rotten ones and I will see you out. Go ahead and pay the draft and I will make it good."

That thereupon he did pay the draft drawn by the Roswell Fruit Growers' Exchange and accepted the apples. It is true that Neely testified that he told Hoffman that he had seen the apples at Ft. Worth, and that in his opinion they were good bulk apples, and that the Roswell Fruit Growers' Exchange would take care of him on any loss he had, thereby denying that he had made any personal contract of indemnity to plaintiffs against possible loss. But this issue was a question of fact to be passed on by the jury. That an agent, acting for a disclosed principal, even may bind himself personally under certain circumstances is well established by the authorities. It is entirely competent for the agent, although his agency is known and he is fully authorized to bind his principal, to pledge his own personal responsibility. He may do this in two ways, namely, he may add his responsibility to that of the principal, or he may tender his own responsibility instead of that of his principal. 1 *Mechem on Agency* (1914) § 1419, p. 1048; *Dahlstrom v. Gemunder*, 198

N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771; Shordan v. Kyler, 87 Ind. 38. Such pledge or promise may be either made expressly by words or by implication from words or conduct. Where the promise of the agent by which he is sought to be held is made in writing, its construction and effect are ordinarily questions of law to be determined by the court, or where the promise, though in writing, is of such character as only one inference can legally be drawn from the facts it is also a question for the court. But in many cases, especially where there is a conflict of testimony as to the nature and extent of the words used or the conduct involved, it is a question of fact to be determined from all the circumstances of the case. In either event the purpose of the law is to ascertain the intent of the parties, and when so ascertained, such intent is conclusive if it can be made so without conflict with established rules of law. Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Worthington v. Cowles, 112 Mass. 30; Phinizy v. Bush, 129 Ga. 479, 59 S. E. 259; Mechem, § 1422.

[8] Therefore we cannot say that the action of the court in sustaining the alleged special exception was not prejudicial error, and that if the question of fact had been submitted to the jury as to whether it was the intention of Neely and Hoffman that if the plaintiffs would pay the draft and accept the apples, Neely would be personally responsible for any loss sustained, or if the language used by Hoffman was reasonably susceptible of such construction, even though in fact he did not intend to pledge his personal responsibility, but Hoffman understood that he did intend to pledge his personal responsibility and acted thereon, that the jury would not have so found. The fact that an agent did not intend to pledge his own responsibility will not itself relieve him if the circumstances warrant the construction that he did so intend. Mechem, § 1423; McConnell v. Holderman, 24 Okl. 129, 103 Pac. 593. For the reasons mentioned, it is the judgment and order of this court that the judgment of the trial court be reversed, and the cause remanded for a new trial in accordance with this opinion.

ACME LAUNDRY v. WEINSTEIN.*
(No. 8281.)

(Court of Civil Appeals of Texas. Ft. Worth.
Nov. 27, 1915. Rehearing Denied
Jan. 15, 1916.)

1. MASTER AND SERVANT §302 — LIABILITY FOR SERVANT'S TORTS.

While a principal is liable for the consequences of acts expressly directed and authorized by him, though performed by an agent or servant, and is charged with the responsibility therefor to the same extent as if such acts had been performed by him in person, his responsibility is not limited to acts performed by himself or by an agent under his express authority, and the important inquiry is not whether

the agent was authorized to do, or omit to do, the act the doing or omission of which constitutes negligence, or whether it was done or omitted in violation of instructions, but whether it was done or omitted by the agent in the course of his employment and while he was engaged in the business of his principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. §302.]

2. MASTER AND SERVANT §330—LIABILITY FOR SERVANT'S TORTS.

When a recovery is sought of a master for an injury inflicted by a servant, plaintiff must show that the servant did the wrong while acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. §330.]

3. MASTER AND SERVANT §302—LIABILITY FOR SERVANT'S TORTS—"COURSE OF EMPLOYMENT."

A servant is acting within the "course of his employment" when he is engaged in doing for his master either the act consciously and specifically directed, or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct, and logical result of it; and the test is not whether the act was done while the servant was in the place appointed for the service, or during the time in which he was engaged in such performance, but whether it was a natural and not a disconnected or extraordinary part or incident of the service contemplated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. §302.]

For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

4. MASTER AND SERVANT §305—LIABILITY FOR SERVANT'S TORTS.

That a negligent act of a servant resulting in an injury may not have been authorized by the principal, or may have been forbidden, will not necessarily relieve the master or principal from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. §305.]

5. MASTER AND SERVANT §330—INJURIES TO THIRD PERSONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a boy struck by a barrel thrown into an alley from the window of a laundry in removing rubbish from a room in which supplies were kept, evidence held to support a finding that the foreman of the washroom and an employé working under his authority were acting within the scope of their employment, though it was claimed that the work was being performed after the completion of their regular duties for the day, and that there was a janitor whose special duty it was to clean up the building and each room thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. §330.]

6. MASTER AND SERVANT §302—LIABILITY FOR SERVANT'S TORTS.

Where it was one of the duties of the foreman of the washroom of a laundry to go to a room where supplies were kept for necessary supplies, it was within the scope of his employment for him to remove rubbish from such room, in order that he might more conveniently and efficiently perform the service specially delegated to him, though the removal thereof was not specially authorized; it being a natural

incident to and growing out of the particular service delegated to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. ¶302.]

7. MASTER AND SERVANT ¶302—LIABILITY FOR SERVANT'S TORTS.

To render a master liable for the act of a servant, it must be done within the scope of the servant's general authority in the furtherance of the master's business and for the accomplishment of the object for which the servant is employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. ¶302.]

8. DAMAGES ¶186—LOSS OF SERVICES—SUFFICIENCY OF EVIDENCE.

In a father's action for the loss of his minor son's services because of injuries necessitating the removal of a kidney, evidence held to sustain a finding that plaintiff's minor son was, by the injury complained of, rendered incapable of performing manual labor, or that his capacity to so perform such labor had been greatly impaired, irrespective of whether the loss of a kidney would, in all cases, impair the ability of one to labor or earn money.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509; Dec. Dig. ¶186.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by E. Weinstein against the Acme Laundry. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Wray, of Ft. Worth, for appellant. McLean, Scott & McLean, of Ft. Worth, for appellee.

BUCK, J. Sol Weinstein, son of appellee, nine years old, while going from school to his home, in passing through an alley at the rear of appellant's building, was seriously and permanently injured by a barrel, which was thrown from an upper story window of appellant's building, coming in contact with his body. The injury was of such a nature as necessitated a surgical operation by which the right kidney of the boy was removed. He was in the hospital for several weeks, and after being removed to the home of his parents was confined to his bed for some time. Plaintiff alleged, and the evidence tends to support such allegations, that the injury had affected the boy seriously, both in mind and body, from which he had not recovered at the time of the trial, about four years after the accident. It was alleged that the injury was caused by the negligence of the defendant company, a corporation, and its employees; that the barrel which caused the injury was thrown from the window by C. R. Crawford and Floyd Bingham, employees of the defendant at the time, in the course of their employment with appellant, and while they were doing work within the scope of their employment; that the place where the boy was injured was on a public thoroughfare, constantly used by pedestrians and persons in vehicles. It was further alleged that plaintiff had expended four hundred

dollars in medical and hospital bills necessarily incurred, and which was alleged to be the reasonable value for such services. Plaintiff further alleged that he had been damaged by reason of the impaired ability of the boy to render his parents service and labor while a minor, and asked judgment for both said expenditures and said loss of service. Defendant answered by a general demurrer and general denial. C. R. Crawford was foreman of the washroom of the laundry, while Bingham was an employé working under Crawford's authority. On the occasion of the injury, after he had finished the performance of his regular duties of foreman of his department, he concluded to go up stairs and clean out the room where supplies were kept, and instructed Bingham to go with him to assist him. There were in said room empty barrels and boxes, and other refuse material, which Crawford concluded ought to be removed, as testified to by him, because the rubbish was in his way. The two collected the rubbish and pitched it out of the window and, as the last barrel was pitched out, the little boy, coming from school, passed along the street or alley and was hit and injured, as before set out. The main controversy between plaintiff and defendant is as to whether or not Crawford and Bingham were, at the time of the accident, acting within the scope of their authority under their employment with the laundry, inasmuch as there was a janitor whose special duty it was to clean up the building and each room thereof, and no special authority or instruction had been given to either Crawford or Bingham to do this work, and the work was performed after the completion of the regular duties of each for the day.

The cause was submitted to the jury on special issues, which the jury answered and found as follows: First, that Crawford was acting within the scope of his employment at the time the barrel was thrown out of the window; second, that Bingham was also so acting at said time; third, that the throwing out of the window of the barrel was negligence; fourth, that such negligence was the proximate cause of the injury complained of; fifth, that the damages sustained by plaintiff amounted to \$1,400. Upon this verdict the court rendered judgment for plaintiff for said \$1,400, from which the defendant appeals.

The court instructed the jury that, if they found and believed from a preponderance of the evidence that at the time Crawford and Bingham went into the stockroom and threw the barrel out of the window, the day's work for which Crawford and Bingham were employed to perform had been done, and Crawford and Bingham had the right to leave the defendant's establishment, but voluntarily remained therein, and voluntarily undertook to do the work of cleaning out the stockroom, they would answer issues 1 and 2 in the negative. Appellant's first assignment is directed

to the refusal of the court to give a peremptory instruction in its favor, and its second, third, fourth, fifth, and sixth attack the finding of the jury in answer to issues 1 and 2. Its seventh assignment is leveled at the verdict of the jury as to the measure of damages. Since it is practically admitted by appellant that the throwing out of the barrel under the circumstances was negligence on the part of Crawford and Bingham, we need only to consider, with reference to the first six assignments, the question of whether or not the employer was liable for such negligent acts, and whether or not said employés, while attempting to clean up the stockroom, were acting within the scope of their employment.

[1] While the principal is liable for the consequences of the acts expressly directed and authorized by him, though performed by an agent or servant, and is charged with the responsibility therefor to the same extent as if such acts had been performed by such principal in person, yet his responsibility is not limited to those acts performed by the principal himself or by an agent under his express authority. As is said by Mechem on Agency, vol. 2, § 1874:

"In determining the principal's liability for the agent's negligence, the important inquiry is, not whether the agent was authorized to do, or omit to do, the act, the doing or not doing of which constitutes the negligence complained of, or whether the act was done or omitted in violation of the principal's instructions, but whether the act was done or omitted by the agent in the course of the employment, and while he was engaged in the business of his principal. In endeavoring to state a rule for such cases, it was said by a learned judge: 'In most cases where the master had been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed the master. The principal is bound by a contract made in his name by an agent only when the agent has actual or apparent authority to make it; but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing the act with the authority. It is sufficient to make the master responsible civiliter if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of his master. This rule is well founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat superior applies, provided, only, that the agent was acting at the time for the principal and within the scope of the business intrusted to him."

Quoting further from the same authority (section 1875):

"Nevertheless, the liability of the master in these cases is based upon the general principles

of agency, and cannot otherwise exist. It is simply another aspect of the question of authority, with its incidents, which was discussed in a preceding section. There is no rule of public policy or convenience that a master shall be liable for all the acts or defaults of his servants. For what acts or defaults is he liable? For those and those only for which he can in some way fairly be deemed to be responsible. He directed the doing of a given act; that very act was negligently done, but it is within the ordinary range of human experience that that may happen. He directed the doing of a given act; the servant did also some other act which was a natural incident or attribute of the main act or a natural and proximate consequence of it; to do that additional act at all was negligence, or it was negligently done. This also is within the ordinary range of human conduct. It is possible, therefore, in these cases to see some direct relation between the authority and the act complained of—to trace some natural and direct causal connection between the authority and the act."

[2] As said in the case of *Railway v. Anderson*, 82 Tex. 518, 17 S. W. 1039, 27 Am. St. Rep. 902:

"When a recovery is sought of the master for an injury inflicted by his servant, the plaintiff must show that the servant did the wrong while acting within the scope of his employment."

In the case of *Railway v. Yarbrough*, 39 S. W. 1096, it appeared that an engineer sounded a whistle merely to frighten plaintiff's horse, and the Court of Civil Appeals for the Fifth District said that:

"The charge of the court is based upon the theory that, if there was no occasion for the employés in charge of the engine to blow the whistle, and they blew it for the purpose of frightening plaintiff's horse, and not in discharge of duty, the railway company would be liable for damages resulting therefrom. This is not the law. If there was no occasion for blowing the whistle in furtherance of the master's business, and the act of the employé in causing the whistle to blow was solely for the purpose of frightening the horse of plaintiff, then the act cannot be said to have been done within the scope of his employment, so as to charge the master with its consequences." *Railway Co. v. Crutcher*, 141 S. W. 137.

[3] What is meant by "course of employment" as used in this connection? In the words of Mr. Mechem, § 1879 et seq.:

"Since no act can be completely isolated from its surroundings, since every act must have its penumbra of incident and attribute, it is essential that some term shall be found which shall include, not merely the act itself, but this train of attendant circumstances. For the lack of a better term, it is said that in order to charge the master with the servant's negligence, the servant must be acting in the 'course of his undertaking' or 'within the course of his employment.' This term 'course of his employment,' like the corresponding term 'the scope of the authority' in cases of agency, and 'the scope of the business' in cases of partnership, is one not capable of precise definition, although many attempts have been made to define it. It is largely a question of fact, and its determination may vary in each case in view of the particular circumstances. The utmost that can ordinarily be said is that a servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed, or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the act or a natural, direct, and logical result of it. If in doing such

an act, the servant acts negligently, that is negligence within the course of his employment. As has already been pointed out, the question of what acts can be deemed to be done within the course of the employment is not merely a question of time or place. Not every act which an agent or servant may do while he is in the place appointed for the service, or during the time in which he is engaged in the performance, can be deemed to be within the course of the employment, or within the scope of the authority. The test lies deeper than that; it inheres in the relation which the act done bears to the employment. The act cannot be deemed to be within the course of the employment, unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated. A servant who, while driving his master's team upon the master's business and holding the reins in one hand, amuses himself by striking people, within reach, with the whip, which he holds in the other hand, does so while he is acting generally for his master and while he is in the place in which his service requires him to be, but his act in striking people with the whip is not within the course of his employment, and his master is not liable for it."

[4] But, on the other hand, it is equally true that the fact that the negligent act resulting in the injury may not have been authorized by the principal, or in fact may have been forbidden, will not therefore necessarily relieve the master or principal from liability. In *Railway Co. v. Derby*, 14 How. 468, 14 L. Ed. 502, the United States Supreme Court held that, where a railway engineer, who was running a train at a time when he had been expressly forbidden to do so, and collided with a special train containing the plaintiff, and thereby injured him, the railway company was liable, and, further, it was held in *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 861, that where the agent of a lumber dealer, in order to promote his convenience in handling it, caused lumber to be piled in a place where his principal had instructed him not to have it piled, and the lumber, being negligently piled, fell upon and injured the plaintiff, the principal was liable. In *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 406, where a salesman in a gun store, who had been expressly instructed not to load guns in the store, loaded one for the purpose of demonstrating it to a customer, who refused to buy unless this was done, and the gun, going off, accidentally shot plaintiff, it was held that the employer was liable. See also *Railway v. Rodgers*, 89 Tex. 675, 36 S. W. 243; *Cook v. Nav. Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

[5] But we think the evidence is sufficient to sustain the jury's findings to which complaint is made. Crawford testified, in part, as follows:

"I was in the employment of the Acme Laundry as foreman; it was my duty to see that things were kept in shape, and I taken it on myself. I went to the storeroom to bring down some supplies for the washroom, perhaps, and at that time there was quite a few barrels, empty boxes, and rubbish in my way, and I decided, while I was up there, I would get one of the boys and make a little cleaning up. Well, to make things short, I just gathered the things up,

and we put it out this second floor window, looking between every piece that went out—looking between the times; and as we taken the last barrel we were to put out, there was a couple of boxes and things to be moved between it, it taken a little more time, so when we threw it out I heard some peculiar kind of a noise, and I looked down and saw this last barrel had struck the boy. * * * It was my duty, in connection with my washing, to go upstairs and get the soda and things to use in the washing. * * * What caused me to clean up the room was there was two weeks of rubbish, boxes, and empty barrels, or about a week's rubbish; that rubbish consisted of about four or five barrels and some little white pine boxes that were knocked to pieces. Floyd Bingham assisted me in throwing that barrel out of the window. He was a wringer employed under me in the washroom, wringing shirts for me at that time. * * * To get around those boxes and barrels I could have got between them without putting it out, but I felt it was my duty, that the trash was there—to move it and get it clear out of the way. There were two keys to that room at the time of the injury; I had one of the keys. * * * They did not have any other room except the one I went to in which they kept these substances for washing clothes. I had been head washman for two or three years. I had the care of that particular room something like about two or three years, I suppose. I had carried the key to that room about two years before the injury. * * * It was part of my duties as head washer to get the material and supplies in to other boys. * * * This young man Bingham who was helping me, he did what I told him to do; so did the janitor."

Bingham testified, in part, as follows:

"I acted under Crawford's orders. Mr. Wheeler placed me under him. Mr. Wheeler was the proprietor of the laundry. * * * When I went to work at the laundry Mr. Wheeler instructed me to do what Crawford said."

[6, 7] From the testimony quoted it appears: First, that Crawford in the position he occupied had been charged with duties involving discretion; second, that in removing the rubbish from this room he was doing so, as he thought, in furtherance of his employer's business; third, that he had at least a limited charge and control of said room; and, fourth, that in removing the rubbish he was performing a service conducive to his convenience as such head washman in the discharge of the duties devolving upon said position. For, as it was his duty to go to this room for the supplies needed, and such act was plainly within the scope of his employment, it can hardly be said with reason as to the attempt to remove the rubbish in order that he might more conveniently or efficiently perform the service specially delegated to him, that his former act, though not specially authorized, was not a natural incident to and growing out of the particular service delegated to him. To render the master liable for the act of a servant, it must be done within the scope of the general authority of the servant, in the furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. *I. & G. N. Ry. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; 6 Labatt's Master and Servant, § 2277.

The language used by the author in the section last cited is as follows:

"It is well settled that if the act complained of was incidental to the discharge of the functions covered by the servant's general authority, the master cannot avoid liability on any of the following grounds: That he did not specifically authorize the commission of that particular act; that he had no knowledge of it; or that it involved the abuse or excess of authority conferred upon him." *Higgins v. Railway Co.*, 46 N. Y. 23, 7 Am. Rep. 298; *Robards v. Sewer Pipe Co.*, 130 Ky. 380, 113 S. W. 429, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394; *Oil Co. v. Parkinson*, 152 Fed. 681, 82 C. C. A. 29; *Hardeman v. Williams*, 169 Ala. 50, 53 South. 794; *T. & P. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 381.

In the case of *Higgins v. Railway Co.*, supra, the court uses the following language:

"The master's liability for the negligence or tort of his servant does not depend upon the existence of an authority to do the particular act from which the injury resulted. In most cases where the master has been held liable for the negligence of his servant not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed to the master."

Therefore, we are of opinion that assignments 1 to 6, inclusive, must be overruled.

[8] The seventh assignment is as follows:

"The verdict of the jury as to the measure of damages is wholly unsupported by the testimony, and a new trial should be had: First, because there was no testimony, expert or otherwise, that would inform the jury of the effect the loss of the kidney would have on the boy's physical condition and his ability to perform his ordinary duties to his father; second, because the mere fact of the loss of a kidney was not sufficient for the jury to infer that it would impair, in any manner or way, the physical or mental ability of the boy to perform his ordinary duties to the plaintiff; third, because it was incumbent upon the plaintiff to establish to the jury that the loss of a kidney would impair the physical ability of the boy to perform his ordinary duties that he would most probably have performed to the plaintiff; fourth, because there was no testimony that disclosed that the loss of a kidney would in any way impair or lessen the boy's earning capacity."

The plaintiff testified in part as follows:

"I am engaged in the mercantile business in Ft. Worth at 105 Houston street, hardware business. * * * I was out about \$400 for hospital and doctor's bills. Just before the time my boy got hurt he was a solid child and never was sick a minute. Since his injury he has not been able to do any work or help me in the store any at all. He cannot do nothing. Whenever I tell him to sweep out the store or pick up a few nails from the floor he cannot do it; he cannot bend himself. He insists that he cannot. His condition in the last two years is one day well and the next day he is sickly, and the third day he is sick entirely, and we keep him always under the doctor and doctor him at home. I have had Dr. Furman with him also at my home. And he treats him many times at home at nights, and daytimes sometimes we take him to the office. In the business I am engaged in I can use a boy from 10 to 21 years of age to assist me, but not that boy. A boy in my business there could do everything in a hardware store—handle nails, handle hinges, sell hinges, buy hinges, sweep the store, move one thing and another. A hardware store has got to be clean every minute; move things from one place to another every minute. * * * Before he was

hurt he had been of assistance to me in the store. He used to come in and help me, and he used to come every time after school to help me carry in the show that we have to show people outside, and in the morning he used to come to help me carry out the show, and now I have to do that myself or hire it done. For the last few years since the injury, the boy has not done a thing in the way of work around the store."

Irrespective of whether or not the loss of a kidney would, in all cases, impair the ability of one to labor or earn money, the evidence quoted is sufficient to sustain a finding that in the present case the plaintiff's minor son was, by the injury complained of, rendered either incapable of performing any manual labor, or, at least, that his capacity to so perform manual labor has been greatly impaired. For such loss of service on the part of his minor son the jury has awarded the plaintiff \$1,000, if we subtract from the total amount the \$400 which the uncontradicted testimony shows was incurred in the way of medical treatment and hospital fees. And while the precise question is not raised in the assignment, and therefore we do not have to decide it, yet it has been held that, in the absence of testimony, expert or otherwise, as to the reasonable value of services, the loss of which is asserted as an element of damages, the jury, who are in full possession of all the details of the entire transaction, may find the value upon their own judgment, provided there be enough in the evidence as to the character of the services to enable them to judge. *Hall & Co. v. Immigration Association*, 53 Tex. Civ. App. 592, 116 S. W. 831. And upon an analogous proposition might be cited the case of *Railway v. Harris*, 172 S. W. 1129. The seventh assignment is overruled.

The judgment of the trial court is, in all things, affirmed.

GALVESTON, H. & S. A. RY. CO. v. WATTS.*
(No. 5519)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 5, 1918. Rehearing Denied
Feb. 2, 1918.)

1. CARRIERS \Rightarrow 315—INJURY TO PASSENGER—PLEADING—RECOVERY.

Where, in an action for injuries to a passenger from falling on the steps while she was leaving the station, plaintiff alleges conjunctively several grounds of negligence which she charges proximately caused, or concurred in causing, her injuries, she is entitled to recover on proof of either, if shown to be the efficient sole cause, or concurring cause, of her injuries.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. \Rightarrow 315.]

2. TRIAL \Rightarrow 29 — SUBMISSION OF ISSUES — WEIGHT OF EVIDENCE—INTIMATION OF OPINION.

In a negligence case, wherein plaintiff alleges conjunctively several grounds of negligence causing her injuries, the action of the court in determining that certain of the grounds are so supported by evidence as to authorize

\Rightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

their submission to the jury is not objectionable as an intimation of opinion on the weight to be given the grounds submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. ¶29.]

3. APPEAL AND ERROR ¶1062 — HARMLESS ERROR — SUBMISSION OF ISSUES — NEGLIGENCE.

In a case involving several separate grounds of negligence, on any one of which recovery can be had if sustained by the evidence, the submission of one or more alleged grounds, not supported by evidence, in conjunction with those sufficiently supported, does not require a reversal, where the real issue is not thereby obscured and the jury not thereby induced to believe that the court thinks there is evidence of many wrongful acts of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. ¶1062.]

4. APPEAL AND ERROR ¶882—INVITED ERROR—INSTRUCTION.

Where, in an action for injuries to a passenger from falling on the steps while she was leaving the station, defendant requested the court to give a special charge, submitting all of the several issues pleaded by plaintiff in the conjunctive, especially directing their attention to the necessity of finding the existence of each act, that each act constituted negligence, and that each and all concurred in bringing about plaintiff's fall, and that but for each and all of them combined her fall and injury would not have occurred, it could not complain that the court in its general charge, adopted the theory of such special instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. ¶882.]

5. TRIAL ¶133 — ARGUMENT OF COUNSEL — ACTION OF COURT.

Statements of counsel for plaintiff in the opening and closing arguments, apparently made to impress the jury with the idea that the general charge was of the same effect as a special charge asked, and would be a safer guide than the special charge, did not require a reversal, where those made in the opening argument were withdrawn, the court instructed that the jury was bound by the special charge the same as by the general charge, and no further instructions on the matter were requested by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ¶133.]

6. APPEAL AND ERROR ¶268—PRESENTATION BELOW—OBJECTION TO INSTRUCTIONS.

On appeal in a passenger's action for injuries from falling on the steps as she was leaving the station, an objection that an instruction was too broad because it failed to provide that no recovery could be had for such injuries as were due to plaintiff's own negligence subsequent to the injury could not be considered, where this specific defect was not pointed out in the exceptions filed below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. ¶263.]

7. TRIAL ¶206—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

The failure of a paragraph of the charge in a negligence case to provide that no recovery could be had for such injuries as were due to plaintiff's own negligence subsequent to the injury, if error, was harmless, where the jury was informed in another paragraph that they could not allow plaintiff damages for any condi-

tions brought about by her own negligence subsequent to the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 716, 718; Dec. Dig. ¶296.]

8. CARRIERS ¶321 — PASSENGER DEPARTING FROM STATION—INSTRUCTIONS—EVIDENCE.

In view of Rev. St. 1911, art. 6591, fixing not less than one hour as a reasonable time within which passengers may depart from the station after their arrival at their destination, the refusal of an instruction, in a passenger's action for injuries from falling on the steps while she was leaving the station, that the verdict should be for defendant if plaintiff, after alighting from the train, remained in the waiting room for purposes of her own and after all business of the railroad connected with her journey had been entirely finished, was not error, where there was no evidence that more than 30 minutes elapsed between the time she alighted from the train and the accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. ¶321.]

9. DAMAGES ¶182 — PERSONAL INJURIES — EXCESSIVE RECOVERY.

A recovery of \$18,000 for injuries to a trained nurse, 39 years old, earning \$25 a week, besides board, was not excessive, where it appeared that she was partially paralyzed, that one eye was rendered useless, and that she was but a wreck of her former self and almost in a helpless condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. ¶182.]

Appeal from District Court, Val Verde County; W. C. Douglas, Judge.

Action by C. L. Watts against the Galveston, Harrisburg & San Antonio Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Boggess & Smith, of Del Rio, and W. B. Teagarden, of San Antonio, for appellant. Joseph Jones, Geo. M. Thurmond, and Walter F. Jones, all of Del Rio, for appellee.

MOURSUND, J. Appellee sued appellant to recover damages for personal injuries, charged to have been received on account of falling from the steps of appellant's passenger station at Comstock on August 18, 1914, at 6 o'clock a. m. She alleged that it was dark, and as she was descending the steps she slipped and fell, and her left foot was caught between the boards of the steps, whereby she was injured, as set out in the petition. She alleged that appellant was guilty of four distinct acts of negligence, each of which directly caused, or contributed to cause, her fall and to produce the injuries, viz:

"First. In allowing said steps to become old and worn and unfit, and to be and remain covered with soft mud and small gravel, which caused her foot to slip or roll while she was in the act of stepping down upon them.

"Second. In failing to have a back to said steps, which would have held her foot when she slipped on the step, and have prevented her fall, and would have prevented her foot being caught between said steps.

"Third. In failing to have a hand or side rail on the ends of said steps which would have enabled her to have avoided the fall when her foot slipped.

"Fourth. In failing to have the steps sufficiently lighted to enable her to see where she was stepping, and the condition of the step before using it."

The answer consisted of denials of the material facts alleged, and pleas of contributory negligence before and after the fall, as follows:

"With full knowledge of all the existing and surrounding conditions present at the time she attempted to go down the steps of the station building, she did not act and step and place her feet and walk with such care and caution as a person of ordinary care and prudence would have done, but heedlessly, carelessly, and rapidly walked down the steps, without properly observing where and how she placed her feet, and was negligent and careless in this respect, and in other respects unknown to this defendant, but well known to her, and peculiarly within her knowledge, and because of the said facts and conditions and conduct on plaintiff's part, she assumed the risk of existing conditions, whatever they were, and was guilty of negligence which caused, or at least contributed to, the injuries complained of. Wherefore she ought not to recover."

"Defendant further charges that if, in fact, plaintiff was injured in manner and form as charged, which is not admitted, but is again denied, the injuries were not serious, but were temporary, and with proper care and attention would have been completely healed and cured in a very brief time, but instead of remaining quiet and treating the injury as a person of ordinary care would have done, she at once went to a public gathering and barbecue, and horse races, and walked about, and stood on her feet all day, and then at night went to a dance and danced and exercised, and frequently afterwards walked, and stood, and exercised herself, and failed to give the injury proper care and attention, and thus by her own imprudence and negligence aggravated the trouble, and brought it to its present condition, if in fact injuries now exist, which is not admitted."

These allegations were denied in a supplemental petition. The trial resulted in a verdict and judgment for appellee in the sum of \$18,000.

Plaintiff became a passenger upon defendant's train at Del Rio, and got off at Comstock at about 6 o'clock a. m., at which time a "misting rain" was falling and it was still dark. It had only rained enough for it to be a little muddy, just enough to stick to the feet good. Plaintiff entered the depot and remained about 30 minutes. When she left it was still so dark that only the houses could be seen. She went out of the depot at a door opposite the one by which she entered, intending to go to the hotel. The waiting room was lighted by an oil lamp hanging on the wall by the side of and about at the top of the door through which she passed out, which was very dim, and the reflector behind the same cast the light towards the other door. This lamp gave no light upon the steps leading down from the door. These steps were about 6 feet in width, extending about 18 inches on each side of the door. There were four steps, made out of lumber 2 inches thick and probably about 11½ inch-

es wide. The outer edge of each board protruded over the inner edge of the lower board about an inch and a half. The steps had no back boards or banisters. The floor of the building was about 2½ feet from the ground. A considerable number of people had passed in and out over these steps that morning, as that entrance to the depot was on the side on which the greater portion of the town was situated. Mud had accumulated on the steps, and there was some evidence to the effect that the steps were worn, but it failed to show the extent. Plaintiff started down the middle of the steps, and when on the second step she stepped on mud, slipped, and fell down. She testified:

"When I stepped on the first step, when I stepped on the second step, I began to slip; the boys caught at me, I guess; anyway, I fell, and in scrambling, I fell straight back on my back, my foot going through, back of the steps. It had no board on it at the back; it was just old, worn steps; it was caused from mud; they were right slippery from the mud—the steps were. They were old steps; I noticed them that day, afterwards."

On cross-examination she said:

"The step was slippery from mud is what caused me to fall. I know that because it was damp; it was misty and rainy, and it was muddy and slippery; my foot slipped was the cause of it. I was just going down those steps like any one else, just going down the steps, and I was very careful in stepping; yes, sir, I went with my face forward. No; I don't know as I went down the steps sidewise, but as well as I know, that is the way I always walk, right straight down, and of course I wasn't, didn't know that I was going to get hurt, and all this. I just stepped out and stepped off; going right forward is the way I went down the steps; didn't walk down sidewise; didn't put my foot sidewise; I just walked like a person naturally would right down the steps. Yes, sir; and when I got on the second step I felt that slick mud; I am sure it was mud, because I was muddy. Yes, sir; that was what caused me to slip and fall; I am sure that was what caused me to slip and fall, because in slipping I just kept slipping. My foot went through."

Plaintiff also said:

"I had my umbrella in my hands, and it was closed, but I dropped it."

The witness McBee saw no mud on the steps, and did not feel any under his feet. He went down the steps immediately after plaintiff fell. He said:

"It was just about the middle of the steps where I went down, but more, I went more to the west side of the steps."

The witness Gregory also went down the steps immediately after plaintiff fell, and he saw no mud, nor did he feel any under his feet. He gave Miss Whistler the middle of the steps, and he walked to one side. Miss Whistler testified the steps were very muddy; that she saw this as the lightning flashed, and felt the mud under her feet.

The above statement will show the main facts, and upon the issues of negligence pleaded we make the following conclusions of fact:

(1) While there is evidence that the steps were worn, it is not sufficient to show that they were worn to such an extent that the

retention thereof constituted negligence, nor is there any evidence to show that the extent to which they had become worn was a proximate cause of plaintiff's fall.

(2) The evidence fails to show that defendant was guilty of negligence in permitting the mud to be on the steps at the time when plaintiff fell.

(3) The defendant was negligent in not having handrails along the sides of the steps, but the absence thereof did not proximately cause, or contribute to cause, plaintiff's injuries, for she went down the center of the steps, and it does not appear that she tried to use, or could have used, handrails.

(4) The defendant was negligent in failing to have backboards upon the steps; and, while it is impossible to say from the evidence to what extent such failure caused the injuries to plaintiff, it is shown that it was the proximate cause of some injury to her. The evidence fails to show whether her ankle turned when she placed her foot on the mud and slipped, or whether it was wrenched by reason of her foot slipping through the back of the steps, thus causing her weight to be thrown upon such foot and ankle.

(5) The company was negligent in failing to maintain a light which would enable passengers to see the steps as they used them; and, there being evidence from which it could be found that the mud was only in the center of the steps, it is shown that the mud could, and naturally would, have been avoided, and therefore the evidence supports a finding that the failure to maintain such a light was a proximate cause, which concurred with the existence of the mud on the steps and the failure to have backboards on the steps in causing the injuries sustained by plaintiff.

[1] The fourth and fifth conclusions of fact, above stated, are referred to as sufficient ground for holding that the court did not err in his rulings relating to the sufficiency of the evidence to sustain the verdict and judgment. Where a plaintiff alleges, though conjunctively, two or more grounds of negligence which he charges proximately caused, or concurred in causing, his injuries, he is entitled to recover upon proof of either, if it is shown to be the efficient sole cause, or concurring cause, of the injuries complained of. *H. & T. O. Ry. v. Easton*, 44 Tex. Civ. App. 97, 97 S. W. 833; *T. & P. Ry. Co. v. Leakey*, 39 Tex. Civ. App. 584, 87 S. W. 1168; *G., H. & S. A. Ry. Co. v. Pitts*, 42 S. W. 255; *Shippers' Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032; *G., H. & S. A. Ry. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279; *Pecos & N. T. Ry. v. Finklea*, 155 S. W. 613; *G., C. & S. F. Ry. Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395. Assignments of error Nos. 1 to 7 are overruled.

[2-4] The defendant excepted to the charge prepared by the court, on the ground that there was no evidence justifying the submission of issues relating to the condition

of the steps and the absence of a handrail. It is, of course, the province of the trial court to determine, in the first instance, whether there is any evidence to justify the submission of an issue, and if the fact that such decision was favorable to plaintiff was accepted by juries as an intimation from the court of the weight to be given thereto by them, and was given controlling effect, there would be no verdict adverse to the plaintiff, unless a peremptory instruction was given to return a verdict for the defendant. It is therefore evident that, in cases involving several separate grounds of negligence upon any one of which a recovery could be had if the facts sustain such ground, the effect of submitting one or more alleged grounds not supported by evidence in conjunction with those supported by evidence must not be given undue importance. It has been held that when such matters are submitted in the conjunctive a greater burden has been imposed on plaintiff than the law exacts, and defendant cannot complain. *H. & T. C. Ry. Co. v. Johnson*, 103 Tex. 324, 127 S. W. 539; *G., H. & S. A. Ry. Co. v. Fry*, 37 Tex. Civ. App. 555, 84 S. W. 664; *Dallas Elec. Ry. v. Stone*, 166 S. W. 708. We can conceive, however, of cases in which the practice may be carried to such an extreme as to obscure the real issue, and be calculated to induce the belief that the court thinks there is evidence of many wrongful acts on the part of defendant. We think it is unnecessary to decide whether this is such a case. In connection with the exceptions referred to, the defendant filed a further exception to the charge, criticizing it on the ground that it authorized a verdict for plaintiff upon a finding of negligence with reference to any one or all of the grounds enumerated in the petition, whereas the evidence showed as a matter of law that such grounds did not all concur in producing the fall and injuries, or that at least whether or not all concurred was a question for the jury, and this should be explicitly stated to the jury if the case is given to them. The record shows that on the same day defendant requested the court to give a special charge, submitting all of the issues pleaded by plaintiff in the conjunctive, specifically directing their attention to the necessity of finding the existence of each act, that each act constituted negligence, and that each and all concurred in bringing about and proximately caused plaintiff's fall, and that, but for each of said things and all of them combined, her fall and injury would not have occurred, and if they did not so find to return a verdict for defendant. The bill of exceptions to the overruling of the exceptions affords no explanation of the circumstances surrounding the presentation and giving of this charge; and, in view of its being given, the fact that the general charge was along the same lines could not have affected the result of the trial. As the

record is subject to the construction that defendant permitted, if it did not induce, the court to adopt its theory that whether or not all things relied upon concurred should be explicitly stated to the jury, we conclude that assignments Nos. 8, 9, 10, 11, and 13 do not show any error requiring a reversal of the judgment.

The twelfth assignment is overruled, for the reasons given in discussing assignments 8, 9, 10, 11, and 13, and also because we think the evidence justified the submission of the issue regarding the insufficiency of the light.

[5] Complaint is made of certain statements made by counsel for plaintiff in the opening and closing arguments, all of which related to the special charge above referred to, given at defendant's request. These statements were apparently made for the purpose of impressing the jury with the idea that the general charge was to the same effect as the special charge, and that it would be a safer guide to them than the special charge. Upon objection being made, the statements made in the opening argument were withdrawn. Those made in the closing argument were not withdrawn, but the court instructed the jury that defendant had a right to have its language presented to them embodying the law, and if the court did not think it embodied the law, he would not submit it; that the jury is bound by a special charge just the same as by the general charge. The bills of exception, as qualified, show that no request was made by defendant for further instructions to the jury. The argument was improper, but we do not think it was so prejudicial that it would require or justify the reversal of the judgment. It could only be prejudicial to the extent that it might cause the jury not to consider the special charge, and that was a matter which could be corrected by instructions from the court. The court undertook to correct, it, and, no further instructions having been asked, we may assume that defendant was satisfied that the instruction given placed the matter in a proper light before the jury, and removed the injurious effects of the argument as fully as could be done. Assignments Nos. 14 and 15 are overruled, as is also the sixteenth, which relates to a similar matter.

[6, 7] By assignment No. 17 complaint is made of the charge on the measure of damages. The proposition submitted is to the effect that the charge is too broad because it fails to provide that no recovery can be had for such disabilities, etc., as were due to plaintiff's own negligence subsequent to the injury. This specific defect was not pointed out in the exceptions filed in the trial court. In fact the exception relating to this matter was couched in such general language that it did not aid the court in any way. If the court can be charged with error on such general objections, the law requiring exceptions to the charge in advance was enacted in vain. Besides, in another para-

graph the jury was informed that they could not allow plaintiff damages for any conditions that were brought about by her own negligence subsequent to the accident. The assignment is overruled.

[8] By the eighteenth assignment complaint is made of the refusal of the following special charge:

"You are further instructed, gentlemen, that if you find and believe from the facts that after plaintiff alighted from the train and her journey was ended she remained in the waiting room for the hotel to be opened, or for any other purpose of her own, and after all business with the railroad connected with her journey had been entirely finished and attended to, then and after such time the defendant owed no duty to keep the station premises lighted for her benefit, and no duty to exercise ordinary care to keep the premises in safe condition for her; and, should you so find the facts to be, your verdict must be for the defendant."

The evidence shows that plaintiff remained in the waiting room a short time; one witness fixing the time at from 5 to 10 minutes, while most of them estimated it at about 30 minutes. Under the common law, the relation of carrier and passenger existed until after the passenger had alighted and had reasonable time and opportunity to leave the depot. We need not inquire whether the special charge correctly states the law, for by article 6591 (R. S. 1911) the Legislature has arbitrarily fixed not less than one hour as the reasonable time in which departing passengers may acquaint themselves with their surroundings and deliberate upon ways and means of further progress. *M., K. & T. Ry. Co. v. Cook*, 166 S. W. 453. Assignment No. 18 is overruled; also No. 19, which relates to the same matter.

[9] It is contended that the verdict is excessive; and, considering the nature of the original injuries, it appears to be grossly excessive, but if plaintiff's condition at the time of the trial can be attributed to such injuries, it cannot be said that the verdict is too large. She testified to great suffering and serious injuries, including paralysis of the leg, arm, and side, serious injury to the left eye, rendering it practically useless. Dr. Garrett testified that it was certain plaintiff would never regain her former health, and at what point the invasion of her nervous system would stop could not be told; that it had been gradually getting worse; that she was a wreck of her former self and almost in a helpless condition, being unable to walk. While there was the usual conflict in the medical opinions, there is evidence from which the jury could find that all of these ill effects resulted from the fall, and that plaintiff was not negligent in the manner in which she took care of herself after sustaining the injuries. Whether our conclusions would be the same is immaterial, for it is the province of the jury to pass upon the credibility of the witnesses. Appellee was 39 years old, and was a trained nurse whose earning capacity was \$25 a

week, besides board. We conclude that it cannot be said that the verdict is excessive. The judgment is affirmed.

MCGRAW v. GALVESTON, H. & S. A. RY. CO. (No. 5581.) *

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916. Rehearing Denied Feb. 2, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1058—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of an expert witness' testimony in a personal injury case, was harmless, where not only was the same witness permitted later to swear to the same facts, but another expert medical witness testified to practically the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. \Leftrightarrow 1058.]

2. APPEAL AND ERROR \Leftrightarrow 730—ASSIGNMENT OF ERROR—SUFFICIENCY—INSTRUCTIONS.

An assignment of error, complaining that an instruction was "uncertain, confusing, and misleading, and was calculated to mislead the jury and was prejudicial to plaintiff" was too general and uncertain to be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. \Leftrightarrow 730.]

3. STEAM \Leftrightarrow 6—EXPLOSION OF LOCOMOTIVE—EVIDENCE.

In an action for injuries to plaintiff from being thrown to the floor of her house when a locomotive in defendant's roundhouse exploded and hurled a great mass of debris against the house, evidence that the explosion was caused by excessive steam pressure did not demand a verdict for plaintiff, in the absence of proof that such excessive pressure was chargeable to defendant's negligence.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 6.]

4. STEAM \Leftrightarrow 6—EXPLOSION OF LOCOMOTIVE—CAUSE—EXCESSIVE STEAM PRESSURE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for injuries to plaintiff from being thrown to the floor of her home in consequence of the explosion of a locomotive in defendant's roundhouse, held not to require a finding that the explosion was due to excessive steam pressure.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 6.]

5. STEAM \Leftrightarrow 6—EXPLOSION OF LOCOMOTIVE—PROOF.

Where plaintiff alleged that the explosion was caused by excessive steam pressure created by defendant's negligence, the burden was on her to prove such allegation by facts rather than by mere speculation.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 6.]

6. STEAM \Leftrightarrow 6—EXPLOSION OF LOCOMOTIVE—PLEADING AND PROOF.

Where the petition alleged that the explosion was caused by excessive steam pressure, and it was not shown that nothing but steam pressure could have caused the explosion, plaintiff could not recover, except on proof that the explosion was caused as alleged.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 6.]

7. STEAM \Leftrightarrow 6—EXPLOSION OF LOCOMOTIVE—CAUSE—PRESUMPTION.

Mere proof of the occurrence of such explosion could not authorize the presumption

that the explosion occurred on account of excessive steam pressure.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 6.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by E. H. McGraw against the Galveston, Harrisburg & San Antonio Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

Fellbaum & Carter, of San Antonio, for appellant. Baker, Botts, Parker & Garwood, of Houston, Templeton, Brooks, Napier & Ogden, and Ed W. Smith, all of San Antonio, for appellee.

FLY, C. J. Appellant sued appellee to recover damages alleged to have arisen from the negligence of appellee in connection with the explosion of a locomotive in its roundhouse in the city of San Antonio. It was alleged that on or about March 18, 1912, while appellant was in her home, about 250 feet from appellee's roundhouse, a locomotive exploded, and great masses of debris were hurled against the house, and plaintiff was thereby thrown to the floor and seriously and permanently injured. Numerous grounds of negligence were alleged, but the only one supported by any evidence and submitted to the jury was excessive steam pressure in the locomotive. The verdict was for appellee. The evidence was conflicting as to the cause of the explosion, and there was testimony upon which the jury justifiably could find that the explosion did not arise from the negligence of appellee.

[1] The first assignment of error assails the action of the court in excluding the testimony of Dr. Allen in answer to a hypothetical question as to what caused a certain physical condition in which the doctor found appellant when he examined her, shortly after the explosion. The answer excluded was: "In my opinion her fall against the table or some object on the floor." However important the testimony may have been, appellant has no just grounds for complaint, if substantially the same testimony was admitted when given by the same or another witness. This we conclude was done. Dr. Allen testified:

"Severe shock and fright, together with a general shaking up from the force of the fall, could cause the condition this lady is suffering from. * * * In my opinion as an expert, a blow or fall against any hard object can cause a contusion. In my opinion, her nervous condition has been caused by the shock and injury and pain from the injury. * * * I am basing my opinion wholly on the assumption that she had this accident, and that she had never had trouble before then."

This testimony covered fully everything in the answer excluded by the court. The physician attributed the injured condition to the fall, which appellant swore had been

caused by the fragments from the exploded locomotive striking her house, and that was all that could have been obtained from the excluded testimony. Repeated asseveration and reiteration could add no more potency to the evidence. It has been settled, in numerous decisions, beyond cavil or dispute, that there is no vital error in excluding evidence which has been given by the same witness during his examination. Not only is this rule well established, but the courts go further and hold that an appellant has no ground for complaint if the rejected testimony has been given by some other witness. This is common sense, for it would be unreasonable to reverse a judgment because a litigant had not been permitted to prove a fact over and over by the same witness, or when the rejected testimony has been given by another witness. The two rules have been reiterated so often by Texas courts that it is useless to cite authorities. They are settled beyond dispute. Not only did Dr. Allen swear to the same facts, whose rejection is complained of by appellant, but another expert medical witness, when substantially the same hypothetical question was asked him, unhesitatingly and emphatically replied: "I attribute them to her recent injury." He also attributed appellant's nervous condition to her fall as testified to by her. The hypothetical question was asked this witness at least three times, and he answered every time that her injured condition was the result of her fall after the explosion. What more could reasonably be demanded? The assignment of error is overruled.

[2] The following special charge was requested by appellee and given by the court:

"You are instructed that before you can find that the boiler in question was caused to explode by reason of defendant's negligence, you must find affirmatively from a preponderance of the evidence what was the cause of such explosion, that same was caused to explode on account of some defect in the boiler or its appliances, or that same was caused to explode on account of some act or omission on the part of some agent or employé of defendant engaged in handling or operating the engine; and you are further instructed in this connection that before you can find negligence with respect to any defect in the boiler, you must find what was the nature or character of such defect (if any), and that same was of such nature or character as that the defendant could, and would in the exercise of ordinary care on its part, have discovered and remedied such defect (if any) before the alleged explosion occurred. And, in this connection, you are further instructed that before you can find negligence on the part of the defendant with respect to any act or omission of any agent or employé of defendant engaged in handling or operating the engine, you must find that there was some act or omission on the part of some agent or employé of defendant with respect to the matter of handling or operating the engine, and that such act or omission was the cause of the alleged explosion, and that a man of ordinary prudence in the circumstances would not have been guilty of such act or omission. Unless you find there was negligence in one or the other respect mentioned, under the above instructions, you must return a verdict for the defendant."

That charge is attacked by appellant on the ground that it "is uncertain, confusing, and misleading and was calculated to mislead the jury and was prejudicial to plaintiff," and "because said charge was upon the weight of the evidence." In the only proposition under the assignment of error the second objection is abandoned, and only the first objection is urged. The ground of objection is very general, and the clause of the motion for a new trial upon which it is based did not notify the trial judge wherein the charge was "uncertain, confusing and misleading and was calculated to mislead the jury and was prejudicial to plaintiff." It is only after the case reaches this court that a proposition is appended to the assignment of error in which it is stated that the charge of the court only submitted one issue of negligence, and that the special charge led the "jury to believe that it was necessary for them to find other grounds of negligence in addition to excessive steam pressure." The object in requiring objections to be made to a charge before it is read to the jury is to give an opportunity to the trial judge to make any corrections in the charge suggested by the objections, and the end to be attained in making a motion for a new trial is to extend to the judge yet another opportunity to remedy any errors in the proceedings or in the charge. The object of the law in requiring objections to the charge to be presented to the court before it is read to the jury would be a "snare and a delusion" if vague and indefinite and general objections pointing out no error would suffice. The practice as to charges would, in no substantial way, be different from what it was before the statute was amended, and charges could be attacked upon any grounds occurring to shrewd counsel after the trial, and after all chance for the trial judge to correct an error is irretrievably lost.

Such assignments of error as the one under consideration have been condemned by this court and consideration of them denied in a number of instances. In the case of *Railway v. Boothe*, 126 S. W. 700, the assignment was that the charge was "misleading and confusing and in many portions of the charge it is impossible to decipher the meaning," and Judge James, for this court, held: "This complaint points to nothing definite, and is not to be considered." Again, in the case of *Railway v. Averill*, 136 S. W. 98, a similar assignment of error was not entertained by this court on account of its uncertainty. To the same effect are *Railway v. Templeton*, 175 S. W. 504, and *Railway v. Watts*, 182 S. W. 412, not yet published, both of this court.

[3, 4] The third assignment of error is overruled. It is asserted therein that the "uncontroverted testimony" showed that the explosion "was caused by excessive steam pressure," and if that assertion was supported by the record, still it would not be sufficient to

justify a verdict unless it appeared that such excessive steam pressure was chargeable to the negligence of appellee. This was not done, but, on the other hand, the evidence showed that the engine had just come from the shops, where it had been thoroughly repaired, tested, and inspected, and that so far as human skill and intelligence could determine, it was in a perfect condition, and if there was excessive steam pressure, the evidence failed to disclose how it arose. There was no evidence tending to show that excessive steam pressure caused the explosion, unless it is to be inferred from the explosion itself, except the opinion of F. A. Carver, who gave it as his opinion that excessive steam pressure caused the explosion. On cross-examination he testified that he had never seen the engine and did not know how much steam was on at the time. In opposition to that opinion, a witness testified to the excellent condition in which the engine was at the time; that excessive steam would cause leaks at every joint, rivet, and bolt; that he had been on the engine, examining it, about 10 minutes before the explosion; and that at that time there were no leaks; and he thought the steam gauge showed between 180 and 190 pounds. He testified that it would have taken 20 or 25 minutes to have accumulated 25 or 30 pounds additional steam to the 180 or 190 pounds. The danger point was placed by Carver at from 600 to 800 pounds. The witness J. E. McLean was an expert master mechanic and if his testimony was to be credited, the jury would naturally reject the opinion of a man which was mere speculation and utterly baseless. The master mechanic also stated:

"I doubt whether an accident such as that was could have been produced by excessive steam pressure."

Another witness testified to having been on the engine a short time before the explosion, and the steam gauge showed 190 pounds. Another witness testified that he was on the engine just a few minutes before the explosion, and there were no signs whatever of excessive steam. There was other testimony tending to support the evidence mentioned, and instead of the "uncontroverted testimony" showing that the explosion was caused by excessive steam pressure, a preponderance of the evidence tended to show that it did not arise from that cause.

[6] There can be no doubt that the explosion, as stated by appellant, "was an unusual occurrence and was terrific," but the testimony utterly fails to disclose the titanic cause of the destructive explosion. As said by the master mechanic:

"Any man can speculate on it, but to be in a position where you can say what caused it is entirely different."

Appellant alleged that it was caused by excessive steam pressure, which was created by the negligence of appellee, and it devolved

upon her to prove it by facts, and not by vague imagination and wild speculation.

[8, 7] It may be that if it had been alleged that the locomotive was under the management and control of appellee and an unusual explosion occurred, in the absence of an explanation, the reasonable conclusion would be that the explosion arose from a want of care, but in this instance appellant's case must rest on proof that the explosion was caused by excessive steam pressure, as she alleged in her petition. If it had been shown that nothing but steam pressure could cause such an explosion, the case would have been different, but that was not done. Under a general allegation of negligence, the facts attending the explosion might be such as to lead reasonably to the belief that without negligence the accident would not have occurred. But the negligence was alleged to have consisted in a certain act or condition brought about by the negligence of appellee, and it must be proved. That the explosion occurred on account of excessive steam pressure cannot be presumed from the fact of the explosion alone. *McCray v. Railway*, 89 Tex. 163, 34 S. W. 95; *Broadway v. Gas Co.*, 24 Tex. Civ. App. 603, 60 S. W. 270; *Talley v. Beaver*, 33 Tex. Civ. App. 675, 78 S. W. 23.

The evidence left the cause of the explosion shrouded in mystery, the experts stating that they did not know what caused the accident. In the very nature of things no man could truthfully say that he knew the cause of the explosion. It might have been caused by excessive steam pressure, but it might also have been brought about by other causes.


The judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. PEREZ.*
(No. 5574.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 10, 1916. Rehearing Denied
Feb. 2, 1916.)

1. STEAM 6 — BOILER EXPLOSION — PRESUMPTION OF NEGLIGENCE.

Where, in an action for injuries to plaintiff, while walking along the street, from the explosion of a locomotive boiler in a roundhouse, it appeared that the locomotive was under the management of defendant and that such accidents do not happen in the ordinary course of things if those having the management use proper care, and no explanation of the accident was given by defendant, the presumption was that the explosion was due to defendant's negligence, though there was no direct proof thereof.

[Ed. Note.—For other cases, see *Steam*, Cent. Dig. §§ 4-11; Dec. Dig.  6.]

2. STEAM 6—BOILER EXPLOSION—PLEADING AND PROOF.

Where the petition alleged that the explosion was due to the negligence of defendant's employees, but did not specify any particular acts of negligence, it being stated that the particular acts were unknown to plaintiff and peculiarly within defendant's knowledge, proof of

general negligence was sufficient, and it was not essential that plaintiff prove any particular negligent acts.

[Ed. Note.—For other cases, see *Steam, Cent. Dig.* §§ 4-11; *Dec. Dig.* ¶ 6.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Severo Perez, by next friend, against the Galveston, Harrisburg & San Antonio Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Templeton, Brooks, Napier & Ogden and Ed. W. Smith, all of San Antonio, for appellant. Harrison & Gray, J. R. Norton, and James Routledge, all of San Antonio, for appellee.

CARL, J. Appellee sued appellant for personal injuries inflicted on him by reason of a boiler explosion, March 18, 1912, in one of appellant's locomotives in its yard in the city of San Antonio. It was alleged that appellee, a schoolboy, was walking along the street on his way to school when the explosion occurred, and a piece of the boiler was propelled by force of the explosion through the air and struck the ground near him, throwing him down and injured him; that the explosion was due to appellant's negligence. The petition alleged that:

"The said locomotive at and prior to the time of said explosion was owned and operated by the said defendant, and was in charge and control of the agents and employes of said defendant. That the said explosion of same was caused solely and only by and through the carelessness and negligence of said defendant and its agents and employes, who without cause or justification caused and permitted said locomotive to explode, as above set forth, solely and only through their fault and negligence. That this plaintiff was not near the said explosion at the time of said accident, but was at least 500 feet away from the same, and that he is not able to state and define particularly what particular negligence caused said explosion of said locomotive. That said locomotive was in the control and management of the defendant at said time and was being operated by it and was not even visible to this plaintiff, who is a minor of tender years, prior to said explosion. That the reason and cause of said explosion and the particular acts of negligence which caused and produced it are peculiarly within the knowledge of the defendant, and are not within the knowledge of the plaintiff and therefore he cannot more fully allege the same."

Almost this entire appeal is predicated upon the theory that the rule of law symbolized by the maxim *res ipsa loquitur* does not apply, and that there is no evidence showing any actionable negligence on the part of the railway company, its agents and employes; that it simply shows that the locomotive and boiler in question was destroyed, and does not show what was the cause of its destruction, whether it exploded or was blown up; and that the evidence does not show, nor tend to show, that any defect in the boiler was the cause of the explosion. The defendant admitted that the boiler exploded or was blown up, but denied the other material allegations. The piece of the boiler, which was

hurled through the air about 1,000 feet away to where appellee was injured, weighed somewhere near 15,000 pounds, and its force was so great that it broke the window lights in the houses near where it fell. There is some testimony that the bolts were broken, and otherwise the boiler was in an improper condition to withstand excessive steam pressure. And there was evidence to the effect that there was excessive steam pressure, that the engine would stand 350 pounds of steam before it would explode, and that a safe working pressure would be about 225 pounds.

[1] This engine was shown to have been on the premises of appellant in its yards and under its control. It exploded, and a large piece of the boiler, hurled with terrific force, caused the injury to appellee, who was passing along a street some distance away.

"Ordinarily there must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by defendant, that the accident arose from want of care." *G., O. & S. F. Ry. Co. v. Wood*, 63 S. W. 185. The "circumstances attending the injury may be sufficient to establish the fact of negligence without any direct proof thereof." *McCray v. G., H. & S. A. Ry. Co.*, 89 Tex. 168, 34 S. W. 95. See, also, *Washington v. Railway Co.*, 90 Tex. 314, 38 S. W. 764.

[2] In the case of *McGraw v. G., H. & S. A. Ry. Co.*, 182 S. W. 417, this day decided by us, particular acts of negligence were set forth, and, having predicated the case upon such particular acts of negligence, it devolved upon the plaintiff to prove same; but in this case it was simply alleged generally that there was an explosion which caused the injury, and that the company was negligent, the particular acts of negligence being unknown to plaintiff, since they were peculiarly within the knowledge of the appellant. And the explosion of a steam boiler is such an unusual occurrence that it speaks for itself and is *prima facie* evidence of negligence. Though the mere fact that an accident has happened may not be evidence of negligence, the character of the accident and the circumstances attending it may be such as to leave reason to believe that without negligence it would not have occurred. For instance, negligence may be inferred from the unexplained derailment of a train. *Railway Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Railway Co. v. Suggs*, 62 Tex. 323; *Shoemaker v. Railway Co.*, 29 Tex. Civ. App. 578, 69 S. W. 990; *Railway Co. v. Hawk*, 30 Tex. Civ. App. 142, 69 S. W. 1037; *G., H. & S. A. Ry. Co. v. Senn*, 125 S. W. 322. Negligence in the operation may be inferred from the mere fact of a boiler explosion whereby injury is inflicted. *Young v. Bransford*, 12 Lea (Tenn.) 232.

The fact that the boiler exploded, coupled with the further fact that such is an unusual occurrence, is of itself sufficient to warrant

the conclusion or inference that some kind of negligence caused it to do so, and, since it was under the control and operation of the railway company, is sufficient, in the absence of explanation, to sustain a finding that the explosion was the result of appellant's negligence. If the doctrine of *res ipsa loquitur* does not apply to a case of this kind, then it would be difficult to find a case to which it does apply. Appellee was not an employé of appellant, but was a distant passer-by at the time he was injured. Ill. Cent. Ry. Co. v. Phillips, 55 Ill. 194; Id., 49 Ill. 234.

It was in evidence that the boiler was scattered in a thousand pieces for a distance of as much as a thousand feet away; that in a boiler of this kind there are 2,500 to 3,000 staybolts; that out of 10 or 12 found 7 or 8 showed the existence of old fractures in the same existing prior to the explosion, or about 60 per cent. of defective bolts.

From what we have said it follows that appellant's assignments of error must be overruled, and the judgment, which is for \$5,000, be affirmed. It is so ordered.

CANODE v. SEWELL et al. (No. 878.)
(Court of Civil Appeals of Texas. Amarillo.
Dec. 18, 1915.)

1. EVIDENCE \S 597—SUFFICIENCY.

To support a verdict there must be more than a scintilla of evidence; there must be evidence sufficient to warrant a reasonable belief of the existence of the fact sought to be inferred.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. \S 597.]

2. NEGLIGENCE \S 121—"RES IPSA LOQUITUR."

The expression "*res ipsa loquitur*" is a shorthand method of showing that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. \S 121.]

For other definitions, see Words and Phrases, First and Second Series, *Res Ipsa Loquitur*.]

3. PLEADING \S 176 — REPLY AS DENIAL—STATUTE.

Under Rev. St. art. 1829, as amended by Acts 33d Leg. c. 127, providing that if any special matter of defense shall be pleaded by the defendant the plaintiff shall be required to answer to each paragraph, either admitting or denying, or denying that he has any knowledge or information sufficient to form a belief, and that any fact so pleaded by defendant that is not denied by plaintiff shall be taken as confessed, where plaintiffs, to defendant's answer, replied that they had not sufficient information to form a belief, such a reply was tantamount to a denial to the extent of putting defendant upon proof of the fact alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 343, 345-353; Dec. Dig. \S 176.]

4. MASTER AND SERVANT \S 278—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—SUFFICIENCY OF EVIDENCE.

In an action for death of a servant found with his skull crushed on the master's descend-

ing elevator, which he had been repairing, evidence held insufficient to establish negligence of the master as the producing cause of the servant's death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. \S 278.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by Carrie Sewell and others against H. P. Canode. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

See, also, 172 S. W. 142.

Cooper & Merrill, of Houston, Lumpkin & Harrington, of Amarillo, and Capps, Cantey, Hanger & Short, of Ft. Worth, for appellant. L. C. Barrett, Jas. N. Browning, E. T. Miller, and J. Marvin Jones, all of Amarillo, for appellees.

HENDRICKS, J. The mother, and the wife and daughter of Alvin Sewell, deceased, sued H. P. Canode, alleging the death of said Sewell to have been produced by the negligence of Canode, on account of a defective elevator, situated in the Amarillo Hotel, at Amarillo, Tex., owned and controlled by said defendant. Upon the trial of the case, after the introduction of plaintiffs' testimony, the defendant refusing to introduce any testimony, the jury, upon the submission of special issues, by the trial court, found that the negligence of the defendant was the cause of Sewell's death, upon which the judgment was rendered; and the sufficiency of the testimony to support this finding, in different phases, is the only assignment of appellant Canode on this appeal.

The testimony of Ong is, in effect, that he was sitting on a settee in the lobby of the Amarillo Hotel, situated on the ground floor of same, facing the hatchway, or shaft, of the elevator, when he heard something fall, "sounding like glass or tools"; and he says that "dust and stuff fell down all around (meaning, we assume, down the shaft of the elevator), and after that "it was not but a second until the elevator came in sight." When the elevator came in sight, he saw one Inman standing inside the elevator, manipulating the lever, used for the purpose of starting and stopping the elevator, back and forth, evidently for the purpose of attempting to stop said elevator. When the elevator descended, and came in sight of Ong, Alvin Sewell was lying on his back upon the top of the cage of the elevator, with his head facing Ong, towards the east, and with his feet over a beam, which we presume was a part of the construction of the top of said elevator cage. The elevator went to the bottom and passed out of sight, the top of said elevator being a little below the lobby floor. Sewell was taken from his position on the top of the cage to the lobby floor, with part

of his skull crushed, apparently dead, and living only a few moments thereafter.

Claude Gaylor, a former employé of Canode, in said hotel, and part of whose duties had been to operate the elevator, testified:

"The elevator was started by a lever working from left to right, and vice versa. The elevator sometimes, when started, would run smoothly, and sometimes it would stop without throwing the lever and start up of its own accord and jerk a little. The elevator sometimes would stop without the current being thrown off and would start up without moving the lever. It behaved as I have described a couple of times, or such matter, in the half of the day that I ran the same, on the Tuesday or Wednesday of the same week prior to the injury complained of. A few weeks prior to the injury, the elevator cage fell from somewhere near the top of the building."

In defendant's answer, in three different paragraphs of the same, there are allegations, one of them in substance that Sewell, prior to the time of his death, had been at work upon the bells of the elevator, placing in same storage batteries for the purpose of operating the floor indicators and the bells connected therewith.

The next averment is, in substance, that the defendant shows to the court that the said Sewell, "just prior" to the time of his injury, which resulted in his death, was working upon the bells of said elevator, situated in said hotel; and the third, in substance, is that Sewell and Inman at and prior to the time the deceased received the injuries, which resulted in his death, had been placing storage batteries for the use of the elevator in connection with its bells and indicator, and that at said time Sewell and Inman were the only persons in and about said elevator.

As to the first allegation, plaintiffs, in a supplemental petition, said they were not informed and had not sufficient information for the purpose of answering the same. The second averment, as to what Sewell was doing just prior to the accident, were specifically denied by plaintiff. The last averment, with reference to the situation and performance of work by Inman and Sewell, was not denied by said plaintiffs.

The appellee would have us, under this condition of the pleadings, to construe the defendant's pleadings, as an admission upon his part of the situation and character of work indulged in by Sewell at or just prior to the time of his injury; and argue that if Sewell was working upon the elevator, in the line of his employment at the time, that fact, in connection with Ong's testimony, and the established fact of the defects of the elevator, constitute sufficient proof of actionable negligence.

If we concede to the extent that appellant's defensive pleadings upon their face, especially the last paragraph mentioned, situates the deceased as placing storage batteries for the use of the elevator, such pleadings would tend to place him in the elevator, "at and

prior to the time" he received his injuries. The testimony of Ong, with the averments insisted upon by appellees, in their brief, as to the work in which the deceased was engaged, placed the batteries, in reality, inside said elevator.

[1] There was a noise of falling glass, or tools, and dust was first seen falling down the elevator shaft, and, within some inappreciable length of time, the elevator hove in sight with Inman desperately attempting to stop it, and Sewell practically dead on top of the cage of the same. We can, of course, infer that the elevator was defective, but the questions remain: What caused the noise as of falling glass, or tools, and the dust and "stuff" that fell down the shaft of the elevator immediately preceding the descent of the same? Or whether Sewell fell through some floor opening into the hatchway, with his tools, and upon the top of the elevator, producing the noise and the debris mentioned, and then Inman started the elevator? As to these questions, we are wholly left to surmise and conjecture. There must be more than a scintilla of evidence; there must be "evidence sufficient to warrant a reasonable belief of the existence of the fact which is sought to be inferred." *Washington v. Railway Co.*, 90 Tex. 321, 38 S. W. 764. In that case cited by appellees, the negro was under some derailed cars, which, it could be inferred upon the principle of *res ipsa loquitur*, had been negligently derailed, and the appellant, when last seen, was walking in the direction of the place of the accident; it could be inferred that the cars, negligently derailed, fell upon and killed him.

"Adjudicated cases on questions of evidence are valuable as precedents only when based on the same or not dissimilar facts, and such cases are rarely found." *Railway Co. v. Boone*, 105 Tex. 184, 146 S. W. 533.

Justice Fly properly said, in the same case (181 S. W. 619), that cases of this character "are decided upon their own proper facts, and not upon those of another and different case," and we look to other cases only "to assist us in the proper understanding of the facts and the probative force that should be accorded them."

In the Boone Case, *supra*, insisted upon by appellees as applicable to this record, when you read Justice Fly's opinion, upon which the writ of error was granted (which more fully sets out the facts and derivable inferences than Justice Dibrell's opinion) in connection with the opinion of the Supreme Court, there is exhibited a train of facts, and circumstantial inferences, though tenuous, which justified the verdict that the engineer, without warning, in the night, negligently shoved a "cut" of cars onto the "cut" upon which Boone was working moving down the track, and which knocked him off the particular car where he was last seen in the line of his duty for the purpose of setting the brakes.

In the case of *Thompson v. Johnson Bros.*, 86 Wis. 576, 57 N. W. 298, the boy got upon a freight elevator and was jerked into an unguarded drum, which rolled and unrolled a cable according to whether the elevator was ascending, or descending; it was certain, of course, that the elevator killed him, and quite inferable that the cable jerked him onto, or into, the unguarded drum. The elevator should really have been started by "check lines," instead of by the cable, and the jury found that the boy, by mistake, when he stepped upon and started the elevator, must have caught hold of the cable instead of the "check lines," and that his youth and inexperience excused his act.

[2] Appellees say that the principle, *res ipsa loquitur* applies. This doctrine, appropriate when applicable, is a shorthand method of saying that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster. If from this record we knew, or there was some pertinent fact to induce a reasonable belief, that the starting of the elevator killed Sewell, or that the elevator started when he was working on top of the same, or that this noise, which Ong heard, producing the dust that fell down the hatchway, was in some manner caused by Sewell's body being jerked over when the elevator started, or was jerked against some obstruction, initially produced by the starting of the elevator, a different cause would be presented. To have Sewell placing the storage batteries in the elevator (which is the defendant's pleading reproduced in appellees' brief, as an admission of Sewell's situation) when the testimony places Sewell in a dying condition upon the top of the elevator cage, without some pertinent fact explaining such a thing, does not aid us.

If we consider the defendant's sixth paragraph of his pleading, as to the situation of Sewell and Inman, in placing the storage batteries for the use of the elevator upon the same, when the first pleading of defendant and plaintiffs' evidence place the batteries inside the elevator, make it equally inexplicable and hard to give the same the effect desired. If we say that this last pleading is not clear and that the pleader really meant that Sewell was placing batteries when he was killed, or some of same, outside of, or on top of, the elevator, this situation is contradicted by that part of defendant's pleading, reproduced in appellees' brief, in situating Sewell as at "work upon the bells of the elevator, placing therein storage batteries for the purpose of operating" the indicators and bells; for in this last paragraph the pleader evidently means, though not grammatically stated, that Sewell was placing storage batteries within the cage of said elevator.

If we should begin to speculate and place

the elevator at a floor opening, and Sewell as standing just outside and reaching in, placing the storage batteries therein, and say that the lever of the elevator was in some manner started, producing the descent, and that Sewell fell from said opening in some manner on top of the elevator, as it was descending, creating the noise, and the dust, the question would then remain: Who started the elevator, Inman or Sewell? The situation of the openings upstairs as to the lever within the cage of the elevator is not shown, nor that of the batteries, except that they were inside the elevator. We seriously doubt that because Inman, when the elevator was descending, was making a desperate effort to stop its descent, in such a situation hypothetically reproduced, we could say that he started it.

[3] We are unable to decide unless we bridge a hiatus by assumption, and say simply, because it is generally shown that deceased was an employé of the defendant, that he was on top of the elevator in the performance of his work when it started, and that by the negligence of Inman he was injured, or from some defect of the elevator. All the evidence assembled by appellee as to his duties, and what he had previously done, does not help us. As to the answer of defendant wherein he first alleged the situation of Sewell as having been engaged in placing storage batteries and as to which plaintiffs replied they had not sufficient information to form a belief, we construe article 1829 as amended by the Acts of the 33d Legislature, c. 127, to make such a reply as tantamount to a denial, to the extent of putting defendant upon proof of the fact alleged; this is the pleading which appellees say in their brief the situation of the deceased is admitted. This, and the other pleadings, place him within the elevator by strong implication, if not expressly at the very time. Carefully considering the pleadings and if permitted to treat them as admissions, we are not helped. Gaylor did say that on one occasion the elevator dropped from the top to the bottom. We understand that to have been a different manifestation than at the particular time inquired about. The self-starting of the elevator, as we deduce it from Gaylor's testimony, reproduced in the preliminary part of this opinion, was at a time when the elevator was ascending or descending, and after running smoothly would sometimes stop without throwing the lever and then start up of its own accord, and "jerk a little." We do not understand from this testimony that the elevator had ever automatically started itself, when the current was off, from a dead rest.

[4] Careful and repeated examination of this testimony, with the inferences (or, rather, the lack of inferences) derivable therefrom, has forced us to the conclusion that the evidence offered was not legally sufficient

to establish negligence as producing the death of Sewell; that in order to do so we have to surmise, which is different from an exhibition of facts establishing a reasonable belief that negligence as an actuating cause has been proved. Deplorable as the occurrence is shown to have been, we feel compelled to remand the cause.

Reversed and remanded.

GALVESTON, H. & S.A. RY. CO. v. WEBB.*
(No. 5575.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 10, 1916. Rehearing Denied
Feb. 9, 1916.)

1. MASTER AND SERVANT §124—INJURIES TO SERVANT—SAFE PLACE TO WORK—DUTY OF INSPECTION.

Where a switchman was injured by jumping from a freight car on which he was working when it was derailed for the second time in a few minutes because of rigidity in the trucks which caused the wheels to mount the rails and leave the track, the master was liable, the rigidity of the trucks being such that, had there been inspection, it must have been discovered, so that, if there was inspection, it was negligent, or the defect was concealed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. §124.]

2. MASTER AND SERVANT §124—INJURIES TO SERVANT—SAFE PLACE TO WORK—DUTY OF INSPECTION.

In such case the fact that the car did not belong to the employer did not relieve him of the duty of inspection and, if a proper inspection would have disclosed the defect, the employer was still liable, where the car had been in his possession long enough to give opportunity for an inspection, and it was shown that some inspection was in fact made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. §124.]

3. MASTER AND SERVANT §286—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTY OF INSPECTION—QUESTION FOR JURY.

In such case it was a question for the jury whether the inspection was properly made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1016, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. §286.]

4. MASTER AND SERVANT §111—INJURIES TO SERVANT—"DEFECT" IN APPLIANCES.

The rigidity in trucks of a freight car which caused the wheels to mount the rails and the car to be derailed is a "defect," for failure to remedy which the master is liable for injury to a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. §111.]

For other definitions, see Words and Phrases, First and Second Series, Defect.]

5. MASTER AND SERVANT §205—INJURIES TO SERVANT—LIABILITY OF MASTER—ACTIONS—BURDEN OF PROOF.

Where a servant alleged injuries due to rigidity in the trucks of a freight car on which he was a switchman, which caused the car to leave the rails twice within a few minutes, it was unnecessary for him to show the cause of

the defect, but it was sufficient to show that the truck was defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. §265.]

6. DAMAGES §132 — PERSONAL INJURIES — EXCESSIVE DAMAGES.

Where the injuries of a switchman consisted of a bad heart, an erratic pulse, a wrecked nervous system, an injured spine, and a disordered stomach, bowels, kidneys, and bladder, the troubles being progressive, a verdict of \$15,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. §132.]

7. APPEAL AND ERROR §1004—SCOPE OF REVIEW—FINDINGS OF FACTS.

In the absence of indicia of passion and prejudice, the verdict of the jury, based on evidence, cannot be disturbed by the court on appeal for excessiveness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. §1004.]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by James Ross Webb against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Templeton, Brooks, Napier & Ogden and Ed. W. Smith, all of San Antonio, for appellant. Perry J. Lewis, Randolph L. Carter, H. C. Carter, and Champe G. Carter, all of San Antonio, for appellee.

FLY, C. J. This is a suit for damages alleged to have arisen by a derailment which occurred through the negligence of appellant in furnishing a car for appellee to ride upon in discharge of his duty as switchman, which was defective, in that—

"the running gear, bolster, and trucks of said car were out of order and defective and would not operate properly; that at the time of said derailment the trucks of said car would not operate so as to permit the wheels to follow the rails, but for some reason, the exact nature of which the plaintiff does not know, the said trucks were caught and held too rigidly, and therefore the wheels would not adjust themselves and follow the rails, and the wheels of said trucks therefore left the rails."

Other grounds of negligence were pleaded, but were not submitted to the jury, and therefore do not require mention. Appellant admitted derailment of the car on which appellee was riding, but denied that he was injured and that the car was defective as alleged and any negligence in connection therewith. The cause was tried by jury, resulting in a verdict and judgment for appellee in the sum of \$15,000.

[1] The evidence showed that appellee was a switchman in the employ of appellant, and was foreman of the crew handling the engine and the derailed and other cars; that the car derailed did not belong to appellant, but was the property of the Lone Star Brewing Association, and was received by appellant from the Missouri, Kansas & Texas Rail-

way Company 2 or 3 hours before the derailment occurred. The car was defective in its truck to such an extent that the wheels would not follow the rails, and while being moved by appellant it left the track, and appellee, fearing disaster, jumped from the car, and, according to the testimony of doctors, was injured materially and permanently. The trucks were too rigid to allow the wheels to adjust themselves to the track, and a proper inspection would have disclosed the defect to appellant. Appellee and Freeman testified positively that the trucks were rigid and the wheels would not take curves, but would mount the rails and then jump the track. The car was derailed twice in 30 or 40 minutes. Appellant introduced no testimony to show that the trucks were not rigid as alleged. If there was a proper inspection of the car, as claimed by appellant, the rigidity of the trucks must necessarily have been discovered. It was either discovered and the facts suppressed, or there was negligence in the inspection. In either event appellant is liable. The jury found that the defect was not latent. The rigidity of the trucks undoubtedly caused the accident, and the evidence showed that a proper inspection would have revealed the defect. The first, second, and third assignments of error are overruled.

[2] The fact that the car did not belong to appellant did not relieve appellant of the duty of inspection, and, if a proper inspection would have disclosed the defect in the trucks, appellant would not be relieved of liability for damages arising from such defect. There was no testimony offered by appellant tending to show a latent defect, but the facts clearly evidence that a proper inspection would have disclosed the condition of the trucks. The duty of inspection was just as obligatory upon appellant as to a car not owned by it, but in its possession, as in regard to its own cars. This rule is well established in Texas. *Railway v. White*, 76 Tex. 102, 13 S. W. 65, 18 Am. St. Rep. 33; *Railway v. Kernan*, 78 Tex. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52; *Railway v. Chambers*, 17 Tex. Civ. App. 487, 43 S. W. 1090; *Railway v. Parish*, 93 S. W. 683. The car had been in the possession and under the control of appellant long enough to give opportunity for an inspection, and, in fact, it was shown that some sort of inspection was made.

[3] It was a question of fact for a jury as to whether the inspection was properly made or not, and the evidence justified a finding that the inspection was negligently made. It would seem that a defect that was so bad that it would derail a car twice in the distance of a mile or so was so apparent that any kind of an inspection would have disclosed it. The charge placed the matter fairly and squarely before the jury, and there was evidence to sustain the verdict.

[4] It is useless to argue that such rigidity

in trucks beneath a car as will cause the wheels to mount the rails in such a manner as to derail the car is not a defect in the trucks. The very fact that the trucks prevented the wheels from remaining on the track showed in no uncertain manner that the trucks were out of order, imperfect, or defective. The fact that the trucks derail a car twice in a few minutes leads to the irresistible conclusion that they are defective.

[5] It did not devolve upon appellee, as appellant seems to think, to show what caused the rigidity in the trucks, but he had met his allegations when he showed the trucks were rigid. The trucks were shown to be rigid to such an extent as to cause derailment, they should not have been in such rigid condition, and, if any reason for such rigidity existed, appellant might have shown it. Certainly appellee was not called upon to show the cause of a defect in the instrumentalities furnished him by appellant. There is no escape from the proposition that the trucks were rigid, that perfect or safe trucks are not in that condition, and therefore the trucks were defective.

The court gave the law pertinent to the issues, and it was not error to refuse the special charges requested by appellant. There was no evidence tending to show that the defect in the trucks was latent, but it appears from the testimony that a reasonably careful inspection would have revealed the defect. The evidence shows a very cursory inspection of the car. The eighth, ninth, and tenth assignments of error are overruled.

[6, 7] If the evidence of appellee and the doctors offered by him is to be credited, he is in a terrible condition as a result of his injuries received in jumping from the defective car. The jury credited the witnesses and based a very heavy verdict on their evidence, and this court is compelled to follow that verdict in the absence of any indicia of passion and prejudice. According to the medical testimony, appellee has a bad heart, an erratic pulse, a wrecked nervous system, an injured spine, disordered stomach, bowels, kidneys, and bladder, and the troubles are progressive. If this be true, he is a physical wreck, and the damages accorded him cannot be held by this court to be excessive.

The judgment is affirmed.

WEST TEXAS SUPPLY CO. v. DUNIVAN. (No. 8292.)

(Court of Civil Appeals of Texas. Ft. Worth.
Dec. 18, 1915. Rehearing Denied
Jan. 22, 1916.)

1. APPEAL AND ERROR — 724—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error which is vague and uncertain, and does not point out any distinct error, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.]

2. APPEAL AND ERROR ¶736—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error should not be multifarious.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. ¶736.]

3. APPEAL AND ERROR ¶742—ASSIGNMENTS OF ERROR—PROPOSITIONS.

An assignment of error should be followed by a proposition germane thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

4. APPEAL AND ERROR ¶742—ASSIGNMENTS OF ERROR—STATEMENTS.

An assignment of error should be followed by an appropriate statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

5. APPEAL AND ERROR ¶1078 — BRIEFS—WAIVER OF ERROR.

Where no attack is made in the brief upon a special verdict, it is conclusive, as between the parties, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1986, until set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ¶1078.]

6. APPEAL AND ERROR ¶264 — PRESENTATION OF GROUNDS OF REVIEW—EXCEPTION.

Where no exception was directed to a special verdict, the appellate court need not refer to the statement of facts to determine whether the evidence was sufficient to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535; Dec. Dig. ¶264.]

7. APPEAL AND ERROR ¶1052—(REVIEW—HARMLESS ERROR—EVIDENCE.

Where a special verdict that the contract whereby plaintiff purchased the property sued for was ratified by defendant's directors, was not attacked, and so was conclusive, any error in allowing plaintiff to testify that he was the owner of such property is harmless, though the testimony elicited was a conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ¶1052.]

8. CORPORATIONS ¶426—ACT OF OFFICERS—RATIFICATION.

Where the directors ratify an unauthorized contract made by the manager of a corporation, such ratification relates back, and validates the contract from the beginning.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. ¶426.]

9. EXCHANGE OF PROPERTY ¶13 — PERFORMANCE—DELIVERY.

Where plaintiff relied on a contract whereby he was to exchange a certificate of stock for a set of tools, and it appeared that he offered to deliver the stock, but was told by defendant's agent to wait until demand was made, plaintiff was entitled to recover, though there had been no delivery.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 25-29; Dec. Dig. ¶13.]

10. APPEAL AND ERROR ¶230—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The refusal of a requested charge will not be reviewed, where exceptions, as required by Vernon's Sayles' Ann. Civ. St. 1914, art. 2061, were not taken at trial and objections were presented only by motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶230; Trial, Cent. Dig. §§ 680-682.]

11. EXCHANGE OF PROPERTY ¶13—ACTIONS—EVIDENCE.

Where plaintiff claimed that he acquired a set of tools from the defendant corporation under a contract whereby he was to deliver to the corporation a certificate of stock which contract was made with one who was then manager, testimony by one who subsequently became manager at a time when plaintiff was using the tools that he made a different contract with plaintiff is admissible.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 25-29; Dec. Dig. ¶13.]

12. APPEAL AND ERROR ¶1056—REVIEW—HARMLESS ERROR.

In such case, though there was a discrepancy as to the dates in such witness' testimony, the refusal nevertheless was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. ¶1056.]

Appeal from Knox County Court; E. R. Howell, Judge.

Action by J. T. Dunivan against the West Texas Supply Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jas. A. Stephens, of Benjamin, for appellant. D. J. Brookreson, of Benjamin, for appellee.

BUCK, J. Suit was filed in the county court of Knox county by J. T. Dunivan for the conversion of certain tinner's tools and materials, aggregating the value of \$430.50, and \$75 per month for the use of said tools, aggregating \$275, and for \$25 for labor alleged to have been performed by plaintiff for defendant. Plaintiff alleged that the defendant was a merchant engaged in the hardware, furniture, and implement business in the town of Benjamin, and kept a warehouse in the rear of the business house, and that plaintiff was keeping his said tools and materials in said warehouse, at the instance and request of defendant, and was using and occupying the same as a workshop for his tinner's trade; that defendant unlawfully took possession of all of said tools and material and converted the same to its own use and benefit, to the plaintiff's damage in the sum of \$430.50. He further pleaded that he was deprived of the use of said tools and materials, and was thereby prevented from pursuing his business as a tinner, to his damage in the sum of \$275 above mentioned. He further alleged that at the instance and request of defendant, he had done certain work in putting up five binders, for which the defendant promised to pay him the sum of \$2.50 each and also did other work for defendant, amounting to \$13. Attached to this petition as Exhibit A was a list of the materials and tools alleged to have been taken and converted by defendant.

Defendant demurred generally and specially to plaintiff's petition, and after a specific denial of the allegations charging the conversion, it alleged that the tools and mate-

rials mentioned did not belong to plaintiff, but to defendant, and denied that it had deprived plaintiff of any right or privilege of pursuing the tinner's work, or any other kind of work, in the town of Benjamin, but alleged that plaintiff of his own free will had abandoned the tinner's work and secured work in the harvest fields and other employment. It further denied that it owed plaintiff for any work performed. Further pleading, it alleged that it was a corporation and that plaintiff was a stockholder therein, and that the defendant, through its agent, turned over to him the materials and tools described, upon the agreement that plaintiff was to pay the defendant the invoice price for all materials used by him in said tinner's business, and that the plaintiff was to have the use of said tools and to work for the defendant at odd times to pay for said use; that in pursuance of said agreement plaintiff took charge of said tools and materials and ran said tinner's business until about the 15th day of June, 1914, at which time the plaintiff abandoned the tinner's business and left the town of Benjamin and secured work with a threshing outfit, and has since said time remained away from said shop; that during the time the plaintiff was in charge of said tin shop, he used sundry materials which belonged to, and were the property of, this defendant, of the alleged value of \$142.98, for which it prayed judgment.

In a supplemental petition, plaintiff denied the allegation of defendant as to the rental contract, and denied that he had used either tools or material belonging to the defendant, and asserted that such tools and material used, other than those bought from defendant and for which payment had been made as originally pleaded, were purchased from other parties named.

The cause was submitted to the jury on special issues, and in answer to the issues presented by plaintiff the jury found as follows: (1 and 2) That on or about the 15th day of October, 1914, plaintiff owned and possessed the tools and material contained in the itemized statement attached to plaintiff's petition; (3, 4, and 5) that the defendant appropriated to its own use and benefit, without the consent of the plaintiff, the tools of the value of \$196.30 and material of the value of \$234.20; (6) that plaintiff could have reasonably earned, from the use of said tools and material from the 15th day of October, 1914, to the time of trial, January 25, 1915, \$137.50; (7) that the defendant owed the plaintiff for labor performed, at the instance and request of defendant, \$23.00; (8) that plaintiff owed the defendant, for goods procured and bought of defendant, nothing.

At the request of defendant the following issues were presented and the jury answered as indicated:

(1) Did the plaintiff trade for the tin shop from the defendant? Answer: Yes.

(2) If yea, what did the plaintiff give defendant for the tin shop? Answer: Stock.

(3) Did the board of directors of the defendant corporation ratify and approve the sale or exchange of the tin shop for the plaintiff's stock in defendant corporation? Answer: Yes.

Upon these answers of the jury to the special issues submitted, the court rendered judgment for the plaintiff in the sum of \$591, from which judgment the defendant appeals.

The evidence tends to show that Dunivan owned five shares of capital stock in the defendant company of the face value of \$500, and that J. F. Albright, defendant's general manager and vice president, by request of W. T. Finn, its president, traded said tools and lists of supplies to Dunivan for \$300 of said shares of stock, and turned over said tools and material to said Dunivan and told him to use the back room of the warehouse to work in, and that he could work for said company at odd times instead of paying rent, and that whenever plaintiff worked as much as a half day at a time he would be paid for it; that Dunivan offered to go and get his shares of stock, which he had placed as collateral with Bob Gray, from whom he had purchased the same, but Albright told him that he need not do it then; that Mr. Finn, who lived at Seymour, would attend to issuing the new stock, and he could get it later. The \$500 worth of stock was all in one certificate, and Albright told plaintiff that he expected Finn would issue new certificates, one back to Dunivan for \$200, and that he supposed Finn would either hold the rest as treasury stock, or sell it to some one else. Dunivan continued to work at the tinner's trade, his shop being, as heretofore stated, in the rear of the warehouse, until some time in the summer of 1914, when he left to work in the harvest fields. On his return, about October 15, 1914, he found another man in charge of the shop and using the tools and materials. Mr. Lanham, who had succeeded J. F. Albright, or at least was acting as manager, told him that Finn, the president, had instructed him to do this. Dunivan testified that while he was running the shop he made from \$75 to \$100 a month, and that, if he had not been prevented from continuing the work, he would have made said amount up until the time of the trial. He further testified that he would have gotten the shares of stock and delivered the same to John Albright for the benefit of the defendant company if Albright had not told him what he did; that he had never offered the stock to Finn or to the board of directors, but did offer it to Mr. U. S. Nicks, who was then acting as manager, but that the latter said he knew nothing about the trade and would not take the stock.

Mr. Albright testified, on behalf of plaintiff, that he was the vice president and general manager of the defendant company for seven or eight years, and that about September, 1913, Mr. Finn, president of the com-

pany, was in Benjamin and had a talk with him, and stated the expenses were too heavy, and instructed him to discharge Dunivan, who was working for the company at that time. Albright told him that he had hired Dunivan for a year, and that his time was not out yet, and that he could not discharge him under the agreement; that Finn asked him if he could not trade Dunivan out some way to stop his wages, and that Albright replied that he had talked the matter over with Dunivan, and that he could trade him the tin shop for his stock as far as it went; that Finn then instructed him to go ahead and make the trade; that he then saw Dunivan and made the trade just like Finn had instructed him to do, Dunivan agreeing to take the tools and materials at the invoice price and let the company take enough of his stock at its face value to cover the amount; that Dunivan offered to go and get the stock, but that he (Albright) told him to wait until Finn came back to make the transfer of stock, as the latter always attended to that; that he and Dunivan went ahead and invoiced the tools and materials, and that they amounted to a fraction less than \$300, and that he turned it over to Dunivan and closed up the trade about September 1, 1913; that he stayed with the company as its manager until about November 1, 1913, and Finn never made any objection about the trade while Albright was there, nor had he ever heard of any one else objecting thereto while he was in charge of the store. He further testified that during all the time he was manager of the company there was never a meeting of directors, nor had he ever heard of such meeting; that he made this trade, just like he had done everything else, under instructions from W. T. Finn; that no directors had ever complained to him for following Finn's instructions. He denied that he had ever received a letter from Finn, instructing him not to make the deal with Dunivan, though while he was manager he received all the mail directed to the company. Such other evidence as will be necessary to note will be given hereafter in the course of this opinion.

[1-4] Appellant's first assignment of error is directed to the action of the court in overruling its special exception leveled at a portion of the plaintiff's petition, which it is alleged charges the defendant with using said tools and having a man in charge of same and "doing the tinner's work at Benjamin, which rightfully belonged to plaintiff." We think appellee's objections to the consideration of said assignment should be sustained, on the ground that the assignment is too vague and uncertain and does not distinctly point out any particular error and is multifarious, and that the proposition thereunder is not germane thereto, and that it is not followed by any statement, etc. But in this disposition of the assignment we feel that

no possible denial of any right to appellant can be charged, because in plaintiff's supplemental petition he plainly shows that he did not intend, by the language used, to allege in his original petition and in the paragraph to which the objection is urged that he had any monopoly of the tinner's business in Benjamin, but merely intended to allege that he had been deprived of pursuing the tinner's business in said town by reason of the acts of defendant alleged.

[5-7] The second assignment complains of the refusal of the court to exclude the testimony of the plaintiff, to the effect that he owned the tin shop and tools in the town of Benjamin, said testimony being as follows:

"I am the owner of the tools and materials as shown in the list in the petition. Mr. W. T. Finn, president of the West Texas Supply Company, wrote a letter to John Albright and told John to trade me this tin shop and material for my stock certificate in defendant company. John Albright told me they would give me the tools and material for my stock in the company. At that time my stock was placed with Bob Gray as security for a note I owed Bob Gray. I told John Albright that I would get the stock, but he told me that I need not do so; that Mr. Finn would have to issue the stock. Albright invoiced and delivered the goods to me; I never at any time tendered the stock to Mr. Finn or any of the directors."

The exception to the admission of this testimony is contained in bill of exception No. 2, instead of bill No. 1, as alleged by appellant in its brief, and the court in its qualification of said bill states that only the first sentence of the above-quoted testimony was brought out by plaintiff on direct examination, and that the balance thereof was brought out on cross-examination by defendant—

"and in the opinion of the court is not germane to this bill, as defendant made a verbal motion to withdraw said testimony from the consideration of the jury, and a separate bill should be predicated on such action of the court on said verbal motion."

As limited by the proposition under this assignment, appellant's complaint is directed only to the refusal of the court to exclude said first sentence above, to the effect that he owned the tinner's tools, because it was a conclusion of the witness—

"and the cross-examination of the witness showed that his claim for the tinner's tools was a trade made by two of the directors, without authority of the board of directors, whereby they traded Dunivan the tinner's tools for his stock certificate in appellant company, and that the stock certificate had never been delivered to appellant at the time of the supposed trade, or tendered into court."

The jury found, in answer to an issue presented by the defendant, that the board of directors of the defendant company ratified and approved the sale or exchange of the tin shop for the plaintiff's stock in the corporation. No attack is made in the brief upon this finding, and therefore it becomes conclusive as between the parties until it is set aside. Article 1986, Vernon's Sayles' Texas Civil Statutes. No exception having been

directed to said answer, we are not required to refer to the statement of facts to see whether or not the evidence is sufficient to sustain that portion of the verdict. *Robertson v. Kirby*, 25 Tex. Civ. App. 472, 61 S. W. 967. Moreover, it has been held that:

"Ownership of personal property is a fact that can be proved by oral testimony, given by one who has adequate knowledge." 9 *Encyc. of Evidence*, p. 263; also *Supp. same work*, 1915, vol. 9, 1405, and cases there cited.

"Ownership of personal property is a fact to which a witness may testify; and on cross-examination he may be required to state the facts on which the claim of ownership rests." *Steiner v. Trnum*, 98 Ala. 315, 13 South. 365.

"A statement by a witness that certain property in controversy belongs to him is not inadmissible as a conclusion, since the question calls for a fact as well as for a conclusion." *Murphy v. Olberding*, 107 Iowa, 547, 78 N. W. 205.

But some of us doubt whether the authorities in this state go to the extent of those cited, and prefer to base our action in overruling this assignment on the ground that the error, if any, was rendered harmless by the unchallenged finding of the jury above mentioned. The evidence is practically undisputed that John Albright, the vice president and manager of the defendant corporation, made the trade as alleged by plaintiff.

[8] The third assignment is as follows:

"You are instructed that before you can find that the tools and tin shop is the property of the plaintiff, you must find: First, that the board of directors authorized J. F. Albright to exchange the tools, tin shop, and material for the plaintiff's stock; second, you must find that the plaintiff delivered to the defendant his stock certificate, and, unless you so find, you will find for the defendant."

The failure of the court to give this instruction is urged as error for the following reasons, to wit:

"(1) Before the defendant could in any way be bound by the contract, it was incumbent upon the plaintiff to prove, not only that Albright was the agent of the defendant, and [but] that the board of directors had authorized said Albright to make the contract with plaintiff. (2) It was the duty of the court to construe and instruct the jury as to the legal effect of the contract; and, as the court nowhere instructed the jury as to the legal effect of this contract, the refusal of this charge was error."

Upon the first point, even though said contract had been made by J. F. Albright without express authority by the directors, and admitting, for the time, that said Albright had no such apparent authority, by reason of the position he occupied in said company, yet, after learning that said contract had been made, the board of directors ratified it, as found by the jury, such ratification would be equivalent to precedent authority.

"By ratifying an unauthorized act, a principal assumes and adopts it as his own, and, as has been seen, this adoption extends to the whole of the act—it goes back to its inception and continues to its legitimate end." *Mechem on Agency*, § 167, p. 108.

Therefore, if the directors ratified the action of Albright in making the trade he did, such ratification was tantamount to and had the legal effect of prior authority.

[9, 10] Upon the second question involved in this requested charge, there is no material conflict in the testimony as to what took place with reference to the delivery of the stock certificate. Both Albright and Dunivan testified that the latter offered to turn over to the former the \$500 worth of stock in order that he might receive a new certificate for \$200, and also surrender the value of \$300 in shares of stock in payment of the tools and material, but that Albright told Dunivan to keep the shares of stock for the present, and that as soon as Finn came down from Seymour, he would issue the \$200 certificate to Dunivan. The unchallenged finding of the jury in answer to issues 1 and 2, submitted by the defendant, is that the plaintiff did trade for the tin shop from the defendant and gave him stock in exchange therefor. We held in the case of *Railway v. Wheat*, 173 S. W. 974, that objections to instructions given and refused will not be considered where the record does not show that exceptions were taken as required by article 2061, *Vernon's Sayles' Texas Civil Statutes*. No bill of exception is contained in the record, complaining of the action of the court in this respect in the instant case. Therefore, if we were correct in the holding in the *Wheat Case*, upon the authorities therein cited, we would be justified in refusing to consider this assignment. The transcript in the instant case shows that the instruction as above set out was asked by the defendant, and by the court refused, but in its motion for a new trial, where he purports to set out this instruction and allege error because of its refusal, an instruction, different in wording, though probably to the same general effect, is given. Probably this evident variance would suggest another ground for our declining to consider the assignment, even though we should be of the opinion that the instruction tendered ought to have been given. But if we should consider the assignment, we would overrule the same, because, for the reasons stated, we do not find that it presents prejudicial error.

For like reason we overrule the fourth assignment, which urges error in the refusal of the court to give what the appellant designates as "special charge No. 3," which is in the form as given in the motion for new trial. This charge appears in the transcript as "special charge No. 1," and the assignment raises the same question as presented, in the main, in the third specification, and for the reasons given in the discussion of the former assignment, this assignment also is overruled.

[11, 12] The eighth assignment complains of the action of the court in not permitting U. S. Nicks to testify, to the effect that said Nicks made a trade with plaintiff during the latter part of September, 1913, whereby the plaintiff was to use the tools of the West Texas Supply Company, and for which the plaintiff was to work for the defend-

ant in its store at odd times to pay for the use of said tools. We think this testimony should have been admitted. The plaintiff testified that he made the trade with Albright about September 1, 1913. Nicks testified that he was manager for the defendant company from about the 1st of November, 1913, to the 7th day of March, 1914, and that while he was manager of said company, Dunivan was running the tin shop. If, as claimed by appellant, Nicks would have testified that he made such a trade with Dunivan subsequent to the alleged trade between Dunivan and Albright, such testimony would have had a tendency to discredit the evidence of plaintiff as to the prior trade; and we do not think that the prejudicial error is removed by the fact that the bill of exceptions shows that Nicks would have testified that this contract between Nicks and plaintiff occurred the latter part of September, 1913, while the testimony of Nicks shows that he did not become manager until November of that year. This discrepancy as to date would affect rather the weight of the evidence than the admissibility thereof. It is probable by cross-examination, or by having his attention called to the apparent discrepancy, the same would have been removed or reconciled. The assignment is sustained.

There are various other assignments presented in appellant's brief, but we do not feel that any good purpose can be advanced by their consideration, since under our view hereinabove expressed, the judgment of the trial court must be reversed and the cause remanded, and the questions raised in the assignment not discussed will not likely occur on another trial.

The judgment is reversed, and the cause remanded.

ALLEN v. CARPENTER et al. (No. 8403.)
(Court of Civil Appeals of Texas. Ft. Worth.
Jan. 8, 1916.)

1. EXECUTION §172 — RESTRAINING SALE ON EXECUTION—NECESSARY PARTIES.

In a suit to restrain a constable from selling property under execution to satisfy a judgment, the judgment creditor was a necessary party defendant, as the constable was but a ministerial officer acting for the owner of the judgment, who was the only party interested in its collection.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. §7.]

2. INJUNCTION §7 — RESTRAINING EXECUTION SALE—RIGHT TO MAINTAIN.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, authorizing the issuance of an injunction where it shall appear that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant, a party whose property is levied on under execution against another party is entitled to sue for an injunction to restrain the

sale thereof, and is not limited to her statutory remedy of trial of rights of property.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34; Dec. Dig. §7.]

Appeal from Wichita County Court; T. R. Boone, Special Judge.

Suit by Mrs. Irma Carpenter and husband against W. W. Allen and others. From an order overruling a motion to dissolve a writ of injunction, defendant named appeals. Writ dissolved, judgment reversed, and cause remanded, with instructions.

Bonner & Bonner, of Wichita Falls, for appellant. W. F. Weeks, of Wichita Falls, for appellees.

DUNKLIN, J. At the instance of Mrs. Irma Carpenter, joined by her husband, M. H. Carpenter, a temporary writ of injunction was issued restraining W. W. Allen, constable of precinct No. 1, Wichita county, from selling a motorboat alleged to be the separate property of Mrs. Carpenter, upon which the constable had levied an execution to satisfy a judgment in favor of the Ferris-Dunlap Auto Supply Company against M. H. Carpenter. From an order overruling a motion to dissolve the writ, Allen has appealed. In the petition for the injunction the only party made defendant was W. W. Allen, who, it was alleged, acted as constable in making the levy to collect the judgment.

[1] One of the grounds urged for dissolution of the injunction was a lack of a necessary party defendant, namely, the Ferris-Dunlap Auto Supply Company, owner of the judgment by virtue of which the levy had been made, and having its principal office and place of business in Dallas county, Tex. In overruling that exception there was error, for which the order overruling the motion to dissolve the injunction must be reversed. Allen was but a ministerial officer acting for the owner of the judgment, who was the only party interested in its collection, and hence a necessary party to the suit. *McCanless v. Gray*, 153 S. W. 174; *Acme Cement Plaster Co. v. Keys*, 167 S. W. 186; 22 Oyc. 915.

[2] We overrule the further contention presented by appellant that an injunction would not lie in view of the fact that Mrs. Carpenter could have resorted to the statutory remedy of trial of rights of property to protect her alleged title to the boat levied on.

By article 4643, 3 Vernon's Sayles' Tex. Civ. Stat., it is provided that an injunction may issue "where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant." This is an enlargement of the old equity rule according to which no injunction would issue if the party complaining had an adequate remedy at law; and under the allegations of her petition Mrs. Carpenter was entitled

to invoke the benefits of that statute. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994.

For the reasons indicated, the judgment is reversed, the temporary writ of injunction dissolved, and the cause remanded, with instructions that the suit be dismissed unless the owner of the judgment upon which the execution was issued is made a party defendant, and the injunction made to apply to such owner as well as to the constable.

TURNER et al. v. McKINNEY. (No. 8293.)*
(Court of Civil Appeals of Texas. Ft. Worth.
Dec. 18, 1915. Rehearing Denied
Jan. 15, 1916.)

1. MASTER AND SERVANT ⇨286—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE.

On evidence, in a railroad employe's action for injuries when the sides of a ditch he was working in caved in on the grounds of defendant's negligence in having it dug so deep and narrow without propping the sides, that defendant knew it was dug through filled land but failed to warn and instruct plaintiff, who did not know it, that defendant knew the work was dangerous but did not warn plaintiff of the danger, and that defendant was negligent in not inspecting the ditch to discover the probability of a cave-in, *held*, that there was no error in overruling defendant's motion to instruct a verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

2. MASTER AND SERVANT ⇨278—ACTION FOR INJURY — SUFFICIENCY OF EVIDENCE — KNOWLEDGE OF DANGER.

Evidence, in such action, *held* to justify a finding that the dangers incident to the work in which plaintiff was engaged were known to defendant and its foreman and were not known to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

3. MASTER AND SERVANT ⇨101, 102—MASTER'S DUTY—SAFE PLACE TO WORK.

A master is bound to exercise ordinary care to furnish a safe place for his servants to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185, 171, 174, 178-184, 192; Dec. Dig. ⇨101, 102.]

4. MASTER AND SERVANT ⇨205 — ASSUMPTION OF RISK—RELIANCE ON CARE OF MASTER—RAILROADS.

A servant is not required to inspect the place where his master has put him to work, but has the right to assume that the place furnished by the master is safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. ⇨205.]

5. TRIAL ⇨260 — INSTRUCTIONS — REQUESTS COVERED.

In a railroad employe's action for injury from a cave-in of the sides of a ditch in which he was working, the refusal of an instruction, that if the dangers and risks incident to the work were obvious to a person of ordinary intelligence and prudence situated as plaintiff was at the time of his injury he could not recover, was not error, where the court charged that plaintiff while in defendant's employ assumed the risks ordinarily incident to the services

which he undertook and such risks as he knew or by the exercise of ordinary care should have known of, and that if plaintiff knew of the dangers of his work, or should have known of them, he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⇨260.]

6. TRIAL ⇨194—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A requested instruction which was on the weight of the evidence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 430, 439-441, 446-454, 456-466; Dec. Dig. ⇨194.]

7. TRIAL ⇨260—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of a requested instruction was not error, where the law involved therein was sufficiently given in the court's main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⇨260.]

8. DAMAGES ⇨208—INSTRUCTIONS—MENTAL ANGUISH AND PHYSICAL PAIN—EVIDENCE.

Evidence, in a railroad servant's action for permanent injury to his collar bone and abdomen, *held* sufficient to justify a submission of the question of his future mental anguish and physical pain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. ⇨208.]

9. DAMAGES ⇨50—ELEMENTS—MENTAL SUFFERING.

Mental suffering will be implied from illness or injuries accompanied by physical pain, and may arise from a sense of discomfort or inconvenience.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 253, 257-259; Dec. Dig. ⇨50.]

10. WITNESSES ⇨344—IMPEACHMENT—CIVIL ACTION.

A witness in a civil action cannot be impeached by requiring him to testify to discreditable acts on his part having no material bearing on the issues involved in the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. ⇨344.]

11. WITNESSES ⇨344—PARTY TO CIVIL SUIT AS WITNESS—IMPEACHMENT.

In a railroad employe's action for personal injury, where plaintiff, on cross-examination, testified that he had left another state looking for work and not because he had been indicted or had jumped bond, the exclusion of the testimony of a private detective, who would have stated that plaintiff told him he left the other state in the nighttime after he had gotten away from two officers, one of whom was the sheriff, and that a whisky charge was then pending against him, offered in support of defendant's claim that plaintiff was not injured at all, and upon whether he was able to labor, and whether he was the kind of man who would seek work, and whether since his injury he had sought work, together with an instruction not to consider any of the testimony under those issues, was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. ⇨344.]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Action by J. S. McKinney against Avery Turner and another, receivers of the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Lockett & Rowe, of Ft. Worth, for appellants. Ben M. Terrel and W. C. Prewitt, both of Ft. Worth, for appellee.

BUCK, J. Suit was brought by appellee, J. S. McKinney, against the appellants, for damages in the sum of \$30,000, for alleged injuries received by him while engaged in laying tiling in the bottom of a ditch some 28 inches wide and 13 feet deep, in the course of construction in appellant's roundhouse in its west yards near the city of Ft. Worth. The ditch was constructed for the purpose of draining a pit or excavation underneath the repair track in the roundhouse. The ditch was some 60 feet long and extended beyond the roundhouse. Plaintiff alleged negligence upon the part of the defendants in the following particulars: (a) In having the ditch dug so deep and narrow without having the sides thereof sloped or propped and braced; that the dirt through which the ditch was dug was filled ground and more liable to cave in than ordinary ground; that such facts were known to defendants, but were unknown to plaintiff, and could not have been known by the exercise of ordinary care, and that defendants failed to warn and instruct plaintiff, as was their duty. (b) That the defendants' foreman and vice principals knew, or by the exercise of ordinary care ought to have known, that the work upon which plaintiff was engaged was dangerous, and it was their duty to instruct plaintiff of the danger existing and how to avoid the same. (c) That defendants were guilty of negligence in failing to brace and sheath said ditch, in failing to furnish suitable material for such purpose, in failing to properly inspect said ditch as it was dug, for the purpose of discovering the probability of its slipping or caving in, and in permitting plaintiff to work in a place known, or which should have been known by them in the exercise of ordinary care, to be dangerous. (d) In assuring plaintiff prior to said injuries that there was no danger of the ditch caving in on him and hurting him. Plaintiff further alleged that at the time of the injuries complained of he was doing nothing which could make, or did make, any change in the nature or character of said ditch, or which affected the risks or danger from the caving in or slipping of dirt in said ditch. Plaintiff's injuries were caused by the caving in or slipping of the sides of the ditch, and consisted, as alleged, and in part proven, in a broken collar bone, fractured ribs, injuries to his abdomen, etc. The case was submitted to the jury on a general charge, and, from a verdict and judgment in favor of the plaintiff in the sum of \$1,500, the defendants appeal.

Appellants' first assignment is directed to the refusal of the court to peremptorily instruct the jury in favor of the defendants because:

"(a) The undisputed facts adduced in evidence upon the trial of this cause show that, at the time the plaintiff sustained his injuries, the defendants, receivers of the Ft. Worth & Rio Grande Railway Company were engaged in interstate commerce, and that, at the time of the injuries alleged by plaintiff to have been sustained by him, plaintiff, J. S. McKinney, was engaged in interstate commerce. (b) Because, under the undisputed facts adduced upon the trial of this cause, it is shown that the plaintiff, J. S. McKinney, assumed the risk of injury and the injuries sustained by him while employed in working in the ditch which caved in upon him and injured him. (c) Because no acts of negligence are established by the evidence against these defendants."

Defendants alleged in their answer that, at the time of plaintiff's injuries, both plaintiff and defendants were engaged in interstate commerce, which allegation plaintiff, in his supplemental answer, denied. The court charged the jury that at the time of the injury, if any, both plaintiff and defendants were engaged in interstate commerce. While we question whether the facts conclusively showed, if at all, the state character of the employment at the time of plaintiff's injuries, yet in view of the full charge given by the court, both on assumed risk and contributory negligence, we cannot see that it would make any difference in so far as the appellants are concerned, whether the service in which plaintiff and defendants were engaged at the time of the accident was interstate or intrastate in its character. Appellants' first proposition under this assignment is that:

"Where appellee's own evidence shows that he had been engaged with others at various times over a period of two weeks in constructing a ditch 60 feet long and of an average depth of 12 to 13 feet, and that for two days prior to his alleged injuries he and a companion had been engaged in digging in the bottom of such ditch and laying tiling therein, and that he was so engaged immediately before and at the time of the accident to him, and that the portion of the ditch in which he had been working the day he was injured, and at the time he was injured, was 13 feet deep and of an average width of 26 to 28 inches, the walls of same being of black earth and of the depth stated, and that same were not sloped; and where the undisputed evidence shows that his foreman upon discovering that appellee and his companion were working in a portion of said ditch, of which the walls and sides were not sloped, told appellee to stay out of same until the sides were sloped, and that, after appellee and his companion got out of the ditch, other employes were put to work sloping the sides of the ditch, but that appellee, after his foreman left, re-entered said ditch, and while working in same was injured as alleged by him—he assumed the risks of such injuries, and there can be no recovery by him for damages sustained thereby."

[1, 2] In the first place, both plaintiff and Jeff Musick, who was working with plaintiff in the ditch at the time of the injury, deny that they were told by the foreman to stay out of the ditch until the sides were sloped, or that they were told by the foreman, or any one else, that it was dangerous. Plaintiff testified:

"We had a foreman of that gang. His name was J. H. McCarver, and W. A. Cresswell was

the straw boss. * * * The foreman, John McCarver, saw this ditch twice a day and some times more while it was being dug. * * * Bill Cresswell stayed there with the gang the majority of the time, looking right down there in the ditch where the work was being done; he kept right in after us all the time. * * * The night before this accident happened, Mr. McCarver, the foreman, told Jeff Musick in a conversation I heard that as we approached the concrete wall: 'I think it will be all right; the concrete wall will make it safer there.' He says, 'There ain't any danger in it whatever.' * * * The way I came to be in this ditch the day I got hurt, Cresswell, straw boss, told me to go in there and lay this tile. * * * When I was told to go into the ditch, I was told to get in there and lay the tile and get through with it. * * * It is not a fact that Cresswell, one of the foremen, came out there to where Jeff Musick and I were working in that ditch and told us to get out of there and cool off, and then went back and told some of the boys to slope the sides of that ditch where we were working. Both Musick and I did not get out of that ditch at any time and cool off, and I don't know it to be a fact that we went back into the ditch and stated that we were not afraid of it and went to work against the instructions of the foreman in charge of the work, and that then the ditch caved in on me. That is not so. I never heard that neither."

It is true that Cresswell testified:

"On that day I was working out there, and I came into the roundhouse where McKinney and Musick were at work, and they were down in the ditch digging. They had dug this ditch back after I left, and then, when I came in there, they had got too far back in the ditch and they had not sloped it like I would have left it when I was there myself, so I says, 'Jim, you and Jeff come out.' I says, 'You are warm, and you get some water and rest until these boys slope this back,' and I turned around and goes back to my work on the outside, and in about 30 minutes there was a negro ran out there, and he says, 'Boss, one of your men in yonder is covered up head and ears,' and I went right back in there and went to work. I found it was McKinney that was covered up. He was one of the fellows I had told to come out of there until the sides were sloped."

So that it will be seen, upon the question of warning and instruction by the foreman to plaintiff and Musick to come out of the ditch for the purpose of having the sides sloped so that they might be safer, there is a sharp conflict in the evidence. Moreover, there is sufficient evidence to support the conclusion that plaintiff did not know of the character of the soil, that it was filled-in soil, and did not know of the danger from caving, while defendant's foreman did know. Upon this issue the plaintiff testified:

"While this ditch was being dug, I put some crossings in at Holloway, and I unloaded some timbers and worked out here in the old Ft. Worth & Rio Grande building, putting in some shelves, and I lined up some bridges and done lots of work like that—surfacing them. * * * I had never helped to dig but one ditch before this one. I had helped to dig a ditch, but it was only about 3½ or 4 feet deep. It was there in the west yards and on the outside of the roundhouse. * * * I did not know the difference between the natural earth and filled-in dirt when I was digging in this ditch; I did not know the difference in the soil when I saw it. I had not had any experience along that line. I expect I would know it now if I was digging in a ditch. * * * It was not very

light in this ditch in which I was injured. This roundhouse was round on one side, and on the south side of the roundhouse were doors where the engines came in on the tracks, and they were all closed up except the one where the blacksmiths work in there, and the windows were all closed down. There were plenty of windows on one side of the roundhouse, but they were dirty and closed down. The roundhouse was covered over."

Cresswell testified:

"I knew about this dirt caving in on Freeman, and I knew it was dangerous. * * * Sure I did. As long as I stayed there, whenever it began to cave in, I sloped it. * * * In order to secure the safety of the ditch, we first put some boards across the ditch, and the dirt slid under that, and we saw that the brace would not hold it, and we taken the boards out."

From the testimony quoted, and from other testimony of like import, we are unable to conclude that the jury were not justified in finding that the dangers incident to the work in which plaintiff was engaged were not known to the defendants and to their foreman, or that they were known to the plaintiff. There is some testimony in the record to the effect that filled-in dirt, and especially black dirt, is likely to cave. In addition to the presumption, perhaps justified, that the defendants had knowledge that the ground within the roundhouse was filled-in dirt, and that there was danger of its caving because of its character, there is ample evidence, as has been noted, that their foreman knew such to be the case and that appellee did not know it. Appellants cite us to the cases of *Railway v. French*, 86 Tex. 96, 23 S. W. 642, *Ft. Worth Stockyards Co. v. Whittenburg*, 34 Tex. Civ. App. 163, 78 S. W. 363, by this court, *Hightower v. Gray*, 36 Tex. Civ. App. 674, 83 S. W. 254, and other cases holding, in effect, that when the dangers and hazards incident to an employment are open to the observation of any man of reasonable intelligence, and such dangers and hazards are as open to the observation of the servant as to the master, the servant cannot recover for injuries sustained while engaged in such work. But we do not believe that the facts in this case bring it within that class.

[3] A master is bound to exercise ordinary care to furnish a safe place for his servants to work, and it is not their duty to inspect the place so furnished. In *City of Austin v. Gress*, 156 S. W. 535, where the plaintiff, an ordinary laborer, was injured while tamping dirt around a pipe in a ditch four feet wide and twelve feet deep by a caving in of the side of the ditch, and the evidence was conflicting as to the character of earth, and it was shown that walls dug by the city in the immediate neighborhood without supporting walls did not cave, and the work of digging the dirt was superintended by the city's chief engineer, and it was shown that he had not considered the dirt in danger of caving, and that plaintiff had no experience in such work, it was held that the danger was not so obvious as to charge plaintiff with the as-

sumption of the risk. In *Gordon Jones Construction Co. v. Lopez*, 172 S. W. 987, the San Antonio court held that where plaintiff, while assisting in taking down a wall, stepped on a plaster of paris cornice or molding which broke off, precipitating plaintiff to the earth below, the danger of stepping on the cornice was not, as a matter of law, as open and apparent to plaintiff as to defendant's vice principal, nor so apparent that a man of ordinary prudence would not have stepped on it. See, also, *Railway v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264, where a switchman on the first day of his employment in the yards of defendant had his foot caught in a frog and was killed. It was held that a recovery should be sustained. Therefore we hold that the trial court did not err in overruling defendant's motion to instruct a verdict for the defendants.

What we have hereinabove said disposes also of the second assignment, which complains of the action of the court in refusing defendants' special charge No. 1 instructing a verdict for the defendants.

The third specification of error is directed to the refusal of the court to give the following special charge tendered by defendants:

"You are further instructed that if you believe from the evidence that the plaintiff had equal opportunity with the defendants, their agents and servants, to observe and discover the risks and dangers incident to the work upon which plaintiff was engaged, under the facts, circumstances, and conditions existing at the time plaintiff alleges he received his injuries, then you are instructed that the plaintiff is not entitled to recover herein, and you will return a verdict in favor of the defendants."

[4] As before observed, the servant is not required to make inspection of the place where his master has put him to work, but has the right to assume that the place the master has furnished is safe. In *Railway v. Hannig*, 91 Tex. 347, 43 S. W. 508, the Supreme Court says:

"We understand the law to be that, when the servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his own duty must necessarily have acquired the knowledge. *Bonnet v. Railway Co.*, 89 Tex. 72 [33 S. W. 334]; *Ry. v. Bingle*, 91 Tex. 287 [42 S. W. 971]."

Therefore the third assignment is overruled, and likewise the fourth, which raises questions already considered and disposed of in this opinion.

[5] The fifth assignment is urged to the refusal of the court to give the following instruction:

"You are further instructed as the law of this case that if you believe from the evidence that the dangers and risks incident to the work upon

which plaintiff was engaged were open and obvious to a person of ordinary intelligence and prudence, situated as plaintiff was at the time of the injuries alleged by him to have been received, the plaintiff is not entitled to recover, and you will return a verdict in favor of the defendant."

In the court's charge the jury were instructed that plaintiff, while in the employ of defendants, assumed such risks as were ordinarily incident to the service which he undertook, and such risks as he knew of, or by the exercise of ordinary care in the discharge of his duties he would have known of, and they were further instructed that if they found and believed from the evidence "that plaintiff, J. S. McKinney, received the injuries complained of in his petition, and in the manner described therein, yet if you further find that he knew of the dangers, if any, with such work at said time and place, or by the exercise of ordinary care for his own safety he could have known of such dangers, then you will find for the defendants." The court further charged the jury that, while it was the duty of the defendants to exercise ordinary care to furnish to plaintiff a reasonably safe place in which to perform the work assigned to him, yet if they found and believed from the evidence that immediately before and at the time of plaintiff's injuries, if any, he was then doing some act which affected the safety of said ditch, then in such event they would find in favor of the defendants. We believe the charge quoted sufficiently covered the issues presented by the special charge requested, and therefore overrule the fifth assignment, and likewise the sixth and seventh, which complain of the refusal of special charges; the matters therein, in so far as applicable to this case, we believe to be sufficiently covered in the main charge of the court.

[6, 7] We overrule the eighth assignment because we believe the special charge No. 7 requested by the defendants, the refusal of which error is assigned, to be on the weight of the evidence. Moreover, we think the law as involved therein is sufficiently given in the seventh paragraph of the court's main charge.

[8] The ninth assignment complains of the submission to the jury of the question of mental anguish and physical pain and authorizes a recovery therein, inasmuch as claimed by appellants in said assignment, the undisputed facts fall to show that he will suffer in the future either physical pain or mental anguish, or that he had before the trial suffered any mental anguish. The evidence is ample to show that the plaintiff was permanently injured in his abdomen, and in his clavicle, or collar bone, and that there was a marked and permanent deformity of his clavicle. Dr. Kingsbury testified:

"He has a broken collar bone, and he has quite a deformity there. The bone overlaps to the extent of about one inch and a half. In other words, the collar bone is shortened that much, and he has a beginning rupture of the left side. * * * He will be unable to do any lifting or sustained work of any character be-

cause he will tire more easily. The anatomical relations are disturbed, and consequently he will be like a man walking on a short leg, with one leg shorter than the other. He will tire more easily doing heavy work of any kind. * * * The broken ends of the bones come in contact with the soft deep tissues of the neck, and consequently he cannot raise his shoulder like a normal man could."

Dr. Kibble testified:

"As far as the clavicle is concerned, he has recovered in a measure, depending on the usefulness of the shoulder; but he has not completely recovered, because he has a degree of disability."

Plaintiff testified:

"I was certainly suffering pain when I was taken out of the ambulance. I was hurting all over. My collar bone was broken and my back hurting at that time. I was almost dead. I did not know much about it for a day or two. I remained conscious after they took me out of the ditch until they went to put me in the ambulance, and then I turned so sick I did not know hardly what I was doing at that time. My side was hurt, and my ribs were fractured pretty bad, and I suffered from that and suffered with my lungs, and spit up blood for a while. I suffered with my side and my collar bone. It was my abdomen that hurt me. * * * I was not well when I left the hospital at Sherman. I was then suffering in the side and shoulders, or in the abdomen down here; that was hurting me when I came back to Ft. Worth. * * * I passed blood from my bowels for about a couple of weeks and spit up lots of blood—lumps of blood. I have not been able to do any hard physical labor. I have tried to."

[9] We think the evidence above quoted sufficiently shows physical pain and mental suffering up to the time of the trial, and that the plaintiff will probably suffer mental anguish and physical pain in the future. Mental suffering will be implied from illness, or injuries, accompanied by physical pain. *Railway v. Johnson*, 43 Tex. Civ. App. 147, 95 S. W. 595; *Railway v. Currie*, 64 Tex. 85; *Railway v. Simpson*, 81 S. W. 353. Mental suffering may arise from a sense of discomfort or inconvenience. *Railway v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356. Further, the testimony of the physicians justifies the conclusion that not only will the plaintiff in the future be incapacitated to do certain kinds of labor incident to his former employment, but that he will experience inconvenience, discomfort, and pain in the attempted use of his arm and shoulder. Moreover, it will be noted that there is no assignment raising the question of the excessiveness of the verdict, and, in the view of some of the court, this would be necessary in order for appellants to take advantage of the question raised by the assignment under discussion. But we think the question is sufficiently answered by what we have said above, and we do not find it necessary to base our action in overruling the assignment upon the last expressed view, concerning which there is some disagreement among us.

On cross-examination plaintiff testified that

he had left North Carolina looking for or hunting work, and that he did not leave there because he had been indicted or jumped a bond. Whereupon defendants introduced the witness Smissen, a private detective, and asked him the following:

"Now, I will ask you, Mr. Smissen, what statement, if any, Mr. McKinney, the plaintiff in this case, made to you with reference to how and his reasons for leaving North Carolina?"

To which question plaintiff's objection that it was immaterial was sustained by the court. It is urged that, if Smissen had been allowed to answer, he would have stated that McKinney told him that he left the state of North Carolina in the nighttime, that he had gotten away from two officers in that state, one of whom being the sheriff, and had swum a river and gone over into the state of Tennessee, and that a whisky charge was then pending against him. Defendants offered said testimony in support of their contention that the plaintiff was not injured at all, and upon the question as to whether or not he was able to labor, and upon the question whether or not he was the kind of a man who would seek to secure work, and upon the question as to whether or not since his injury he had sought work or employment. The court instructed the jury verbally as follows:

"You are instructed that you will not consider for any purpose the testimony of the plaintiff given before the jury yesterday afternoon, to the effect that he left North Carolina looking for, or hunting work, or a job, and to the effect that he did not leave there because he had been indicted, or that he had jumped a bond, in order to escape the officers. You will not consider that for any purpose."

To the refusal of the court to admit the testimony of Smissen to the above effect and to the verbal instruction given, appellants' tenth and eleventh assignments are directed.

[10, 11] A witness in a civil action cannot be impeached by requiring him to testify to discreditable acts on his part having no material bearing on the issues involved in the case. *Railway v. Burleson*, 157 S. W. 1177; *Moody v. Rowland*, 46 Tex. Civ. App. 412, 102 S. W. 911; *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272; *Railway v. Johnson*, 83 Tex. 628, 19 S. W. 151. Nor do we think that such character of testimony would be admissible, over objection, when offered by a witness other than the one sought to be discredited or impeached. While the appellants argue that this testimony was admissible on the grounds stated, yet we think it was too remote for such purpose, and that the court did not err, either in refusing the admission of the testimony, or in instructing the jury not to consider any of the testimony which had in fact been introduced upon these issues.

Finding no prejudicial error, the judgment of the trial court is hereby in all things affirmed.

GALVESTON, H. & S. A. RY. CO. v. REINHART. (No. 5576.) *

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916. Rehearing Denied Feb. 9, 1916.)

1. MASTER AND SERVANT—204—INJURIES TO SERVANT—LIABILITY OF MASTER—ACTIONS—PLEADING—SUFFICIENCY TO SUPPORT INSTRUCTIONS.

In a servant's action for injuries alleged to have been caused by the negligence of two fellow servants whose names were unknown, but who were Mexicans, where there was no evidence of negligence of any fellow servants except the Mexicans, an instruction authorizing recovery if the injury resulted from the negligence of fellow servants, without limiting it to the negligence of the Mexicans, was not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1157, 1161-1167; Dec. Dig. ¶ 294.]

2. APPEAL AND ERROR—1066—HARMLESS ERROR—INSTRUCTIONS.

In such case, where the verdict for the plaintiff required a finding that the negligence was that of the Mexican fellow servants and of no others, the error, if any, in failing to follow the pleading precisely, was harmless, the result being unchanged by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ¶ 1066.]

3. APPEAL AND ERROR—1058—HARMLESS ERROR—EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION.

A party cannot complain of the exclusion of testimony which was thereafter admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. ¶ 1058.]

4. EVIDENCE—317—ADMISSIBILITY—HEARSAY EVIDENCE.

In explaining the absence of a material witness, testimony of defendant's agent that his subagent telephoned that he had located the witness, who refused to attend, was inadmissible because hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. ¶ 317.]

5. EVIDENCE—318—ADMISSIBILITY—STATEMENTS OUT OF COURT.

Where a material witness is absent and his absence is not satisfactorily explained, it is not error to exclude his sworn statement made before the trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. ¶ 318.]

6. MASTER AND SERVANT—279—INJURIES TO SERVANT—LIABILITY OF MASTER—ACTS OF FELLOW SERVANTS—EVIDENCE—SUFFICIENCY.

Evidence of plaintiff held to show that his injuries proximately resulted from the negligent act of his fellow servants, so as to support recovery from the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. ¶ 279.]

7. DAMAGES—132—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where, prior to his injuries, plaintiff was in good health and had worked as a carpenter, doing heavy work for many years, and the evidence showed that his fall caused severe bruises on the head and shoulders, that he was in the hospital for 2½ months, and had been unable to work for over a year and a half, that his back was weak, that his blood pressure was exceedingly high, that his heart skipped beats,

and a physician testified that the injuries were done to his nervous system by the fall, and that he could never do hard work because of danger of heart failure, and that his life would be materially shortened, a verdict in his favor of \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. ¶ 132.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by R. Reinhart against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Templeton, Brooks, Napier & Ogden, and Ed W. Smith, all of San Antonio, for appellant. Engelking & James, of San Antonio, for appellee.

MOURSUND, J. Appellee sued appellant for damages on account of personal injuries, alleged to have been sustained by him while he was working for defendant as a carpenter in its roundhouse at San Antonio. It was alleged that, at the time of the accident, the crew of which plaintiff was a member was engaged in the work of placing a heavy beam up under the roof of the roundhouse; that the end of the beam where they were working at the time had been placed on a scaffold underneath the roof; that a screw jack had been set on the scaffold under the beam; that plaintiff was sitting astride the scaffold and was raising the beam into place by turning the jack with a lever; that while he was engaged in such work two of his fellow servants, whose names were unknown to plaintiff, but who were Mexicans, were directed to lift the beams by prying with a crowbar, but they negligently gave a sudden jerk with such crowbar so that the beams resting on the jack were suddenly elevated and their weight removed from the head of the jack on which plaintiff was pulling; that when the weight of said beams was so removed from the head of said jack plaintiff's weight on the jack lever caused it to revolve quickly, and, as plaintiff was without support, he lost his balance and fell from the scaffold. In paragraph 6 plaintiff alleged:

"The said two Mexican servants were negligent in suddenly and with a jerk raising the said beams by means of the crowbar so that their weight and resistance was taken from the jack, and plaintiff thereby caused to lose his balance on the scaffold and fall, as aforesaid."

In paragraph 7 plaintiff alleged that the defendant and some of plaintiff's fellow servants, whose names he cannot give, were negligent in suddenly removing the support and position of firmness which the said jack had under the said beam, and thereby caused the lever with which plaintiff was operating and holding himself to be pulled out of the jack and the plaintiff to be thrown from the scaffold.

The railway company admitted the happening of the accident, but denied that it was caused by the alleged negligence of two of plaintiff's Mexican fellow servants in prying on and jerking the beam with the bar. It alleged that plaintiff placed the jack on the scaffold under the beam and operated it to suit himself, and that his fall was caused by his failure to put the lever far enough into the hole in the jack or in so placing the same that it slipped out or in the manner in which he pulled on the lever, or in some other way unknown to defendant. It further pleaded that in acting as he did appellee was guilty of contributory negligence, and that he assumed the risk.

The trial resulted in a verdict and judgment for \$10,000.

[1, 2] The second paragraph of the charge reads:

"If you find from the evidence that while plaintiff was sitting on the scaffold and was raising the beam into position with a screw jack, one or more of his fellow servants was prizing on the beam with a bar, and if you further find that, while plaintiff was so operating the jack, his said fellow servants suddenly jerked the beam with the bar and that this released the weight on the jack and caused plaintiff to lose his balance and fall, and if you further find that the jerking of the beam with the bar, if it was so jerked, was negligence, and that such negligence was the direct and proximate cause of plaintiff falling, and if you further find that plaintiff sustained in such fall any of the injuries alleged in his petition, then you should return a verdict for plaintiff."

Appellant contends that this portion of the charge was erroneous because it fails to require that two of appellee's fellow servants, who were Mexicans, must have been prizing on the beam and suddenly jerked the same, etc., as alleged in the petition. The contention is that the evidence shows that two of appellee's fellow servants, Haak and Mathewson, are not Mexicans, and shows and tends to show that Mathewson is the man who was handling the bar and prizing the beam, and that neither of the Mexicans handled the bar or jerked the beam with the bar, and therefore the jury, under the charge, might have found for plaintiff upon the negligence of Mathewson instead of that of the two Mexicans. This contention finds no support in the testimony. Plaintiff testified unequivocally that the two Mexicans were prizing with the crowbar at the time he was injured. Every witness for defendant testified positively that no one was using the crowbar at that time. Haak and Mathewson testified that prior to this time Mathewson had tried to prize the beam over, but he could not do it, so he took the bar out and they used the jack again. Haak testified that at the time of the accident Mathewson was standing on the ground, holding the rope; that no one at that time was using the crowbar. Mathewson testified that at the time plaintiff fell, he (Mathewson) was standing on the running board of the engine, and was not using the

bar while plaintiff was using the jack, nor did he think any one else was.

Appellee contends that in paragraph 7 he imputed the act of negligence to "some of plaintiff's fellow servants, whose names he cannot give," and that said allegation was sufficient to authorize the charge. We think there is no merit in that contention, for it appears that in paragraph 7 the plaintiff undertook to allege a different act of negligence from that alleged in paragraph 6. The one alleged in paragraph 6 was submitted, and as the two fellow servants were described as Mexicans, for the purpose of identifying them, they being the only two who were Mexicans and their names being unknown, the case is exactly in the same attitude as if the names of the two fellow servants alleged to have been negligent had been stated in the petition, but admitting that the court should have submitted the case just as it was pleaded, we are unable to see any probability that the failure to do so injured appellant. If the jury believed plaintiff and found there was negligence in jerking the beam with a bar, they must have found that the two Mexicans were handling the bar for plaintiff so testified, while the other witnesses testified positively that no one was working with the bar at that time. We therefore overrule the first assignment of error.

The second assignment complains of the failure to give a special charge requiring the jury to find that two Mexicans jerked the beam with a bar, or else plaintiff could not recover. This assignment is overruled on the ground that if error was committed in refusing to give it, such error is not one requiring a reversal. The reasons on which the holding is based are stated in discussing the first assignment.

[3, 4] M. H. Bonner, appellant's claim agent, after testifying that on December 6, 1913, he took the statement of Torres, one of the Mexicans present at the time plaintiff fell from the scaffold, testified further that he had been requested to locate Torres as a witness in the case, but did not know of his own knowledge where he was; that he made inquiry about a day or two before the 1st day of March, and learned where he was from other persons. He was not permitted to testify that he learned Torres was at his father's house, near San Angelo, Tex. The statement of facts shows that afterwards Bonner testified that the case went over for a special setting on March 22d, and he was told by attorneys for defendant to find out where Torres was, and arrange for his attendance. He testified further:

"According to the information I had at that time, I heard he had gone to San Angelo. As soon as I learned he had gone out there, I heard he had left there, and it was said he had gone to Laredo, and it was also reported he had joined the Mexican army. Feliciano Acosta is the man that was sent off to Laredo, Del Rio, Sonora, and west of Sonora for Torres; I had a telephone from him last night at Sonora, and

expect him to return to-night at 8:50. I have done everything in my power to get Torres here at this trial, but have been unable to do it."

He also testified that Acosta told him over the telephone that he had found Torres 25 miles west of Sonora, but he refused to come. This statement was excluded, upon objection that it was hearsay. Appellant's third and fourth assignments of error relate to the two rulings excluding testimony as to what Bonner had been told as to Torres' whereabouts. It is apparent that the very testimony covered by the first assignment was afterwards given, for the witness stated that his information at the time the case was first set for trial was that Torres was at San Angelo. Appellant does not show clearly upon what theory its contention is based that proof could be made of what Acosta, defendant's subagent, had done and that the witness whom he had located refused to attend the trial, by the hearsay statement of such subagent. We think the court did not err. Furthermore, this testimony could only be material on the issue whether Torres was absent by the procurement of defendant, and if the jury did not believe what Bonner said about his efforts to have Torres present, it is inconceivable that the unsworn statement of Acosta, an agent of Bonner, to the effect that he had found Torres 25 miles from Sonora and he refused to come, would have caused them to believe that Bonner was truthful concerning his efforts. Both assignments are overruled.

[5] By the fifth assignment complaint is made because the court excluded the sworn statement made by Torres on December 6, 1913. There is no merit in the assignment.

[6] The sixth and seventh assignments attack the sufficiency of the evidence to support the verdict. Plaintiff's testimony, which was believed by the jury, supports a finding that the beam was negligently jerked by means of a crowbar wielded by two Mexicans, and that such act was the proximate cause of plaintiff becoming overbalanced and falling from the scaffold. The assignments are overruled.

[7] Appellant contends that the verdict is excessive. The evidence shows that prior to appellee's fall he was in good health; that he had worked for appellant for many years doing carpenter work, which included lifting heavy planks and timber; that his fall caused severe bruises on his head and shoulders; that he was in the hospital for 2½ months; that he had not been able to work up to the time of the trial, a year and a half after his fall. He still has a tender spot in the small of his back, and is very weak in the back; besides, his blood pressure is exceedingly high and betokens a dangerous condition. His heart skips beats. This condition is attributed by him to his fall, and the testimony of Dr. Goeth warrants a finding that such condition was brought about

by injuries to his nervous system sustained on account of the fall. Dr. Goeth expressed the opinion that on account of the condition of appellee's heart he would never be able to do hard work, because of danger of heart failure, and that his life would be materially shortened. The verdict is high, but we conclude that it is not so high that the amount itself manifests passion or prejudice.

The judgment is affirmed.

CATTLEMEN'S TRUST CO. OF FT.

WORTH v. TURNER. (No. 8287).*

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 11, 1915. On Motion for Rehearing, Jan. 15, 1916.)

1. CORPORATIONS §90—STOCK SUBSCRIPTION —"ISSUE"—STATUTES.

Stock was subscribed for, and at the same time two notes given to the promoter for the corporation, one for part of the subscription price payable to the promoter and realized upon by him, and the other for the balance payable to the corporation and attached to which was an agreement that the stock subscribed for be held as collateral security for the note. At the same time it was agreed between the promoter and the subscriber that the stock and certificate were to be held until the notes should be paid, which was accordingly done, but in the meantime the stock was voted in the subscriber's name under proxy contained in the subscription contract, dividends declared upon it and credited upon the note, and the subscriber notified by the corporation from time to time of its condition, meetings, etc. Held, in an action upon the note, that it was valid and given in a valid transaction, and that the stock was not delivered and did not "issue" within the meaning of Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, prohibiting corporations from issuing stock except for money paid, labor done, or property actually received, because the transaction constituted but a subscription to stock with a future promise to pay, which is not prohibited by the constitutional and statutory provisions stated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. §90.]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

2. CORPORATIONS §123—PLEDGE OF STOCK.

Such a transaction vests the subscriber with but a qualified right to the stock, not capable of being pledged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. §123.]

3. CHATTEL MORTGAGES §17 — CORPORATE STOCK.

Such a transaction vests the subscriber with but a qualified right to the stock, not capable of being mortgaged.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 55-58; Dec. Dig. §17.]

4. CORPORATIONS §77—STOCK SUBSCRIPTION —CONSTRUCTION.

A stock subscription agreement, a note, and an agreement attached thereto to hypothecate the stock subscribed, all simultaneously executed and delivered, constitute but a single subscription contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243, 255; Dec. Dig. §77.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court

5. CORPORATIONS ¶94 — **STOCK** — "CERTIFICATE OF STOCK."

A "certificate of stock" is not the stock itself, but an acknowledgment of the interest of the shareholder in the corporate property, and operates to transfer nothing to the shareholder, but merely affords him evidence of his rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. ¶94.]

For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock.]

6. CORPORATIONS ¶99 — **STOCK SUBSCRIPTIONS—STATUTES—CONSTRUCTION.**

The purpose of Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, prohibiting corporations from issuing stock except for money paid, labor done, or property actually received, is to insure for the protection of the purchasing public an equivalent in corporate property for such stocks or bonds of the corporation as are emitted or circulated, and thus made a commodity of purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. ¶99.]

7. APPEAL AND ERROR ¶1011—**INFERENCES FROM FACTS.**

Mere conclusions or inferences from facts, which are not findings of fact upon conflicting evidence as contemplated by statute, will not be approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ¶1011.]

On Motion for Rehearing.

8. APPEAL AND ERROR ¶1095—**OVERSIGHT OF UNDISPUTED FACTS—PREJUDICIAL ERROR.**

An oversight of undisputed facts in reviewing the evidence does not constitute prejudicial error, as such facts may be considered by the Supreme Court with or without a finding by the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. ¶1095.]

Appeal from District Court, Tarrant County; J. W. Swayne, Judge.

Action by the Cattlemen's Trust Company of Ft. Worth against Robert Turner. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

A. H. Kirby, of Abilene, for appellant. Madden, Trulove, Ryburn & Pipkin and Kimbrough, Underwood & Jackson, all of Amarillo, for appellee.

CONNER, C. J. This suit was instituted by the appellant, the Cattlemen's Trust Company, against the appellee, Robert Turner, upon a promissory note for the sum of \$7,500, payable to the plaintiff on or before June 1, 1914, bearing interest at the rate of 8 per cent. per annum from its date, and containing the usual provisions for 10 per cent. additional as attorney's fees. Credits of \$150 on December 13, 1913, and of \$300 on December 31, 1914, were admitted in the petition. The defendant admitted the execution of the note, but, among other things, specially alleged that it had been given in payment for 500 shares of the capital stock of the plaintiff corporation then sold and delivered to him. It was charged that such transaction was illegal and void.

The plaintiff denied that the note had been executed and delivered as a part of an illegal and void contract or transaction, but charged that the defendant subscribed in writing for 500 shares of the capital stock of plaintiff company at and for the sum of \$10,000, which defendant promised to pay plaintiff for said stock; that to evidence the time when said sum of \$10,000 was to be paid, and as a part of the same transaction by which the defendant subscribed for the stock, the note sued upon was given, as also another note for \$2,500, which has since been paid; that the contract provided that the stock should be paid for at the time stated in the notes, but that said stock was not to be delivered to, or become the property of, the defendant until it had been fully paid for in cash in accordance with the contract, and that it should then, and not before, be issued and delivered; that pursuant to the contract no part of the stock had ever been issued or delivered to the defendant, nor to any one for him, and has never been in his possession, control, or custody, but has at all times since said contract of subscription been in the exclusive custody, control, and keeping of the plaintiff.

The case was tried before the court without a jury, resulting in a judgment denying plaintiff a recovery, etc. The court filed his conclusions of fact and law, and we now have the case before us for revision upon the assigned errors. The vital question presented on this appeal is: Did the appellant company issue to the defendant the stock contracted for by him, receiving in payment therefor the note in controversy, in violation of article 12, § 6, of our Constitution, which reads:

"No corporation shall issue stocks or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

We have a statute also of like effect. See article 1146, Vernon's Sayles' Texas Civil Statutes. The contention of appellant is that none of its stock was ever issued to appellee. The reverse of this contention is urged by appellee, his insistence being that the stock mentioned in the pleadings was issued to him in consideration, in part at least, of the note sued on, and that therefore said note is void. The court adopted appellee's theory of the facts, and rendered judgment accordingly.

We think it may be safely said that there is no material conflict in the evidence. In all material respects we view the facts as substantially undisputed. As shown by the court's findings and the undisputed evidence, appellant was a private corporation chartered and organized under the laws of Texas, with its domicile at Ft. Worth, where it has been engaged in business since about December 1, 1912; that on or about the 12th day of May, 1913, the plaintiff, through its authoriz-

ed agent, J. B. Martin, solicited and procured from the defendant, Turner, a written subscription signed by him for 500 shares of capital stock of the plaintiff corporation of the par value of \$10,000; said signed subscription containing, among other things, the following terms, to wit:

"Subscription for Stock.

"No. Shares, 500. Amount, \$10,000.00.

"This is to certify that I hereby subscribe for five hundred shares of the capital stock of the Cattlemen's Trust Company, Ft. Worth, Texas, for which I agree to pay ten thousand dollars to said company.

"I further agree that this application and contract constitutes the sole and entire agreement, representation, and warranty between us, and that the said company reserves the right to reject this subscription within twenty days from receipt thereof and return to the subscriber the full amount paid said company, and further that 25 per cent. of the sale price of the stock herein purchased is to be and will be expended for organization and promotion expenses, to which I expressly agree and hereby authorize.

"I hereby make, constitute, and appoint A. L. Camp, of Ft. Worth, Texas, as my true and lawful attorney to represent me and to vote my proxy, and I hereby ratify and confirm the acts of my said attorney until hereafter annulled by me in writing. This proxy is revocable at my pleasure."

At this same time, and as a part of the same transaction, the defendant, Turner, executed and delivered to the said agent, Martin, for the plaintiff corporation, two promissory notes, one for the principal sum of \$2,500, being one-fourth of the subscription or sale price of said shares of stock payable to the said J. B. Martin, and which he afterwards collected as commission due him for obtaining the subscription. The other note was for the principal sum of \$7,500, and is the note declared upon in this suit. Attached to said \$7,500 note, and constituting a part thereof, was the following collateral agreement, viz.:

"As collateral security for the foregoing note, and other notes, if any, this day given for the stock hereinafter named, I have delivered to the said the Cattlemen's Trust Company the following securities: 500 shares of the Cattlemen's Trust Company of Ft. Worth.

"In case of default in the payment of any of the foregoing and above described notes at maturity, I, we, or either of us authorize the holder of said notes to sell said securities, with or without notice, at public or private sale, at the option of the holder, applying the proceeds to the payment of the above notes, including interest and attorney's fees, and the surplus, if any remaining, thereafter to be paid to the maker hereof on demand. Robert Turner."

Both the notes last mentioned and the collateral agreement were executed, as stated, at the same time, and at the same time delivered by the defendant, Robert Turner, to the plaintiff's agent, J. B. Martin, who thereafter duly delivered the same to the plaintiff corporation at its office in Ft. Worth. The subscription contract and collateral agreement were accepted by the plaintiff corporation, which thereupon made out and attached to the note for \$7,500 the following certificate, viz.:

"Incorporated under the Laws of the State of Texas.

"No. 186. Shares, 500.
"The Cattlemen's Trust Company of Ft. Worth.
"Authorized Capital Stock, \$1,000,000.00.

"This certifies that Robt. Turner is the owner of five hundred shares of the capital stock of the Cattlemen's Trust Company of Ft. Worth, full-paid and none assessable, transferable only on the books of the corporation by the holder hereof in person or by attorney upon surrender of this certificate properly indorsed.

"In witness whereof the said corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this 12th day of May, A. D. 1913.

"J. W. Milner.
"Asst. Secretary
"Seal.]

A. H. Kirby,
Vice President.
Shares.
"\$10.00."

The certificate was indorsed upon the back with the following:

"Certificate for 500 shares of the capital stock of the Cattlemen's Trust Company of Ft. Worth.

"Issued to Robt. Turner.

"Dated May 12th, 1913."

It was agreed between Turner and the plaintiff, through its said agent, Martin, at the time the subscription contract and the notes hereinbefore mentioned were signed and delivered, that the plaintiff corporation should have and retain the possession of the stock to be issued to Turner as collateral security for the note sued upon, and Turner was informed at that time by said Martin that the certificate for stock would not be delivered to him until said note was paid. In accordance with this agreement and understanding, the physical custody of the certificate mentioned has been at all times, and still is, with the plaintiff corporation. It further appears that on September 2, 1913, at a meeting of the stockholders of plaintiff corporation, A. L. Camp, as proxy for the defendant, voted said 500 shares of plaintiff's capital stock in accordance with the provision contained in the original subscription agreement. It also appears that yet later, in December, 1913, a dividend of \$150 was declared by the plaintiff corporation on said 500 shares of stock, and entered by plaintiff corporation as a credit upon the note sued upon. Yet later, in December, 1914, another dividend for \$300 was declared by the plaintiff corporation upon said 500 shares of stock, and likewise entered by the plaintiff as a credit upon said note. It also appears that the plaintiff corporation entered upon its stock book or record of subscriptions the name and the address of defendant in connection with said certificate No. 186, for 500 shares, showing the date of the certificate to be May 12, 1913, the amount, \$10,000, amount of cash paid, none, notes, one for \$2,500, and one for \$7,500, and salesman J. B. Martin; this being all that the books of the plaintiff corporation showed in the nature of an account with the defendant. It further appeared that the defendant from time to time, un-

til about the time of the institution of this suit, received letters from the plaintiff corporation showing the condition of the company, receiving notices of stockholders' meetings, and of the first dividend mentioned, etc.

The trial court further found, as differences evidently from the facts hereinbefore stated, that the certificate for stock had been "issued"; that at the time of the execution of the stock subscription contract and note mentioned it was the intention of Martin and the defendant that the plaintiff corporation "should hold such certificate as defendant's property subject to plaintiff's lien"; that the only consideration for the two notes mentioned "was the sale by the plaintiff to the defendant of 500 shares of capital stock of the plaintiff corporation; * * * that the defendant did not pay to the plaintiff, nor did the plaintiff receive from the defendant, either at the time of the transaction between the plaintiff and the defendant, May 12, 1913, or at any subsequent time, any money paid, labor done, or property actually received." The court further concluded "that it was the intention and agreement of the parties that the plaintiff should sell to the defendant, and that the defendant should buy from the plaintiff, the 500 shares of plaintiff's capital stock, all on a credit, and that the plaintiff should accept in exchange or payment for said shares the two notes referred to, and that the defendant should become the present owner of the shares of stock, unless the plaintiff rejected the defendant's subscription and returned the notes," which was not done. There were other inferences and findings of like effect by the trial court, but nothing, we think, that substantially adds to or takes from the legal effect of the facts as we have found them; the court concluding, however, on the whole, that the transaction amounted to a sale of the stock upon a credit, it being held that the manual delivery of the certificate was not essential to the ownership of the shares or to the issuance of the stock. Judgment was accordingly entered in favor of the defendant, as stated in the beginning of the opinion.

[1-4] We recur to the question: Did the plaintiff corporation "issue" to the defendant shares of its capital stock within the meaning of the constitutional and statutory provisions hereinbefore referred to, and receive as payment therefor the promissory note sued upon in this case? We think not. It is undoubtedly true that one may lawfully subscribe for shares of capital stock of a corporation and lawfully promise to pay therefor at a future date; the inhibition of our constitutional and statutory provisions being that the stock shall not be really issued by the corporation until it has been paid for. It is said in section 65, 1 Cook on Stock and Stockholders and Corporation Law (3d Ed.):

"Upon general common-law principles any one who is competent to enter into any ordinary contract may make a valid subscription for stock in an incorporated company. A subscription for stock is a contract; and, in general, any one who can contract may subscribe."

Further authorities might be cited to the effect that the note in controversy in this suit in legal effect added nothing affecting the question under consideration to defendant's promise to pay as contained in the subscription contract which is also declared upon in appellant's pleadings. The subscription agreement, the notes, and attached collateral agreement were all executed and delivered at the same time, and severally constituted parts of a single whole, to wit, a subscription agreement, which, as already observed, may be lawfully made. The principal office of the notes under the circumstances was to fix the time of the payment of the sum promised in the subscription agreement. Under the circumstances, too, what is designated in the record as a collateral agreement to hypothecate the stock was, in a legal sense, meaningless and of no effect now necessary to consider. Until after delivery to the defendant, or to some one capable of receiving it for him, the certificate, or stock, if it should be so classed, which was attached to the note declared upon, constituted no tangible right of the defendant capable of being the subject of a pledge or chattel mortgage. While appellee, Turner, may have had, and doubtless did have, for some purposes and as against some persons, a qualified interest in or right to the stock for which he subscribed, yet in truth, as we think, such stock has never been issued to him within the meaning of the constitutional provision quoted. True, appellee testified that he "understood the shares were to be issued at once and held as collateral" for the notes, and that he signed both the notes and the subscription contract upon that agreement, and, in effect, that he considered himself as the owner of the stock; yet he further testified that he never was a director or officer in the corporation, or sustained any relation thereto, save that arising from his subscription contract and notes; that he never saw this certificate or stock until it was produced in court and never had it in his possession; that it was a fact that "Capt. Martin stated the certificate would be delivered to me when I paid the notes in full"; that when he paid the \$2,500 note he "never demanded of any one the delivery of the stock, or any part of it, as it was to be held as collateral for the notes, and it was my understanding the stock was not to be delivered until I had paid the notes in full." He again testified:

"I never demanded delivery of this stock, because it was agreed from the start that they were to hold the stock until payment of the notes."

Mr. Martin's testimony was to the same effect. Mr. Camp testified without contradiction that;

The certificate of stock in question, "like all others, was written up at once as a matter of convenience and to save bookkeeping. Otherwise we would have had to keep an account with each stockholder; but by writing up the stock and attaching thereto the notes the notes were entered on the bills receivable, and, when the dividends were paid, it was only necessary to enter it on the backs of the note, and thus not keep a separate account with each stockholder, and the stock was ready to be delivered when the notes were paid in full. * * * This certificate was never out of the possession of the trust company until it was exhibited here in court this morning. The Cattleman's Trust Company never received any part of the \$2,500 note, nor has it received payment of any part of the principal or interest of the \$7,500 note."

[5] The trial court evidently concluded as an inference from the facts pleaded that the certificate of stock mentioned in the testimony was "stock" of the corporation, and that the signing thereof, tearing it out of the stock book, and attaching it to the defendant's note was a "delivery" of such character as to constitute an issuance of the stock. Mr. Cook, the same author hereinbefore referred to, in the second edition of his work (section 10), says:

"A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises; it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. Accordingly it follows that shares have no 'earmarks,' that one share cannot be distinguished from another share, but that it is only the certificates which are distinguishable one from the other by their number and in other ways. The certificate, therefore, has value in itself only as evidence, and, apart from the shares which it represents, it is utterly worthless. And even as evidence it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it. One element of its value to the shareholder is that it is *prima facie* evidence of his title."

But, if the certificate in question should receive a more liberal construction and be considered as stock, it cannot be said that it was delivered to the defendant either actually or constructively. It never passed out of the hands of the appellant corporation. This is conceded. It is said by our Supreme Court in the case of *Tyler Building & Loan Ass'n v. Biard & Scales* (Sup.) 171 S. W. 1122, that a deed delivered by the grantor to his agent for delivery to the grantee in accordance with specific instructions is not in escrow while in the hands of the agent. In speaking of "delivery" in the law of sales, it is said in 35 Cyc. pp. 188, 189:

"The word 'delivery' in the law of sales may signify either an actual or a constructive delivery. Actual delivery consists in giving to the buyer or his servants or accredited agent the real possession of the goods sold. Constructive

delivery comprehends all of those acts which, although not truly conferring real possession of the goods sold, have been held constructive *juris* equivalent to acts of real delivery, and in this sense includes symbolical or substituted delivery. Both actual and constructive delivery contemplate the absolute giving up of the control and custody of the goods on the part of the seller and the assumption of the same by the buyer."

So that, as it seems to us, it cannot be said that the certificate for stock issued in the name of the defendant, even treating it as stock of the corporation, was delivered, in a legal sense, to the defendant so as to pass to him anything other than some contingent, qualified right. The certificate at all times, as shown by the undisputed testimony, remained with the corporation, subject to its exclusive control, and could not have been effectively sold, transferred, or circulated in any way by the defendant. It certainly cannot, as we think, be said to have been "issued" within the terms of the inhibiting constitutional provision. The term "issue" is thus defined in Webster's Unabridged Dictionary:

"To send forth or give out officially; delivered by authority; give to the public; as, to issue money, ammunition, or commands; to issue a journal; to bring to a conclusion or final issue; settle."

A number of constructions of the term are also given in 4 Words and Phrases, 3778, 3779. We will refer to but a few of them to illustrate our conclusions. It is there said:

"The word 'issued' ordinarily means 'emitted' or 'sent forth,' and, in the absence of other definition, that must be taken to be the sense in which it was used in the legislation of Kansas." *Corning v. Meade County Com'rs*, 102 Fed. 57, 60, 42 C. C. A. 154.

"The terms 'issued' or 'put in circulation,' in a statute providing that no banking association shall issue or put in circulation any bill or note, 'have a restricted, special, and almost technical meaning relating exclusively to the money currency of the country, or, in the language of the general banking law, to 'circulating notes in the similitude of banking notes.'" *Curtiss v. Leavitt*, 17 Barb. (N. Y.) 309.

"The term 'issue,' as used in the Negotiable Instruments Law, means the first delivery of the instrument, complete in form, to a person who takes it as a holder"—citing the statutes of Massachusetts, Ohio, Virginia, and North Dakota.

"In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. * * * When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term." *Yessler v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014.

"The ordinary and commonly accepted meaning of 'to issue' is to send forth, to put into circulation, to emit, as to issue bank notes, bonds, etc. * * * To issue tax bills, then, as ordinarily understood, necessarily includes delivery to some one; just as municipal bonds may be written out or printed and signed, but they are not issued until sent out, delivered or

put into circulation. And, where tax bills are to be given to a contractor for a public improvement, and are prepared for delivery to the contractor, they are issued when he takes the same and gives his receipt on the face of the register of the engineer, whose duty it is to register the same in his office." *Folks v. Yost*, 54 Mo. App. 55.

"A county warrant or order is 'issued' when made out, and placed in the hands of a person authorized to receive it, or is actually delivered or taken away. So long as a county warrant or order is not delivered or put into circulation, it is not 'issued.' * * * If a warrant or order unlawfully directed to be issued by a board of county commissioners remains in the hands of the county clerk, and is not delivered, or sent out, or put into circulation, by the county clerk or any one else, the wrong attempted * * * does not succeed, because there is no actual issuance of the warrant." *State v. Pierce*, 52 Kan. 521, 35 Pac. 19.

Other definitions of like import are given by the authority referred to, but we have quoted sufficiently, we think, to illustrate the conclusion already stated that, in our opinion, the stock in the appellant corporation for which the appellee contracted was never, in fact, issued to him in violation of the constitutional and statutory provisions on the subject. We think this conclusion is also supported by a number of our own authorities. Thus, in the case of *Cope v. Pitzer*, by this court, 166 S. W. 447, *Cope*, among other things, subscribed for ten shares of the capital stock in the *Wichita Southern Life Insurance Company*, agreeing to pay therefor the sum of \$2,500, evidenced by two promissory notes, one of which was payable to *S. A. Pitzer*, who solicited the subscription for and on behalf of the company. *Pitzer* instituted suit upon the note executed to him, and recovered judgment thereon. Among other findings of the trial court not necessary to state, was the following:

"The said company delivered no stock to the defendant on the execution of said contract and notes, and no stock has been delivered to defendant, and said company has not agreed to deliver any stock thereon until said note for \$2,000 is paid in full, and demands payment of shares of stock prerequisite for issuing said ten shares of stock, or any part thereof, to defendant. The company stands ready to deliver payment of said ten shares of stock on said note for \$2,000."

We held, as did the lower court, that the subscription contract was valid and the notes enforceable.

In *Horn Bros. v. Baker*, 173 S. W. 474, it appears by the opinion of the Galveston Court of Civil Appeals that the defendants subscribed for stock in a proposed corporation, and for stock in a proposed corporation thereof, and in evidence of their agreement therefor executed a note secured by a chattel mortgage, but there was no agreement on behalf of the corporation to sell and deliver the stock on their promise to pay therefor, and the stock was not, in fact, delivered. The court upheld the validity of the note, saying: "We shall not discuss appellants' assignments of error in detail. The evidence, when analyzed, shows that no agreement was made with *Horn*

Bros., at the time they subscribed or afterwards, to sell and deliver to them the stock upon their promise to pay for it. No fraud was practiced to induce their subscription. They, just as the other subscribers, subscribed for so much of the capital stock of the proposed corporation. When the charter was issued and the corporation accepted the promise of *Horn Bros.* to pay for the five shares, their liability evidenced by the subscription was complete. The execution of the note was only another expression or admission of liability, and was of no greater dignity than the contract of subscription would have been had the note not been given, in so far as it affects the liability of the corporation's subsequent creditors; for, having been executed as a part of the same transaction, the note and subscription contract evidenced one contract only, and that was to take and pay for the stock. That such a transaction does not contravene section 6 of article 12 of the Constitution we think clear, and are sustained in this conclusion, we think, by the following authorities: *Street Railway v. Adams*, 87 Tex. 125, 26 S. W. 1040; *McCarthy v. Texas Loan & Guaranty Co.*, 142 S. W. 96; *Houston Fire & Marine Ins. Co. v. Swain*, 114 S. W. 154."

The same court, in the case of *F. & M. State Bank v. Falvey*, 175 S. W. 833, upheld the validity of a subscription and notes by *Falvey* very similar in character to those here under consideration, notwithstanding the fact that in that case the note there under consideration had actually passed out of the hands of the corporation into the possession of the bank. It is true that another one of the same series of notes involved in the consideration of the case last above referred to was declared to be invalid by the Court of Civil Appeals at El Paso in the case of *Sturdevant v. Falvey*, 176 S. W. 908, on the ground that the transaction was violative of the constitutional provisions and statute here under consideration. The El Paso court referred without disapproval to the cases upholding a mere subscription contract between the parties where there had not been an issuance and delivery of the stock, and distinguished the decision by the Galveston court above referred to on the ground evidently that in the El Paso court case then under consideration the agreed facts of that case showed "that the stock for which the note was given was issued and delivered to *Falvey*."

[8] By the common law of the land owners of stock in corporations are entitled to a ratable share in its assets, and the evident purpose of the constitutional and statutory provisions under consideration was to protect the purchasing public in the acquisition of stock or bonds of corporations that was not represented by an equivalent in the way of assets belonging to the corporation issuing the stock, and it is not easy to apprehend in what way, under the circumstances of this case, the stock market of the country can be demoralized or a purchaser therein injured. It is clear that what is designated as the stock in the case before us was not "emitted," circulated, or issued, so as to become the subject of a commodity on the

market, nor was it in the power either of the corporation or of the defendant, Turner, to so place the stock in circulation. The substance of the transaction, as we have before indicated, seems rather to have been a mere contract for the acquisition of stock by the defendant, Turner, which, for aught that appears in the record, was of value to him; it not appearing that the appellant corporation was insolvent, or that its stock was worth less than its face value. It was a contract which, upon payment, or tender of payment by him, he would have been entitled to enforce, and likewise a contract, which in turn may, as we think, be enforced by the corporation.

[7] There are a number of what purport to be findings of fact which are attacked by appellant, and which seem to be at variance with the facts as we have stated them, but, as before indicated, we think them mere conclusions or inferences from facts not to be classed as findings of fact upon conflicting evidence, as contemplated by our statutes on the subject, and therefore they are not approved. The fact that appellee understood that the stock was owned by him, and that in some respects he was so treated by appellant, cannot alter the undisputed fact that the stock was not issued or delivered to him, nor was it so agreed. No amount of verbal manipulation can disguise or alter the legal effect of the undisputed facts in this case, and upon such facts we think the judgment below must be reversed, and here rendered for appellant, for the reasons hereinbefore given.

Reversed and rendered for appellant.

On Motion for Rehearing.

[8] Counsel for appellee have presented a lengthy motion for rehearing which we have endeavored to consider with all of the care such a painstaking and able presentation merits. We, however, believe that in our original opinion we made a fair statement of the substantial facts upon which the rights of the parties in the case depend, and therefrom drew the proper legal conclusions. It is well settled that we need not set out the evidence upon which our conclusions of fact are based, and if by inadvertence we overlooked any "undisputed fact," it will not operate to appellee's prejudice before the higher reviewing tribunal, inasmuch as our Supreme Court may consider "undisputed" facts with or without finding on our part. See *Biano Co. v. Hollingsworth*, 91 Tex. 49; *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899; *Rountree v. Thompson*, 30 Tex. Civ. App. 595, 71 S. W. 574, 72 S. W. 69; *Vansickle v. Watson*, 103 Tex. 37, 123 S. W. 114.

The motion for rehearing and the additional findings is accordingly overruled.

J. M. GUFFEY PETROLEUM CO. v. DINWIDDIE. (No. 8276).*

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 27, 1915. Rehearing Denied Jan. 8, 1916.)

1. MASTER AND SERVANT \S 276—ACTION FOR INJURY—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in a servant's action for injury from falling from a ladder on the side of an oil derrick, held to sustain the jury's findings that the defendant's negligence in affixing a step to the ladder and in allowing it to become and remain loose and unsafe, was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 964, 959, 970, 976; Dec. Dig. \S 276.]

2. MASTER AND SERVANT \S 297—ACTION FOR INJURY—FINDINGS—JUDGMENT.

Findings that defendant was guilty of negligence in the construction of a ladder, which negligence was the proximate cause of plaintiff's injury, would support a judgment for plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. \S 297.]

3. APPEAL AND ERROR \S 1071—REVIEW—FINDING OF IMMATERIAL FACT.

The finding of immaterial facts cannot be made ground for reversal if the judgment is not in conflict with the findings upon material issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. \S 1071.]

4. TRIAL \S 351—ISSUES—INVITATION.

In a servant's action for injury from falling from a ladder on defendant's oil derrick, defendant's requested issue as to its negligence in the construction and maintenance of the steps of the ladder was an invitation to the court to submit issues as to defendant's negligence in the manner in which a step was fastened to the ladder and in allowing the step to become loose and unsafe.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 829, 834-839; Dec. Dig. \S 351.]

5. TRIAL \S 352—SPECIAL INTERROGATORIES—STATUTE.

Special issues as to the defendant's negligence in fastening a step to the ladder, and in allowing the step to become loose, sufficiently presented the question suggested by the requested charge as to whether defendant was negligent in the construction and maintenance of the steps of the ladder, and in a form more in accordance with *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1984a, providing that the court on the request of either party shall submit a cause upon special issues, stated distinctly and separately, so as to be answered separately.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. \S 352.]

6. EVIDENCE \S 587—SUFFICIENCY—CIRCUMSTANTIAL EVIDENCE.

A material fact or issue may be established as well by circumstantial evidence as by direct evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2436; Dec. Dig. \S 587.]

7. DAMAGES \S 208—ACTION FOR INJURY—IMPAIRMENT OF EARNING CAPACITY.

In a servant's action for personal injury by falling from a ladder on defendant's oil derrick, striking upon his back with his head on some iron tubing, evidence held to warrant a

submission of plaintiff's impaired ability to earn money in the future.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 333, 534; Dec. Dig. § 208.]

§ TRIAL § 232—INSTRUCTIONS—ERROR.

Where a servant's action for personal injury was submitted to the jury on special issues, instructions informing the jury of the facts to be found to entitle plaintiff to recover were not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. § 232.]

§ TRIAL § 351—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In a servant's action for personal injury, the refusal of special issues requested by defendant was not error, where the special issues submitted by the court sufficiently comprehended all of the material issues in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 834-839; Dec. Dig. § 351.]

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Action by T. B. Dinwiddie against the J. M. Guffey Petroleum Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 168 S. W. 439.

Carrigan, Montgomery & Brittain, of Wichita Falls, for appellant. E. W. Nicholson and J. M. Blankenship, both of Wichita Falls, for appellee.

CONNER, C. J. The appellant company appeals from a judgment in appellee's favor in the sum of \$4,225. The judgment was awarded as damages for personal injuries suffered by appellee in a fall from a ladder affixed to an oil derrick owned and operated by the Petroleum Company. In his petition appellee alleged that the ladder had been improperly and negligently constructed and maintained. To appellee's petition the appellant answered by a general denial, pleas of contributory negligence, and assumed risk. Appellant also pleaded a legal settlement with the appellee. The case was submitted to a jury upon special issues, which, having been answered in appellee's favor, and the judgment as above stated, followed.

[1] The majority of questions presented by appellant's assignments of error are dependent upon the state of the evidence. Complaint is made of the refusal of the court to give an instructed verdict, of the court's charge in submitting the issue of negligence alleged, and of the verdict of the jury, all upon the ground, substantially, that there was no affirmative proof of the negligence alleged and upon which appellee's case was based. But a careful examination of the evidence has resulted in the conclusion on our part that all such assignments of error must be overruled. Briefly and substantially stated, the evidence sufficiently shows that appellee was one of the appellant's employes on January 23, 1913, and that as such it was at times necessary in the performance of his

duty to ascend and descend a ladder affixed to an oil derrick over a well designated in the testimony as "Miller Well No. 5." The derrick was in the shape of a pyramid 80 or 90 feet high, about 22 feet wide at the bottom, and about 6 feet wide at the top; the ladder was constructed from the bottom to the top by two plane 2x4 pieces of timber or "runners" spiked to the outside of the derrick, with steps made of plank 1¼ inches thick fastened to the runners or upright timbers of the ladder with eightpenny nails driven, one at each corner of the step, through the step and into the runner. On the day of the accident appellee ascended the ladder to a platform erected within the frame of the derrick about 60 feet from the bottom, for the purpose of pulling, as was his duty, some tubing out of the well. The appellee himself was unable to detail how his fall occurred, the injury, as his testimony tends to show, having destroyed his recollection, and no witness saw appellee at the moment his downward course began. Another employé, however, immediately before saw the appellee walking on the girders of the derrick on about a level with the platform just mentioned towards the ladder; immediately afterward the witness heard an exclamation, "Oh!" on appellee's part, and looked up and saw appellee falling, with a step from the ladder immediately following him. Appellee, as the evidence tends to show, fell upon his back with his head on some iron tubing, and was seriously injured in his head and shoulders. It was found that the step was from the ladder some 55 or 60 feet from the bottom of the derrick; that the top nails on each side of the step had been pulled out unbent; that the bottom nails on each side were bent back almost double across the edge of the plank or step. The witness Henry Ammann testified, in substance, that he had followed the vocation of contracting and building for a livelihood some 27 or 28 years, and as a contractor had built ladders as high as 70 feet. He examined the step mentioned and the nails with which it had been attached to the runners, and he pronounced the nails common eightpenny nails; and gave it as his opinion that:

"A ladder 52 feet high constructed with steps of 1¼ inches, using one common eightpenny nail in each corner, is not a safe and proper construction of that ladder. An eightpenny common nail is generally about 2¾ inches long, and when that nail passes through that 1¼ inch step there is about 1½ inches left to go into the upright to hold it."

There was testimony on the part of other witnesses that the derrick in question had been built in August, 1912, that the dripping of oil, etc., had a tendency to loosen the steps of the ladder, and that it was proper to make frequent examinations thereof in order to insure safety in its use, and several witnesses testified that they had not noticed any in-

spection or examination of the ladder in question during the period of their 6 or 8 months' service.

The jury in answer to special issue 10, submitted by the court, specifically found that the defendant company had been "guilty of negligence in the manner in which the step was affixed to the ladder." And in answer to special issue 11 found that the defendant company was "negligent in allowing such a step to become and remain loose or out of repair and unsafe." The jury also gave an affirmative answer to issue No. 12, which was in the following form:

"If you have answered either issue No. 10 or 11 in the affirmative, then was such negligence the proximate cause of plaintiff's injury?"

[2, 3] We feel no hesitation in saying that in our opinion the evidence not only authorizes the submission of these issues, but is fully sufficient to support the findings of the jury thereon. Or, if it be conceded, as is insisted by appellant, that the evidence failed to support the finding in answer to issue No. 11, it cannot materially affect the result. There yet remains the finding undoubtedly supported by the testimony that the appellant company was guilty of negligence in the construction of the ladder, and this finding, with the finding in answer to issue No. 12, as undoubtedly supports the judgment. As said in *Kelley v. Ward*, 94 Tex. 289, loc. cit. 294, 60 S. W. 311:

"The finding of immaterial facts cannot be made ground for reversal, if the judgment is not in conflict with the findings upon material issues."

See, also, to the same effect, *Sears v. Sears*, 45 Tex. 557; *Gibson v. Moore*, 22 Tex. 616; *O'Farrell v. O'Farrell*, 56 Tex. Civ. App. 51, 119 S. W. 901.

[4] Moreover, appellant requested the submission of the following issue:

"State whether or not the defendant was negligent in the construction and maintenance of the steps of the ladder on the derrick on Miller well No. 5, as described in the plaintiff's petition."

By numerous decisions this amounted to an invitation on appellant's part to the court to submit both issues embodied in the special instruction.

[5] And to the further contention of error on the part of the court in refusing this special instruction, it is to be observed that special issues 10 and 11, as submitted by the court, sufficiently presented the question suggested in the special charge and in a form, too, more in accordance with article 1984a of the Revised Statutes, which, among other things, specially provides that the court, upon the request of either party, is required to submit a cause upon special issues raised by the pleadings and the evidence in the case, and which particularly declares that:

"Such special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately."

See General Laws 1913, p. 113.

[6] In connection with this branch of the case we might further add that while it is true no witness was able to testify that he saw the appellee, after starting towards the ladder as stated in the beginning, actually get thereon and saw appellee as he grasped the step of the ladder that gave way and saw the step as it pulled loose from its fastenings, yet no other theory of appellee's fall seems consistent with the circumstances, and it is unquestionably true that a material fact or facts may be established as well by circumstantial as by direct evidence. The condition of the nails in the step as found immediately after appellee's fall, the fact that the step was above him and not below in its descent, the fact that appellee fell backward upon his head and one shoulder, the fact that the ladder extended—particularly at the point where the step gave way—almost, if not quite, perpendicularly, the fact that the evidence tends to show that he had completed the performance of his duty on the platform in the derrick some 60 feet high and had started toward the ladder with the evident purpose of descending, all tend to negative the idea that the step of the ladder was displaced by a kick or by appellee's body coming in contact therewith as he descended, but on the contrary, as stated, tends to show that appellee as he got upon the ladder, or soon thereafter, stepped upon or grasped the step which gave way because of its original insecure construction, or because it had, by reason of a failure to inspect, been allowed to become weakened and insufficient to support appellee's body.

Without reciting what it is, we fail to discover in the evidence any reasonable basis for the contention that appellee ratified the release of the damages executed by him at a time when the evidence shows he was undoubtedly of an uncomprehending mind. Nor do we find a suggestion in the evidence, as appellant urges, that it was appellee's duty to inspect the ladder from which he fell, or that in the performance of his duty such defects were obvious, or must necessarily have been discovered.

[7] There is a contention in several forms that there was no evidence of an impaired ability on appellee's part to earn money in the future, and hence that a special instruction to that effect should have been given, and that the court erred in permitting a consideration of this element in the measurement of the damages. But, in view of the small verdict that was rendered and of the evidence relating to the subject, we feel but little patience with the contention. The good faith of appellee's testimony that his recollection of the transaction had been destroyed by his fall was substantially admitted on the submission of the case before us. Chas. Boone testified:

That he did oil field work for the defendant, and had known the plaintiff for 7 or 8 months;

had social intercourse with him off and on before his injuries and since, and worked with him; that there was a difference in his mind; that before the plaintiff's injury "he seemed to be a very bright, ambitious young man, and since then he never seems to have the same ambition. * * * He seems to forget his work. He would leave his stops open, he would lose oil from the tanks."

Arvin Anderson testified:

"It seems to me that Dinwiddie's mind is impaired to a certain extent; that is my opinion, and my opinion is formed from my association with him. * * * He gets lost in what he is talking about. He cannot carry on a conversation now as he did before his fall. He is complaining of his hip and his head considerably."

O. D. Baker testified:

"I have seen Dinwiddie at work after he fell. He switched water at the time I noticed him, and he would tell you that a tank was open or closed and it was right to the contrary. Sometimes he was right and sometimes he was wrong. He was firing a boiler and I relieved him. I relieved him because I was instructed to do so."

The plaintiff himself testified:

"My head has never quit hurting me up until to-day. I have a dull ache right over my eyes seemingly. My head since the injury has felt thick-headed, feels dull, have a dull headache most all the time; I do not know it seems like it is hard for me to comprehend anything. I do not learn, and it is hard to understand anything with much meaning to it, and that condition exists now. That condition did not exist before I got hurt. I was 21 years old at the time of my injury on the 23d of January, 1913."

And it was agreed in open court that the plaintiff had a life expectancy of 40 years.

Dr. J. E. Daniels testified:

"I have examined his head. * * * I would consider it a permanent injury. It will affect his memory, cause inability to collect himself, quick or rapid, and lack of interest in things. * * * It is my opinion that Dinwiddie has a lacerated brain. * * * It would be a permanent injury. The probable results from a lacerated brain are the lowered vitality of the brain cells, subject to epilepsy, paralysis, and all of the diseases that go with an affected brain. * * * A man who has received injuries of this kind is more susceptible of disease."

The effect of this evidence is not destroyed by the fact that after appellee was able to leave the hospital the appellant company furnished him with employment (but of a different grade, as there is evidence to suggest) at substantially the same wages appellee had received before his injury. Appellee's impaired mentality, as shown by the evidence, according to all human experiences must necessarily result in an impairment of his earning capacity; at least the evidence is such as to authorize the court to submit an element of damages for the consideration of the jury.

[8] As introductory to the special issues the court in his charge, in general terms, defined the duty of the master to use ordinary care to furnish the plaintiff as its servant with reasonably safe appliances for the purpose for which they were to be used, and to exercise such care to keep such appliances in reasonably safe condition. Also in general terms he defined the term "negligence," and gave

the rule of law relating to the issue of assumed risk which had been pleaded by the appellant company; also the rules of law by which the jury should be governed in determining the issues relating to the release of damages pleaded by the appellant company. Error is assigned to these charges on the ground, substantially, that the charges indicated to the jury the effect of their special findings contrary to the real purpose and intention of the law. The precise point seems to have been presented in the case of T. & F. S. Ry. Co. v. Casey, 172 S. W. 729. It was urged by the appellant in that case:

"That by informing the jury that under a certain state of facts the plaintiff in the suit would recover a judgment, and that under a certain other state of facts she could not recover, the court thereby influenced the jury to find the facts which required a judgment in the plaintiff's favor."

In disposing of this contention the court, speaking through Justice Hodge, there said:

"This argument is based upon the assumption that the jury would take into consideration the character and conditions of the parties to the suit, and would be moved by a feeling of sympathy for the plaintiff. It may be that in controversies of this character such emotions do sometimes control the verdicts of juries; but, in the absence of some evidence to that effect, we cannot assume that such bias and sympathy existed. The mere finding of facts favorable to the plaintiff is not sufficient when the evidence is of that character which warranted such finding. To gratuitously assume that a jury which has been properly tested and selected yielded to such sympathy, or was probably controlled by such emotions under such conditions, is to impeach the system of trial by jury for being fundamentally unreliable. Where a general verdict is to be rendered, the jury are necessarily informed of what is required to be found in order to entitle either party to a judgment. Evidently the law does not contemplate that such information should be concealed from juries in order to insure absolute impartiality."

The statute hereinbefore cited (General Laws 1913, p. 113), among other things, further specifically prescribes that:

"In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues."

In appellant's proposition and statement under the assignment raising the question indicated no inaccuracy in the court's general instruction is pointed out, and we approve as applicable here what we have quoted from the opinion in the case of Railway v. Casey, supra.

[9] By several assignments, error is assigned to the action of the court in refusing to submit a number of special issues requested by appellant. We think it sufficient to say, without extending our opinion by a particular analysis of these several assignments, that the special issues submitted by the court sufficiently comprehended all of the material issues of the case, and we conclude that all assignments of error should be overruled, and the judgment affirmed.

Affirmed.

GALVESTON, H. & S. A. RY. CO. v. MUHLEMANN. (No. 5573.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916. Rehearing Denied Feb. 9, 1916.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show liability of a railway company for injuries to a car inspector received when inspecting a locomotive on a turntable, when the turntable was moved without warning, in spite of the custom to give warning when the turntable operator could see that any one was about the engine, where the evidence also showed that the injured servant could not have been seen had the operator looked.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ¶278.]

2. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER—ACTIONS—INSTRUCTIONS.

Where a car inspector was injured while inspecting a locomotive on a turntable which was moved without warning in spite of custom to give warning if any one could be seen about the engine, it was error to refuse to instruct that the employe could not recover if, had the turntable operator looked, he could not have seen the employe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. ¶293.]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by Fred Muhlemann against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, of Houston, and Templeton, Brooks, Napier & Ogden and Ed W. Smith, all of San Antonio, for appellant. Engelking & James, of San Antonio, for appellee.

MOURSUND, J. This is an appeal from a judgment for \$4,500 on account of injuries to appellee's foot sustained on April 21, 1913, while he was in appellant's employ in the capacity of engine inspector. Appellee alleged that he was at the time inspecting an engine on appellant's turntable near its roundhouse in San Antonio, and was under the end of the tender at the edge of the turntable; that the employes in charge of the turntable knew, or by the exercise of due diligence were bound to know, of his situation; that while he was so situated the table was turned without notice or warning to him; that it was the custom not to turn the table without giving such notice or warning; that when the table was turned his foot was caught and injured. The material allegations of the petition were traversed by defendant, and the existence of the alleged custom specially denied. The facts were pleaded with great particularity, it being averred (among other things) that it was not plain-

tiff's duty to inspect engines on the turntable; that it was his duty to govern his work and movements by the work and movements of those operating the table; that the table was liable to be turned at any time without notice, and plaintiff knew that fact; that he could have easily protected himself against injury incident to the turning of the table without notice.

Appellee was an engine inspector. Scott was engine "hostler," whose duty it was to take engines upon the turntable and thence into the roundhouse. He had a helper by the name of Smith. Appellee testified: That when he got to the engine neither Scott nor Smith was there. That he had not seen them up to that time, and did not know who put the engine on the turntable. When he looked out of the roundhouse and saw the Katy engine on the turntable, he said: "Here's a strange Katy. I am going out to inspect her." That he was "suspicious" that she would be turned and get out right away. The engine was headed west and was long enough to nearly cover the turntable. The end of her tender was within a few feet of the edge of the turntable. He went to the north side and then came around on the south side; inspected the cab; then the tender; then inspected the head of the engine; then went along the south side inspecting the south side of the engine and tender until he got to the rear of the tender and the east end; during all of which time he did not see Scott or Smith, or any one else, around there. He went around to the east side of the tender and near the east edge of the turntable, where it joined the pit wall. He took the height of the coupler, and then inspected the coupler springs and coupler. He testified that in order to do this "he had to stoop down under the end of the tender and go right under." Up to this time he had not seen anybody about the engine at all. Just before he started to go under the tender he stepped around the corner and looked to see if there was any one in the motor house. He testified:

"That is the custom. If there was a man in the power house I would not have gone under, and it was his time to look after I went under."

He knew the engine might be moved in a minute; but that the employe moving it must look out from the power house before moving it. His testimony as to what occurred next, as given in his direct examination, is as follows:

"I went under her and inspected the back coupler, and I went underneath like this (indicating), and I was away under and looked up under the frame (indicating by lying down). I saw the coupler was all right, and I came out. As I turned to get out, my foot got caught between the rails. The turntable was running, and it took my foot down between the table, and while the engine was right even with the edge it threw me on the edge, and I put my arm this way (indicating) on the coupler and kept pulling on my foot, and my foot went down."

On cross-examination he testified further:

"I could see the power house from where I was under the coupler when I went under. Then after I turned I looked up and saw the coupler, I didn't look at the house any more, I went to inspecting. When I stooped under the tender, I looked up under the tank towards the power house to see if I could see the power house, and I could see the power house, and there was nobody in there. I looked to see about that, because it was my duty. I was under there about a minute. I don't remember what I testified to on the other trial, but it may have been less than a half a minute or more than half a minute that I was under there. A man at the power house could see under the tender and see a man at the back end of the tender. When the turntable started, I was just getting out from under the engine. Just as the turntable got started, I was on the turntable. The moment I got up, I was like this (indicating by leaning in a slanting position), and that foot was back there (indicating). I straightened; the table caught my foot at the same time it started. When the table started, I had both my feet on the table, and when the table moved around in some way my left foot caught, and the table went about two stalls, about twelve feet, something like that, before I got my foot out. My entire foot was down between the edge of the turntable and the pit wall, down to the ankle. The toes were backward towards the east and the heel towards the west. I had inspected the front end and the south side of the engine and had inspected the east end before the accident happened. The north side was still to be inspected, and after the accident happened I inspected the north side, then I went around to where my helper, Brown, was, and told him I had gotten hurt."

He testified he afterwards saw Scott; that he came out of the power house and went along the north side of the engine and came around the head of the engine, and appellee met him on the back of the tender; that he came back there to see if the track was all lined up, and that appellee said: "Scott, you have got me," to which he replied:

"I can't help it, you know I wouldn't hurt you, but I haven't got no helper this morning, and I haven't got time to look around."

Scott denied that any such conversation took place.

Appellee's version of the custom pleaded by him is as follows:

"It is always the rule for the man who is moving the turntable to look out before moving it, and if he sees anything or anybody at work on the turntable he would call out or holler at you before moving it. That was the rule. There was standing orders same as an engineer when he moves an engine either to blow the whistle or ring a bell. When the operator gets ready to move the table, he always looks out, and if he saw me or any one on the table he would call out or holler at me. He would holler: 'Look out there! Get off of there! I am going to move the table.' He would look out, and if he saw me or any one on the table he would holler at me that way. Whoever operated the table was to look out before they started the table, give a warning to get out. When the table is safe, then he would move the table, and if he saw no one he would naturally not holler."

The motor house is situated about 4 or 5 feet from the track on the turntable and about the same distance from the edge of the table. It is about four feet square. The lower part is formed by a wooden frame with

a door next to the track. The upper part is formed by glass windows the size of the house. In order to move the turntable, the employé steps into the motor house and pulls a lever, which causes the turntable to be moved. It is impossible for any one on the turntable to be injured by moving the same unless he gets some part of his person between the edge of it and the pit wall, there being an opening, estimated by appellant at from $2\frac{1}{2}$ to 3 inches, and by Cavanaugh, who measured it, at from $\frac{3}{4}$ of an inch to an inch. The head of the engine was towards the motor house. It was about 75 or 80 feet across the turntable. There was no rule requiring any signal to be given when the turntable was moved. The testimony supports a finding that it was customary for inspectors to sometimes inspect engines while on the turntable. Appellant had the same engine run onto the turntable and experiments made by three disinterested witnesses for the purpose of ascertaining whether a person in appellee's position, as testified to by him, could be seen from the motor house. One of these, Lehr, testified that on account of the angle, the tank and trucks, in fact all the lower part, obstructed the view so that he could not, from any part of the motor house, see back of the tender; that a person would have to leave the motor house and walk around the engine to see whether there is any one behind the tender at the edge of the turntable. It is true that Horan, one of the three, placed himself a little further back than appellee was. They all testified to being unable to see any one behind the tender. Lehr testified that when he went behind the tender he stooped under where the coupling was; that he was in a squatting position underneath the coupling. Photographs were taken from the motor house which show that the angle was such that the line of vision would be greatly obstructed by the wheels and the portions of the tender which hang low. Scott testified it was impossible for a man in the motor house to see a man crouched under the rear end of the tank on the other side of the turntable; that even where the drawhead is you could not see him. As the angle of vision would be downward, and the floor of the tank being about 4 feet from the ground, the wheels 36 or 38 inches high, making the axles half that height, and the brake shoes and beam as well as the sand board still lower, it is evident that it would be difficult to see any one behind the rear axle. In addition, one looking from a point 4 or 5 feet from the engine, to the rear of the tender, a distance of about 75 feet, would have an angle which would bring the wheels and all the other obstructions almost in a continuous line, to say the least. Upon the former trial of this case appellee was asked the following question:

"But when you stepped back from the southeast corner around to the east end and stooped down under the head of the engine, you were

not in sight of anybody up at the power house on the west end of the engine on the south side of it?" He answered: "There was nobody there."

He was then asked:

"But if there had been, you would not have been in sight of anybody there, would you?" His reply was: "I don't think they could see me."

Appellee in his brief contends this testimony was not inconsistent with that on this trial, because the question referred to "head of the engine," instead of the tender. This excuse is worse than none, for it is apparent, when the whole question is read, that it related to the very time when appellee had stooped under the coupler after stepping from the southeast corner of the tender, from which he looked to the motor house. This is also shown by his previous testimony, appearing on the preceding page of the transcript of the former testimony. On the former trial he testified, also, that the table was standing still while he was down, and just as he got up his foot caught; that just as he got up the table was turned; that he had raised himself; that he looked under there about ten seconds; that when he started to get out he said, "Let's go before it starts"; that he knew it was liable to be turned at any time.

[1] It is apparent that no theory of liability could be based upon the failure of appellant to send an employé to see that no one was behind the tender before moving the turntable, for the danger was very slight and easily guarded against. Nor did appellee ask that any such theory of liability be submitted. The evidence wholly fails to show that Scott had knowledge that appellee was inspecting the engine and tender, so we come down to the proposition whether the evidence warrants a finding that Scott, by the exercise of ordinary care, would have known of appellee's situation. What care should have been exercised, and did the failure to exercise it proximately cause appellee's injuries? He contends that appellant owed him the duty, pursuant to a custom to which he testified and which was supposed by appellant's witness Nuhn to exist, of having Scott look out of the glass-topped motor house, and, if he saw any one on the turntable, give warning by calling. Scott did not call, and it does not appear that he looked out. He does not testify that he did so, and his statement to appellee indicated he did not look. There is, however, an issue raised by appellant as to whether Scott could have seen appellee had he looked, and this became the vital issue in the case; for, if the failure to look was not the proximate cause

of appellee's injury, he cannot recover. Appellee testified that a man at the power house could see under the tender and see a man at the back end of the tender. He does not explain whether he ever made the experiment, or whether he is testifying to an opinion arrived at from the fact, as testified to by him, that when he went under the coupler he could see the power house and there was no one in it, so he turned, looked up, and saw the coupler. He was getting out from under the engine just as the turntable started; that he was standing in a slanting position. If his testimony can be taken to mean that in such position he was visible from the motor house, it is certainly, to say the least, flatly contradicted by that of Lehr and other witnesses. As the testimony shows that the turntable can be instantly moved by moving a lever, and as he himself testified Scott was not in the motor house within less than a minute previous to its being moved, it is evident that had Scott looked he would not have seen appellee unless he could see him as he was rising to his feet behind the tender. In view of the contradiction in appellee's own testimony, for which no explanation at all has been offered, and of the overwhelming preponderance of the testimony to the effect that he could not have seen, the verdict should not be permitted to stand. It also appears that appellee did not rely upon the custom, for he took no pains at all to see whether any one looking from the motor house would by the exercise of ordinary care be able to see him. If his statement on this trial is correct, he was relying on his being able to watch the motor house from under the tender, which he might do through a very narrow opening, and one through which it would be practically impossible to see him from the motor house.

[2] The appellant asked the court to instruct the jury that if they believed from the evidence that plaintiff, at the time of the happening of the alleged accident, was at such place and in such position that the operator of the turntable could not see him from the motor house, then he would not be entitled to recover. As the court had overruled appellant's request for a peremptory instruction, this charge should have been given. There was no evidence from which a jury could find that Scott in the exercise of ordinary care would have known that appellee was inspecting the engine, unless it be deduced from the fact that if he had looked according to custom, when he started to turn the lever, he would have seen appellee.

The judgment is reversed, and the cause remanded.

SMITH v. STATE. (No. 3903.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. Rehearing Denied Feb. 9, 1916.)

CRIMINAL LAW § 608—CONTINUANCE—ILLNESS OF DEFENDANT—EVIDENCE.

Where, on an application for a continuance on the ground that defendant, charged with violating the local option law, was sick and unable to go to trial, the court sent a physician to examine defendant, who swore that he could not find anything wrong with defendant, and that, though defendant complained of pains in his back, he had a normal pulse, no fever, and no visible or ascertainable signs of any disease, and was able to go to trial, and no other evidence was offered, the overruling of the application was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1350, 1364-1368; Dec. Dig. § 608.]

Appeal from District Court, Walker County; S. W. Dean, Judge.

I. N. Smith, Jr., was convicted of violating the local option law, and he appeals. Affirmed.

A. T. McKinney, of Huntsville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of violating the local option law, and his punishment assessed at one year's confinement in the state penitentiary.

The only ground presented claiming error is that the court erred in overruling his application for a continuance. An application was presented alleging that appellant was sick and unable to go to trial. The court sent a physician to the residence of appellant. The physician examined appellant and swears he could not find anything wrong with him; that, while appellant complained of pains in his back, yet he had a normal pulse, no fever, and no visible or ascertainable signs of any disease; that he was able to go to trial. No other evidence was offered. There was no error in overruling the application on this ground. He also contends that the attorneys of the Walker county bar would defend no man charged with bootlegging, and he desired further time to secure an attorney. The record before us discloses that he was defended by a very able member of the Walker county bar, Hon. A. T. McKinney.

The judgment is affirmed.

MORGAN v. STATE. (No. 3905.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. Rehearing Denied Feb. 9, 1916.)

1. CRIMINAL LAW § 1092—APPEAL—BILL OF EXCEPTIONS—APPROVAL.

The court on appeal from a conviction cannot consider a bill of exceptions from which the judge's signature is omitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2831, 2919; Dec. Dig. § 1092; Judges, Cent. Dig. § 157.]

2. CRIMINAL LAW § 1099—APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING.

A statement of facts filed on October 23d on appeal from a conviction at a term adjourned September 25th cannot be considered; more than 20 days having elapsed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.]

3. CRIMINAL LAW § 1099—APPEAL—RECORD ON APPEAL—STATEMENT OF FACTS—APPROVAL.

A statement of facts not approved by the trial judge or signed by the prosecuting attorney cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.]

Appeal from Baylor County Court; T. J. North, Judge.

C. A. Morgan was convicted of wife desertion, and he appeals. Affirmed.

Payne & Gamble, of Abilene, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of wife desertion, his punishment being assessed at a fine of \$200 and 90 days' imprisonment in the county jail.

[1] There are several interesting questions presented. The record contains a bill of exceptions which is not approved by the judge. His signature does not appear to it in any form. This bill of exceptions, had it been approved, was filed on the 8th day of September, and was never, apparently at least, presented to the judge, because his name does not appear to it either approving or disapproving it. It therefore cannot be considered.

[2, 3] There is what purports to be a statement of facts which was filed on October 23d. The court adjourned on 25th day of September. The statement of facts was not filed within the 20 days required by the statute, even had it been approved by the trial judge, which was not done. The statement of facts is signed by the attorneys for the defendant, but not by the state's counsel nor approved by the judge; therefore it cannot be considered. In the absence of the statement of facts and bill of exceptions there is nothing reviewable, as it would be necessary to have the evidence in order to consider the matters urged.

The judgment is affirmed.

LANIER v. STATE. (No. 3911.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. Rehearing Denied Feb. 9, 1916.)

1. BURGLARY § 45—TRIAL—QUESTIONS FOR JURY.

On a trial for burglary it appeared that a house was burglarized, and that a few days after the burglary defendant sold a pistol taken from the burglarized house. He testified that F. gave him the pistol and requested him to sell it, and that he did so. F. denied this. On the ex-

amining trial P. testified that he saw F. deliver a gun to defendant, and this testimony was introduced on the trial. *Held*, that this was a matter for the jury, and its verdict of guilty would not be disturbed.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 110; Dec. Dig. § 45.]

2. **BURGLARY** § 42.—**BURDEN OF PROOF—EXPLANATION OF POSSESSION OF STOLEN PROPERTY.**

Where a burglary is shown, and defendant is found in possession shortly afterwards of some of the stolen property, and gives an explanation which would exonerate him, the state must show this statement to be false in order to obtain a conviction.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.]

3. **CRIMINAL LAW** § 1159.—**REVIEW—SUFFICIENCY OF EVIDENCE — INCOMPETENCY OF WITNESS.**

Where no objection was raised to the competency of a witness for the state during a trial, the mere fact that it appeared on his cross-examination that he had once been convicted of lunacy did not require a reversal as for insufficiency of the evidence, since, while lunacy is presumed to continue, and the testimony must show to the contrary, this can be shown in various ways by any legitimate testimony which would show restoration to proper mental status.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

4. **CRIMINAL LAW** § 959.—**NEW TRIAL—MOTIONS—POSTPONEMENT OF HEARING.**

On a trial for burglary it was shown that defendant shortly after the burglary sold a pistol taken from the burglarized house, and he testified that F. gave him the pistol and requested him to sell it, but this was denied by F. When a motion for a new trial was taken up on November 27th defendant's counsel stated that on November 23d he received information that two boys had been informed that F. made statements to various parties that he stole the pistol, and that defendant was not guilty. He further stated that he had been in attendance on the Court of Criminal Appeals, and in an examining trial, and had not received the affidavits, but had an appointment with the witnesses that morning to secure them. *Held*, that the refusal to postpone the hearing of the motion was not error, as diligence was not shown, and the evidence would have been impeaching and apparently hearsay, especially as it appeared that the court was still in session, so that an additional motion could have been made if the testimony was material.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2406-2411; Dec. Dig. § 959.]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Bob Lanier was convicted of burglary, and he appeals. Affirmed.

Heldingsfelders, of Houston, for appellant. John H. Crooker, Crim. Dist. Atty., T. J. Harris, and E. T. Branch, all of Houston, and C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The verdict of the jury gave appellant five years in the penitentiary for burglary. The case is one of circumstantial evidence. That the house was burglarized by some one is not questioned. The state introduced evidence of recent posses-

sion by appellant of a pistol taken from the burglarized house, which he sold to the witness Pappas a few days after the burglary, receiving \$8 as compensation.

[1, 2] Appellant sought a continuance on account of the absence of Peters. A bill of exceptions was not reserved to the action of the court overruling the application. Peters was expected to testify that the pistol in question was received by appellant from Franks. Franks testified that he did not have the pistol; that he never saw it until he saw it during the trial, and did not deliver the pistol or any other pistol to appellant with the request that he sell it. Appellant testified he received the pistol from Franks, and also introduced the evidence delivered by Peters, his alleged absent witness, at the examining trial. Peters testified substantially at the examining trial that he saw Franks deliver "a gun" to appellant, but did not hear the conversation. It is claimed that Peters was in Galveston, but no further effort was made to get him. This is substantially the case.

Summarized, the evidence shows conclusively that the house was burglarized by some one, and that a few days subsequent to the burglary appellant sold the pistol taken from the burglarized house. His explanation given on the trial was that he had obtained the pistol from Franks for the purpose of selling it. The authorities in Texas are to the effect that, where a burglary is shown, and the accused is found in possession shortly afterwards of some of the stolen property, and gave an explanation which would exonerate him, the state must show the statement to be false in order to obtain a conviction. Peters' testimony was to the effect that Franks delivered to appellant a pistol. Appellant testified that he obtained the pistol from Franks with the request that he sell it, and that, in accordance with this request, he did sell it. Franks denied this. This was a matter for the jury, and for this reason we do not feel justified in disturbing the verdict.

[3] Appellant contends the evidence is not sufficient to convict, as Franks testified he had once been convicted of lunacy. This was brought out by appellant on cross-examination. When this occurred, or where it occurred, or whether it was of a permanent nature, or whether he had been subsequently discharged as being restored, is not shown or attempted to be shown by the evidence. The statute provides that insane people are not competent witnesses. No objection was raised to Frank's competency as a witness during the trial, and appellant developed the fact that he had been at one time charged with and convicted of lunacy. This is the substance of the case on this phase of it. It is true that, where a party has been once convicted of lunacy, the general rule is that

this mental condition will be presumed to continue, and the testimony must show to the contrary. This can be shown in various ways by any legitimate testimony which would show restoration to proper mental status. There is nothing in the record with reference to this question one way or the other, except the general statement that at one time he had been convicted of lunacy. In this view of the case, and without any exception to the competency of the witness, or sufficient facts to show that he was not of proper mental condition to testify, it would not justify the court in reversing on this record as the evidence is stated. It is evident that the witness had been discharged from custody as a lunatic at some time, but when and why is not shown. Only the fact is stated on cross-examination that he had been at one time so convicted. We do not think this matter is so presented as to require this court to reverse on insufficiency of the evidence.

[4] A bill of exceptions shows that a formal motion for new trial had been filed on the 18th of November, the conviction having occurred on the 17th, or a day prior to the filing of the motion; that on the 27th of November the court announced he would take up the motion at or about 8:30 on the morning of said day. Counsel for defendant came into court, the motion was called, and appellant's counsel, addressing the court, stated he was not ready to proceed, for the reason that on last Tuesday, the 23d of November, he received information of a boy named Murphey, and a boy by the name of George Burns, that they had been informed that the state's witness Clifford Franks had made statements to various and different parties that he stole the pistol and burglarized Dr. Smith's office, and that Bob Lanier, defendant, was not guilty of the offense, and that he was glad that he was convicted and got five years in the penitentiary. The attorney further stated when he received this information he had to go to Austin on Tuesday night to attend the Court of Criminal Appeals in two cases in which he was counsel; that he returned on Wednesday night, and on Thursday, being Thanksgiving Day, he was not in his office. On Friday he was engaged in defending a homicide case in an examining trial, and that up to the time of speaking to the court with reference to this matter he had not received the affidavits, but that he had an appointment with the mentioned witnesses at 10 o'clock that morning to secure necessary affidavits, and that such evidence, if true, would be newly discovered, and would be set up in amended motion for a new trial, and that he expected on that day to get these affidavits together, setting up these facts, and that they would be sufficient to authorize the granting of the motion for a new trial, and asked a postponement for that purpose. The court refused

this, and appellant sets these matters up in a bill of exceptions. We do not believe this is a sufficient showing. The affidavit of these two parties giving the information with reference to the statement of Clifford Franks would not state that they had heard Clifford Franks make the statement, but they had been informed he had made these statements to different parties; but in any event it would be impeaching testimony, and as presented in this statement would be but hearsay. No effort had been made to obtain any of the parties to whom Franks made these statements, if he made any, and their names are not set out. Several days had elapsed after receiving the information; in other words, diligence is wanting. For this reason we are of opinion the case should not be reversed. It may be further stated that all this occurred about the 27th of November. The caption shows that the court is still in session, and has been since appellant's conviction, and it will not adjourn until the 31st of January, 1916. If testimony of the character indicated should be obtained, and it could be shown that Clifford Franks was the guilty party, and not appellant, there was sufficient time to secure the affidavit, even after the motion for new trial had been overruled. An additional motion could have been made, and, had there been merit in the affidavits of any substantial nature, doubtless the court would have granted the motion, to the end that, if appellant was not guilty, a new trial would be awarded, or, if the testimony was material, going to show that he was not guilty, the same order should have obtained on the part of the court. The transcript was certified by the clerk on the 23d day of December, nearly a month after the occurrences mentioned above. No attempt was made to secure these affidavits.

As the record is presented, we are of opinion that there is no sufficient reason shown why the judgment should be reversed, and it is therefore affirmed.

GRAHAM v. STATE. (No. 3921.)

(Court of Criminal Appeals of Texas. Jan. 26, 1916.)

1. CRIMINAL LAW — 372 — EVIDENCE — SALE OR GIFT OF LIQUOR — OTHER SALE.

On the issue of whether defendant gave away whisky, as he claimed, or sold it, as claimed by those receiving it, testimony that an hour later he sold liquor to others is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. — 372.]

2. INDICTMENT AND INFORMATION — 180 — INDICTMENT — VARIANCE — NAMES.

There is no fatal variance between an indictment charging sale to "Chandoin" and proof that his name was spelled "Chaudoin," he being generally known and called by the former name.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551-556; Dec. Dig. — 180.]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Ed Graham was convicted, and appeals. Affirmed.

Marvin B. Simpson and John W. Estes, both of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was charged with unlawfully selling to one L. E. Chandoin intoxicating spirituous liquors, in quantities less than a gallon, without first having obtained a license to sell such liquors. It was admitted on the trial that prohibition was not in force in the territory where the liquor was sold, if sold, and also admitted that appellant had no license to sell such liquors.

The facts would show that appellant was a porter at the Siebold Hotel, and the state's witnesses testify that they went to the Siebold Hotel and asked appellant if he would get them some whisky, and he said he could. Chandoin, or Chaudoin, testified he purchased a bottle of whisky and paid appellant \$1 for it; that Officer Brothers was with him, and he also purchased a bottle of whisky from appellant. Appellant denies making any sale of whisky to Chandoin or Chaudoin, but admits that Chandoin did come and ask him for a drink of whisky, and he gave him the bottle to get a drink out of it, when Chandoin kept the entire bottle, but appellant most emphatically denies that he made any sale of the whisky, or that he received any money for it; that it was a gift. The state also proved by its witnesses that about an hour after they say they purchased the whisky they, together with Officer Elliott, went back and Brothers purchased four pints of beer from appellant, paying him 75 cents for it. Appellant admits also letting Brothers have the beer, but says it also was a gift, and that Brothers paid him no money for it.

[1] Appellant objected to the testimony of the purchase of the beer on various grounds. There was no error in admitting the testimony. Appellant was contending that he made a gift and not a sale of the whisky, and other contemporaneous transactions would be admissible to aid the jury in passing on that issue. *Craig v. State*, 23 S. W. 1108; *Stovall v. State*, 97 S. W. 93. The court properly limited this testimony in his charge, and instructed the jury he could not be convicted for any sale other than a sale to Chandoin, if he made such sale.

[2] The information charged appellant with making a sale to L. E. Chandoin. On the trial of the case this witness was asked how he spelled his name, and he spelled it Chaudoin. Appellant then asked for an instructed verdict of not guilty, the sale not having been proven to have been made to the person alleged. The court, in approving the bill, states:

"Witness swore that while his name was Chaudoin he was as well known by the name Chandoin as by the name Chaudoin."

The statement of facts supports this qualification, he testifying:

"I am generally known and called by the name of Chandoin. I receive letters addressed to me as Chandoin." *Perez v. State*, 50 Tex. Cr. R. 37, 94 S. W. 1036; *Owen v. State*, 7 Tex. App. 335; *Young v. State*, 30 Tex. App. 308, 17 S. W. 413; *Carter v. State*, 39 Tex. Cr. R. 350, 46 S. W. 236, 48 S. W. 508; *Addison v. State*, 44 Tex. Cr. R. 80, 68 S. W. 679, 100 Am. St. Rep. 841.

The above are the only two questions presented in appellant's brief. While there are some others raised in the motion for a new trial, we do not deem it necessary to discuss them. We have read the entire record, and no error is presented.

The judgment is affirmed

DAVIDSON, J., absent.

FURNACE v. STATE. (No. 3874.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. Rehearing Denied Feb. 9, 1916.)

1. CRIMINAL LAW \S 594 — CONTINUANCE — DISCRETION OF COURT.

Defendant is not entitled to continuance as a matter of right for the absence of a witness, but his application is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1321, 1322, 1332; Dec. Dig. \S 594.]

2. CRIMINAL LAW \S 594 — CONTINUANCE — ABSENCE OF WITNESS—DILIGENCE.

Where defendant was immediately arrested upon killing deceased, and indicted in 12 days, but for more than 3 weeks made no application for process for a witness, who had left for California, not showing in his application for continuance any reason why process was not sooner issued, or when the witness left for California, or that defendant did not know he was going to leave, defendant was not entitled to continuance for absence of the witness for want of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1321, 1322, 1332; Dec. Dig. \S 594.]

3. CRIMINAL LAW \S 597—APPEAL—REVIEW—REFUSAL OF CONTINUANCE.

The appellate court will not reverse a conviction for a refusal of continuance for absence of a witness, unless in connection with the evidence adduced on trial it is impressed that if the absent testimony, relevant, material, and probably true, had been before the jury, a verdict more favorable to defendant would have resulted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1331, 1332; Dec. Dig. \S 597.]

4. CRIMINAL LAW \S 1144 — REVIEW — PRESUMPTIONS.

Where the testimony heard by the court in acting on a contested motion for new trial is not in the record, the appellate court must conclude that the trial judge was justified in refusing new trial on the grounds assigned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. \S 1144.]

Appeal from District Court, Bell County; John D. Robinson, Judge.

R. L. Furnace was convicted of murder, and he appeals. Affirmed.

J. H. Evetts and J. F. Hair, both of Belton, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the murder of Charlie White, and his punishment assessed at life imprisonment. There is practically no conflict in the testimony on any material issue in the case. Every material fact is established by uncontroverted testimony. Whatever conflict there is is merely of some incidental matter, which did not affect the case materially one way or another.

For several years prior to this homicide, appellant was a partner in the saloon business in Belton, and lived in Belton with his family. He was about his saloon almost continuously while he was a proprietor thereof, though he did very little, if anything, in running it. During all these years he was a continuous and heavy drinker, so much so that in April, two years before this homicide in July, 1915, he was afflicted because thereof with delirium tremens. While this spell was on him, he was crazed thereby. The doctors at the time treated him for delirium tremens, and soon got him in a condition where, as they say, they sent him to Marlin to be treated with hot water, and this treatment boiled the whisky out of him. He got over the delirium tremens, and thereafter was a changed man, so far as his drinking and drunkenness was concerned. He realized the effect that his drinking had upon him, and as soon as he returned from Marlin sold out his interest in the saloon and quit that business. He thereupon moved some distance from Belton to the country on his farm and farmed thereafter. It appears that from this time on he never drank any.

He and Mr. White, the deceased, lived near neighbors in the country and had been acquainted with one another for a long time. Mr. White represented him in some trade, and thereupon claimed a commission from appellant. This was the cause of an estrangement between them, and some hostility was engendered by appellant against Mr. White. Shortly before the killing a yearling belonging to another was seen in appellant's pasture. It disappeared at such a time and in such a way as to lead to suspicion and perhaps some talk or inference that appellant had stolen the animal. Appellant was informed of this rumor or talk. He thereupon presumably armed himself and hunted up Mr. Russell, who had inquired of him for the yearling, but who did not get it. Appellant found Russell in Russell's field, and told him that he had come to settle with him, forbade him to come closer to him, put his hand in his shirt bosom, and told him that he had been accused of being a cow thief, and had not heard it until the

day before, and the effect of his accusation at the time was to accuse Russell of having made said accusation against him. It seems that Russell satisfied him at the time that he had made no such accusation. He thereupon inquired what White, deceased, had said about it. Among other things, he told Russell at the time that he had once been prosecuted for horse theft, and said as he left Russell he would find the son of a bitch that started that joke. He then suspected White was the man who was instrumental in having such accusation of the theft of the yearling rumored against him. It was shown that a few days before the killing appellant passed back and forth in front of Mr. White's residence, apparently looking for him, but Mr. White was not at home at the time.

Mr. Warren, a deputy constable at Belton, testified that some days before the killing appellant came to him and asked for Mr. Messer, the constable for whom he was deputy, and then told him (Warren) that, if anything happened out where he lived, to tell Hugh Smith, the sheriff, not to be uneasy—that he would answer. Mr. Walker testified that some days before the killing he was going to town with appellant, and talked to him about the rumor that he had stolen said yearling; that this seemed to "rile" him, and after talking about it some time appellant said, "I will kill the son of a bitch that started it." Mr. Hemphill, one of appellant's witnesses, on cross-examination, testified that about 30 minutes before the killing he had a talk with appellant, wherein appellant told him that he had gone down to kill one man about the rumor that he had stolen said yearling, but that that man came clean with him and he did not kill him, and that another man had lied to him about it.

For a short time before the killing the deceased was shown to have been standing on the sidewalk in front of a saloon in Belton talking with friends, and that appellant is placed in such a position as would show that he saw and knew that White was there. The evidence clearly shows, however, that White knew nothing about the proximity of appellant. The testimony then shows that appellant approached deceased from out in the street, or square, going directly towards deceased. All the testimony shows that appellant fired his pistol twice at deceased; the second shot immediately following the first. Mr. Walker testified that at the time of the first shot he had just walked up to deceased and was shaking hands with him; that they had their right hands clasped in this greeting, and that he had his left hand on deceased's right shoulder, and that at the time the first shot was fired deceased was looking at the witness. Mr. Springer testified that he was standing in the company with White at the time, and as appellant walked up he (Springer) went to shake hands with appel-

lant, but appellant said, "Step back, boys; I want to kill that son of a bitch," and immediately fired the first shot at White; that the witness threw up his hand, struck appellant's pistol, knocked it up so that the first shot went wide of its mark and above the door. Mr. Tarrant, who was one of the company about White at the time, testified that the first shot was what attracted his attention; that appellant said nothing to Mr. White before he heard the first shot, and then, just after he fired the first shot, appellant said to White, "It is you I am after;" that at this time Mr. White was going from appellant, running into the saloon; and that then appellant deliberately grasped his pistol with both hands and shot White in the back, after he had gotten into the saloon, from which he very soon died.

Appellant's sole defense was that he claimed he was insane at the time. It was shown, and not disputed, that the only time appellant was insane was in April, some two years before the killing, when he had a spell of delirium tremens. The undisputed testimony shows that, upon treatment by the doctors and the boiling out at Marlin, he was cured of delirium tremens, and never thereafter was so afflicted, and never at any time was insane. Dr. McElhannon and appellant's brother-in-law, Dr. Alsup, were shown to have been his family physicians from the time he was afflicted with delirium tremens, and no one else is shown to have been his physician during that time, or that of his family. Some six months before the killing, appellant had a little son die, to whom he was much attached. When the child first became sick, the other members of his family wanted him to call in a physician, but he refused, thinking the child was not sick enough for that. The child growing worse, however, he later consented to send for a physician, and did so, sending for his family physician, Dr. McElhannon, and his brother-in-law, Dr. Alsup. They at once advised him of the very serious illness of his child, and that they thought it would result fatally. It did so result very soon. Appellant became much depressed on the loss of this child, and the remorse that he had because he did not sooner send for a physician, or consent that one be sent for, blaming himself, and expressing himself that, if he had done so in time, the child probably would not have died.

Appellant not only introduced as his witnesses the said Dr. McElhannon, but also Mr. J. F. Alsup, his father-in-law, Mrs. Kelso, his daughter, Dr. Alsup, his brother-in-law, his wife, his brother, Jim Furnace, another grown daughter, and his sister on the question of his claimed insanity. Not a single one of them would testify that he was insane, and not a single one of them did testify that he was insane.

The state had Dr. Barton, an expert phy-

sician, present, who heard all of the testimony on the issue of insanity, and he swore:

"If the symptoms which the witnesses testified to have been proven, and if the jury believe these symptoms existed and were true, in my opinion there is no evidence in this case that shows that the defendant was insane at the time he committed the act."

On cross-examination, he said that from his actions, as told about by the witnesses, he would say that appellant was not insane; that he came to his conclusion after he heard all the facts.

Appellant made a motion for a continuance on account of the absence of Dr. Batte, a resident of Bell county, but who was not present, and who had not been subpoenaed. He alleged in his motion that Dr. Batte had been his physician for a number of years, and, if present, would testify that about two years before, and for a considerable length of time, appellant's mind was totally deranged, and that at times since then up to and immediately preceding the homicide he was subject to illusions and hallucinations and at times irresponsible for the acts he committed, and that, if appellant was greatly worried or subjected to grief or sorrow, his reason would be dethroned, and he would temporarily be insane.

[1] In the recent case of Stacy v. State, 177 S. W. 114, we had occasion to fully investigate and discuss the question of the diligence which must be used by an accused to entitle him to a continuance. We can do no better than to here copy what we there said, which is the law of this state. It is:

"It is the settled law of this state, both by statute and all the decisions, that an accused is not entitled as a matter of right to a continuance; that the truth of his application therefor, as well as the merits of the ground and its sufficiency, is addressed to the sound discretion of the trial court. It is also statutory, as well as in accordance with the decisions, that before an accused can get a continuance he must affirmatively show that he has used due diligence to procure the attendance of his claimed absent witness. Judge White says: 'Diligence in securing the attendance of a witness is in the highest degree essential; and the continuance should invariably be refused when the want of diligence amounts to pure negligence. Greenwood v. State, 9 Tex. App. 638.' Section 600, White's Ann. C. C. P. 'Continuance is properly refused always where there is a want of diligence. O'Neal v. State, 14 Tex. App. 582; Hart v. State, 14 Tex. App. 657; Childers v. State, 16 Tex. App. 524; Hawkins v. State, 17 Tex. App. 593, 50 Am. Rep. 129; Timbrook v. State, 18 Tex. App. 1; Barrett v. State, 18 Tex. App. 64; Bond v. State, 20 Tex. App. 421; Moseley v. State, 25 Tex. App. 515, 8 S. W. 652; Stegall v. State, 32 Tex. Cr. R. 100, 22 S. W. 140, 40 Am. St. Rep. 761; Underwood v. State, 38 Tex. Cr. R. 193, 41 S. W. 618; Henry v. State, 38 Tex. Cr. R. 306, 42 S. W. 559.'

"This court, in Skipworth v. State, 8 Tex. App. 139, said: 'The law requires of the defendant a rigid compliance with the exact terms prescribed for such applications, and if there is a lack of diligence, apparent from the application or otherwise, * * * its mandate is inexorable and the trial must proceed.' In Walker v. State, 13 Tex. App. 647, 44 Am. Rep. 716, note, this court said: 'We know of no rule of law which requires the state to show a want of

diligence in opposition to a continuance. It devolves upon the defendant to show, affirmatively and distinctly, that he has used all the diligence to obtain his witness required by law.' In *Long v. State*, 17 Tex. App. 129, this court said: 'The onus is upon the defendant to establish the exercise of diligence in support of an application for a continuance. * * * The burden is upon the party seeking a continuance to show himself entitled to it by definite, exact and certain averments.' In *Massie v. State*, 30 Tex. App. 67, 16 S. W. 771, this court said: 'Neither will this court nor the trial court supply by inference and presumption allegations not contained in an application for a continuance which should be stated therein. The application must be complete within and of itself, in order to require this court to say it was erroneously refused. Presumption, when indulged, will and must be in favor of the rulings of the court in reference to the matter complained of, and not against same.'

[2] There can be no question but that this record clearly shows that appellant used no diligence whatever to get this witness, and is not entitled to a new trial because a continuance was refused him. He killed deceased on July 10, 1915. He was at once arrested. The grand jury returned an indictment against him July 22d. He made no application for process for Dr. Batte until August 14th, more than three weeks after he was indicted. Neither his application nor his bill shows any reason why process was not sooner issued for this witness. He does not show when this witness left Belton for California, but he alleges that he left "on or about the ——— day of ———, 1915." He does not show that he did not know that he was going to leave at any time. Hence the court committed no error in overruling his motion for a continuance, because no diligence whatever was shown to have been used by him to procure the attendance of Dr. Batte.

Again, Judge White, in section 599 of his *Ann. C. C. P.*, says:

"An application for continuance must state the residence of the witness; and when it states that a witness is temporarily absent, it should state how long he had been so absent, and when he left the county of his residence. *Dove v. State*, 36 Tex. Cr. R. 105, 35 S. W. 648; *Vanwey v. State*, 41 Tex. 639; *Wolf v. State*, 4 Tex. App. 332; *Thomas v. State*, 17 Tex. App. 437; *Colton v. State*, 7 Tex. App. 50. Where the application for continuance did not show at what time the defendant ascertained that the witness was a resident of the county to which he had a second attachment issued, the diligence was insufficient. *Hughes v. State*, 18 Tex. App. 130."

[3] Again, quoting from the *Stacy Case*, supra:

"Our continuance statute (*C. C. P.* § 608) further provides that, when an accused's application for a continuance is overruled, 'if it appear upon the trial that the evidence of the witness * * * was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted.' As stated, said statute and the decisions are to the effect, as thus stated by Judge White: 'The truth, merit, and sufficiency of an application therefor are matters now addressed to the sound discretion of the trial court. *Abrego v. State*, 29 Tex. App. 143, 15 S. W. 408.' Section 620. So that the court, in acting upon the motion for

a new trial because of the overruling of appellant's applications for a continuance, must consider, and we, of course, must presume he did, whether a new trial should be granted under all of the facts of the case. Under such circumstances, among others, Judge White lays down these rules: 'An application for continuance will be held properly overruled, when, in connection with the evidence adduced on the trial, it is apparent that the proposed absent testimony would not be probably true. * * *' Section 643. 'The court on appeal will not revise or reverse the judgment of the lower court refusing a continuance or postponement, and the overruling of the motion for new trial based upon the application for continuance or postponement, unless it is made to appear by the evidence adduced at the trial that the proposed absent testimony was relevant, material, and probably true. * * *' Section 647. 'The court on appeal will not reverse a judgment on account of the refusal of a postponement or continuance, unless in connection with the other evidence adduced on the trial they are impressed with the conviction, not merely that the defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that if the absent testimony had been before the jury a verdict more favorable to the defendant would have resulted. * * *' Section 647, par. 2."

In quoting what Judge White states as the rules just above, we have omitted the cases he cites thereunder. They are all cited in the *Stacy Case*, so that it is needless to again cite them here. We think there can be no question but that under the facts and circumstances of this case the court in no event committed any error in overruling appellant's motion for a continuance, nor in denying his motion for a new trial because thereof. The trial judge no doubt concluded that Dr. Batte would not testify as appellant alleged he would, and, even if he would have, his testimony would not probably be true. Appellant did not procure any affidavit from Dr. Batte and attach it to his motion, showing that Dr. Batte would swear what he alleged he would.

Appellant has two bills to very short excerpts from the prosecuting attorney's argument before the jury. Neither of these presents any reversible error. *Bass v. State*, 16 Tex. App. 69; *Pierson v. State*, 18 Tex. App. 524; *House v. State*, 19 Tex. App. 227; *Tweedle v. State*, 29 Tex. App. 586, 16 S. W. 544; *Mooney v. State*, 176 S. W. 56. A great many other cases might be cited, but it is unnecessary.

[4] He attacked the verdict of the jury on three grounds. One was he claimed that the jury panel passed and some of them viewed the scene of the homicide, and saw the place where the deceased and the defendant respectively stood when appellant fired the shots, and noticed the door and transom where the bullet went through the glass. His second attack was he claimed that some of the jurors mentioned and discussed the fact that appellant had not testified. And his third attack was that one of the jurors, Mr. Collier, was not competent, in that he was biased and prejudiced against appellant and had so expressed himself before taken,

etc. The state vigorously contested appellant's motion on these grounds, and each of them, alleging that each of said grounds, in whole and in part, were untrue, and tendered proof in support of the denial. It is evident that the court heard testimony when acting on said motion for new trial. What that testimony is the record does not disclose. Hence, under the well-settled rule, we are bound to conclude that the trial judge was clearly justified in refusing a new trial on either and all of said grounds. We see no necessity of discussing this question, nor again collating the authorities. We have often done so.

There is no reversible error presented in this record. We have thoroughly considered the case and the questions presented. The judgment will be affirmed.

Ex parte HUTSELL. (No. 3677.)

(Court of Criminal Appeals of Texas. Oct. 20, 1915. On Motion for Rehearing, Jan. 19, 1916.)

1. CONSTITUTIONAL LAW — 230 — LICENSES — 7 — CLASSIFICATION — OCCUPATION TAX — "LOAN BROKERS."

Acts 34th Leg. c. 28, regulating loan brokers and imposing a tax of \$150 per annum, and by section 1 defining "loan brokers" as persons pursuing the business of lending money and taking as security, an assignment of wages, etc., was not invalid because of its exclusion of bankers or other money lenders not pursuing the business of taking such security, etc., as making a capricious or unreasonable classification, since no person pursuing that business is exempted, and none who do not follow that business are required to pay the tax.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. —230; Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

2. LICENSES — 7 — OCCUPATION TAX — VALIDITY — AMOUNT.

Such act, by levying an annual tax of \$150 on such loan brokers, is not invalid, as imposing a prohibitive tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

3. ASSIGNMENTS — 3 — REGULATION — WAGES AND HOUSEHOLD FURNITURE — VALIDITY.

Acts 34th Leg. c. 28, § 11, providing that every assignment or transfer of the salary or wages of a married man and every bill of sale or chattel mortgage upon his household furniture shall be void unless made with the consent of his wife, evidenced by her joinder in the assignment, etc., and the signing of her name thereto and by her separate acknowledgment thereof, is constitutional, as promoting the public welfare and protecting the wife and children in the possession of the home and its furniture.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 5; Dec. Dig. —3.]

4. CONSTITUTIONAL LAW — 89 — USURY — 5 — REGULATION — LOANS — CONSTITUTIONALITY.

Acts 34th Leg. c. 28, § 13, making compromises for usury or unlawful interest collected and received void, thereby giving the borrower or debtor a remedy to recover his money back

if the broker charges more than the law allows, is not invalid as impairing the right of contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. —89; Usury, Dec. Dig. —5.]

5. LICENSES — 7 — LOAN BROKERS — BOND.

Acts 34th Leg. c. 28, § 2, providing that those engaging in the business of loan brokers on the security of assignments of wages, bills of sale of household furniture, etc., to give bond in the sum of \$5,000, conditioned to faithfully comply with every requirement of the law governing such business, and to pay to all persons dealing with them any judgment obtained against them, did not impose an unreasonable requirement; nor was section 5, requiring each loan broker to keep a set of books recording all of his transactions, an unreasonable requirement.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

6. LICENSES — 7 — LOAN BROKERS — POWER OF ATTORNEY — STATUTE.

Acts 34th Leg. c. 28, § 7, which provides that each loan broker before engaging in business shall file with the county clerk an irrevocable power of attorney, constituting the county judge his agent and attorney in fact for the purpose of accepting service for him, construed as limited to service only in transactions growing out of the charging and collecting of unlawful interest in making loans and taking security, was not unconstitutional, even though some of the causes for the recovery of usurious interest might be brought before such county judge.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

7. LICENSES — 7 — LOAN BROKERS — NON-PAYMENT OF JUDGMENT — SUSPENSION OF RIGHTS — CONSTITUTIONALITY.

Acts 34th Leg. c. 28, § 8, providing that, if any judgment obtained upon any bond given by a loan broker shall remain unpaid for 60 days, the license to engage in such business shall be suspended until such judgment is paid, and providing a penalty for engaging in such business during the time the law has suspended the license, was within the legislative authority.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

8. LICENSES — 7 — LOAN BROKERS — JUDGMENT — COLLECTION AGAINST BOND.

Acts 34th Leg. c. 28, providing by section 9 that any judgment obtained against a loan broker should be collectible out of the bond therein provided for conditioned for the faithful compliance with all the requirements of the law governing the business, construed as limited to judgments for debts incident to or growing out of the loan brokerage business, was valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. —7.]

9. STATUTES — 64 — UNCONSTITUTIONALITY IN PART — EFFECT.

Under Acts 34th Leg. c. 28, regulating loan brokers, the invalidity of section 9, providing that any judgment against a loan broker should be collectible out of the bond provided in the act, would not invalidate the whole act, where its purpose might be accomplished by making the bond liable under section 2 for all judgments obtained because of a violation of the provisions of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. —64.]

On Motion for Rehearing.

10. CONSTITUTIONAL LAW — 70 — WISDOM OF LAW.

The Court of Criminal Appeals, in determining whether the statute regulating loan brokers (Acts 34th Leg. c. 28), by requiring a bond,

power of attorney, annual occupation tax, etc., is constitutional, has nothing to do with the wisdom of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. 70.]

11. LICENSES 7 — LOAN BROKERS — VALIDITY—PENALTY.

Acts 34th Leg. c. 28, regulating loan brokers by requiring them to file a bond, a power of attorney, and to pay an annual license tax, etc., is not void because it provides no penalty for its violation, when construed with section 10 thereof, assessing a specific penalty against all persons engaging in the licensed occupation without taking out a license under the law, and in view of the usury laws requiring the receiver of usury to pay back double the interest so collected.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. 7.]

12. LICENSES 7—OCCUPATION—LOAN BROKER.

Under such act it is the occupation that one pursues that is licensed and taxed, and not the mere loaning of money on security, and, though one making an occasional loan is not within its provisions, that does not render the act discriminatory.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. 7.]

13. LICENSES 7—LOAN BROKERS—STATUTES.

Acts 34th Leg. c. 28, regulating loan brokers, and by section 13 declaring that all compromises for usury or unlawful interest collected and received shall be void, is not contrary to public policy.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. 7.]

Davidson, J., dissenting.

Application by James Hutsell for writ of habeas corpus. Relator remanded.

Brooks & Worsham, of Dallas, and Chambers, Watson & Reyes, of San Antonio, for relator. K. C. Barkley, of Houston, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. [1, 2] Applicant sued out a writ of habeas corpus alleging that complaint had been filed against him charging him with violating the provisions of chapter 28 of the Acts of the Thirty-Fourth Legislature, defining and regulating "loan brokers." Relator admits he has violated each and every provision of the act, but contends that the law is unconstitutional, and he therefore is entitled to be discharged. Not only does relator admit that he has violated every provision of the act, but the complaint is so drawn as to necessarily bring in review each section of the act. Section 1 provides:

"A 'loan broker' is a person, firm or corporation who pursues the business of lending money upon interest and taking as security for the payment of such loan and interest an assignment of wages, or an assignment of wages with power of attorney to collect the same or other order for unpaid chattel mortgage or bill of sale upon household or kitchen furniture."

It is insisted that, as a banker or other money lender who does not pursue the business of taking as security for money loaned

an assignment of wages or a mortgage upon household and kitchen furniture does not come within the provisions of the law, the provisions of the law do not bear equally upon all citizens; that it is a capricious classification and unreasonable regulation of those who pursue this class of business. We are cited to the case of *Owens v. State*, 53 Tex. Cr. R. 105, 112 S. W. 1075, 126 Am. St. Rep. 772, as sustaining applicant's contention. In that case the court was passing on a statute which levied a \$5,000 occupation tax on persons engaged in the business of purchasing assignments of unearned wages, and which act exempted from the provisions of the law any person taking, accepting, or procuring such assignments to pay or secure the purchase price of the necessities of life, the purchase price of a homestead, or improvements thereon, or any other article necessary to the wage-earner in the pursuit of his employment, or the payment of premiums on life or accident insurance, etc. This act was held unconstitutional: First, because it did not bear equally on all, because of the above-recited exemptions. The act before us exempts no person from the operation of its provisions, but applies to all who engage in the line of business defined. Second, it was held unconstitutional, in that the \$5,000 tax was prohibitive. This act is not prohibitive, for it levies a tax of \$150 per annum only, and, if this is a character of business the Legislature has the right to regulate, certainly the amount of the tax levied would not render the act void. There is no evidence offered in this case that such a tax would be prohibitive.

In the *Owens Case*, supra, it is said:

"The Legislature may classify the subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but, where the classification is made, all must be subjected to the payment of the tax imposed who, by the existence of the facts upon which the classification is based, fall within it, unless exempted under some other constitutional provision."

Tested by this rule of law, and since none doubt its correctness, the act under consideration would not be invalid. All persons, firms, or corporations who pursue the business defined are brought within its provisions; no person pursuing that business is exempted from the operation of the law, and none who do not follow that occupation are required to pay the tax. It is levied on all who pursue that line of business. While a banker, or other money lender, who does not follow this occupation is not liable to the tax, the very moment the banker or any other money lender does engage in this occupation he becomes subject to the tax and all provisions of the law. We do not think it a capricious classification; for it selects a well-defined class, men engaged in a specific character of business, and places all within this class under the operation of the law.

[3] Our laws have exempted from attach-

ment, garnishment, and forced sale household and kitchen furniture, current wages, and the tools of one's trade, and no one now questions the validity of such laws. They were passed to protect the laborer and the families of the citizenship of the state, that they might not become dependent upon the state. To go one step further and say that a man should not take a mortgage on wages and household and kitchen furniture to secure a debt due him without the husband and wife both agree thereto, and that he must give bond, if such a lien is given, that the creditor will not charge a greater rate of interest than that fixed by law, does not render the law unconstitutional. But it is insisted that a man has the right to do what he pleases with that which belongs to him. This is true unless the public welfare demands that he be restricted in those rights. A man purchases him a farm, and then marries him a wife. The law says the public welfare demands that he shall not be permitted to sell this homestead without the consent of his wife; that neither he nor the wife, nor both combined, shall give a mortgage thereon. It is his property; why cannot he sell or mortgage it at will? Because the public welfare demands that he shall not be permitted to do so. The best interests of society require that he give up this much of his individual rights. And, if the law can say that he cannot sell the homestead without the consent of the wife, and cannot mortgage it even with her consent, certainly the law can say that he cannot mortgage the furniture within that home without the consent of the wife. To say the law can protect the wife and children in the possession of the home, and not protect them in the possession of the furniture inside of the home, would be an absurdity. And, if it can be said that he cannot mortgage it at all, it can certainly say that he can mortgage it only upon the conditions named in the law.

[4] The contention is made that poor men may need money and have nothing else to give a lien upon. So may the man who only owns a home. There is nothing that is prohibitive in the law; it only requires that the creditor or money lender shall deal fairly with the borrower, and charge no more interest than the Constitution and laws of this state permit. And laws which have heretofore been held valid prohibit him, without the provisions of this statute, from charging more than the law permits, and this statute only gives to borrower or debtor a remedy whereby he can recover his money back provided the lender does charge him more than the law allows. The "right of contract" was impaired, if impaired at all, in providing that the lender should not be allowed to charge more than 10 per cent. interest on the money, and, if he did so charge and collect, even though the borrower had contracted to pay it, the borrower might collect back double the amount so paid. And

such law has been held valid. Taylor v. Sturgis, 29 Tex. Civ. App. 270, 68 S. W. 538.

This law simply provides a mode of collection.

[5] The second section, which provides that before engaging in such business one must give bond in the sum of \$5,000, conditioned that he will faithfully comply with each and every requirement of the law governing such business, and will pay to the person dealing with such loan broker any judgment that may be obtained against him, is not an unreasonable requirement, and, if the business is such a business as may be regulated by law, the Legislature had the right to provide that such bond should be given as in the pawnbroker statute, the liquor license statutes, and other similar laws. And it is not an unreasonable requirement that such broker shall keep a set of books in which all his transactions are to be truly recorded.

[6] The section of the law which requires that each loan broker, before engaging in such business, shall file with the county clerk of the county in which he is engaged in business, an irrevocable power of attorney, constituting the county judge his agent and attorney in fact, for the purpose of accepting service for him, or being served with citation, is not a new provision of law. The law makes an agent of a railroad company such an agent; the statutes require foreign insurance companies to file such power of attorney, constituting a named person its agent to accept service of citation, or person upon whom citation may be served. This is a condition placed by law upon the right to engage in such business, and we must assume, in the absence of any showing to the contrary, that the necessity for such provision existed; otherwise the Legislature would not have so provided. Foreign companies or nonresident persons may be engaged in this character of business in this state, and the Legislature deemed it absolutely essential to the proper enforcement of the law. At least, in the absence of any showing to the contrary, we must presume there existed a necessity therefor, or the Legislature would not have so provided.

The contention that the law should have selected some other person than the county judge is one addressed to the wisdom of the Legislature, and does not affect the constitutionality of the law. The fact that some of the cases for recovery of usurious interest may be brought in the county court does not render the law invalid, even though the county judge should be held disqualified to try the cause by reason of his agency to have citations served on him. The question of whether or not he would be disqualified does not arise in this case; therefore we do not pass on that question, but only the question, if it should be held that it did disqualify him, this would not render the law invalid. There are a number of instances in which trial judges are disqualified, and ample provision

is made by the law to select a special judge in such instances.

[7] Section 8 provides that, if any judgment obtained upon any bond given by a loan broker shall remain unpaid for 60 days, the license to engage in such business shall be suspended until such judgment is paid. Again, we think the Legislature had the authority and power to place such restriction in issuing the license. The absolute forfeiture of license has been sustained in this state. And, if the Legislature has the right to declare a forfeiture of the rights under the license, certainly it had authority and the right to declare a suspension of the license and say that any one who continued to pursue the business during the suspension of the license should be guilty of a misdemeanor, and punished by a fine for each and every day the broker should engage in such business during the time the law declares his license shall be suspended, and this section cannot be construed to be imprisonment for debt. The law does not pretend to say he shall be imprisoned if he never pays his debt; it simply says, if he does not pay a judgment obtained under the law, his right to continue in the business shall be suspended, and he shall not engage in such occupation during the time his license is suspended, and provides a penalty, not for failing to pay the debt, but engaging in the business of loan broker during the time the law has suspended its license to engage in such business. If he does not engage in the business while the license is suspended, he cannot under the law be imprisoned if he never pays the judgment and debt.

[8, 9] Section 9 of the law, which provides that "any judgment obtained by any person against a loan broker under these articles or under the laws of the state of Texas, shall be collectible out of the bond herein provided for," cannot and should not be construed to mean that a judgment for debt not incident to nor growing out of the loan brokerage business may be collected out of the bond. If such construction should be placed thereon, then we think this provision would be invalid, but the invalidity of such provision would not invalidate the entire act. The proper construction of this section is made plain by the conditions of the bond required to be given, which provides simply that the bond shall be conditioned for the faithful compliance with each and every requirement of the law governing the business defined in the act. The only legitimate construction to be placed on the language of section 9 is that the judgments obtained under this law, or any other law governing loan brokers, as defined in this act, which have heretofore or may hereafter be passed by the Legislature, shall be collectible out of the bond given. And, as said, if section 9 should be held invalid, because of doubt as to the meaning of the words employed, the object and purpose

of the law is made plain by the other provisions of the act, and can be accomplished thereunder, and the bond would be liable under section 2 for all judgments obtained because of a violation of the provisions of the law, and the act should be held valid.

We have not discussed the law by sections, but in the opinion have passed on every question raised by relator, and we are of the opinion the law is in violation of no provision of the Constitution.

The relator is remanded.

DAVIDSON, J. (dissenting). I deem it not necessary to write. I am persuaded the case on the law should have been reversed. I further believe some of the provisions clearly invalid and unconstitutional.

On Motion for Rehearing.

HARPER, J. Relator has filed a motion for rehearing in this cause, and a very able argument in support of it. It has been pending for some time, and we have during that time given the propositions most careful thought and study, and we are frank to say that the one first presented was not to us entirely free from difficulty, but, after reading the decisions of the various states of the Union, and the decisions of the Supreme Court of the United States, we have come to the conclusion that, when a citizen, like a corporation, comes to the government and asks a privilege or license to engage in any given character of business that is subject to police power of the state, the state has a right to annex to the privilege or license in granting it any reasonable regulation it deems necessary to attain the purpose and object of the law. One of the purposes and objects of this law is to prevent those who are engaged in the business or occupation of lending money on household goods or upon assignment of wages of wage-earners to charge a greater rate of interest on such loan than that authorized by law, and, if they do, to provide a ready means whereby the penalty prescribed by law may be readily enforced.

[10] Relator speaks feelingly of the man who has nothing but his wages or household goods to give as security for a loan, and that it is not right to deprive him of the privilege of mortgaging such property, if necessity requires or he desires to do so. With the wisdom of the law this court has not and cannot sit in judgment. This power is not confided to us, but the sole question we have to pass on is: Is the law violative of any provision of the federal or state Constitution? Texas was the pioneer state in exempting the homestead from execution and forced sale, and at the same time provided in the Constitution that no mortgage lien could be created thereon, even with the consent of the wife. If such provisions of law were violative of the federal Constitution, then this clause of our state Constitution would be void; but not

so, it has been sustained in all the courts of the land where the question was raised. And, if the people had the authority and power to place that provision in the Constitution, then they, acting through their chosen representatives, have the same power to so enact in regard to other species of property whenever they deem the public welfare demands it, if there is no inhibition in the state Constitution. It is the people of the state so enacting, and, if the law is unwise and it works unnecessary hardships on the poor and friendless, we have that faith in the ultimate judgment of the citizenship of the state that it will not long remain the law. But, be that as it may, it is not a question of whether or not the law is wise or unwise; all we can do is to see whether or not it intrrenches upon any right reserved to the citizenship as a whole or any individual citizen, and we shall discuss the law from that standpoint, and that alone, and will not diverge into other fields.

The first contention of relator is that we erred in holding that the state had the authority and power to provide, as condition prerequisite to issuing one a license to engage in this business, that the licensee shall file a power of attorney, appointing the county judge of the county in which such license is sought to be obtained his agent upon whom service of citation may be had for any suit growing out of the loan brokerage business as defined by this law. And we will say that relator desires us to correct the impression, if such was made by the original opinion, that he contended that the law was void by reason of it selecting the county judge as such agent to be appointed. Relator concedes that, if the Legislature had the authority to require the selection of an agent upon whom process might be had, the law could select the county judge. His contention is that no authority existed to require the naming of an agent for the purpose named, and he ably presents this question. One of the most and oftenest quoted opinions on this subject is that of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 566, and in that opinion the Supreme Court of the United States says:

"Neither do we mean to assert that a state may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgment rendered upon such service may not be binding upon the nonresidents both within and without the state. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch. 290: 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a

judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' See, also, *Ins. Co. v. French*, supra [18 How. 404, 15 L. Ed. 451], and *Gillespie v. Insurance Co.*, 12 Gray [78 Mass.] 201 [71 Am. Dec. 743]. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. *Copin v. Adamson*, L. R. 9 Ex. 345."

And in *Wilson v. Seligman*, 144 U. S. 42, 12 Sup. Ct. 541, 36 L. Ed. 339, the Supreme Court of the United States holds:

"It may be admitted that any state may by its laws require, as a condition precedent to the right of a corporation to be organized or to transact business within its territory, that it shall appoint an agent there on whom process may be served, or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicile at which, service may be made within the state, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the state. In such cases the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the state shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. *Lafayette Ins. Co. v. French*, 59 U. S. (18 How.) 404, 15 L. Ed. 451; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Pennoyer v. Neff*, 95 U. S. 714, 735, 24 L. Ed. 566, 573; *Vallee v. Dumergue*, 4 Exch. 290, 303; *Copin v. Adamson*, L. R. 9 Exch. 345, 355, 356, and L. R. 1 Exch. Div. 17."

It is thus seen that the United States Supreme Court holds that such provisions of law may be applicable to an individual as well as to corporations who seek a privilege or license from a state. If the loan brokerage, as defined, was not of a character of business the state had the right to regulate and control, a different question would be presented, but, inasmuch as it is such a business, the state has the right to prescribe that no one engaged in it shall charge a greater rate of interest than that authorized by the laws of the state, and prescribe means to prevent one from charging such excess rate, and, if they do, to provide means whereby the penalties prescribed by law may be enforced, then the state has the right to prescribe as a prerequisite to issuing one license to engage in such business that he shall name an agent upon whom service can be had when the penalties fixed by the law of the state are sought to be enforced, if the laws pertaining to such business are violated by the person to whom license is issued.

Relator contends that, even if the state had the right to require that an agent be designated upon whom service could be had in case he violated the law, the state had no right to require that he give a \$5,000 bond,

"conditioned that he will faithfully comply with each and every requirement of the law governing the loan brokerage business, as defined, and will pay to any person dealing with such loan broker any judgment that may be obtained against him"; that bond in such sum is prohibitive, and without proof we ought to take judicial notice that no person can give bond in such sum. The writer feels that the courts have no judicial knowledge on this question, and, if we had personal knowledge, we would not be authorized to take into consideration in passing on this question. We do not know the volume of business done by those engaged in the loan brokerage business, nor the profits arising from such business. We do not know whether this bond is excessive or not. We do know it is in no greater amount than the bond required of retail dealers in spirituous liquors, and that bond is conditioned, as is this one, that the licensee will obey the law governing such business, and will pay penalties to any person suffering by reason of the licensee not observing the law governing his business. And such law has been upheld by our courts in numerous instances. We do know that retail dealers readily give such bonds, and it seems to us that, if they can do so, with the environments thrown about them, then certainly a loan broker under this statute can do so, if he has so lived as to have the reputation of being a law-abiding citizen, and, if not, this law or any other law does not contemplate the licensing of any person to engage in any character of business who is a criminal, or continuous violator of the laws of this state. Such laws are in force in many states, not only with reference to liquor dealers, but also in reference to persons engaged in the business of pawnbroker, and they have uniformly been upheld in the various states of the Union. We all know that bonds of this character are to a large extent now made by indemnity or surety companies, and in this record there is no evidence of what their fees would be for becoming surety on such bond, and no evidence that the average profits on business of this character would not justify the paying of such fees. Then it authorizes the giving of a personal bond.

The contention of relator "that the bond given shall by its terms and recitals provide that it shall continue and remain in force and effect so long as such loan broker continues to do business in this state, that it is like a mighty river, going on forever," is not sustained by the statute in question. It provides that a new bond shall be given annually, so that the bond given in any one year will be held to be responsible only for violations of the law and penalties incurred during the year in which it was given to cover alone, and by provisions of law it expires at the end of the year, and is liable for no transactions occurring after that time. We

have provisions fixing the time in which suits may be brought upon this bond, as we have in case of the liquor dealer and pawnbroker bonds, and its provisions are no more onerous than are the bonds in those instances.

[11] It is contended the law is void because it levies no penalty for its violation. If that was the correct construction of the law, we are satisfied relator would not take the time nor trouble to contest its validity. Our laws provide, if one lending money shall charge and collect a greater rate of interest than that fixed by law, he may be required to pay back double the interest so collected. This is the penalty prescribed by law, and for which the bond given will be liable, and it is because of this penalty and liability relator contends the bond will be so difficult to give. We must always view laws dealing with a given subject in their entirety, and not take one separate provision and construe it alone. *Lewis' Sutherland, Statutory Construction*, §§ 443 to 449. But, in addition to this, in section 10 a specific penalty is assessed against all persons who engage in the occupation licensed without first taking out a license under the law.

[12] It is also contended that the law is discriminatory, in that it does not bear equally on all who may engage in this character of occupation. We think relator is wrong in seeking to place such construction on the law. He admits that the act in question, in and of itself, does not do so, but his contention is that other provisions of law necessarily so result. If the law does not bear equally on all who engage in the given occupation, we would readily concede that it is invalid, but the illustrations cited by relator do not bear out his contention. It should be remembered that it is a given occupation that is taxed, pursuing a certain line of business, and we think all who pursue that occupation will be liable for the tax. It is true that a lawyer, as cited by relator, might occasionally take such a lien to secure his fee, and it would not render him liable for the tax, nor that some person who might sell another furniture would retain a lien to secure the payment of the purchase price would not be rendered liable for the tax. But neither of them would be engaged in the business and occupation of "lending money upon interest." It is the occupation that one pursues that is licensed and taxed, and this term has a well-defined meaning under our law and the decisions of this court. *Tarde v. Benesman*, 31 Tex. 282; *Standford v. State*, 16 Tex. App. 332; *Williams v. State*, 23 Tex. App. 500, 5 S. W. 136.

[13] Relator next contends that the provisions of the law are violative of "the laws of both God and man," in that it provides "all compromises for usury or unlawful interest collected and received are contrary to public policy, and shall be void." Why the

prohibition of a compromise of the penalty prescribed by law for doing this unlawful act is any more violative of law than the prohibition of compromises of other unlawful acts we are unable to discern. Article 422 of the Code, and *Shriver v. McCann* (Civ. App.) 155 S. W. 317. The law has fixed the penalty for charging unlawful interest, and certainly it can say that no citizen shall have authority to nullify this law as a matter of public policy.

We want to also say in behalf of relator that he did not contend that the provisions of this law could be construed into imprisonment for debt, and, if the original opinion gave such an impression, we readily make the correction at his request. His contention is that it is an effort to make the loan broker pay his debts, which provision of law is applied to no other citizen, and, if it were, it would likely bankrupt many who are now engaged in legitimate business. If a man violates many of the laws of the state in which a pecuniary penalty is assessed, he is taken bodily and imprisoned in jail, and held until the penalty is paid, or he has served out the time either in jail or upon public works at so much per day. This was not to make him pay the debt, but to respect and observe the law. So in this instance the law simply prescribes that, if a man engages in the loan brokerage business as defined, does not pay the penalties prescribed by law for charging unlawful interest, if he does do so, such person shall no longer be authorized under the law to engage in such business. It suspends his license to engage in business until he has paid the penalty the law prescribes if he charges unlawful interest, and such fact established in a court of law. Nothing more, and even absolute forfeitures under such circumstances have been sustained.

While perhaps we have not discussed every question presented in the motion and argument for a rehearing, yet we have done so either in this order or in the original opinion, and, in our opinion, on the face of the law, without any facts surrounding the business before us, we do not think it violative of any provision of the Constitution, with the statement that under the provisions of the law the loan broker under his bond would be liable on his bond for no amount other than the penalties fixed for the

charging and collecting of unlawful interest, and suit could not be maintained by service upon the county judge for any other transaction than that growing out of charging and collecting unlawful interest in making loans and taking security for the payment of such loans and interest on assignment of wages and powers of attorney to collect same or other order for unpaid chattel mortgage or bill of sale upon household and kitchen furniture.

The motion for rehearing is overruled.

DAVIDSON, J., dissents.

BEAKES v. STATE. (No. 3929.)

(Court of Criminal Appeals of Texas. Jan. 26, 1916.)

INDICTMENT AND INFORMATION \S 5—COUNTY COURT—NECESSITY OF INFORMATION.

A conviction in the county court upon a complaint only, where the defendant did not waive the filing of an information but objected to trial on the complaint, could not be sustained.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 28; Dec. Dig. \S 5.]

Appeal from Wharton County Court; W. G. Davis, Judge.

Abe Beakes was convicted of adultery, and he appeals. Reversed, and cause remanded.

O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of adultery, and assessed the lowest punishment therefor.

The trial was had in the county court upon a complaint only. No information was filed. Appellant in the court below objected to this, and preserved a bill of exceptions to the fact that he was tried without any information filed against him, and only on the complaint. No question of waiver of an information is raised. In fact, the reverse of this is true. He did not waive it, but expressly sought to prevent a trial without it. Under such circumstances his conviction cannot be sustained. *Ethridge v. State*, 172 S. W. 786, and, also, *Id.*, 172 S. W. 784.

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

HOLLINGSWORTH v. STATE. (No. 3614.)
(Court of Criminal Appeals of Texas. June 16,
1915. On Motion for Rehearing,
Jan. 12, 1916.)

1. WITNESSES — 380 — IMPEACHMENT OF WITNESS — EVIDENCE.

Where, in a prosecution for incest, the female informed the grand jury that accused had never had intercourse with her, and subsequently revealed the name of the alleged father of her child, the state, having placed her on the stand and elicited testimony tending to show that accused was the only male having access to her, could not, the female having testified on cross-examination that accused had never had intercourse with her, introduce a copy of a letter, written by the female, charging accused with being the father of her child, in impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.]

2. CRIMINAL LAW — 400 — EVIDENCE — LETTERS OF PROSECUTOR.

Such letter is not admissible as original evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.]

Prendergast, P. J., dissenting.

Appeal from District Court, Coryell County; J. H. Arnold, Judge.

Alfred Hollingsworth was convicted of incest, and he appeals. Reversed and remanded.

Briefs of appellant on motion for rehearing, published in response to direction of Judge Harper contained in his opinion:

Preliminary Statement of Facts.

Aside from certain letters and correspondence hereinafter to be referred to, the incriminating evidence is confined within a brief compass. It was shown, among other things: That the prosecutrix, Cassie Dunn, lived at the residence of the appellant with her sister Fannie, and appellant's mother, who was an aged woman. That Cassie Dunn had practically no company and went out in a social way but very little. That appellant had an opportunity to have committed the offense, and probably the best opportunity of any one else, does not appear a matter of doubt under the evidence. It was also shown on the trial that some time in 1912 one Roy Hollingsworth, a cousin of the appellant, saw Cassie Dunn very early one morning sitting on the appellant's knee. This witness said that at the time he did not think anything unusual about this occurrence or attach any importance to it, but that, in the light of the charge against the appellant and Cassie's pregnancy, it afterward looked to him to be somewhat unusual. It was also shown by the testimony of one Oscar Easter that in the spring of 1914 he saw appellant and Cassie Dunn while engaged in an act of carnal intercourse. This was the evidence offered by the state and all the evidence offered by the state, except the letters and statements to be hereafter referred to.

Some of these statements, as, for instance, the statements of Cassie Dunn before the grand jury, were, if admissible at all, admissible only for the purpose of contradicting Cassie, and were not admissible as primary evidence of appellant's guilt. We shall undertake hereafter to demonstrate that sundry of the letters introduced in the evidence were wholly inadmissible, and that this was particularly true in respect to the purported letters of Cassie Dunn to appellant, in which, in substance, she ascribes the paterni-

ty of her child to him. Except for such letters, in view of the probable untruth of Easter's statements, it is inconceivable that any jury could or would have convicted appellant.

The offense charged was in terms denied by the prosecuting witness, Cassie Dunn, and by appellant, and strong evidence in other respects of appellant's innocence was shown on the trial. Nor should it be forgotten that appellant was a man 59 years old, that his wife had been dead for something like 20 years, and that his reputation was beyond question for chastity, for honesty, and fair dealing and as a truthful man. After the death of his wife, he remained true to her memory and never went to see any other woman, but sought to raise up the family born to them, and was, in every respect, above suspicion until the conspiracy in this case was filed to exact money from him and, failing to receive this, to send him to the penitentiary.

The able opinion of the learned Presiding Judge contains intrinsic evidence, to our mind, that it was to some extent based on the unauthorized and untrue statements in the explanation of the trial court to sundry bills of exceptions, wherein the trial court, without any evidence to sustain it, finds a conspiracy between Cassie Dunn and appellant.

We shall not undertake in this argument to discuss all the errors assigned, nor to make any reference to all the matters discussed in the court's opinion. We shall confine our argument to the presentation of only three or four questions, in the certain conviction that a careful examination, in the light of the authorities, must convince the court that a cruel injustice has been done this man, and that reason, law, and justice all demand that a rehearing should be granted in this case, that the judgment of conviction should be set aside, and the cause remanded for new trial.

I.

We assert without fear of contradiction that the application for a continuance should have been granted, and that the trial court was literally without the slightest excuse in failing to grant same. It will be remembered, and will be seen by reference to this motion for continuance, that the same was based and founded on the absence and for the lack of testimony of appellant's mother, Mrs. Cassie Hollingsworth, and Mrs. Lizzie Whitley and Mrs. Annie Ford, his daughters.

We are inclined to concede, if a rigid rule were to be applied, that under the circumstances appearing in the record the highest and strictest diligence would have required of appellant that he should have taken the depositions of his mother; but that the diligence with reference to the other witnesses was sufficient was not questioned in the trial court and has not been questioned in this court. Let us concede further that the trial court was correct in holding that the evidence expected to be given by these witnesses in respect to the visits of Cassie Dunn and Fannie Dunn to the house of Hazel Ford were shown so clearly beyond dispute as to not make this portion of evidence a matter of importance. It still remains, as we shall undertake to show, that the application was a good one; that the testimony which would have been given by these witnesses was not only admissible, but of the highest importance, and such as might, and probably would on a fair trial, have brought about appellant's acquittal.

Now, let us see: It is shown in the application that appellant was arrested on the 22d day of January, 1915, and that on the same day he caused a subpoena to be issued for these two witnesses. The case was called for trial on February 3, 1915, on the eleventh or twelfth day after his arrest. It was shown beyond any sort of dispute that the witness had been

duly and properly served with subpoenas. It was shown beyond any question, and no issue was made on this, that they were both sick at the time the case was called for trial, and that it would have been impossible by any diligence known to the law or by any effort for the appellant to have secured their presence at the trial.

Clearly, the application was not made for delay. It is not a case where the prosecution had lingered through many months and years, and where a continuance was sought merely for wearing the state out and delaying the trial. It was the first application. The diligence was perfect. Would the testimony sought to be obtained through these witnesses have been admissible? As we shall show, this is not a matter of debate. Was it material? This we shall demonstrate. If the evidence sought by these witnesses was admissible, if it was material, then the fact that it was cumulative is no answer and would not justify the overruling of the application. That testimony is cumulative is no objection to a first application for continuance is no longer an open question in this state. Branch, Criminal Law, § 257, first paragraph. It has even been held that if the absent testimony is very important that a second application should be granted, though the absent testimony is somewhat cumulative. *Gilcrease v. State*, 33 Tex. Cr. R. 630, 28 S. W. 531.

The cases cited by the Assistant Attorney General, including that of *Fulkerson v. State*, 57 Tex. Cr. R. 80, 121 S. W. 1111, were cases where a second application for a continuance was being considered.

Now, let us see what the statements were as to the evidence expected to be adduced through Mrs. Whitley and Mrs. Ford. As to Mrs. Whitley, we find the following statement taken literally from the application for continuance (transcript, page 11):

"By the witness Mrs. Lizzie Whitley defendant expected to prove that witness is defendant's youngest daughter, who was about four years old at the time of her mother's death, and who lived with defendant until she was about 19 years of age, and kept house for him during the latter years that she lived with him; that witness, after her marriage, frequently visited the home of the defendant, and had been there often since Cassie Dunn has been living in the home of defendant; that witness has observed the conduct and demeanor of the defendant toward Cassie Dunn and of Cassie Dunn toward the defendant, and that the conduct and demeanor of each toward the other had been circumspect and above criticism, and that she never saw any undue familiarity on the part of either toward the other, and that the defendant treated Cassie Dunn with the same consideration as he does his own children, and treated her as a daughter."

It is further stated in the motion for continuance (transcript, page 12) that appellant expected to prove by his daughter Annie Ford:

"That witness frequently visited the home of defendant during the time Cassie Dunn lived with him, and had occasion to observe the conduct of the defendant toward Cassie Dunn, and that it was circumspect and above reproach, and that defendant was never unduly familiar with Cassie Dunn at any time within the knowledge of the witness."

The testimony of the appellant's mother along these same lines would have been to the same effect. The record will show that testimony of this same general character was introduced by appellant through Mrs. Roy Hollingsworth (statement of facts, page 59), and there seems to have been no objection to it, as indeed there could have been no good objection to it.

In his explanation to this bill of exceptions, the trial court, in speaking of this particular evidence sought by appellant, makes this statement:

"I desire to make this observation with reference to the testimony, not only of Mrs. Whitley and Mrs. Ford, but to the testimony of Mrs. Cassie Hollingsworth as well: It was never the contention of the state that defendant has been guilty of any intimacy or of any acts of familiarity in the pres-

ence of his two daughters named, or of his mother. It was the theory of the state, and so argued on the trial, that such acts of intimacy and familiarity took place by stealth, and secretly, and at no time was any contention made that the defendant was guilty of an act of intimacy or of improper familiarity in the presence of his mother and two daughters. These two daughters lived apart from the defendant, and not in his home, and his mother lived with the defendant only a part of the time, but was probably at his house during the time that Cassie Dunn lived there most of the time, but the two daughters had married and left home before she came to live with the defendant."

We have thus set out literally the testimony expected to be proved by these two witnesses, and have also inserted herein the court's explanation in declining to grant the continuance, so far as same relates to this particular testimony. It will be observed, of course, that this court, as trial courts are coming more and more to do, makes a somewhat lengthy argument to minimize his error. Of course, we state in the motion for continuance that appellant's two daughters had been married and were living apart from the appellant. We do state, however, and this is not denied, that both of them, who are shown to have lived close to appellant, were frequently at his house and had excellent opportunities for observing the conduct of appellant and Cassie Dunn. This criticism of the court would have been proper in argument as going to the weight to be given to the testimony of these witnesses and as affecting their opportunities for such observation as would have disclosed any undue intimacy. However, it is believed that the court's explanation, while it exhibits his partisanship, does not seriously impair or affect the value of the evidence of these witnesses. The court's explanation that there was no contention by the state that there was any improper intimacy between the appellant and Cassie Dunn in the presence of his daughters would be folly, if it was not worse. In other words, the substance of it is that, as long as the state kept the weight of the evidence from imputing to appellant and Cassie Dunn improper relations in the actual presence of his daughters, their testimony as to his blameless life, character, and conduct becomes immaterial. This testimony was doubly important in this: The jury had seen and heard the testimony of Mrs. Roy Hollingsworth that, according to her observations, there was no familiarity between the appellant and Cassie Dunn, but that his conduct toward her was that of a parent toward a child. Would not any jury on earth inevitably have wondered and reflected how it was and why it was, if this was true, that the facts were not proved by the appellant's own daughters, who naturally would have been more intimately and long associated with him than his daughter-in-law?

Again, if the court's explanation is of value, it must be on this theory: That such testimony of blameless conduct and lack of familiarity between these two parties is worth nothing unless the state had first shown affirmatively that, in their presence, there had been a breach of propriety. This is ridiculous and absurd. Now, let us test the matter out. Here is the first application: A trial demanded and urged by the state within less than two weeks after the arrest of a citizen of the state who has lived all his life without reproach in the neighborhood where he has raised his family. The nature of the offense, and beyond all the manner of this trial, made it important that appellant should have every right that the law gave to him and all the evidence admissible under the law, particularly when, as in this case, he has used the utmost possible diligence to secure the testimony, and when he was deprived of such evidence by sickness and under circumstances where no diligence known to man would have procured it.

Was the testimony admissible? No one can question that. Would it have been of any

value? We think that must be evident. Would it have been of considerable value? That we shall undertake to demonstrate. Here is a case where, not merely on some isolated occasion, but, if the state's theory is correct, through many months and years, an illicit intercourse had been pursued by these parties in appellant's home. Would it not be important to show that appellant's own children, who, in memory of their mother, would have been the first and quickest to observe such misconduct, had, with the very best of opportunity, failed to discover anything which would even excite their suspicion? In determining this question, we should have some slight regard to human nature, and pay some attention to the nature and character of the offense. That our view on this question and our discussion of this matter may at least impress the court as being sincere, we desire to make the following quotation from the utterances of the writer while a member of this court and under his official oath charged with the responsibility of declaring the law. It is there said:

"Ordinarily incest, falling short of rape, is not the result of sudden impulse, but grows out of a relation having its foundation in fondness and intimacy. Or, in cases where a father has thus far obtained such ascendancy over the mind of his daughter as would, in a sense, compel acquiescence without violent protest, it does not develop overnight. It is a slow work of days and weeks and months and years, between cousins, nieces, or nephews, or other close relatives of opposite sex. It grows out of familiarity, common taste, intimate association, fondness, affection. The improbability of such an offense without some precedent or subsequent relationship of a similar character renders necessary for the protection of society the rule so well established that as throwing light on, as corroborative of, the incident and act relied upon, it is permissible to show other acts of a similar character. If, in a given case, a father was charged with incest, with his daughter as the victim, it would, in most cases, if the state was restricted in its proof to one single act of intercourse, seem almost incredible that any father should be guilty of an offense of this kind upon the child of his loins. Would it be contended in such case that the state should not be permitted to show proof of opportunity, proof of intimate association, proof of endearment, evidences of fondness, evidences of the ascendancy of the father over the mind of his daughter, or any one of the thousand circumstances that might lend strength and probability to the belief that the father had by reason of any or all of these things finally gained the consent of his child to intercourse."

Now, let us apply this doctrine here. Was it allowed to the state? Undoubtedly. The state was permitted to show, and properly so, the intimate association, the almost exclusive association, of appellant with Cassie Dunn. It was permitted to show, and properly so, that she had no sweetheart and went little into society. It was permitted to show by Roy Hollingsworth that on one occasion he saw what later he thought to be an act of undue familiarity with Cassie Dunn. All right. Was it not admissible for the appellant to show by his daughters that with the very best opportunity for observation, with their frequent visits to appellant's house, their intimate association with him and Cassie Dunn, their knowledge of the fact that appellant for some time was living alone with the two girls, that notwithstanding all these facts, in all the years that they had had this intimate association, that no single circumstance had ever occurred, no act had been performed, no look, no word, no fondness, no endearment had ever challenged their attention, provoked their inquiry, or caused them to suspect any impropriety. This court, being composed of men, as well as lawyers and judges, must know, and we think do know, that in memory of their dead mother, having a pride in their memory of her and her memory, these daughters more than any other person would naturally and inevitably have been on the lookout for anything of this sort, and would, in

some way, if it had existed, been cognizant of it. Since our mothers are women, and since our wives are women, and since our daughters are women also, we cannot close our eyes to the fact that, from the nature of the crime here charged, it is inconceivable that, if there had been improper relations between this man and this woman, that somewhere and at some time, by some look, some word, some speech, some act of the father, the uncle, and the niece would have arrested attention and have been observed by these daughters. It will not do to say, as in effect the trial court says, that because the appellant and Cassie Dunn did not go to bed together in the presence of his daughters, or had not in their presence physically embraced her, and because the state did not so claim, this renders this testimony useless. If such claim had been made, and they had denied the specific acts and conduct attributed to their father, their testimony here may be more direct and more positive, but is none the less valuable in the fact that their evidence relates to a general course of conduct extending over years, rather than to a particular fact occurring at a particular time. To our minds, it is not debatable that the application should have been granted. That the testimony was admissible, nobody can question that. It was of at least some value; nobody can doubt that. That it was cumulative on the first application for a continuance is no answer to appellant's contention. To our minds it was extremely important, and such evidence, as, if admitted, and the improper evidence hereinafter referred to had been excluded, as it should have been, on a fair charge, which appellant did not receive, he ought to have been, and we believe would have been, acquitted. Therefore we respectfully submit that if there ever was no other question in the case, the judgment of conviction should be set aside, a rehearing granted, and the cause reversed.

II.

Reversing somewhat the order in which the matters relied on for reversal are complained of, we want to call the court's attention to a patent and most hurtful error in the court's charge. It will be necessary, in order to make our position understood, to set out two paragraphs which precede the particular sentence of the charge which will be the subject of discussion in this paragraph of the argument.

On page 5 the court instructed the jury as follows (statement of facts, p. 5):

"You are further instructed that if you will find from the evidence that the witness Cassie Dunn, in her testimony before the grand jury, stated facts relating to the defendant's connection with the alleged crime of incest differently from the way she testified on the stand in the trial of this case, then you can only consider her testimony before the grand jury for the purpose of enabling you, if it does enable you, to do so, in passing upon the credibility of the witness, Cassie Dunn, and of determining the weight you will give to her testimony. Her testimony, as she gave it upon the stand in this case, must be regarded as her evidence in your deliberations. Her statements made to the grand jury, if any different to what she testified, cannot be considered as evidence of the defendant's guilt, but only for the purpose aforesaid of aiding you in determining the credibility of the said witness, if it does aid you in that regard.

"You are further instructed that if you do not believe from the evidence beyond a reasonable doubt that the defendant received the letter, a copy of which has been exhibited in evidence before you, you will not consider the same for any purpose, except that of aiding you, if it does aid you, in determining the credibility of the witness Cassie Dunn, but you may consider it for that purpose only. However, if said letter was received by the defendant, you will determine the weight you will give to the same under the instructions given you in the last paragraph of this charge."

The portion of this charge which is clearly erroneous and hurtful is the last sentence, to this effect:

"However, if said letter was received by the defendant, you will determine the weight you will give the same under the instructions given you in the last paragraph of this charge."

The last paragraph of the charge therein referred to is in this language:

"You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony; but you are bound to receive the law from the court, which is herein given you, and be governed thereby."

The defendant excepted to that paragraph, because same was on the weight of the evidence, and "because the court, in effect, in said paragraph charges the jury that they may consider said letter as evidence against the defendant, if received by him" (transcript, page 7). A formal bill of exceptions was taken and duly approved by the court (transcript, pages 41 and 42), in which the written objections above referred to are copied, and in which, in effect, said charge was claimed to be an instruction telling the jury that if said letter was received it proved appellant's guilt. The court makes an explanation to this bill in the nature of an argument, in which he says he did not inform the jury that the letter was a criminative fact against the defendant, nor did the charge intimate that said letter proved appellant's guilt; but the court adds:

"On the contrary, the court told the jury that it was for the jury to determine what weight they would give, if any, to said letter, calling their attention to the fact that the jury was the exclusive judges of the facts proven, of the credibility of the witnesses, and of the weight to be given to their testimony."

He also adds:

"I thought the charge on the whole was a proper one on the subject in question, and was designed and intended for the benefit of the defendant's rights and to safeguard the same before the jury."

That the court deliberately and purposely did the appellant this manifest injury, of course, we do not claim. That the charge was injurious and hurtful, and contrary to all the law, and without a precedent in the books to sustain it, we think is apparent, and it will be our purpose to sustain this contention. That this letter and the inquiries made concerning it may have been admissible on redirect examination of Cassie Dunn, with a view of refreshing her memory, with a view of inducing her to confirm and admit statements theretofore made, or even for the purpose of contradicting her, we may assume to be true. The discussion of the learned Presiding Judge upon this question in the opinion filed in this case is very strong, seems to be well reasoned, and is well supported by the authorities. That the letter was not admissible generally against appellant we think we can demonstrate, and will undertake to demonstrate in another subdivision of this argument. However, for our present purposes, we will assume that it was admissible generally, on the presumption, of course, that the evidence, all taken together, raised an issue of fact and might justify the belief that the letter had been received by appellant.

Now, as we say, we will assume that this contention of the state is true, and that the letter, if the jury so believed, was admissible against the appellant. That it was not admissible against him, if not received by him, seems to have been thought by the trial court, and seems to be conceded in the opinion of the learned Presiding Judge. Therefore it all comes to this: Under the instruction here complained of, the court tells the jury, in substance, this:

"Gentlemen of the jury, if this letter was not received by appellant, then it can only be considered by you for purposes of impeachment in respect to the witness Cassie Dunn. If it was received by him, then, under the last paragraph of this charge, you will do your duty like men."

Suppose, in this case, the court had instructed the jury:

"Gentlemen of the jury, if you find that the witness Easter was in such a position, on the evening that he speaks of, that he could not have seen in the seed house, then you will disregard his testimony; but, on the other hand, if you believe that he was in such a position that he could have seen a man and woman in the act of intercourse in the seed house, you may consider these facts, and in respect to them you are referred to the last paragraph of the court's charge."

That this would have been error, of course, nobody would deny. The court, of course, is familiar with the rule, universally obtained, that it is error to charge the jury in any case on the weight of the evidence. Nor are we without support in the authorities on this question. We desire to call the court's attention to the case of *Rice v. State*, 49 Tex. Cr. R. 569, 94 S. W. 1024. The portion of the opinion in point here appears on page 584 et seq. of 49 Tex. Cr. R., on page 1032 of 94 S. W. In that case the state had made proof that Rice, some months after the death of his wife, had, in connection with others, induced a witness, Nellie Long, with whom it is shown that he sustained improper relations, to leave the state. After reciting the fact that such evidence had been introduced, the court instructed the jury as follows:

"You are instructed that you can only consider such evidence or testimony for the purpose for which it was admitted; that is, as a mere circumstance which, if you deem it worthy, may be considered by you with other evidence, if there is any, in determining whether defendant killed Amanda Rice, as charged in the indictment, and, if so, his motive in so doing. You cannot and must not consider it for any other purpose, for you cannot convict defendant for any offense other than that named in the indictment."

Among the objections made to this charge, as same appeared in the printed record, is the following:

"Further, that it was on the weight of the evidence, in that it singled out a fact occurring long after the homicide, and instructed the jury that they could consider the same in determining the motive of the defendant at the time of the killing."

Furthermore, that it was injurious and prejudicial to appellant, in that it was an intimation by the court that the circumstance of Nellie Long going to Dalhart was of importance in determining his motive; in other words, that it was of importance in corroboration of her statement that he was getting her away to live with him; that said testimony if admissible at all, was admissible as original and primary evidence, and it was not proper for the court to tell the jury to consider it upon any particular phase of the case."

There were, as the court will notice from the opinion, other objections, not here appearing, to the charges which are discussed in connection with the particular charge here made. In that case, the following statement is made:

"As stated, this testimony was admissible as an inculpatory circumstance against the appellant."

Here we are assuming that the fact of the writing and receipt of the letter in question was admissible. If not admissible, the case should, of course, be reversed on that ground. If admissible, and if the letter was received, it was admissible as primary evidence of the appellant's guilt.

Now, in the *Rice Case*, the court, after saying that there was no danger of the conviction of appellant's running off the witness, uses the following language:

"Consequently the court was not required to charge upon this act or conduct of appellant at all. However, the charge complained of singles out this fact, and instructs the jury that they may consider the same to aid them in determining whether defendant killed Amanda Rice, as charged in the indictment, and his motive in so doing. In the first place, the court had no right to single out this isolated fact and instruct the jury in regard thereto. White's Ann. Code Crim. Proc. § 810, and authorities there cited. Certainly there was no authority on the part of the court to tell the jury that they might consider this isolated fact, done long after the homicide, to aid them in determining whether defendant killed his wife."

True, in their deliberations they might take into account the fact that long after the homicide appellant was guilty of suppressing this testimony, and might regard it as a circumstance having more or less bearing on appellant's guilt of the homicide. But the court was not authorized to single out this fact and tell the jury that they could so consider it. Much less was the court authorized to inform the jury that they could regard this fact of suppression or attempted suppression of the testimony of Nellie Long as bearing on the motive which may have actuated appellant in taking the life of his deceased wife."

The opinion in the Rice Case, from which we have quoted, is in harmony with the unbroken line of decisions in this state. Now, let us apply these decisions to this case, and let us reason out the question in an attempt to ascertain whether the charge here complained of violates the rule. That it was permissible to introduce this letter and to interrogate Cassie Dunn about same for purposes of refreshing her recollection, and for purposes of impeachment, we will, for the time being, concede. But let us go further, and assume that it had been shown by incontrovertible evidence that this letter had been duly received by the appellant and that an express admission to this effect had been shown by him. Still, as we believe, the letter would not have been admissible. Let us concede, however, for the sake of argument, that it was admissible; would it have been proper for the court to have instructed the jury, as in substance it did do, that it being shown by the evidence, or if the jury should find from the evidence, that such a letter had been received by him, that they would give this fact such weight as, in their judgment, under the last paragraph of the court's charge, that they are conclusive judges of the evidence, as was proper to do. If it would not have been proper for the court to have thus instructed the jury in a case where there was no question about the letter being received, was it proper for the court to instruct them in a case where an issue was raised that if they believed that the letter had been received they would give it such weight as they thought proper. If the court was authorized to give this charge, it was likewise authorized to have instructed the jury that, if they believed the testimony of Easter, they would convict him; that if they believed the testimony of Roy Hollingsworth as to the act of familiarity testified to by him, they might give it such weight as they thought proper. It would also have been permissible for the court to have instructed the jury on the evidence of opportunity and familiar association of appellant and Cassie Dunn as members of the same family; though the truth is they were actually and literally not excluded from giving weight to this paragraph of the court's charge complained of. Nor can the court say in this case that it was not erroneous. The court should, we think, consider that the accuracy and correctness of its charge was well excepted to before it was read to the jury and before the argument began. Appellant, through his counsel, had done everything it was possible to do to arrest and prevent the act of the court in giving this charge to the jury.

Before the present law was enacted, this court, and especially the Presiding Judge, had gone deliberately on record in holding that they would look with more favor on complaints against the charge of the court where an exception had been taken to it in advance than they would do where such objection was for the first time made in the motion for new trial. Of course, in the present law objections to the court's charge are required to be made before same is read to the jury and before the argument began. The law was complied with in this case, and, if the court's charge is erroneous, surely we are in the best possible situation to complain of it. That it was erroneous does not, to our minds, admit of doubt. That it was hurtful, we believe, can be demonstrated.

Let us put ourselves as nearly as possible in

touch with the scene of the trial in Coryell county. The nature of the case itself was such as to demand that appellant's rights under the law be safeguarded. Whether guilty or innocent, he was surrounded and so environed as, at least, to raise a strong suspicion against him. Except the evidence in respect to the actual act of intercourse, the fiercest battles of the entire case raged around the receipt of this letter. Appellant denied its receipt. He denied any acts of intercourse with the appellant. He denied any knowledge of pregnancy up to the meeting of the grand jury. The state was insisting that he was the father of the child. The state was insisting that he knew of Cassie Dunn's pregnancy, and, with knowledge of such facts, had sent her to her father's home.

This letter not only in substance advises him of the birth of the child, but in almost unequivocal language imputes its paternity to him. If admissible, and the jury believed he had received the letter, they would naturally attach great importance to this evidence. Now, in this juncture, the court tells the jury that, if he did not receive the letter, they would use it only for the purpose of determining the credibility of Cassie Dunn. Then comes the fatal charge:

"However, if said letter was received by the defendant, you will determine the weight you will give to the same under the instructions given in the last paragraph of this charge."

That meant this:

"If he did not receive the letter, gentlemen, then you will limit your consideration of it, in so far as it may aid you in determining the credibility of the witness Cassie Dunn; but, if he did get it, it is up to you to do the rest."

The charge violates the law. It was duly excepted to at the time. The inevitable effect of it was, in substance, to tell the jury that they were free to go the limit, as they did do, not only in convicting appellant, but in giving the heavy punishment assessed against him.

III.

We next desire to call the court's attention to the error of the trial court in admitting in evidence, over the objection of the appellant, copy of letter from Cassie Dunn to appellant, set out in bill of exceptions No. 15, and which appears on pages 35 and 36 of the record. There are in the record two other bills of exceptions, to wit, eleventh and twelfth, in which some general reference is made to this same letter in the way of cross-examination of appellant. The trial court seeks to justify his action in permitting inquiries concerning this letter on cross-examination upon the theory that, appellant having denied any and all knowledge of Cassie Dunn's pregnancy up to about the time the grand jury met, it was permissible to ask him touching the letter in question. In view of the length of this argument, we shall not discuss these two bills, 11 and 12. We think it may well be doubted whether, to the extent and in the manner permitted, this cross-examination was proper; but we are so thoroughly and perfectly sure that there was error in the action of the court in admitting the error itself that we shall at once proceed to a discussion of the action of the court in so admitting same.

We think it likely true that the objection made to the introduction of this letter that it was not the best evidence, but a mere copy, is not well taken. We shall not urge that objection here. Our position is that if the original letter had been presented, and it was conceded that it had been received by appellant, and if it were shown beyond controversy that it was produced from his possession, that it would not have been admissible, and this, we think, we shall be able to demonstrate. It seems to have been thought by the trial court, and such, we understand, to have been, in effect, the ground upon which the admissibility of this letter was stated, that the

trial court's action was justified on the ground and theory of a conspiracy between the appellant and Cassie Dunn.

Before getting to the particular questions here involved, let us discuss this matter a minute. In the first place, there was no conspiracy proven in the case, and no evidence at all on which to base the trial court's statement that there was any conspiracy, unless it may be found in the fact that the trial court believed appellant guilty.

The offense charged in this case was incest. Incest, in this case, meant carnal connection between Hollingsworth, the uncle, and Cassie Dunn, the niece. They were, of course, both equally guilty, and Cassie Dunn was an accomplice to the offense, if any offense was committed. It is not properly a case of conspiracy. By conspiracy, as that term is ordinarily used, is meant an unlawful agreement between two or more persons to commit an offense in respect to the person or property of some other person. It has never been applied to the relation between two persons guilty of offenses like incest or adultery. If that were true, then it would always be the rule that any statement by one of the persons charged would be admissible against the other under all circumstances. Again, the declarations of such persons under a fair view of the law cannot be justified, for the reason that, before admitting such declarations, the conspiracy would have to be shown; that is, the fact would have to be shown that they had been guilty of the very act charged. It would result, of course, that said declarations and statements of one of the parties would never be admissible unless they were guilty, and if it has been proved that they were guilty they would not be needed. Clearly, a moment's reflection must convince the court that it is not a case where the doctrine of law of conspiracy applies.

Again, if it could be said that it is a case where the law of conspiracy might apply, then it could only be on the theory and based on the view that these parties had conspired to violate the law; but here such conspiracy had terminated at least when the parties were separated and Cassie Dunn had removed to a distant county. The rule, of course, is well known that in no case is the declaration or statement of one of the co-conspirators admissible against the other after the object of the conspiracy had been completed. In this case it was alleged that appellant had been guilty of incest with his niece, Cassie Dunn, on the 29th day of January, 1914. The letter in question, if written at all, was written some time after the 29th day of October—in other words, almost a year after the date and time of the alleged offense; so that, under any view of the case, the statements of Cassie Dunn, whether written or oral, made nearly a year after the commission of the alleged offense, could not have been, and would not under any of the authorities on any theory of conspiracy be, admissible against defendant. It cannot be contended that merely because appellant denied his guilt, and because Cassie Dunn for a time refused to disclose the author of her shame, and all because, when she did disclose it, that it was a person other than appellant, that this showed a conspiracy in respect to the offense charged here. The statement of the trial court on the whole subject of the conspiracy, and the wish and purpose on the part of Cassie Dunn and appellant to resume their relation, is not only unsupported by any evidence, but is directly in the face of all the evidence. In this connection, we may say further that we understand the propriety and sometimes the necessity of trial court's making explanations of bills of exceptions with a view of exhibiting and disclosing correctly the particular circumstances under which the court acted or the conditions under which the matter arose; but we have never understood that a general

judgment or opinion of the trial court, involving practically a decision of the very matter and issue in controversy, is binding on anybody, and that is particularly true in this case, where such explanation is flagrantly and outrageously untrue.

The testimony in this case shows beyond doubt that appellant never talked to Cassie Dunn from the time she left Coryell county in the spring or summer of last year until a few days before the trial, and that then such conversation was had openly in the presence of her father and others. More than that, it is disclosed by the testimony of the state itself that neither the appellant nor his counsel, his kinpeople, or any friend had talked or conferred with Cassie Dunn about the case at all until just before the trial, and then in a perfectly open way in the presence of the witnesses for the prosecution. Commencing on the bottom of page 6 of the statement of facts, we find the following:

"Q. Mr. Calloway asked you if counsel representing your uncle and your uncle and his brothers had not been talking to you about this matter? A. No, sir, they haven't. Q. All the talk that has been had with reference to this case with you was in the presence of your father, by us? A. Yes, sir; also in the presence of several others. Sam Whitley was the first person and Uncle Alfred that I ever told who was responsible, who it was that had had intercourse with me. I told them that there at the hotel. In a short time then you (Mr. Sadler) and Mr. Cobb (another attorney for the defendant) and Mr. Whitley and Mr. Hollingsworth, my uncle, all came down to the hotel, and I told you all in the presence of my father who was responsible. Up to the time I told Sam Whitley and my uncle who was responsible, I had not talked to any of the Hollingsworth people about this case. I had not seen my uncle since I left home and went out West, till he and Sam Whitley came down to the gallery where I was at the hotel, and that is when I told them who it was."

Again, the witness Tom Dunn, father of Cassie Dunn, on redirect examination testified as follows:

"The defendant did not talk to my daughter at all from the time she went to Callahan county till he talked to her down at the hotel in the presence of Sam Whitley. The defendant, nor none of his counsel, nor no one interested in the case, has talked to Cassie outside of my hearing and presence. None of the defendant's relatives or friends or representatives had talked to Cassie before she told Sam Whitley down at the hotel that Henry Dollins was responsible and that the defendant was not guilty. They had never seen the girl since she left here last summer. I was present and heard the girl make the statement at the hotel in regard to Dollins and the defendant. She gave, as the reason she did not tell me who it was, was because she did not want to. That is the only reason she ever gave me before she came here. Cassie never was back in Coryell county from the time she left here and went out to my home until I brought her back here before the grand jury. We were subpoenaed here before the grand jury for the purpose of trying to find out who was responsible for her condition."

There is no testimony in the record that at all disputes the statements which we have above quoted. Therefore we say in respect to the matter of conspiracy obtruded in the case by the trial court, and on which some reliance seems to have been placed by the learned Presiding Judge, since it is included in his opinion, that it does not and cannot affect at all the admissibility of this letter for the reasons given below:

(a) That the law of conspiracy has no relation to and does not apply at all in this character of case.

(b) Because if it could apply, as a matter of fact, there was no proof at all of conspiracy except and unless it might be said that a conspiracy is to be implied from the nature of the charge and the evidence adduced in support of it.

(c) In any event, if there could be said to be conspiracy, it was only in respect to the offense alleged to have been committed, and that, if committed at all having been done almost a year before the letter was written, the conspir-

acy was at an end, and on this ground the declarations and statements of Cassie Dunn were not admissible.

Was the letter admissible on any other grounds? We say no. This answer and this position we shall be able to sustain, not only by the clearest and most convincing reasons, but by an overwhelming weight of authorities in this and other states. We go further, and say that there is no authority anywhere, by any court which the most diligent search has been able to disclose, to the contrary. The only theory on which it could, with any seriousness, be contended that this letter was admissible, would be on the ground that, in effect, it was an accusation by Cassie Dunn against the appellant, or an assertion to him that involved of necessity an assertion that he was the father of her child, and therefore guilty of incest.

If the affirmative of this proposition can be maintained by such an accusation or statement as made by the letter, then the particular objection we are here urging might not be good. Our position is that, whenever such accusation of guilt or statement implying and embodying of necessity a clear implication of guilt had been admitted, it has been in cases where same are made *in the presence of the defendant* charged, and where, being so made in his presence, and there was no denial, such evidence has been received as in the nature of an admission of such defendant. Such statements, it has been held, are most logically admissible as *res gestæ* of the offense. *Surber v. State*, 99 Ind. 71; *State v. McCourry*, 128 N. C. 594, 38 S. E. 883; *State v. Duncen*, 116 Mo. 288, 22 S. W. 699. And this is evidently the correct theory and the legal reason on which courts have acted and must act.

It is well settled in the authorities that if one is charged with crime, and one person or a thousand persons in his presence accuse him of the crime and he makes denial, such accusation cannot be admitted. If it were otherwise, of course, designing persons might, in sheer weight and number of such accusations, get before the jury the opinion of a mighty crowd of witnesses, under such circumstances as to destroy any defendant. On the contrary, the rule is well settled in *Rice v. State*, 49 Tex. Cr. R. 569, 94 S. W. 1024, that where a direct accusation of guilt is made to a defendant *in his presence*, and same is heard and comprehended by him and goes undenied, this act and fact may be shown as in the nature of an admission, and weight, more or less strong under the circumstances, will be ascribed to his silence as the nature of the accusation and other circumstances may warrant. Why is this? It is not the accusation of itself that counts; it is the silence of the person accused. The law rightly reasons, if such accusation is made in the presence and within the hearing of the defendant, that if he is innocent he will instinctively speak without opportunity to fabricate his defense, without opportunity to weigh his words, but, in accordance with human nature wherever man has lived, if innocent, the instinctive denial will be made. And it will be found, as we will undertake to show by the authorities hereinafter appearing, that in every case where such an accusation has been made, and where same was undenied, that it has been cases where the accusation was made in the *direct personal presence of the accused*. Any other rule would do violence to all the reasons and reasoning on which the rule itself is based. Now, in this case, if we may assume—and we shall do so for the sake of the argument—that Cassie Dunn wrote the letter in question—if we assume that same was received by appellant, it was in evidence that when written by Cassie she was in Callahan county, and when received, if received, by appellant, he was in Coryell county. The two parties were far removed in physical presence from each other.

What appellant said when he received the letter no one knows. Whether he then to himself

and to his Maker registered a denial, or whether, if any one was present, he entered a denial to him, the record does not show. Knowing the charge to be unjust, was he required to take his trusty pen in hand, to look up his lone bottle of ink and find the writing paper, to elaborately pen the letter, to secure an envelope, to borrow a stamp, to take same to the post office and send it, 100 miles away, under penalty, if refusing to do all these things, to have a hearsay declaration admitted in evidence against him. There is no reason for such a rule, and there is no authority sustaining such a rule. This identical question has been decided by this court. The case of *Robins v. State*, 9 Tex. App. 671, is in point here. In that case both Callie and Mary Robins were charged with the murder of one Hope Millenium. There the court admitted proof of the confession of Callie Robins, made on the second day after the fatal difficulty; the defendant Mary Robins *being present* and saying nothing. In discussing this matter, the court says:

"We are of opinion that the court did not err in admitting this evidence, *the defendant being present*, and the other evidence being amply sufficient to establish that the parties had acted together. The confession of Callie Robins came, we think, within the exception to the general rule that, after the common enterprise is at an end, no one is permitted, by any subsequent act or declaration of his own, to affect the others, which exception is, where the confession is made in the *presence* of the defendant, and under circumstances which would make it receivable on ground of assent or implied admission."

Another case directly in point is that of *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343. In that case St. Claire, Hansen, and Sparf were charged jointly with a murder on the high seas of one Fitzgerald. In that case, it appears that Hansen, after the killing, made certain declarations to *Green and Larsen* in the *presence of Sparf*. He also made certain statements, confessions and declarations to one *Sodergren*, *not in the presence of Sparf*. In discussing the admissibility of this declaration, the court held that, as to the declaration made in Sparf's presence and hearing, this was admissible on the grounds, as stated, that he would naturally contradict it if he did not assent to their truth. As to the other declarations, made not in the presence of Sparf, the court held them inadmissible. In discussing this matter, Judge Harlan uses this language:

"The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in *his presence* and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

"But the confession and declarations of Hansen to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Claire, Hansen, and Sparf were charged jointly with the murder of Fitzgerald. What Hansen said after the deed had been fully consummated, and not on the occasion of the killing, and in the presence only of the witness, was clearly incompetent against his codefendant, Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder, the rule is settled that 'after the conspiracy has come to an end, and whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.' *Logan v. United States*, 144 U. S. 263, 309, 12 Sup. Ct. 817, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010; *Wright's Criminal Conspiracies* (Carson's Ed.) 212, 213, 217; 1 Greenleaf, p. 233. The same rule is applicable where the evidence does not show that the killing was pursuant to a conspiracy, but yet was by the joint act of the defendants.

"The objection to the question, in answer to which the declarations of Hansen to Sodergren were given, was sufficiently specific. The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule. It has, therefore, been

often held that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered an error, if in any possible circumstances it could be deemed or could be made relevant, material, or competent. But this principle will not sustain the ruling by which the declarations of Hansen, made long after the commission of the alleged murder, and not in the presence of Sparf, were admitted as evidence against the latter. In no state of case were those declarations competent against Sparf. Its inadmissibility as to him was apparent. It appeared upon the very face of the question itself."

"This language is also of value on the question of conspiracy. We also beg to call the court's attention to the comparatively recent case of *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84. In that case the court used the following language:

"It is further insisted that, assuming the correctness of the ruling in admitting such confession, as to defendant Sanderson such confession by an accomplice was insufficient to warrant his conviction. It must be remembered that all of the admissions and statements made by Mrs. Morley, co-defendant of Sanderson, in relation to the fire and her connection and that of Sanderson therewith, were made in *Sanderson's presence*. She there stated that Sanderson applied the match, and gave a detailed account of Sanderson's connection with the fire."

This case is in keeping with the general rule that before such declarations can be admitted it must be shown that they were made in the presence of the defendant.

The rule laid down in the case of *Anthony v. State*, 44 Fla. 1, 32 South. 818, is to the same effect. In discussing the general question, the court says:

"The eighth assignment is that the court erred in permitting the witness Conroy to detail the statement of Tom Moore as to his having sent pork loins to the defendant. This assignment has reference to a statement made by Moore and *assented to by defendant* when they were before the committing magistrate. They were warned by that officer that any statement they made might be used against them. Moore made a statement in reference to six pork loins taken by him and sent to Anthony on the 20th of April, 1901, and the latter said, 'Yes, that is right.' In a colloquy between them at that time Anthony stated that he paid Moore \$5 for the lot on Monday, and they did not agree as to the payment being made on Monday, but finally both agreed that the payment was on Sunday. The contention is that the confession of Moore, being a codefendant, was inadmissible as against defendant Anthony, under the rule stated in *Anderson v. State*, 24 Fla. 139, 3 South. 884, that, when two parties have been engaged together in an offense, the confession of one, after the completion of the offense, is not allowable as evidence against the other. The record before us shows that only that part of Moore's statement that Anthony *expressly assented to* and stated to be correct was put in evidence against him, and we do not see what ground of complaint he has on this account. It was a statement not simply acquiesced in, but stated by him to be correct, and to this extent it was his own statement."

The same rule is likewise laid down in the case of *State v. Bowers*, 17 Iowa, 46, and in this case it is said:

"It was competent to prove what was said by Cowen in regard to taking the horses in the presence and hearing of defendant, to which he made no objection, although he remained silent and did not by any words or other acts assent to its correctness. The weight to be attached to such a conversation, or the presumption arising from the prisoner's silence, must depend upon the circumstances, and of all these the jury are the proper judges. In some instances this presumption would be very strong against him; in others, equally slight. As a rule, however, such testimony should be cautiously received and weighed in the same manner. It cannot be said, however, to be incompetent and inadmissible."

Many other authorities could be cited in support of our position, if time and space permitted. We assume, in view of our great confidence in the learning and ability of this court, that when the matter is called to their attention that no additional authorities on this subject will be required. In this case the objection

was timely made. It was made with sufficient fullness and clearness to arrest attention and to indicate to the court the precise grounds on which the objections were predicated. Any statement by Cassie Dunn or any other person touching appellant's connection with the offense in question after the completion of same was as to him hearsay, and this is true as to declarations and statements made by Cassie Dunn as if made by any one else.

Suppose in this case Cassie Dunn had, in the most formal manner, made a complete confession in writing under the statute, with all the safeguards and solemnities required by law, in which she had confessed her own guilt, made unequivocal statements implying the guilt of this defendant, and she or the state had mailed same to appellant, and he had put same in his pistol pocket, or in his bank book, or destroyed it, or made no reply to it; would such statements contained in such confession have been admissible against this man, not having been made in his presence, but being merely sent to him 100 miles away? We say no; and no authorities can be found contrary to our assertion, and, as we believe, no good reasons can be given supporting the contrary of our claim. If we are correct about this matter, it will need no argument to convince this court that the motion should be granted and the case reversed. Without this testimony, it is doubtful if appellant would have been convicted. With this illegal testimony in, his escape became almost an impossibility.

IV.

We have decided to say something in respect to the action of the court in overruling the motion for new trial, but we feel that we have already protracted this argument to too great a length. The whole case was tried, as the record discloses, after the manner of a poorly regulated debating society. The cross-examination of the appellant in respect to the whole case, and especially in respect to the letter of Cassie Dunn and other matters, was an outrage. The testimony against appellant in many respects is most singular. No one can read the testimony of Easter, the only witness who testified to any acts of intercourse, without being struck with the utter improbability of it all. The time of day, the scene, the place, the improbability of his being at the place at the time he said he was, the unlikelihood of his seeing him, even from his own standpoint, what he claims to have seen, and the utter impossibility of his doing so, in the light of the affidavit contained in the motion for rehearing, must, it seems to us, impress the court as being demonstrated beyond doubt.

Some regard, further, should be had, it seems to us, to the good character of this man, who, under all the evidence, for 20 years after the death of his wife, had never waited on any other woman. There was the strongest reason for Henry Dollins to undertake to fix the guilt upon the appellant. For the time being, he seems to have done so. It remains to be seen whether, in view of the patent and grievous errors above complained of, he can ultimately succeed. We respectfully urge the court to carefully and prayerfully review the case, in the light of reason and authorities, in the confident belief that when the court has done so that your honors ought to and will grant a rehearing. There are other errors of a grave nature to which we have not had time to call attention. It will be observed, further, that we have, in this argument, called attention to some authorities directly in point of which the court did not have the advantage on original submission.

Supplemental Argument in Support of Motion for Rehearing.

On the trial, the state was permitted to introduce in evidence a letter from Cassie Dunn

to appellant, written many months after the alleged commission of the offense with which appellant stands charged. There was no correspondence either before or after this letter from appellant in respect to the matter to which the letter relates; that is, in respect to that portion of same which implies a charge of guilt against him. It is clear, too, that there is not in the record any admission by appellant, either verbal or written, of the truthfulness of any statement or charge therein contained. It is also true that this letter was written some eight or nine months after the date of the commission of the alleged offense. That this letter is not admissible is clearly held, as we conceive, by all the authorities, for that the statement was made long after the commission of the alleged offense. The rule seems to be that:

"The admissions, to be competent against a co-conspirator, must have been made pending and in furtherance of the conspiracy. If made before or afterwards, they are inadmissible, unless made at the instance or with the knowledge and consent of the co-conspirator."

Again it is said:

"The admissions, to be competent, must not only be made at the time of the conspiracy or its execution, but must relate thereto." Ency. of Evidence, vol. 1, pp. 593, 594.

This matter we have discussed quite fully in our original argument, and deem it unnecessary to cite additional authorities on that question. The main question involved in the case under this assignment is whether or not a letter from an accomplice after the commission of the alleged offense, not replied to, is admissible. On this question we desire to call the attention of the court, first, to the rule laid down in the latest edition of Jones on Evidence (volume 2, § 269, p. 493), where he uses this language:

"Letters written to a party and received by him may, under some circumstances, be read in evidence against him, but before they can be received as admissions against him there must be some evidence besides mere possession showing acquiescence in their contents as proof of some act or reply or statement; and in such case there must of course be proof that the one sought to be charged has received the letter."

Again the same author, on page 494, says:

"A distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation on his part to the person addressing him or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but his failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law."

Again, the same author, on page 588 of the same volume, uses this language (after having discussed the admissibility of silence under accusations of guilt):

"With respect to written communication, however, the rule is different, because the failure of one receiving the letter to answer it may be attributed to many causes besides an acquiescence in the truth of what is written, and such a rule would furnish a dangerous weapon in the hands of an unscrupulous party to make evidence in his favor against a careless opponent. It cannot be said, however, to be an unvarying rule that an unanswered letter may not be evidence against the person addressed, because there are cases in which such letters have been admitted. The better supported rule probably is that on the reasonable grounds above stated unanswered letters are ordinarily no evidence against the person addressed as admissions of the truth of statements contained therein. The true rule to be gathered from the cases is that unanswered statements in letters are seldom to be regarded as ad-

missions by the persons addressed, but that exceptional circumstances may justify the court in submitting them to the jury with the proper caution."

The rule as stated in Cyc. (volume 16, p. 690) is as follows:

"The general rule is that omission to answer a written communication is not evidence of the truth of the facts therein stated, and that under ordinary circumstances a party is not required to reply to a letter containing false statements of fact. There are circumstances under which unanswered letters are competent evidence of admissions by acquiescence in the statements therein contained, as when the party receiving a letter has in any way invited the same, or when there is any ground to infer that he has acted on the letter by partly answering it, or otherwise recognizing it, or when with such letters goods or other articles are forwarded with bills, and these are received without return or protest, or where money is sent upon terms and conditions stated in the letters, and is not returned, and there is no objection to or denial of the statements contained in the enclosing writing."

The rule on this subject is thus cited by Mr. Wharton, in his valuable work on Criminal Evidence (volume 2, § 682):

"The fact that an unanswered letter or other paper is found in the possession of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him. Were it admitted, an innocent man might, by the artifices of others, be charged with a prima facie case of guilt which he might find it difficult to repel. It is otherwise, however, when the party addressed in any way invited the sending to him of the letter, or when there is ground to infer he acted on the letter. Where such tacit recognition is claimed, the whole conversation or correspondence which constitute a recognition must be given."

This general question is also discussed by Mr. Wigmore, in his work on Evidence, in section 1073, where very many of the authorities to which we will call attention are cited. This section is so lengthy that we deem it inadvisable to insert it here. It will be noted that Mr. Wigmore probably in his text goes further than any other author towards sustaining unanswered letters. His references to some of the English authorities would, if not carefully analyzed, rather tend to oppose the position which we are seeking to maintain. We think the authorities cited above and the reasons on which they rest must and will support the proposition, to which the numerous authorities hereafter noted relate, that in a *criminal case* letters unanswered containing statements of criminative facts are not to be received under any circumstances, unless possibly where, in prosecution for treason or matters of that sort, it becomes important, in respect to letters written at the time the events were moving, to show his knowledge of the action and conduct of others. Ordinarily, unanswered letters are not admissible even in civil cases, and, as the authorities note, the exception to this rule in civil cases is where, for instance, it is sought to prove demand, where such demand is necessary, letters, though unanswered, may be given in evidence. Another exception is where the character of one's possession is in issue, and he is holding adversely, it has been permitted to make proof of a demand by a letter, though unanswered. Another exception is that, where the letter so received has been acted upon, and again where the person receiving the letter has replied to certain portions of it, and his replying letter contains no denial of the other matters with which he is sought to be charged. Under some circumstances such letter is admissible. Or when goods have been sent with a letter, and received and appropriated, the letter, though unanswered, has been admitted; and the same is true where there has been a remittance of money, and, as in the Horne-Took Case in England, where he was charged with treason, it was held that, though unreplyed to, letters found in his possession, covering the dates of the treason alleged, were admissible. Such also seems to be the ruling

in *De Beringer's Trial*, which was also for treason. These are the only criminal cases which we have found which in any way oppose the doctrine for which we contend, and we think are easily distinguishable from the case at bar. It may be that the case of *Commonwealth v. Waterman*, 122 Mass. 43, is in a general way opposed to our view. The statement of facts in that case is very lengthy, but the opinion is a general abstract one, and does not refer to the many other Massachusetts cases which thoroughly support our position.

We propose now to consider some of the cases which sustain our position. Among these is the case of *People v. Colburn*, 105 Cal. 648, 38 Pac. 1105. In that case Colburn was charged with robbery. There was introduced against him a letter from a friend which contained quite damaging evidence against him. The letter is set out in the opinion. In discussing the letter the Supreme Court of California say:

"That the letter contained damaging evidence against the defendant is quite apparent. It does not in direct terms state his guilt, but the fact that the writer regarded defendant and A. [Alic Knox] as being guilty is plainly inferable from his solicitude and caution to them to avoid discovery of their whereabouts. All this was well calculated to impress a jury with the belief that defendant was guilty. This letter was clearly hearsay. Were such evidence admissible against a defendant charged with crime, there would be no limit to the power of designing persons to manufacture testimony against their neighbors. It will not do to say that Moore was a friend of the defendant, and hence that the evidence was admissible. It would be quite easy for an enemy, under the guise of friendship, to indict the most damaging epistles to a victim whose destruction he was seeking to encompass. The question of friendship or enmity does not properly constitute a factor in the problem. The letter was a statement of a third party, in no wise connected with defendant, was not made under the sanction of an oath, and not admissible. The possession of unanswered letters is not such evidence of acquiescence in their contents as to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it. *Rap. Cr. Law*, § 283; *Whart. Cr. Ev.* § 682; *People v. Green*, 1 Parker, Cr. R. [N. Y.] 11; *Com. v. Edgerly*, 10 Allen [Mass.] 184; *Smith v. Shoemaker*, 17 Wall. 630 [21 L. Ed. 717]. There are exceptions to the rule, as, for instance, where it is shown that the defendant has acted upon the information contained in the letter; or where he has answered it, in which case so much of the letter as is explanatory of his answer is admissible; or where the party receiving the letter has by his acts or conduct invited the sending of it to him. There was no sufficient showing to render the letter admissible under any of these exceptions."

This case, we think, very clearly states the rule. It also clearly states the exceptions to the rule in criminal cases, and they are as follows: (a) Where it is shown that the defendant has acted upon information contained in the letter; or (b) where he had answered it, in which case it is stated so much of the letter as is explanatory of his answer is admissible, or where the party receiving the letter has by his acts or conduct invited the sending of it to him. On this last exception we ask the court to note particularly the case of *Packer v. U. S.*, 106 Fed. 906, 46 C. C. A. 35, as to what is meant by the phrase "inviting the sending of the letter to him."

The next case to which we desire to call attention is the case just noted of *Packer v. U. S.*, supra. That case was decided by Judge Wallace, Circuit Judge, in New York. It is, in our judgment, one of the best opinions in the books on this question. We quote practically all that is said by the court in that case:

"The introduction in evidence of the Moody letter was prejudicial to the accused, and we can discover no ground on which the ruling receiving it can be upheld. It was written and sent after the offenses charged in the indictment had been committed. The correspondence between Moody and the accused while the transactions evidencing the scheme to defraud were taking place was competent, because the letters were verbal acts consti-

tuting a part of the res geste. It was also competent because the letters from the accused were admissions of facts contained in them, and a response to the letters of Moody, and the latter were necessary to a correct understanding of the scope and effect of the admissions. It is urged that the last Moody letter was competent because it was a reply to a letter from the accused soliciting further remittances from Moody. The contention is fallacious unless it can be maintained as a correct legal proposition that a request admits in advance the statements made in response. This would be a very dangerous doctrine, and finds no color of support in the law of evidence. If only that part of the reply refusing to make further remittances had been read, no harm would have been done; but, as has been stated, the letter was, in substance, a narrative of past events, of which there was no other evidence, and an argument to demonstrate that the accused had been guilty of a scheme to defraud Moody. It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements; it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements; but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter.

"In *Com. v. Eastman*, 1 Cush. [Mass.] 215 [48 Am. Dec. 596], the court said: 'The letters, however, if properly identified, would not, of themselves, authorize any inference against the defendants. They were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants by some reply or statement, or by some act done in pursuance to their suggestion, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received, but never answered or acted upon. So far as these letters might be shown by other proof to have been acted upon or sanctioned by the defendants, so far they would be competent evidence.'

"In *People v. Green*, 1 Parker, Cr. R. [N. Y.] 17, the court said: 'The maxim, "Qui tacet consentire videtur," has also been applied between the parties to certain mercantile dealings; as where an account current was sent to the party by letter, and no objection made to it within a given time, established by convenience or by commercial usage. But it could not, in principle, be applicable to facts stated in a letter which the party was not bound or interested to answer. It would be placing a man entirely at the mercy of another, if he was bound by what others chose to assert in addressing letters to him. In no case could his silence be considered an admission of such facts.'

"It could not be applicable to any case where the letter only tends to support a charge of guilt, and where it has been followed by no action, and no response on the part of the person receiving the letter. The same principle has been repeatedly applied in civil actions. *Fairlie v. Denton*, 3 Car. & P. 103; *Gaskill v. Skene*, 14 Q. B. 664; *Learned v. Tillotson*, 97 N. Y. 1 [49 Am. Rep. 508]; *Bank v. Delafield*, 126 N. Y. 418, 27 N. E. 797; *Gray v. Ice Cream Co.*, 162 N. Y. 397, 56 N. E. 903, 49 L. R. A. 580 [76 Am. St. Rep. 327]."

It will be noted that in that case the admissibility of a letter was sought to be sustained on the ground that it was a reply to a letter from the accused soliciting further remittances from Moody. Answering this contention, the court say:

"The contention is fallacious unless it can be maintained as a correct legal proposition that a request admits in advance the statements made in response. This would be a very dangerous doctrine, and finds no color of support in the law of evidence. If only that part of the reply refusing to make further remittances had been read, no harm would have been done; but, as has been stated, the letter was, in substance, a narrative of past events, of which there was no other evidence, and an argument to demonstrate that the accused had been guilty of a scheme to defraud Moody."

Our recollection is that there were no letters from appellant to Cassie Dunn read in evidence on the trial. There was, as we recall, probably another letter of hers to appellant introduced in evidence, and there was, as we remember, a letter or two from her father to appellant. There was proof, as we remember, that appel-

lant and Cassie Dunn had conducted a friendly correspondence after she left appellant's place; but there is, we are pretty sure, nothing in the evidence to at all indicate that this letter was in reply to anything written by appellant, and especially nothing in anything that appellant had written that had any relation to the grave charge contained in the Cassie Dunn letter.

Another valuable case is that of *Commonwealth v. Eastman*, 1 Cush. (Mass.) 159, 48 Am. Dec. 596. So much of the opinion as relates to the matter here discussed will be found in 1 Cush. 215, 48 Am. Dec. on page 599, as follows:

"The letters, however, if properly identified, would not of themselves authorize any inference against the defendants. They were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence, in the latter case, may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received, but never answered or acted upon. So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants, so far they would have been competent evidence."

We desire to call special attention to the case of *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963. This authority is valuable for the reason that, among others, the letter offered in evidence purported to be in response to a letter from the wife against whom it was sought to be used. We make the following liberal quotation from that opinion, which is practically all the court says on the question here involved:

"It is next insisted that the court erred in excluding from the jury a certain letter alleged to have been found by appellant in his wife's trunk, and containing a proposition to meet her in St. Louis for improper and adulterous purposes. It was shown that, while the letter was addressed to 'Gertie,' the familiar name of the wife, on the inside, it was addressed to 'Mrs. Bosburg, Box 99,' on the envelope containing it. It is shown, also, that a considerable package of letters was thus found, some entirely innocent, and others more or less incriminating. It is insisted that the letter excluded was one of a series, and in answer to one written by the complainant, and, having been found in the possession of the complainant, was therefore competent evidence. To this it must be said there is in this record no evidence that it was one of a series, or that it was in answer to one written by complainant, other than that contained in the letter itself. This letter, if addressed to the wife and found in her possession, would not be evidence against her unless the contents had been adopted or sanctioned by some reply or statement or act done on her part, shown by proof allunde the letter itself. While the possession of letters of this character is wholly inconsistent with the duties and obligations of a wife, it cannot be said that her silence, and retention of the letters, necessarily implies assent to their contents. Where verbal communications are made, silence may authorize an inference of assent; but the same rule does not ordinarily apply to letters received, but never answered or in any way acted upon. 2 Whart. Ev. § 1154; *Com. v. Eastman*, 1 Cush. 215 [48 Am. Dec. 596]; *Smith v. Shoemaker*, 17 Wall. 630 [21 L. Ed. 717]. The recital in the letter that it was an answer to one received by the writer cannot be admitted for the purpose of establishing that fact. We should, in that case, have the anomaly of a letter, inadmissible in evidence, proving that it was written in reply to one from the complainant, and the fact thus proved rendering the letter admissible. Nor is there any pretense in the record that the letter was ever acted upon or an attempt made to meet the writer."

We desire to call further attention to the case of *Commonwealth v. Edgerly*, 10 Allen, 184, which we think should be of value. The opinion in that case is by Chief Justice Bigelow of the Supreme Judicial Court of Massachusetts. While the facts in that case are somewhat different from the facts here, the following clear statement of the law ought to receive acceptance:

"An unanswered letter is inadmissible, although the statements contained in it are well known to the party to whom it was sent; and this is held on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated in the letter."

Another clear statement of the rule is found in the case of *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508. The court there, among other things, say:

"From an examination of the cases, we think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law."

This case has been approved in express terms in the more recent cases of *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385, and particularly in *Gray v. Ice Cream Co.*, 162 N. Y. 397, 56 N. E. 903, 49 L. R. A. 580, 76 Am. St. Rep. 327. We have examined all the cases cited by Mr. Wigmore, in *Jones on Evidence*, in *Wharton on Evidence*, and in the *Encyclopedia of Evidence*, and such other authorities as a fairly industrious search have developed, without finding anything to contravene the position which we have herein sought to maintain. We have cited the court to the accessible authorities, including those tending to establish the negative of our position, as well as those sustaining it. It will be noticed by an examination of Mr. Wharton's work on *Criminal Evidence* that the exceptions noted under note 3 are all English cases, and that the English authorities cited are opposed to the rule laid down in *Commonwealth v. Eastman*. We also call attention to section 695 of Mr. Wharton, where he discusses this exception and says:

"But it should be remembered that, before the admissions of the agent can be proved, the fact of agency should first be established by other evidence. And it has been questioned whether the admissions of an agent, not a co-conspirator, unless a part of the *res gestæ*, can be put in evidence, if the agent himself could be called to substantiate the facts admitted."

Now, applying these authorities to the question here before us. The court, of course, will remember that appellant stood charged with a serious crime, in respect to which he had interposed his plea of not guilty, and to meet which he was interposing his strongest denial. It will further be remembered that Cassie Dunn, whose letter was received in evidence, herself denied substantially every criminative fact in the case. It will also be remembered by the court that, in a motion for new trial, there was produced a sworn statement from Cassie Dunn to the effect, in substance, that this particular letter was written by her in fear, under duress, and by the compulsion of her father. It will also be remembered that this letter was written in a distant county by Cassie Dunn, many months after the commission of the alleged offense. If the parties could be treated as co-conspirators, the conspiracy was accomplished, and Cassie Dunn stood in relation to the appellant like any other witness. Clearly the letter was hearsay, and it is inconceivable to us on what theory, being a mere hearsay, unsworn statement, it could be admitted. We conceded in our original argument, as we here concede, that the state made out at least a *prima facie* case that the

letter had been received by appellant. We think the court below and this court would, under the evidence, be justified in assuming that the proof was sufficient to raise an issue and question that the letter had been received by him. True, he denies its receipt; but that was a question for the jury. It is not contended by any one that appellant acted on this letter; on the contrary, the proof is, as we believe, conclusive that he did not act on it. It is not contended by any one that appellant at any time, expressly or impliedly, admitted the truth of the criminative facts contained in such letter; on the contrary, the evidence is absolutely conclusive that with his latest breath he strenuously denied such facts. It is not contended that he made any reply to this letter, and its admissibility is not brought within the rule that, replying to a portion of it and omitting to reply to the criminative part, he could in any sense be held to have admitted the charges therein made. Its admission cannot be justified on the ground that it was part of the *res gestæ*, nor can its admission be justified because it was the act of a co-conspirator, because, if there had ever been a conspiracy, it had long since been accomplished, and the crime, if there was a crime, wholly executed. Its admissibility cannot be justified upon the ground, as in the *Horne-Took Case* and others, that it was pertinent as showing knowledge, as might be true, perhaps, in cases of treason. It cannot be admitted on the ground that goods or anything of value was sent with it and received and appropriated, because no such claim is made or can be made in this case. It is not admissible on the ground that it contained a receipt for money which was appropriated by appellant, because no money was sent and none received. Indeed, there is no exception to the rule noted by some of the authors upon which the testimony could be received. It was an unsworn, pure, bald, hearsay statement by an unsworn witness.

We further contend, may it please the court, that the fact that this statement was made by Cassie Dunn does not make it any more admissible than if it had been made by her father or by the rankest stranger. If some stranger residing in Callahan county had written appellant a letter, in substance charging him with the commission of the offense for which he is here sought to be convicted, and appellant, conscious of his innocence, had thrown it in the waste basket, what lawyer or judge would have contended that such letter was admissible? Does the fact that such a letter was written by Cassie Dunn add to its admissibility? We cannot think so. In fact, as it seems to us, based on all the authorities, and based on reasons that admit of no denial, the letter was inadmissible and should have been rejected. Of course, if it was not admissible as against the objection, not only timely made, but made with sufficient clearness and definiteness, it must result in a reversal of the case. This question has never been passed on, so far as we have discovered, and as far as we believe, in this state. Our position is maintained by all the authorities. This court ought not to lend the great weight which will naturally attach to its approval of a doctrine contrary to all law, against all precedent and reason, and which might, as in this case it did, result in the conviction of an innocent man.

Sadler & Cobb, of Gatesville, D. W. Odell, of Ft. Worth, and Ramsey, Black & Ramsey, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted for incest with his niece, Cassie Dunn, the daughter of his sister, was found guilty, and assessed the highest punishment.

The state introduced said Cassie Dunn as

its first witness. She testified on direct examination to her relationship to appellant as alleged in the indictment; that she was 20 years old June 18, 1914; that for the four or five years preceding this trial, which occurred in February, 1915, she had been living with and making her home with appellant; that when she first went to living with him his family consisted of himself and two sons, then nearly grown; that about two years after she went to live with appellant, her sister Fannie, two years younger than she, also arrived there, and thereafter made her home also with her uncle; that both appellant's said sons married, one more than a year before this offense is alleged to have been committed, and the other some time before that, and that both of them thereafter ceased to live with their father, but had their own homes, and lived at their own homes in the same community; that when these two sons of appellant thus married and removed from appellant's, and established their own homes, she, appellant, and Fannie constituted the family; that after Fannie arrived at appellant's and made that her home, she (Cassie) did the housekeeping, cooking, washing, and milking, and that when Fannie was there Fannie assisted her in the discharge of these duties; that she and Fannie had five other uncles living in the same community of appellant, appellant's brothers, whom Fannie visited from the time of her arrival at appellant's until after this offense was committed; that she would sometimes go and stay a week or two at a time, though not very often; but she would go and stay with them whenever she wanted to; "when Fannie would go away, that would leave Uncle Alfred (appellant) and myself alone; when Fannie was gone I did the milking and cooking. I kept house, and made up the beds," etc.; that when Fannie was there she assisted Cassie in these duties; that during all that time she (Cassie) had no sweethearts or beaux, and kept company with none such; that she occasionally went to parties, gatherings, singings, and things of that kind, but not often; that she went more before appellant's two sons were married, they taking her; that whenever she went, either appellant or one of the sons would carry her; that appellant carried her to church, but did not carry her to parties, and occasionally took her to town; that she left appellant's, who lived in Coryell county, near Turnersville, and went to her father's home, who is shown to have lived in Clyde, in Callahan county, on June 18, 1914; that "Uncle Alfred [appellant] treated me just like he would one of his own children all the time I lived there; he treated me right, just like he would his own girl; anything I wanted I got it, dresses or anything else; * * * I love every one of my uncles; yes, I expect I love Uncle Alfred better than any of the balance of my uncles; I have loved him all the time;

* * * I was pregnant when I went home in June, 1914; I had been home about a month before my people found out that I was pregnant; Dr. Bailey is the man that told them about my being pregnant; I was sick, and we called in Dr. Bailey to wait on me, and he told them what was the matter with me; I have a child now; it was born the 29th of October."

The above is substantially and fully everything this girl testified on her said direct examination. It will be seen therefrom that unquestionably her testimony was favorable to the state and in no way unfavorable thereto; that it showed practically that appellant had the opportunity, and he alone had the opportunity, to have had sexual intercourse with this girl; that some one did, about the latter part of January, 1914, is unquestionably established, not only by her testimony, but by all the other testimony in the case. Immediately upon her being turned over to the appellant for cross-examination, he had her, the very first thing, to testify as follows:

"Henry Dollins is the father of my child. My uncle never did have any illicit intercourse with me in any way; never did ask me to; never asked me to yield to him in any way. During the entire time that I lived with my uncle he never did undertake or try to get me to do anything that was wrong. I have just told you that Henry Dollins was the first person that ever had intercourse with me. The first time Henry ever had intercourse with me was at Hazel Ford's. Hazel Ford lived about a mile from where my Uncle Alfred lived. I recall the fact that Hazel Ford and his wife went to Meridian in January, 1914."

In view of several questions raised by appellant's bills of exceptions, we deem it proper to here state what the trial judge said, and sometimes repeatedly said, in explanation and qualification of appellant's said several bills. In one he said:

"It is further apparent from the whole testimony that a conspiracy existed between the defendant and the prosecuting witness [Cassie Dunn] not only to commit the crime of incest, but to go further and suppress knowledge that the child that was to be and in fact was later born was the fruits of the crime of incest, and the conspiracy extended even further on the part of the prosecutrix and defendant, and looked to a resumption of their unlawful relations with each other as soon as the birth of the child had been accomplished and the public had been quieted, and the relatives of the prosecutrix and defendant satisfied regarding the defendant's connection with prosecutrix. It is evident, also, that the conspiracy extended and contemplated that both prosecutrix and defendant would deny that the defendant was the father of the child in question and commit perjury with regard thereto, if necessary, in order to keep secret the fact that said child was the offspring of incestuous intercourse, and in order to carry out their design that such intercourse might be resumed by them. * * *"

In another he said:

"The witness [Cassie Dunn], though used by the state, had sworn on the trial that the defendant was not the father of her child, and showed to be very friendly toward the defendant, and willing to swear anything that she could that would be in his favor."

In another he said:

"The witness was extremely unfriendly to the state, and sometimes sullen, and openly testified to anything that she thought would be beneficial to the defendant."

In another he said:

"The prosecutrix testified adversely and injuriously to the state on the trial of this case. In fact, she was friendly to the defendant, and in his hands 'like clay in the potter's hands.'"

Bob Hollingsworth, a cousin of appellant, testified that in April or May, 1912, one morning between daylight and sun-up, he went to appellant's house to see him on some business, and as he walked up to the yard gate he looked into the house and saw Cassie Dunn sitting in appellant's lap; that at the time neither Cassie nor appellant saw him, but before he could call a dog barked, which attracted their attention; that they then both looked and saw him, and Cassie at once got up out of his lap and sat in a chair beside him.

Oscar Easter, for the state, testified that in the spring of 1914 he went, late in the evening, from Neel Dollins' to Tom Dollins' to get some clean clothes, they both living in the same neighborhood of appellant; that appellant lived somewhat between the said two Dollins, and on this occasion he went by appellant's to see him; that in approaching appellant's lot he saw appellant therein feeding or preparing to feed his stock, and that said Cassie went out there at that time to milk; that she at once went into the seed house. Appellant immediately followed her, and while she was therein he went into the seed house; that he (the witness) then approached the seed house in such a position and close enough that he could see both the parties therein; that he then saw appellant and said Cassie having sexual intercourse.

Appellant testified, and both he and said Cassie denied that they had ever at any time or place had sexual intercourse.

Appellant made a motion for a continuance on account of the absence of his mother and his two married daughters, Mrs. Whitley and Mrs. Ford; his two daughters living near to and in his immediate vicinity. The state vigorously contested this motion. The bill and record shows that he was indicted January 19, 1915, arrested on the 22d, made bond the same day, and that day had subpoenas issued for said witnesses, which were executed, returnable January 25th, at which latter time the case was set for trial. It appears that for some reason the case was reset from the 25th to the 27th of January, at which latter date Mrs. Ford was in attendance, but the other two were not; that the trial of the case was again postponed, for some reason undisclosed, until February 3d; on that date it seems neither of these witnesses attended. The case was again postponed till February 5th, at which time neither of the witnesses were present, though they had been notified by 'phone on the 3d to appear on the 5th.

Appellant claimed that each of them was too unwell to attend the court.

The court, in allowing and approving the bill, fully explained and qualified it, which was accepted by appellant, and he is bound thereby. In this explanation and qualification the trial judge showed that appellant's mother was an old woman, 86 years old, and was unable to walk without help; that she was both aged and infirm, of which appellant had absolute knowledge all the time, and her absence was no ground for continuance; that he could and should have taken her depositions—citing article 818, C. C. P. 1911. We think there can be no doubt but that the court correctly overruled the application as to this witness. *Kirkpatrick v. State*, 57 Tex. Cr. R. 17, 121 S. W. 511; *Gregory v. State*, 39 S. W. 572; *Brittain v. State*, 40 S. W. 297. The trial judge, in further explanation of the bill, clearly shows that what was expected to be testified by these witnesses was amply proved on the trial by other witnesses, and was of matters which were not contested, but conceded by the state. The bill and qualification of the judge are quite lengthy. We deem it unnecessary to copy either. We have carefully read them, and the bill as qualified by the court clearly shows that no error was committed in overruling appellant's motion.

By appellant's bill No. 2 he complains that the state was permitted, on redirect examination of Cassie Dunn to have her testify that she had a conversation with Dr. Bailey about writing to the child's father for money; his objections being that it was out of his hearing and presence, was hearsay, immaterial, and irrelevant, he could not be bound thereby, and it would tend to prejudice him before the jury. By his bill No. 7 he complains that, while Dr. Bailey was testifying for the state, he testified that when he first examined Cassie Dunn and told her she was pregnant that he told her a place where she could go and stay till the baby was born, and if the man who was responsible for her condition was able to pay for it she could go there and stay until the baby was born, and they could have some one to adopt the baby, and she could return to her home, and that nobody would ever know anything about it; that it would take a good deal of money to do that, and that Cassie said she could get plenty of money. Appellant objected to this testimony for the same reasons as to that of Cassie in bill 2. The court explained each of these bills, and shows that in effect this testimony of Cassie Dunn was brought out on his cross-examination of her and with reference to the writing of a \$300 letter introduced in evidence. Besides, as to bill No. 7, the court further states that appellant did not object to Dr. Bailey stating the whole conversation he had with Cassie in explanation of his attitude, and that he understood it was agreeable with appellant's attorney for the doctor to make said

full statement, and that the objection he made was not to its admissibility, but went rather to the weight of the testimony. As explained by the judge, neither of these bills shows any error.

Appellant has several bills of exceptions as to what the state proved was testified to by Cassie Dunn before the grand jury, and the admission in evidence of her written sworn statement made before it, and of her other testimony and conduct before the grand jury. Said written statement is as follows:

"Jan. 11, 1915.

"Miss Cassie Dunn, being duly sworn, testified: For about the past four years I have lived with Uncle Alfred Hollingsworth, near Turnersville, in Coryell county. When I went there to live, his family consisted of himself, his two boys, Roy and Joe; and Grandmother H. lived there about half of the time. Roy and Joe both married about October, 1912, and moved to themselves. Me and Fanny lived there all the time. My brother William lived the most of his time with the other kinsfolk. I did the cooking, the milking, and the general housework, and Fanny helped me. My baby was born October 29th, 1914. I never had any intercourse with but one man in my life. The first time I ever had intercourse with this man was when I was about 19 years old. I had intercourse several times. I never had any sweethearts. I told Uncle Alfred not to tell who it was. He knows who it is, and he is the only one I ever told who it was, and he will not tell. I won't tell who it was. Fanny wrote the letter you have shown me, dated November 22, 1914. She wrote it for Uncle Alfred. Somebody else wrote the one to father, but Uncle Alfred signed it. That is his handwriting. I received that letter through the mails. I wrote the letter you have read me, dated November 24th, to my uncle. I knew I was doing wrong. I would not have yielded my virtue to any man that did not have my respect and confidence. I had intercourse with the man in different places, both night and day. Uncle Alfred knew when I left to go out West that I was pregnant, and I promised him not to tell it. He knows who it is. The things I said in that letter are true.

Cassie Dunn."

We will discuss the questions raised by these bills without taking them up separately. We have given above the substance in full of Cassie Dunn's testimony on direct examination when first introduced by the state. A careful and thorough consideration of these bills, as qualified by the court, and unquestionably sustained by the record, shows that the state, in no instance and at no time, attacked or attempted to attack the said testimony given on direct examination of said Cassie Dunn. Her said testimony as stated above, tended, we think with considerable force, circumstantially, to show appellant's guilt. There is no indication by her testimony on direct examination which shows or tends to show that she failed to remember, or refused to testify, or failed to make the state's case. On the contrary, it was shown by her testimony on cross-examination, at various times and in its various phases, that her testimony tended to show, and if believed would have shown, appellant's innocence of the crime with which he is charged. Under such circumstances there can be no question, both by the statute itself (C. C. P., art. 815)

and a long and uniform line of decisions, that the state could impeach and attack her as to such testimony so given by her on cross-examination. The fact, if so, that the state's counsel knew or had information that this witness on cross-examination might give testimony materially injurious to the state's case would not and could not preclude the state from introducing her as its witness to prove as it did material facts against appellant by her. As to these material facts only, the state had her to testify as stated above. The state never at any time sought to impeach her, or attack her testimony drawn out by its direct examination; but it was only that which was given by her at appellant's instance on cross-examination.

Appellant seeks to apply that well-established rule that it is error for the state to impeach its own witness, where such witness merely fails to remember, or refuses to testify, or fails to make out the state's case; that a mere failure to make proof is no ground for impeaching such witness. Mr. Branch in his Criminal Law (section 866), lays down the above rule and cites many decisions of this court to that effect. Appellant cites only some of these cases cited by Mr. Branch. In other words, Mr. Branch cites a larger number of cases establishing this rule than does appellant herein, but they are all on the same line. The true rule applicable in this case is prescribed by our statute. It is (C. C. P. art. 815):

"The rule that a party, introducing a witness, shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness."

That is the rule, and the only rule, applicable in this case, and was followed by the trial judge.

Appellant has several other bills, one of which was expressly refused by the court; others so modified by the judge's qualification as to practically refuse them; and, as so modified and qualified by the judge, none of them present error. It is unnecessary to state them.

Appellant most vigorously attacked the testimony of said Oscar Easter as false, recently fabricated, and corruptly induced by Henry Dollins and his brothers. Under the circumstances the court committed no error in permitting the two brothers of Henry Dollins, whom Cassie Dunn said was the father of her child, to testify to facts which circumstantially corroborated said Easter, over his objections that their testimony was immaterial and irrelevant. *McGrath v. State*, 35 Tex. Cr. R. 422, 34 S. W. 127, 941; *Wade v. State*, 37 Tex. Cr. R. 401, 35 S. W. 663; *Hamblin v. State*, 41 Tex. Cr. R. 139, 50 S. W. 1019, 51 S. W. 1111; *Ball v. State*, 44 Tex. Cr. R. 185, 69 S. W. 512; *Lamb v. State*, 55 Tex. Cr. R. 325, 116 S. W. 588, and other cases collated in Branch's Crim. Law, § 46.

There is no question but that the other bills, as explained and qualified by the trial judge, show such a state of facts as that Cassie Dunn wrote to appellant a certain letter asking for \$300. In fact, appellant acknowledged receipt of that letter, but claimed to have lost it. That it was written by Cassie Dunn to him, received by him, and lost or destroyed, was clearly established; so that, not only did the state have the right to cross-examine him about it, but to introduce secondary evidence of its contents, and none of appellant's bills on that subject, as qualified, show any error.

Other bills, as qualified by the judge, clearly show that Cassie Dunn, soon after the birth of her child, wrote and had mailed to appellant a letter, a copy of which is as follows:

"I don't want to tell you a lie, and I will not if the truth kills me. You know what you thought was the matter with me. It was so. It came the 29th of last month. It is a boy, and all right. Has the bright eyes. I intend to bring it to Ft. Worth to one of the rescue homes. You know it was nobody else but you, but I will die before I will tell it. I have told Pa a story. Never told you any stories. You may think I am not as good as I was. I know I am to blame for it. So you see what I wanted with the money. It was for Bailey. He charged me \$15, so you see that would be enough for me to go to Ft. Worth. I can't help what Pa wrote down there. He has done everything he can to get me to tell him. I'll die first. I told you I would not tell, and I have not yet. Do as you like; cast me off if you want to, but I'll never tell it. I spent my money for fruit, and the rest for the boy, some clothes for the boy, and that is why I wanted you to come to meet me. I wanted you to see him. Don't let Fanny read this."

On the back of this page is the following: "A. M. Hollingsworth. Fanny don't you open this. Uncle Alfred, you open it yourself."

He denied the receipt of this letter, but the state established such a state of facts as would justify the trial judge and the jury to believe that he did receive the letter, and his denial of the receipt thereof was false. Cassie Dunn's father, without her knowledge, took a copy of the letter to appellant and the address thereon, and he and Dr. Bailey at the time examined and compared the original with the copy he retained. If the letter was received by appellant, which he denied, he had lost or destroyed it, and failed to produce it on this trial. Under the circumstances, the copy of the letter and asking the various witnesses thereabout was clearly admissible.

On the theory that he had demonstrated to the jury that said Easter's testimony was false, and that where he placed himself he could not have seen the act of incestuous intercourse between appellant and Cassie Dunn, he asked a charge on circumstantial evidence, which the court refused. We think it would have been improper for the court to have given a charge on any such assumption. We have studied the record and statement of facts in connection with this matter, and

we think the lower court would not have been justified in taking that question from the jury by giving such charge. Whether his testimony, or whether the testimony of the witnesses from their standpoint, testifying that he could not have seen what he testified he did see, was correct or incorrect, was a question for the jury.

Among other things the court charged the jury as follows:

"You are further instructed that if you find from the evidence that the witness Cassie Dunn, in her testimony before the grand jury, stated facts relating to the defendant's connection with the alleged crime of incest differently from the way she testified on the stand in the trial of this case, then you can only consider her testimony before the grand jury for the purpose of enabling you, if it does enable you to do so, in passing upon the credibility of the witness Cassie Dunn, and of determining the weight you will give to her testimony. Her testimony, as she gave it upon the stand in this case, must be regarded as her evidence in your deliberations. Her statements made to the grand jury, if any different to what she testified, cannot be considered as evidence of the defendant's guilt, but only for the purpose aforesaid of aiding you in determining the credibility of the said witness, if it does aid you in that regard.

"You are further instructed that, if you do not believe from the evidence beyond a reasonable doubt that the defendant received the letter, a copy of which has been exhibited in evidence before you, you will not consider the same for any purpose, except that of aiding you, if it does aid you, in determining the credibility of the witness Cassie Dunn, but you may consider it for that purpose only. However, if said letter was received by the defendant, you will determine the weight you will give to the same under the instructions given you in the last paragraph of this charge."

We think appellant's criticism of the last three lines of the second paragraph, claiming that it was on the weight of the evidence, is untenable. Taking the charge as a whole, it was proper for the court to charge as he did under the evidence. If the jury had not believed beyond a reasonable doubt that appellant received that letter—there was ample evidence for them to conclude he had, but as he denied it the question had to be submitted to the jury for a finding—then it was necessary for the court to tell them that they could not consider it at all; but, on the contrary, that if they believed he did receive it, then they could consider it only on the question of the credibility of Cassie Dunn, and, under the circumstances, adding the latter clause to it, and qualifying it with the first paragraph just above quoted, cannot be construed to be on the weight of the testimony, but it was merely submitting the question to the jury. It is embraced within the rule about a confession which is denied by an accused. Besides, the court not only required the jury to believe affirmatively all the facts essential to convict appellant, otherwise to acquit him, but told them he was presumed to be innocent until his guilt was established by legal evidence beyond a reasonable doubt, and in case they had such doubt to acquit him, and

also that they were the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to their testimony.

Appellant has two bills of exceptions complaining of the argument of the district attorney. As qualified by the judge, it is shown that the argument objected to was provoked, and in answer to that of appellant's attorney, and neither presents error. *Sinclair v. State*, 35 Tex. Cr. R. 132, 32 S. W. 531; *Baker v. State*, 4 Tex. App. 229; *Chalk v. State*, 35 Tex. Cr. R. 128, 32 S. W. 534; *Ray v. State*, 35 Tex. Cr. R. 357, 33 S. W. 869; *Campbell v. State*, 35 Tex. Cr. R. 163, 32 S. W. 774; *Martin v. State*, 41 Tex. Cr. R. 246, 53 S. W. 849; *Pierson v. State*, 21 Tex. App. 60, 17 S. W. 463; *Norris v. State*, 32 Tex. Cr. R. 173, 22 S. W. 592; *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658; *Vann v. State*, 48 Tex. Cr. R. 15, 85 S. W. 1064; *Hilcher v. State*, 60 Tex. Cr. R. 180, 131 S. W. 593; *Washington v. State*, 35 Tex. Cr. R. 154, 32 S. W. 693; *Mooney v. State*, 176 S. W. 56.

The only other question necessary to mention is appellant's motion for a new trial on the ground of newly discovered evidence. The court, as the record shows, heard evidence on this. The motion itself, and the affidavits attempting to support it, and the statement of facts thereon, are quite lengthy. We have carefully studied the question and the record on the subject. We deem it unnecessary to go into any statement of it. Suffice it to say that we think the trial judge correctly held that the appellant was not entitled to a new trial on that ground, and we think would not have been justified in granting a new trial.

The judgment is affirmed.

On Motion for Rehearing.

HARPER, J. This case was affirmed some time ago, and Presiding Judge PRENDERGAST in his opinion explains, in a great measure, the delay in acting on the motion for a rehearing. The writer of this opinion wants to admit that he conferred with and discussed with the Presiding Judge the opinion in this case before it was handed down, and he at that time concurred with him in the opinion that the case should be affirmed; but a further study of the record, the briefs filed by able counsel, and the authorities bearing on the questions involved, has led him to the opinion that he was in error. If he had written the original opinion, he would feel less reluctance in now holding that the record presents error, because he, in a measure, feels that he may be in part responsible for the errors which he now believes appear in the holding in the original opinion, and he wishes to assume his full responsibility for such opinion. Yet, while doing so, he feels it his duty, as a member of this court, when convinced of his

error, he should unhesitatingly admit his error, for every man in this state, regardless of how guilty he may be (if guilty he be) is entitled to a trial in accordance with the settled rules of law, and, if he has not received such a trial, to have his case reversed, in order that he may be accorded a fair and impartial trial, and his guilt or innocence passed on by a jury only on evidence legally admissible.

[1, 2] We think the court erred in holding that the state could impeach its witness Miss Cassie Dunn. The state called her as its first witness and had her testify:

"My name is Miss Cassie Dunn. I suppose I am a daughter of Tom Dunn. My mother was Bettie Dunn. She was a sister to Alfred Hollingsworth. For the past four or five years I have been living and making my home with Uncle Alfred Hollingsworth. He lives up close to Prairie View, up close to Hurst, in Coryell county. When I went to Uncle Alfred's to live, the family consisted of himself and two boys, Roy and Joe. Roy and Joe stayed at home two years. When the boys married, Joe left home, and Joe went right straight, and Roy stayed at home till January. They have been married two years last October. Yes; I am speaking of the old man's two boys, Roy and Joe. They married in about October, 1912. They have been living to themselves ever since they were married, except Roy stayed there at his father's from October to January, and then left. Roy left there January 1, 1913. He has been away the first of this year makes two years. After the boys left, Uncle Alfred and myself and Fannie constituted the family. Fannie was not there till two years ago last August. Fannie came there in August before the boys married in October. Fannie came there two years ago last August. She came in August, 1912. I am 20 years old; was 20 years old the 18th day of last June. Fannie and I both did the house-keeping and cooking and washing dishes and milking and things of that kind for Uncle Alfred. We both did it together. Sometimes Fannie would leave there and go to her other uncle's and visit; but she did not go very often and did not stay very long. Sometimes she would go and stay a week or two at a time. She did not do that very often. My uncle had five brothers that lived up in that neighborhood, and Fannie would go and stay with them whenever she wanted to. When Fannie would go away, that would leave Uncle Alfred and myself there alone. When Fannie was gone, I did the milking and cooking. I kept house and made up the beds, etc. I attended to all that when she was not there. When Fannie was not there she did not do any of the work, and of course I did it; but when she was there she assisted me in it. I did not during that time have any sweethearts or beaux that went with me; did not have any beaux or keep company with any one. I went to parties and gatherings and singings and things of that kind during that time; but, goodness, I don't know how often I went to them. I went a good deal for a while, and then I did not go so often; but I went enough I suppose. I went a good deal the first two years, before the boys married. After the boys married I did not go so much, because I did not have anybody to go with me. When I did go, Uncle Alfred and first one and then another would carry me. Uncle Alfred carried me to church, but he did not carry me to parties. He would carry me to town occasionally. We lived four or five miles from Turnersville. That is not where we did our trading. We did it at Hurst and Clifton. Clifton was about 15 miles from where we lived. That is a larger town

than Turnersville. I went home and left my Uncle Alfred's house on the 19th day of June, 1914. Uncle Alfred treated me just like he would one of his own children all the time I lived there. He treated me right—just like he would his own girl. Anything I wanted I got it; dresses or anything else.

"Q. Do you love your Uncle Alfred? A. I love every one of my uncles. Yes; I expect I love Uncle Alfred better than any of the balance of my uncles. I have loved him all the time. I love every one of my uncles.

"I was pregnant when I went home in June, 1914. I had been at home about a month before my people found out that I was pregnant. Dr. Bailey is the man that told them about me being pregnant. I was sick, and we called in Dr. Bailey to wait on me, and he told them what was the matter with me. I have a child now. It was born the 29th of October."

This was all her testimony on direct examination.

Why did the state call this witness and have her testify that she lived with appellant; that she loved him better than she did either one of her other uncles; that she and her sister lived alone with appellant; that while she had lived with her uncle (appellant) she had no beaux or sweethearts; that she was pregnant when she left appellant's home in June; and that a child was born to her on the 29th of October, etc. By the indictment appellant was charged with having incestuous intercourse with this witness, his niece. Were not all the above facts and circumstances elicited from the girl to prove by circumstantial evidence that appellant was the father of her child; that no other person had opportunity, and would not the evidence thus adduced by the state have a strong tendency to show that he was guilty of the charge, if no other testimony was adduced from her? The state having before the trial been informed by the witness that she would testify that another was the father of the child, and appellant had never had intercourse with her, could it adroitly, by not asking her who was the father of the child, adduce testimony from her that would fasten the crime on him, and appellant not be permitted on cross-examination to ask her who was the father of her child and elicit from her the following facts; "Henry Dollins is the father of my child. My uncle [appellant] never did have any illicit intercourse with me"—without making the girl his (appellant's) witness? If the state had not known the girl would so testify before they called her as a witness, there is no doubt they could impeach her as to those statements. But the record places it beyond question, and it is in no way controverted, that the girl had told the district attorney the week prior that she would testify that Henry Dollins was the father of her child, and her uncle, appellant, had never at any time had intercourse with her, and this was the reason the state avoided asking that question, yet the state called her as a witness and proved all other and different facts it could by her that would tend to fasten the crime on appellant. She testified:

"That night when you and Mr. Cobb and my uncle and father all came down there with Mr. Calloway, the district attorney, you all left the room, and left Mr. Calloway and I in the room to talk the matter over. I told Mr. Calloway then and there that Henry Dollins was responsible, and that my uncle was not responsible."

When can the state impeach its own witness? At common law it could never do so, but by virtue of our statute (article 815, Code Cr. Proc. 1911) it is provided, when facts stated by the witness are injurious to the cause of the party offering the witness, he may be impeached as to such testimony. The only case which we have found that would seem to sanction the action of the trial court in permitting Miss Dunn to be impeached is *Blake v. State*, 38 Tex. Cr. R. 384, 43 S. W. 107. In that case it was held that the party offering the witness need not be surprised by the testimony, if he had good reason to believe that when the witness was called on to testify he would testify to facts beneficial and not injurious to his cause. In this case the state cannot and does not contend that it had any reason to believe that she would testify that her uncle, appellant, had had intercourse with her. She had been before the grand jury, and there had refused to testify who was the father of her child, although the record makes it manifest that she at that time knew they were investigating as to whether or not appellant had had incestuous intercourse with her; but after going before the grand jury she had told the district attorney that appellant had not had incestuous intercourse with her, and that Henry Dollins was the father of her child, and with knowledge that she would so testify the state calls her as a witness and adduces from her facts and circumstances which would tend to show that appellant was guilty of the incestuous intercourse, knowing at the time, if asked the question, she would most emphatically deny such to be the fact, and for this reason propounds no such question. The state desired the jury to believe her when she testified to facts and circumstances tending to show his guilt, and introduced her to prove those facts and circumstances, but claims the privilege of impeaching her as a witness when she testifies to a fact to which they knew she would testify that would show that no such fact should be deduced from the facts and circumstances that they had called her to prove. In *Oates v. State*, 149 S. W. 1194, we held that under such circumstances a witness could not be impeached, and we believe the rule there announced applies to the state as well as to the defendant. And the identical question here involved was passed on by this court in *Perrett v. State*, 170 S. W. 316, being an incest case, and it was there held:

"The state will not be permitted to put a witness on the stand, knowing that the testimony would be adverse, in order to get in another statement which would be beneficial to the state. If the state had expected her to swear to the intercourse, and she had denied it, then perhaps,

* * * the prosecution might have introduced this testimony by way of impeachment," but not so when the state was fully aware she would not so testify when placed on the witness stand.

And in *Scott v. State*, 20 S. W. 549, this court said:

"The statute is for the protection of those whose cause is unexpectedly injured by a witness."

The state, knowing she would testify that appellant had never had an act of intercourse with her and that Henry Dollins was the father of her child, yet called her as its first witness to prove facts and circumstances that would lead the jury to find that he had had intercourse with her. This was the whole purpose and sole purpose of the testimony adduced from her by the state, and the purpose of introducing her testimony before the grand jury was not to show that the witness was wholly unworthy of belief, but that appellant was guilty of the crime. The statement that Henry Dollins was the father of her child, and that appellant had never had intercourse with her, in no wise conflicted with her testimony before the grand jury, except in so far as the circumstances stated before the grand jury might have a tendency to show appellant's guilt. When before the grand jury she refused to state who was the father of her child, and with whom she had had intercourse. Her testimony on this trial in no wise conflicted with that statement. We are therefore of the opinion that the court erred in admitting the statement made by the witness before the grand jury to impeach her, and also the letter written in November, 1914, by her, in so far as it was admitted to impeach her testimony given on this trial.

But if in error in so holding, as to it being admissible to impeach her, then we are called on to pass on the question of whether or not the letter was admissible in evidence as tending to show the guilt of appellant, and could be considered by the jury for that purpose if he received it. The court specifically in his charge authorized them to so consider it, if they found that he received the letter. We will not pass on the question as to whether or not a letter of this character is admissible under any circumstances, but simply hold that under the facts of this case such letter was not admissible as original testimony to show that appellant was guilty of the crime of incest. Appellant's counsel have filed a very able and exhaustive brief, contending that under no circumstances could such a letter be admissible as original testimony tending to show the guilt of the person on trial. This brief will be published in connection with this opinion in the official reports. Presiding Judge PRENDERGAST exhaustively reviews the authorities which would tend to hold that such letter is admissible under certain circumstances as original testimony as tending to show the guilt of the accused. We do not think

the facts of this case bring the letter within the rules of law cited by our Presiding Judge. He cites Wigmore on Evidence, § 1073, and other sections. Mr. Wigmore states:

"The different situations [in which such instruments become admissible] may be grouped under four heads: (1) Documents seen; (2) documents found in possession; (3) documents of demand, received but not answered; and (4) documents made use of."

And in dealing with the third says:

"The failure to reply to a written communication may sometimes suffice to permit an inference of the party's assent to the correctness of the statements made therein. But the inference is not ordinarily so strong; and judges have always pointed out that the failure to reply in writing to a written communication does not have the same significance as a failure to reply orally to an oral communication. So far as any definite rule is concerned, it seems impracticable, and the precedents indicate that each case must stand upon its own facts."

Under this text he cites *Hill v. Pratt*, 29 Vt. 119, which holds:

"It would seem that the rule has never been extended to unanswered letters, particularly when the fact stated has relation to past transactions and upon which no future action of the party is contemplated."

Many other cases will be found cited under this section of Wigmore, and they make it evident to our mind that under the rule as stated by that author, the letter in this case was inadmissible. The father had written appellant in July, charging him with being the father of his daughter's child. Appellant replied at once, indignantly denying the fact. When the charge was renewed in November, why was he called on to reply again, having denied it when first charged by letter? Is one compelled to answer letter after letter, if he has answered the first denying the charge, else the subsequent letters will be admissible as an admission of guilt? We do not think so. The most that can be said, under the facts in this case, is that the girl wrote the letter, and appellant received it. He in no way acted on the letter. He denies ever having received it, and, while it may be said the testimony would support a finding that he did receive it, yet, if he did do so, all he did was to destroy it and make no answer thereto, having already written to the girl's father denying the accusation. This was but an unsworn statement of the girl contained in a letter. This could legally prove no fact. Appellant can be said to have completely and entirely ignored the letter. It may be that the state could have asked the girl if she did not write such a letter to appellant and he not answer it, on the theory that when one is charged with crime his conduct and failure to act may be considered as evidence against him, but this would not render the letter admissible as evidence that he was guilty of the crime. It is his act, not hers, which the law considers as evidence of his guilt. The letter is copied in the original opinion, and we do not, therefore, deem it necessary to here copy

it, or state its contents. It charged appellant with being the father of the child. The witness Cassie Dunn testified on the trial that she wrote this letter and gave it to her father to mail. Her father testified he took a copy of the letter and mailed it. This copy was introduced in evidence. After testifying she wrote the letter, Miss Dunn testified when asked if the statement contained in the letter were true or false:

"It was false. I told you once that the statement in the letter as to my uncle being the father of my child was false."

In his charge the court tells the jury, if they find that the defendant received this letter, they would be authorized to consider the statements contained therein in passing on the guilt or innocence of appellant. We know of no rule of law which would authorize an unsworn statement of a witness to be considered as evidence of one's guilt, where the witness swears on the trial that the unsworn statement is untrue. Such statement may be used at times to impeach a witness, but never to prove a fact against a person on trial. The witness swore the statement contained in the letter, that appellant was the father of her child, was not true. It may be that they conspired and concluded to acquit appellant; that her testimony on the trial was untrue. But it is only testimony which some witness swears on the trial is true which can be considered in passing on the guilt or innocence of the person accused of crime. An unsworn *ex parte* statement is never evidence of that fact. Attached to the motion for a new trial is an affidavit of this girl in which she swears:

"I further state that I wrote the two letters which my uncle had, and which were offered in evidence upon the trial of his case after my child was born, and also one which my father copied, under compulsion from my father. My father, after the birth of my child, told me I had to write these three letters or he would whip me. I did not want to write them, for they were not true; but in my condition I thought I had to do it. I did not know why my father so insisted upon my writing these letters until since I have come back home. Recently my stepmother went to Abilene to visit, and before she left she told me not to visit Mrs. Guy Thomas. After mother left, Mrs. Thomas came to our house and told me that the reason my father made me write the letters was that my stepmother had threatened to leave him if he did not. Mrs. Thomas told me that my stepmother told her that she had told papa that if he did not make me lay my condition on Uncle Alfred she would leave him. She also told Mrs. Thomas that, if I would lay it on Uncle Alfred, papa could get \$1,000 or \$1,500 out of Uncle Alfred to keep it out of court. I never told any of this to any one until after the trial of Uncle Alfred. I did not want to do it on account of papa."

It may be that appellant is guilty, as is so strenuously insisted on by our Presiding Judge in his opinion overruling the motion for a rehearing. This we do not care to discuss, nor express an opinion on; but we do hold that no person's liberty ought to be taken away from him, and he branded as a felon, upon the unsworn statement of a girl

contained in a letter, which she swears is not true, and which, in affidavit attached to a motion for a new trial, she swears she was compelled to write by her father while she lay sick shortly after childbirth, and which she says was written to obtain money from appellant. The law does not sanction blackmail any more than it does the crime of incest. We do not think any one could read this record, and say that unless the jury had been authorized to consider this letter of Cassie Dunn as evidence of the guilt of appellant the jury would beyond question have found appellant guilty and assessed against him the highest penalty known to the law for the crime of incest.

Appellant is a man 59 years of age. He had lived in the same community for 28 years immediately preceding his trial. His wife had been dead for 20 years. He had raised a family of boys and girls, and when he offered to prove by his neighbors that during all these years he had lived the life of a peaceable, law-abiding citizen and a virtuous man, the state admitted as a fact "that the defendant has been a peaceable, law-abiding, quiet citizen all the time that he lived in that community; that his reputation up to the time of this occurrence has been that of an honest, upright, and virtuous citizen." It may be that in his old age he has committed this crime, and, if so, the punishment is none too severe; but before the writer can consent that his reputation of a lifetime of upright citizenship be taken from him and he incarcerated in prison walls, it must be done upon testimony which the law says is legal and competent, and not upon unsworn statements of the girl, which she swears on the trial are false and untrue.

There are other questions in the case, and especially the first application for a continuance, which the writer thinks present error, but we do not deem it necessary to discuss them. The witnesses for which the continuance was sought can be had on another trial, if granted, and, if not, a discussion of that question would be of no avail.

Being of the opinion that at least that portion of the charge of the court which authorized the jury to consider the letter written by the girl as evidence of appellant's guilt, under the facts in this case, presents error for which the judgment should be reversed, we think the motion for a rehearing should be granted, and the judgment reversed and remanded for another trial.

As before stated, upon the other questions presented, not herein discussed, the writer expresses no opinion, as he does not deem them essential to a disposition of the case.

The motion for a rehearing is granted, the affirmance is set aside, the judgment is reversed, and the cause remanded.

DAVIDSON, J. (concurring). Reviewing the record in the light of the motion for rehearing, I am concurring with Judge HAR-

PER in reversing the judgment. I do not purpose to enter into a lengthy discussion of the facts; they are sufficiently set out in the opinions written by our Presiding Judge and Judge HARPER. The letter, under discussion in those opinions, in my judgment was not admissible, either as original or impeaching evidence. The state was fully aware of the fact, when they placed Cassie Dunn on the stand as a witness, that she would not testify that appellant had intercourse with her, or was the father of her child, but that she would testify that Henry Dollins was the child's father. Before the grand jury she refused positively to name the author of her shame, but some time before the trial of the case she had informed the prosecution of the fact that she would not testify to her uncle's guilt, but would testify that a man by the name of Dollins was the father of her child. This was communicated by Cassie Dunn to the state some time before she was placed on the witness stand. So any question of surprise was eliminated. She had not misled the state in any way; therefore they were not only not expecting her to testify that appellant was the father of her child, but knew she would not.

This is not a case like *Blake v. State*, 38 Tex. Cr. R. 377, 43 S. W. 107, where the witness had sworn to a state of facts and subsequently testified contrary to those former statements. Judge Hurt in that opinion held that the party placing the witness on the stand has the right to expect him to testify as formerly; but the facts in this case are different. This witness had not testified to her uncle's guilt, or at least of the fact that he was the father of her child, and had informed the state she would not so testify; yet in the face of this she was placed upon the stand as a witness and testified that Dollins was the father of her child. It is a settled rule that, where a prosecuting witness does not testify as expected, the state cannot prove its case by showing as original testimony statements of the witness, made outside of court, contradictory of those testified on the trial. *Dunagain v. State*, 38 Tex. Cr. R. 614, 44 S. W. 148. For collation of authorities, see *Rose's Notes*, vol. 5, page 1207; *Goss v. State*, 57 Tex. Cr. R. 557, 124 S. W. 107; *Harris v. State*, 68 Tex. Cr. R. 209, 150 S. W. 796. It is a well settled rule that failure to make proof is not sufficient as a predicate for impeachment. *Largin v. State*, 37 Tex. Cr. R. 574, 40 S. W. 280; *Bennett v. State*, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875; *Smith v. State*, 45 Tex. Cr. R. 520, 78 S. W. 519; *Scott v. State*, 52 Tex. Cr. R. 164, 105 S. W. 796; *Wells v. State*, 43 Tex. Cr. R. 451, 67 S. W. 1020; *Owens v. State*, 46 Tex. Cr. R. 14, 79 S. W. 575; *Hanna v. State*, 46 Tex. Cr. R. 5, 79 S. W. 544; *Ware v. State*, 49 Tex. Cr. R. 413, 92 S. W. 1093; *Skeen v. State*, 51 Tex. Cr. R. 39, 100 S. W. 770; *Quinn v. State*, 51 Tex. Cr. R. 155, 101 S. W. 248; *Shackelford v.*

State, 27 S. W. 8; Finley v. State, 47 S. W. 1015; Knight v. State, 65 S. W. 88; Goss v. State, 57 Tex. Cr. R. 557, 124 S. W. 107. There are many other cases that might be cited in support of this proposition, but these would seem to be ample. The state would not be authorized to place Cassie Dunn on the stand, with full knowledge that her testimony would exonerate defendant and inculpate another as the guilty party, and successfully then offer another statement of hers, made out of court, which would be beneficial to the state. Perrett v. State, 170 S. W. 316.

I do not care to amplify this matter. This is the only question in the case that I care to discuss. I think the exception to the court's charge was well taken, but I do not care to enter into a discussion of that question.

I therefore concur with Judge HARPER in granting the motion for rehearing, and reversing and remanding the judgment.

PRENDERGAST, P. J. (dissenting). This case was affirmed and the opinion rendered, on June 16, 1915. On June 29th, following, after this court had adjourned to October 4, 1915, appellant, by his able attorneys, who represented him in the court below and in this court on the original submission, filed a motion for rehearing on these grounds only:

1. Claiming that this court erred in holding against him on his bills and propositions thereunder relative to the testimony of Cassie Dunn, as set out in pages 1, 2, and 3 of the opinion, and further contending that the judge's qualifications were unauthorized and this court in effect should disregard them. I think his contentions on this point are not well founded and cannot be sustained. I further believe that the record bears out the district judge in his qualifications to the bills.

2. His next ground is, in effect, that the court erred in overruling his motion for a continuance. He also claims that the explanation made by the judge to his bill on this question is not borne out by the record. I have again examined this question, and think the judge's qualification is borne out fully by the record. I stated it sufficiently in the original opinion.

3. His only other ground for a rehearing is his claim that the court erred in overruling his motion for a new trial because of his claimed newly discovered evidence. I have again reviewed this question, and am well satisfied that no reversible error was committed by the court on this ground. He heard all the testimony, saw the witnesses and their manner of testifying, the manner of direct and cross examination, and was better able to judge their veracity, etc., than this court possibly could. Lamb v. State, 169 S. W. 1161.

As stated, the above three grounds are the

only ones made the basis of the motion for rehearing herein. At the instance of appellant's other eminent attorneys, evidently engaged by him after the original decision and filing of his motion for rehearing herein had been had, the submission of this cause for rehearing was postponed for some weeks, in order that they might further brief for him said motion. They then filed quite a lengthy and able brief and argument. Later they were given additional time, and then filed still another brief.

Without any complaint whatever by appellant in his motion for rehearing, in said brief, he now urges two other grounds: In one, that the trial court erred in admitting in evidence the letter of Cassie Dunn to him, copied in the original opinion; in the other, to the latter sentence of the court's charge to the jury relative to their consideration of this letter. This charge is also copied in the original opinion.

First, as to the admissibility of said letter. It is conceded by appellant that the objection to the copy, because a copy and not the original, is under the proof not well taken. He seems to concede in one place in his brief:

"That letter and the inquiries made concerning it *may* have been admissible on redirect examination of Cassie Dunn, with a view of refreshing her memory, with a view of inducing her to confirm and admit statements theretofore made, or even for the purpose of contradicting her."

But his urgent and vigorous contention is:

"If the original letter had been presented, and it was conceded that it had been received by appellant, and it were shown beyond controversy that it was produced from his possession, it would not have been admissible."

And he asserts he will "demonstrate this." I think the reverse of his contention is the law, and can be demonstrated to be so, both by reason and authority. His *seeming* concession that the letter *may* have been admissible for said certain purposes, and his immediate insistence that it was inadmissible, are, at least, apparently inconsistent and contradictory.

The witness Cassie Dunn was unquestionably "extremely unfriendly to the state," and "testified adversely and injuriously to the state" on appellant's examination of her, and "openly testified to anything she thought would be beneficial to the defendant," and was, "in his hands, 'like clay in the potter's hands,'" as stated by the trial judge, and is abundantly established by this record. And, at his instance, and upon his examination of her, he had her to testify specifically:

"Henry Dollins is the father of my child. My uncle [appellant] never did have any illicit intercourse with me in any way; never did ask me to; never asked me to yield to him in any way."

She also swore that she told appellant, before he sent her to her father's, that she thought she was pregnant, and:

"I did not tell him I would not tell who the father of the child was. I did not make him any promise in that regard."

The state impeached her on this testimony directly by her written statements in said letter. It is copied in the original opinion. It is unnecessary to again copy it. A mere reading of the letter will show it is a direct and flat contradiction of her said testimony in favor of appellant on this trial. That said testimony by her in favor of appellant, and given at his instance, was very material for him and against the state, cannot even be questioned by any one. Its direct and only effect, if believed by the jury, would have been to destroy the state's case and show his innocence of the crime for which he was indicted and on trial; so that it was the imperative duty of the state to discredit and impeach her as to this very material testimony, if it could do so.

Every text-book writer on the subject, and the decision of every court of the land, is that former statements of a witness which are contradictory of his present testimony are admissible to impeach him. This is not only so by oral, but especially so by written, statements. This court has always heretofore so held, and all the appellate courts of this state uniformly so hold. I know of no exception. This method of impeaching a witness is daily and universally acted upon by all trial courts of this state. In order that no uncertainty might arise on this point, as to one's own witness, our statute (C. C. P. 1911, art. 815) expressly enacted:

"The rule that a party, introducing a witness, shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in other manner, except by proving the bad character of the witness."

There is nothing in his bills to show, or intimate, that the state knew, or had any notice whatever, that Cassie Dunn would testify that Dollins was the father of her child when it introduced her and she gave material testimony in its behalf. Even if the state had known this, there is nothing in the books or decisions, until the majority opinion in this case, that the state could not impeach her by said letter and her sworn written testimony before the grand jury. The effect of the decision in *Blake v. State*, 38 Tex. Cr. R. 384, 43 S. W. 107, cited in Judge HARPER'S opinion, is to the reverse of what he cites it for. The cases of *Scott v. State*, 20 S. W. 549, *Oates v. State*, 149 S. W. 1194, and *Perrett v. State*, 170 S. W. 316, have no application whatever to this case. A mere reading of these several cases will clearly demonstrate what I say about them is correct. That said letter and said statement before the grand jury were admissible to impeach Cassie Dunn there is no shadow of doubt.

But appellant vigorously contends that the reason assigned by the trial judge why he admitted it is, in effect, no valid reason, and is contrary to the law; his contention being, in substance, that a conspiracy cannot be entered into to commit the crime of incest, arguing further that, even if there could be a con-

spracy to commit such crime, as soon as such crime was committed, "such conspiracy had terminated," and no statement or admission by the other party would be admissible against the party on trial. It is elementary that a wrong reason for a correct ruling cannot affect the ruling, even if it be conceded the trial judge gave a wrong reason for his correct ruling. I know of no law, or decision to the effect that the man and woman who commit incest cannot also be guilty of conspiracy to commit said crime. I know of no reason why they cannot. The statute is plain that they can. Article 1433, P. C. 1911, is:

"A 'conspiracy' is an agreement entered into between two or more persons to commit any one of the offenses hereafter named in this chapter."

Article 1437 is:

"The agreement, to come within the definition of conspiracy, must be to commit one or more of the following offenses, to wit: Murder, robbery, arson, burglary, rape, or any other offense of the grade of felony."

Incest is a felony. Article 486, P. C.

Further, the trial judge explained and qualified appellant's bill to the admission of said letter fully. I quoted most, but not all, of this, in the third page of the original opinion, which is the first quotation therein of his quoted qualifications. He did not limit his qualification to only a conspiracy to commit the crime of incest, but pointedly stated such conspiracy went further. I will state the full substance of his explanation and qualification. It is: That a conspiracy existed between defendant and Cassie Dunn, not only to commit the crime of incest, *but also* to suppress knowledge that the child that was to be, and in fact was later, born was the fruits of their crime of incest, *and* extended even further to a resumption of their unlawful relations with each other as soon as the birth of the child had been accomplished and the public quieted, and their relatives satisfied regarding his connection with her, *and* that they both would deny he was the father of the child, and commit perjury with regard thereto in order to keep secret the fact that said child was the offspring of the incestuous intercourse, *and* to carry out their design that such intercourse might be resumed by them, *and it was during all this conspiracy* said letter was written to and received by him. He accepted this bill thus explained and qualified, and under the well-settled rule, until now in this case, is bound thereby.

In his brief and argument he ignores—at least, does not discuss or mention—the full conspiracy, but confines his contention to only one item of it, to wit, the crime of incest. The case of *Serrato v. State*, 171 S. W. 1138, is directly in point against him. In that case *Serrato* was on trial for the murder of *Ortiz*. He claimed, not only that he personally had nothing to do with the killing, but also that he was not a party to any agreement or conspiracy with some 15 others, or any of them, to kill, and further that, if he had entered in-

to such conspiracy, it terminated with the killing, and that thereafter no act, conduct, word, or statement by any of the others was admissible against him. The state contended that the killing did not terminate the conspiracy, but it also embraced additional things thereafter to be done. With the issues thus drawn, the state was permitted to introduce in evidence, over his objections, all the acts, and conduct of each and all of said other parties, and what each of them said, after said killing and until they were actually arrested and placed in jail—all of said acts, conduct, and statements occurring after the killing. This court expressly held all said evidence was admissible, holding:

"It has always been the rule in this state that the acts and declarations of one conspirator in furtherance of the common design are admissible against another conspirator pending the conspiracy and until its final termination. This proposition includes anything that was within the contemplation of the conspiracy, such as dividing the spoils, or any of those matters that may be subsequent to, but included in the scope of, the conspiracy. *O'Neal v. State*, 14 Tex. App. 582; *Rix v. State*, 33 Tex. Cr. R. 353, 26 S. W. 505; *Franks v. State*, 36 Tex. Cr. R. 149, 35 S. W. 977; *Small v. State*, 40 S. W. 790; *Long v. State*, 55 Tex. Cr. R. 57, 114 S. W. 632; *Gracy v. State*, 57 Tex. Cr. R. 68, 121 S. W. 706; *Milo v. State*, 59 Tex. Cr. R. 196, 127 S. W. 1028; *Kipper v. State*, 45 Tex. Cr. R. 384, 77 S. W. 611; *Holt v. State*, 39 Tex. Cr. R. 299, 45 S. W. 1016, 46 S. W. 829; *Eggleston v. State*, 59 Tex. Cr. R. 542, 128 S. W. 1111. And what is said and done by any of the conspirators, pending the conspiracy and in furtherance of the common design, is admissible against the one on trial, though said and done in his absence. *Wallace v. State*, 46 Tex. Cr. R. 349, 81 S. W. 966; *Barber v. State*, 69 S. W. 515; *Trevino v. State*, 38 Tex. Cr. R. 64, 41 S. W. 609; *Dobbs v. State*, 51 Tex. Cr. R. 115, 100 S. W. 946; *Roma v. State*, 55 Tex. Cr. R. 345, 116 S. W. 598; *Cox v. State*, 8 Tex. App. 264, 34 Am. Rep. 746; *Smith v. State*, 21 Tex. App. 96, 17 S. W. 560; *Armstead v. State*, 22 Tex. App. 59, 2 S. W. 627; *Slade v. State*, 29 Tex. App. 391, 16 S. W. 253; *Richards v. State*, 53 Tex. Cr. R. 409, 110 S. W. 432; *Bowen v. State*, 47 Tex. Cr. R. 144, 82 S. W. 520; *Williams v. State*, 45 Tex. Cr. R. 240, 75 S. W. 509; *Chapman v. State*, 45 Tex. Cr. R. 484, 76 S. W. 477; *Hannon v. State*, 5 Tex. App. 551; *Taylor v. State*, 3 Tex. App. 200; *Moore v. State*, 15 Tex. App. 1; *Eggleston v. State*, 59 Tex. Cr. R. 542, 128 S. W. 1111."

In that opinion, Judge Harper cites and quotes at length other authorities applicable herein. See also the companion cases of *Gonzales v. State*, 171 S. W. 1146, *Gonzales v. State*, Id. 1149, and *Martinez v. State*, Id. 1153, to the same effect.

If, as contended by appellant in his brief, the conspiracy between him and Cassie had gone to the extent only of committing incest, then his contention might have been applicable and sound. But the conspiracy between them did not stop with their agreement to commit, and committing, incest, but, as stated by the court, it was not only (1) to commit incest, but also (2) to suppress all knowledge that her baby was the fruits of this crime, and (3) that they both would deny he was the father of her child and commit perjury in

order to keep secret the fact said baby was the fruit of their incestuous sexual intercourse, and (4) as soon as the public was quieted and their relatives satisfied he was not the father of her illegitimate baby, resume their illicit incestuous intercourse. It is therefore certain that their conspiracy had not been completed and ended, but that it was still pending and incomplete, and they both were, on this very trial, doing all in their power and within their agreement to carry out their full conspiracy. Again, as specially applicable herein, I reiterate what this court said in *Martinez v. State*, supra, as follows:

"* * * The rules of law governing in conspiracy cases have been well established, and as said by a well-known writer: 'The conspiracy may, of course, be shown by direct evidence, and it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy from the very nature of the case, and the rule which admits this class of evidence applies equally in civil and criminal cases. In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to arrive at a satisfactory conclusion. And it is no objection that the evidence covers a great many transactions and extends over a long period of time, provided, however, that the facts shown have some bearing upon, and tendency to prove, the ultimate facts at issue. But much discretion is left to the trial court, in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. If it be shown that several have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of all, and therefore proof of such act will be evidence against any of the others who were engaged in the conspiracy, and any declaration made by one of the parties in the absence of the others during the pendency of the illegal enterprise is not only evidence against himself but against all the other conspirators who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves.' These rules have been approved in all the text-books and in the following cases in our own court: *Atkinson v. State*, 34 Tex. Cr. R. 424, 30 S. W. 1064; *McKenzie v. State*, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *McFadden v. State*, 28 Tex. App. 241, 14 S. W. 128; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Phillips v. State*, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Williams v. State*, 24 Tex. App. 17, 5 S. W. 655; *Kennedy v. State*, 19 Tex. App. 618; *Piereson v. State*, 18 Tex. App. 524; *Post v. State*, 10 Tex. App. 598; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; and the authorities cited in the *Serrato Case*, 171 S. W. 1133, and *Gonzales Cases*, 171 S. W. 1146, 1149. * * *

Upon a most careful study of the testimony, I think it clearly supports the judge in his qualification of appellant's bill. In the original opinion, I stated some of the facts. I will here give some other of the salient facts. In the first part of the original opinion, I gave the material testimony of Cassie Dunn on direct examination by the state. It shows with much cogency that appellant,

and he alone, had the opportunity to get her pregnant. In his brief, he seems to concede this, stating: That he had an opportunity, and probably the best opportunity of any one else, to have committed the offense, "does not appear a matter of doubt under the evidence." That she was gotten pregnant by some man about January 29th, while she lived with appellant, is established with certainty by the fact that a baby was born to her October 29, 1914. She swore she told him, when it occurred, that she had missed her menses; but she told neither her sister nor grandmother. He swore "that she was sick some way. Her womanly periods had stopped"—the natural effect of pregnancy. They both swore he then took her to a doctor to see if she was pregnant. The doctor swore this was the latter part of February or first of March, 1914; that appellant told him to examine her, and he did so, and did not then discover any evidence of pregnancy. It was then just about a month since the act of intercourse producing pregnancy had occurred. The doctor said that he felt of her abdomen and stomach through her clothes, and did not make any further examination of her. Of course, at that early stage, his very casual examination of her could not, and would not, disclose pregnancy; but he testified that the child's birth made it certain that she was pregnant when he examined her. Appellant sent Cassie off to her father's in June, 1914. She swore that before that she told him she thought she was pregnant, but "he did not ask me who the man was"—"did not make any inquiry as to who the father of it was." "He did not ask any questions about it." The reason he did not is perfectly evident. It was because he *knew* that *he*, and no one else, had had sexual intercourse with her, and that *he*, and no one else, had gotten her pregnant, and that *he*, and no one else, could be the father of her then unborn babe. No other conclusion can be drawn. When appellant sent her off to her poor old father to be confined, he intended she should return to him as soon as the babe was born and she could, for he swore when he sent her he gave her money to buy her return ticket to come back on. She swore that she intended to return to him. The trial judge was clearly justified in believing and stating that this return was for the purpose of resuming their illicit incestuous intercourse. That the judge was authorized to believe they both swore falsely when they said he did not have sexual intercourse with her is clear from the testimony. It was a month after she reached her father's that the doctor there, and her father, found out she was pregnant. Her father, at once, did all he could to get her to tell him who got her pregnant. She refused to tell. The doctor tried to get her to tell him. She refused. The doctor then advised her that he knew a maternity home in Kansas City where she could go, be confined, the baby adopted, she return, and nobody would ever know any-

thing about it; but it would take \$250 to \$300 to do this, and advised her to write to the father of the child for the money. She promptly wrote to appellant for the money, \$300, telling him she wanted it to go to said maternity home in Kansas City. He failed or refused to produce that letter, but admitted he received and promptly answered it. No doubt the letter gave him full information, and if produced would have been most damaging against him. He swore:

"When the girl [Cassie] wrote me she wanted \$300 to go to a maternity home in Kansas City, I wrote her and asked her why she did not go to Ft. Worth, or Dallas, or Abilene, somewhere in Texas."

The judge was clearly authorized by the evidence to believe Cassie Dunn's testimony that Henry Dollins, and not appellant, was the father of her babe, and that she did not promise and agree with appellant not to tell he was its father, was untrue. I will give some more of these facts which justify the judge's qualification. If Dollins, and not appellant, had been the father of her babe, there was no reason on earth why she would have refused to tell on Dollins, for neither he nor she would have been guilty of any offense. When pressed for a reason, she said, "Because I did not want to tell it." On the other hand, there was every reason for her to refuse to tell on appellant, for, if she did, he was certain to be convicted of incest and be sent to the penitentiary as a criminal. They both knew this. She flatly refused to tell her father, her doctor, the grand jury, or any one else. Of course, appellant *knew* it, without her telling him. She swore before the grand jury:

"Uncle Alfred [appellant] knew when I left to go out West that I was pregnant, and I promised him not to tell it. He knows who it is." "I never had any intercourse with but one man in my life." "I had intercourse several times. I never had any sweethearts. I told Uncle Alfred not to tell who it was. He knows who it is, * * * and he will not tell. I won't tell who it was." "I would not have yielded my virtue to any man that did not have my respect and confidence. I had intercourse with the man in different places, both day and night."

If she had at first told her father, her doctor, and especially the grand jury, that it was Dollins, the probabilities are the grand jury would never have indicted appellant. Her late tale, that it was Dollins, is so unreasonable that it could not deceive or mislead any one to believe it was he, and not appellant. She and Dollins were barely acquainted. They had never been thrown together, so that he could have had an opportunity even to have gained her "respect and confidence." Her whole conduct, and every act and word of hers, from start to finish, stamps her testimony that it was Dollins, and not appellant, as unreasonable. She swore she never, at any time or place, told Dollins that he was the person who got her pregnant, and never at any time so wrote him; that she never wrote to him at all. When the doctor told her to write to the fa-

ther of her then unborn babe and get money to go to the Kansas City maternity home, so that she could there be confined and effectively conceal her shame, she promptly wrote to appellant, and not Dollins, for the money. She swore she loved her uncle. He swore he loved her. That love was not merely such affection as is common and natural between an uncle and niece as such, but it was more—it showed to be amorous. This record shows that the United States mail was kept "hot" carrying letters, almost daily, from one to the other just after he sent her away to be confined, like the most ardent lovers when separated, one from the other. Of course, it was not shown the full number of letters which passed between them. The state had no way of securing them. It is apparent they both would conceal every one which they thought would have a tendency to "give them away," and that they would produce only those which they thought would not do this. He failed and refused to produce the letter wherein she wrote for said \$300, although he had to admit he received and answered it, and he denied receiving the one copied in the opinion; but the state proved, not only that she wrote him that letter, but that he also received it.

Among other things, her and his testimony, in effect, show that her belated tale that Dollins, and not he, was the father of her babe, was very recently manufactured. Appellant at first had had Dollins subpoenaed as his witness to testify to his good reputation. Dollins had attended the various sittings of the case to so testify for him. But just before the trial, it seems, Cassie recalled the fact that years before, and before Dollins was married, he (Dollins) had been indicted in Bosque county for seduction, and upon that, doubtless inspired by appellant, she attempted to manufacture the tale that Dollins was the man. Appellant testified that when Dollins went to work on a bridge near his house he warned Cassie not even to work in the garden in sight of, but some distance from, Dollins, "just on account of the way he [Dollins] had acted heretofore you know. Yes, that was the reason"—that his community knew Dollins had been charged with seduction. Of course, both Cassie and appellant swore, in effect, there was no concert between them that she should try to swear it off on Dollins, but all the circumstances were amply sufficient to justify the belief that such was a fact. Dollins swore positively that he never, at any time or place, had sexual, or even ordinary social, intercourse with Cassie; and his and other testimony showed he never had the temptation or opportunity; that the said seduction charge against him was defeated by proving that said alleged seduced woman was common; other men had sexual intercourse with her, and all this occurred years before, while he was unmarried; that he had been married for about four years, and had a

strong, vigorous, healthy wife, when the offense herein charged was committed.

In his said next to his last brief, appellant contended with all positiveness, in effect, that it was only "where a direct accusation of guilt is made to a defendant *in his presence*, and is heard and comprehended by him, and goes undenied, that this act and fact may be shown as in the nature of an admission," and that such undenied accusation, to be admissible, must be "made in the *direct personal presence of the accused*," and that "there is no authority sustaining a rule" that his failure to answer a letter received by him, so accusing him, denying such accusation, is admissible. He pressed this point vigorously in argument, and cited some authorities, which he claimed sustained his position. In justice to him, it must be stated that in his last brief filed he seemed to recede from his above position, and concede, in effect, that such accusing letter, unanswered, denying such accusation, under certain circumstances, would be admissible as an admission of guilt, and cites authorities to that effect, but contends that the circumstances of this case are not such as authorized said letter in evidence. At least, I so understand his briefs and positions. But whether I correctly state or understand him, or not, I think, both by reason and authority, said letter, under the circumstances of this case, was clearly admissible. I will discuss the question from that standpoint.

It is the settled law of this state that when a verbal accusation of guilt is directly made to a defendant in his presence and hearing, and is understood by him, and he does not then and there deny the accusation, but remains silent, said accusation and his silence are pertinent evidence against him as an admission or confession to show his guilt. This rule is established by many decisions of this court, uniformly so holding. It is unnecessary to collate them. But see *Finn v. State*, 60 Tex. Cr. R. 522, 132 S. W. 805; *La Grone v. State*, 61 Tex. Cr. R. 171, 135 S. W. 121; *Davis v. State*, 54 Tex. Cr. R. 244, 114 S. W. 386; *Stanley v. State*, 48 Tex. Cr. R. 538, 89 S. W. 643; *White v. State*, 85 S. W. 1140; and section 223, Branch's Crim. Law, where he collates some of the cases. The correct rule on this point is also tersely stated in an elaborate and clear note in 25 L. R. A. (N. S.) 543, where a number of cases from this and other states in point are cited, as follows:

"The rule has been broadly and generally asserted that statements made in the presence of a person accused of crime, and not denied by him, must be taken as adopted by him, * * * and that they are competent evidence against him as an indication of guilt. * * *"

I understand appellant concedes the law as stated as to oral accusations. To my mind there are stronger reasons for written accusations unanswered and undenied being admissible in some instances than oral ones.

But first to the authorities. 1 Greenleaf on Evidence (18th Ed.) § 198, says:

"The possession of documents, also, or the fact of constant access to them, sometimes affords ground for affecting parties with an implied admission of the statements contained in them. Thus, * * * the possession of letters, and the like, are circumstances from which admissions by acquiescence may be inferred. * * *"

1 Wig. on Ev. § 260, says:

"The possession of a document is an important and often the only circumstance to show that its possessor has by reading it become aware of its contents. * * * This use of such evidence needs, however, to be distinguished from its use for other purposes, which are frequently associated in the same litigation; for it may be used to evidence an *assent* to the document's contents, or an *admission* of their truth."

2 Jones on Ev. (1913 Ed.) § 269, p. 493, says:

"Letters written to a party and received by him may, under some circumstances, be read in evidence against him; but before they can be received as admissions against him there must be some evidence besides mere possession showing *acquiescence* in their contents, as proof of some act or reply or statement."

16 Cyc. 960, says:

"The general rule is that omission to answer a written communication is not evidence of the truth of the facts therein stated, and that under ordinary circumstances a party is not required to reply to a letter containing false statements of fact. There are circumstances, however, under which unanswered letters are competent evidence of admission by acquiescence in the statements therein contained; as when the party receiving a letter has in *any way invited* the same, or when there is *any ground to infer* that he has acted on the letter by partly answering or otherwise recognizing it."

2 Wh. Cr. Ev. (10th Ed.) § 682, after saying, in effect, the mere finding of an unanswered and unacknowledged letter in one's custody is not sufficient for its admission against him, says:

"It is otherwise, however, when the party addressed in *any way invited* the sending to him of the letter, or *where there is ground to infer* he acted on the letter."

It is useless to multiply authorities. They are all to the same effect. Mr. Wigmore's recent work on Evidence is regarded by most as the best and most thorough ever written on the subject. In addition to what I have quoted from him in volume 1, he treats the subject in detail in volume 2, and more so than any other author. In section 1073, under the heads of "Writing Sent to the Party, or Found in His Possession: Unanswered Letter," he treats the subject at length. He clearly lays down the propositions, and cites cases in point clearly supporting him, to the effect that a letter or document found in a party's possession accusing him of committing a certain crime, unanswered or undenied, is admissible against him as an admission of his guilt. He propounds the question: Is the party's possession of a third person's document "sufficient to justify an inference of assent to the statements contained therein?" And answers:

"It is easy to imagine instances in which such an inference would be fallacious. Yet, since the

party may always exculpate himself and disown the inference by proving the true reason for his retention of the document, the question remains whether the mere fact of possession ought not to suffice at the outset to make the document receivable, subject to explanations that may later be made. This question was in orthodox practice answered in the affirmative."

Again he says:

"The failure to reply to a written communication may sometimes suffice to permit an inference of the party's assent to the correctness of the statements made therein upon the general principle of (section 1071) 'silence gives consent.'"

I think it unnecessary to cite and quote from the cases he cites in his notes. Suffice it to say they are from some of the greatest judges and courts, and clearly sustain him. All the authors and judges writing on the point mention instances and give certain circumstances wherein such a letter would be inadmissible; but they are all very different from the circumstances and facts of this case, and none of them hold that under such facts and circumstances as shown in this case would the letter be inadmissible, but, on the contrary, their effect would be that such letter is admissible as an admission of appellant.

I will give only some of the facts and circumstances on this point. In doing so, it will be necessary to repeat some already stated. Cassie had been constantly and exclusively in appellant's care, custody, and control since she was 15 or 16 years old—some 3 or 4 years. She had lived with him all these years. It was his duty to shield and protect her from harm and injury, and especially protect her in her virtue and chastity, which is the most sacred thing to every woman. Woman's virtue is the most sacred thing to every man, too. He, and he alone, had had the opportunity to have had sexual intercourse with her. Her menses did not come on at the regular time. She told him, but told neither her sister nor grandmother, who were both in his house at the time. He promptly took her to a doctor to see if she was pregnant, but it was too soon after the act of sexual intercourse for the doctor to ascertain by the very casual examination he gave her whether she was then pregnant or not. Appellant swore she was *sick*—her womanly periods had stopped. She told him, in effect, she was pregnant. He sent her far away in a distant county to be confined. At no time did she tell any other except him that she was pregnant, or even that she thought she was. It was more than a month after she reached her father's before the doctor there, or her father, learned she was pregnant. She was then about six months "gone." The doctor at once advised her to go to a maternity home to be confined and effectively conceal her condition, and write to the father of her babe for money to do this. She immediately wrote to appellant for the money, telling him it was to go to a maternity home. He received and answered her letter. He knew she could go to a *maternity* home for

no other purpose than to be confined and dispose of her illegitimate babe. Such homes are for no other purpose. Her father and doctor tried to get her to tell who was the man who had gotten her pregnant. She peremptorily refused to tell. From the facts and circumstances then known to her father, he was certain appellant, and no other, was the man, and he at once wrote to him in language no one could misunderstand, denouncing him as her seducer, and telling him he knew he was responsible for her condition, and calling on him "to come here at once," pay the expenses, etc. Immediately upon receiving this letter he first went to his friends, then "post haste" to his lawyer, with it. His lawyer at once wrote or advised an answer, which he signed and sent, denying his guilt and telling him, "I desire not to hear from you again." But he did hear again. In about a week her father wrote him he was not surprised at his denial, but, if he was not the man, "why was there so much secrecy?" and denouncing in unmeasured language the villain who took advantage of his child, and "when you prove to me you are not guilty (how?) by helping to bring the guilty to justice, then I am willing to walk from here there and get down on my knees at your feet and ask your forgiveness." Under the circumstances, if he had not been the guilty one, every impulse and dictate of honest manhood would have irresistibly compelled him to hasten to Cassie and her father, and not only establish at once to her father his innocence, but also help "to bring the guilty one to justice." He did neither—did absolutely nothing to ferret out, if another, and bring that other to justice. He swore he made no reply to her father's last letter and made no explanation whatever to him.

The said letter, the admission in evidence of which is under discussion, was *directly and expressly invited* by appellant, and after its receipt was unquestionably *acted upon by him*. On November 22d, he wrote Cassie:

"Will answer your letter which came to hand a few days ago. Was glad to hear from you, but sorry you had been sick. [She had been sick from confinement on October 29th.] * * * I am the same fellow [as] when you saw me last, and I want to noe [know] now Cassie [if] you want to come home, an [and] I want to know what is the matter with you, an [and] just as soon as I get the news I will send you the money to come on, an [and] nobody never has read your letters and won't. Your pa has rote some letters here an [and] I want to noe [know] if you are all right an [and] I want to know just what is the matter."

On November 24th, immediately upon receipt of this letter, as therein invited and requested, she answered him. The reading of her answer just here, which is copied in full in the original opinion, will demonstrate that she therein in plain and unequivocal language accused him directly of the crime charged herein. It needs no comment to show this. That he then acted on what she stated therein has been clearly shown above. From the very frequent correspondence between them,

the jury was clearly justified to believe he answered her letter, and there can be no doubt that he did. So that, under all the authorities, her letter and his failure to answer and deny her accusation was without doubt admissible as an admission by him of his guilt.

The only other question to be considered is his attack on the court's charge about this letter. I copied this charge in the original opinion. As I have shown, this letter was unquestionably properly admitted to impeach Cassie Dunn, if for no other purpose. Its statements directly and positively charged appellant with being the father of her child and guilty of incest with her, for which he was indicted and then on trial. He swore he did not receive the letter. The other testimony was amply sufficient to show that this testimony by him was false, and that he did receive the letter. The court, however, could not himself decide that appellant's testimony was false, and that he did receive the letter; but it was imperative upon the court to submit that question to the jury, made so by appellant himself. And it was necessary for the court to submit it on both theories—one, in case he had not received it; the other, in case he had received it. The court, in said charge, in very clear, apt, and appropriate language, which could not be misunderstood, did submit both theories. The charge is copied in full in the original opinion. It is in a separate paragraph. Appellant made no objection to the first part of this charge. He objected to the last three lines of it only, beginning with the word "however." The court qualified and explained his bill presenting this question as follows:

"I desire to state that the charge in question was one given to the jury for the purpose of protecting the defendant's rights before the jury in their deliberations, in the event they should find that the letter in question was not received by him. The court did not inform the jury, as is contended by the defendant in the bill, that the letter was a criminative fact against the defendant, nor did it charge or intimate that said letter proved defendant's guilt; on the contrary, the court told the jury that it was for the jury to determine what weight they would give, if any, to said letter, calling their attention to the fact that the jury were the exclusive judges of the facts proven, of the credibility of the witnesses, and of the weight to be given to their testimony. I thought the charge on the whole was a proper one on the subject in question, and it was designed and intended for the benefit of the defendant's rights, and to safeguard the same before the jury."

It is undoubtedly the settled law of this state, established by a great many decisions of this court, and not questioned by any of them, as tersely and correctly stated by Mr. Branch in his Criminal Law (section 873, p. 556), as follows:

"Proof of contradictory statements offered by the state to impeach a witness, where the same could be used by the jury to establish any fact in the case, other than as affecting the credibility of the witness, should be limited in the charge. * * * If the state impeaches her

own witness by proof of contradictory statements, and the same could be used by the jury to establish any fact in the case, other than the credibility of the witness, such proof should be limited in the charge. * * *

This doctrine is held and applied all the time by this court. Mr. Branch cites some of the cases only. A great many others could be cited, but it is unnecessary. Cassie Dunn's statements in the letter could have been used by the jury to directly establish that appellant was guilty of incest with her. Hence it was the imperative duty of the trial judge in his charge to tell the jury, as he did, that:

"If you do not believe from the evidence, beyond a reasonable doubt, that defendant received said letter, you will not consider it for any purpose, except to aid you, if it does, in determining the credibility of Cassie Dunn, but may consider it for that purpose only."

It thus being necessary for the court to tell the jury what they could do about considering the letter if *not* received, it became his further duty to tell them what they were authorized to do if it had been received. The state is just as much entitled to a full and fair charge presenting all the contingencies as the defendant; so that I think it was the duty of the judge to tell the jury, as he did:

"However, if said letter was received by the defendant, you will determine the weight you will give to it under the instructions given you in the last paragraph of this charge."

Said last paragraph was:

"You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony; but you are bound to receive the law from the court, which is herein given you, and be governed thereby."

This should always be given in a felony case, (section 789, Wh. An. C. C. P.), and is universally approved by this court.

I do not understand how any one could seriously contend that said sentence, beginning with "however," is on the weight of the evidence. It is not, and cannot be even misconstrued to be. There is no intimation, directly or indirectly, by the judge of his opinion of the letter, nor of what weight, if any, he thought should be given to it by the jury. He told them the law:

"You are the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given to the testimony."

He left all to the jury, and in no way intimated what he even thought about it. Such a charge as this has expressly been held proper by this court in Chas. H. Proctor v. State, 54 Tex. Cr. R. 261, 112 S. W. 770. The charge there was:

"If you find that the state has introduced any act of W. R. Proctor done by him in the absence of Chas. H. Proctor, after the commission of the homicide, then you will not consider it in finding your verdict; but you will wholly disregard it unless you find from the evidence beyond a reasonable doubt that Chas. H. Proctor directed said W. R. Proctor, in which event you will consider it as legal evidence in the case against Chas. H. Proctor." (Italics added.)

See also Morris v. State, 39 Tex. Cr. R. 375, 876, 46 S. W. 253; Terrell v. State, 174 S. W. 1093.

Appellant cites and relies upon Rice v. State, 49 Tex. Cr. R. 584, 94 S. W. 1024. I have carefully read and studied that case. In my opinion, the condemned charge therein is wholly unlike the charge herein. The opinion of the court therein demonstrates that. In my opinion the motion should be overruled. I protest against the case being reversed.

HIGHTOWER v. STATE. (No. 3876.)
(Court of Criminal Appeals of Texas. Jan. 26, 1916.)

1. BURGLARY \S 41 — SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary, evidence held sufficient to authorize a verdict of guilty as principal, but not as an accessory.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. \S 41.]

2. CRIMINAL LAW \S 59—"ACCESSORY."

Under Pen. Code 1911, art. 86, defining an accessory as one who, knowing that an offense has been committed, conceals the offender, or aids him to avoid arrest or trial, the accessory becomes criminally connected with the principal and not the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. \S 59.]

For other definitions, see Words and Phrases, First and Second Series, Accessory.]

3. CRIMINAL LAW \S 69, 76 — ACCESSORY — CONCEALMENT OF KNOWLEDGE.

Concealment of knowledge that a crime is to be committed does not make a party an accessory before or after the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 87, 93; Dec. Dig. \S 69, 76.]

4. CRIMINAL LAW \S 76—ACCESSORY—FAILURE TO INFORM.

Failure to inform on a person known to have committed a crime will not make one an accessory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 93; Dec. Dig. \S 76.]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Bill Hightower was convicted as an accessory to a burglary, and he appeals. Reversed and remanded.

L. N. Frank, of Stephenville, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. The indictment against appellant contained three counts; one charging him with being a principal in the burglary, another that he was an accomplice, and the third that he was an accessory to the crime.

[1] Many questions are presented for review, some of which were not presented in the trial court, but we do not deem it necessary to discuss them at length, but merely to say that none of them present reversible error if the evidence is sufficient to sustain

the verdict. Had the jury found appellant guilty as a principal in the transaction, the evidence, in our opinion, would have sustained the verdict, but the jury by their verdict specifically found him guilty as an accessory to the crime. The state's case is that Higginbotham's store was burglarized, and some property stolen therefrom, among the articles stolen being a 38-caliber pistol. Appellant is shown to have been in and around that store on Saturday evening and Saturday night. Sunday morning after the burglary, Sammie Mayberry and another testified they saw appellant take a pistol out of a stove in their residence and hand it to Nick Mayberry. This pistol was subsequently found in possession of Nick Mayberry, and was identified as the pistol stolen from Higginbotham's store. These circumstances would have justified a finding that appellant was a principal in the transaction, as he the morning after the burglary is, by this testimony, shown to be in possession of property stolen from the burglarized store.

[2-4] Appellant did not testify on the trial, but there was introduced in evidence a statement made by him voluntarily when before the grand jury. In this statement appellant admits he was at Higginbotham's store Saturday evening and Saturday night, but says he left with Sammie Mayberry and another negro, whose name is given merely as "Lige." The state's testimony corroborates the statement that appellant left the store with these two negroes. Appellant says, when he was at the store Saturday evening, he saw Nick Mayberry hid in the ceiling of the store, and Nick whispered to him, "I have got 'em now." The testimony of the officers corroborate him as to some one being above the ceiling. He admits he told no one about seeing Nick Mayberry hid above the ceiling. He denies that Sunday morning he got the pistol out of the stove and gave it to Nick, but says he saw Nick with the pistol at his home Sunday morning, and Nick then told him where he had hidden the other stolen property. He, Nick, and George Clark on Monday night rode a freight train to Ft. Worth, where they were all three arrested, Nick being in possession of the pistol. Does any of the evidence tend to show that he was an accessory to the crime of burglarizing this house? As before said, the testimony would support a finding that he was a principal in the commission of the offense, but an accessory is defined by our Code (Pen. Code 1911, art. 86) as one who, knowing that an offense has been committed, conceals the offender, or gives him any aid that he may avoid arrest or trial. The evidence is clear that appellant did not conceal Nick Mayberry, knowing that an offense had been committed. It is true that before the commission, and apparently in preparation for the commission of the offense, he saw Nick Mayberry concealed above the ceiling, and he gave no alarm. But no offense had then been committed, and such acts

would tend to show him either a principal or accomplice in the crime, and would have no tendency to show that he was an accessory as defined by our Code. There is no evidence that he gave Nick Mayberry any aid to assist Nick in avoiding arrest. All the testimony goes to show is that, after the burglary, they fled to Ft. Worth, going together on the same train. There is nothing to show that he gave Nick any assistance whatever. It is true he concealed the crime, and, if concealment could be considered as giving aid, yet it has been held in *Noftsinger v. State*, 7 Tex. App. 301, and other cases, that concealment of knowledge that a crime is to be committed does not make a party an accessory before or after the fact; and mere failure to inform on a person he knows to have committed a crime will not constitute one an accessory. As said by this court in numerous cases, a person can never become an accessory until there has been a crime committed, and the accessory then becomes criminally connected with the principal and not the offense by reason of the fact that he is assisting the principal in some of the methods specified in the statute. *Schackey v. State*, 41 Tex. Cr. R. 255, 53 S. W. 877; *Figaroa v. State*, 58 Tex. Cr. R. 611, 127 S. W. 193. The aid given must be personal aid to the party who committed the crime. He does not become an accessory by reason of any connection with the crime itself. The evidence, and all the evidence, would have a tendency to show that appellant was connected with the crime, and there is no evidence tending to show that he gave Nick Mayberry any aid after the crime was committed. The facts do not support a finding that appellant was an accessory to a crime committed by Nick Mayberry, but all that the evidence would suggest is, that he was a party to the crime when committed. The evidence being wholly insufficient to support a finding that appellant was an accessory to the crime, as accessory is defined by our Code, the case must be reversed and remanded.

Many states have by statute abolished the distinction between accomplice, accessory, and principal, and so drawn their statutes as to define as principals in an offense all persons known to the common law as principals, accomplices, and accessories, but our state has not done so; and, until it is done, even though the evidence would sustain a conviction of the person on trial as a principal, yet, if the jury find him guilty as an accessory, when there is no evidence to sustain such a finding, the judgment cannot stand. To those who advocate reform in criminal procedure, this would seem to present a field for their activities.

As before said, we do not deem it necessary to discuss the other questions raised, but because there is no evidence which would justify a finding that appellant was

an accessory to the crime of burglary committed by Nick Mayberry, as accessory is defined by our Code, the judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

HERNANDEZ v. STATE. (No. 8930.)
(Court of Criminal Appeals of Texas. Jan. 28, 1916.)

1. HOMICIDE \S 810—ASSAULT WITH AN INTENT—INSTRUCTION.

Where defendant testified that merely to frighten he shot into the ground before the parties he was charged with assaulting to murder when he saw them following him, the refusal of special charges, presenting the issue that, if he did so fire without intent to kill, he was guilty of no higher offense than aggravated assault, was improper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 857-861; Dec. Dig. \S 810.]

2. HOMICIDE \S 86—ASSAULT WITH AN INTENT—SPECIFIC INTENT.

The specific intent to kill is an essential element of the crime of assault to murder, unless the attack is made with such a reckless disregard of human life that the law will impute malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 112; Dec. Dig. \S 86.]

3. CRIMINAL LAW \S 543—EVIDENCE—TESTIMONY ON FORMER TRIAL.

In a prosecution for assault to murder, where the testimony of a witness on examining trial was reduced to writing, on trial, after the witness had gone to Mexico and was beyond the jurisdiction of the court, defendant could reproduce so much of the testimony as showed that the party he was charged with assaulting was armed with a pistol at the time and had secured cartridges from the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1233, 1236; Dec. Dig. \S 543.]

Appeal from District Court, Bee County; F. G. Chambliss, Judge.

Abundio Hernandez was convicted of assault to murder, and he appeals. Reversed, and cause remanded.

Beasley, Beasley & Daugherty, of Beeville, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of assault to murder, and his punishment assessed at two years' confinement in the state penitentiary.

[1, 2] Without reciting the testimony, we will say that the evidence offered in behalf of the state would amply support the verdict; but we think, under the decisions of this court, the evidence offered in behalf of the defendant raised the issue of aggravated assault, and it should have been submitted in the charge of the court, and on account of the failure and refusal of the court to do so it will necessitate a reversal of the case.

Appellant testified he went to a dance at

Espidio Ramirez's house. After the dance was over, he and others came down stairs into the restaurant; that while in the restaurant Jesus Ramirez put him out of the restaurant for cursing; that he started in the direction of the post office, when Espidio Ramirez and Pedro Torres followed him, and while they were engaged in conversation, he saw Jesus Ramirez and his brother approaching; that he told Espidio to send the boys back, and he began to back off; that they did not go back, and he pulled his pistol and fired into the ground to frighten them away. To use his language as it appears in the statement of facts:

"I shot in the ground when Espidio and his two sons continued to follow me, as I thought they were going to do me some harm and I wanted to scare them away. I shot twice. I shot in the ground both times; that altogether there were nine shots fired, but the other shots, than the two shots he says he fired, were fired by others from the direction of the post office."

Thus, according to his testimony, he fired the shots he says he fired to frighten Espidio and his boys away. In an assault to murder case there must be a specific intent to kill, or the shots fired with such a reckless disregard of human life as that the law will impute malice.

Appellant excepted to the court's charge because of the failure to submit aggravated assault, and asked two special charges presenting the issue that, if appellant fired the shots, he fired to frighten away Ramirez and his two sons, with no intent to kill, he would be guilty of no higher grade of offense than aggravated assault. This issue should have been submitted to the jury for their determination. *Thomas v. State*, 60 Tex. Cr. R. 86, 131 S. W. 314; *Angel v. State*, 45 Tex. Cr. R. 137, 74 S. W. 553; *Stevens v. State*, 38 Tex. Cr. R. 550, 43 S. W. 1005.

[3] Another matter is presented which we think necessary to pass on. Appellant's contention is that Jesus Ramirez and his brother were approaching him under circumstances that led him to believe his life was in danger. Arturo Chapa was a witness at the examining trial, and his testimony was reduced to writing. On the trial of this case appellant offered proof that since the examining trial Arturo Chapa had gone to Mexico and was beyond the jurisdiction of the court. Under such circumstances we think he should have been allowed to reproduce so much of the testimony as would have shown that Jesus Ramirez was armed with a pistol on that occasion, and had secured cartridges from the witness Chapa.

The newly discovered testimony need not be discussed, as it will not be newly discovered on another trial.

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

COFFEY v. TIFFANY et al. (No. 11177.)
(Kansas City Court of Appeals. Missouri.
July 6, 1914. Rehearing Denied
Nov. 23, 1914.)

1. PHYSICIANS AND SURGEONS ⇐18 — ACTIONS—BURDEN OF PROOF.

An action for malpractice being founded on negligence, plaintiff has the burden of proving that a negligent error was made by the physician in his treatment, and that such negligence was the direct cause of the injury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. ⇐18.]

2. PHYSICIANS AND SURGEONS ⇐16—MALPRACTICE—MISTAKE OF JUDGMENT.

A physician is not liable for an honest mistake in diagnosis or judgment, being bound to use only that degree of skill usually exercised by physicians and surgeons in good standing; but he is liable for negligence in administering medicines, or in performing an operation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. ⇐16.]

3. PHYSICIANS AND SURGEONS ⇐18—NEGLECT—PRESUMPTIONS.

That bad results follow treatment by a physician or surgeon raises no presumption of negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. ⇐18.]

4. PHYSICIANS AND SURGEONS ⇐18 — MALPRACTICE—EVIDENCE.

In an action against an oculist for negligently blinding plaintiff in one eye by administering improper medicines, evidence of negligence held sufficient for the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. ⇐18.]

5. PHYSICIANS AND SURGEONS ⇐18—MALPRACTICE—BURDEN OF PROOF.

Where plaintiff showed that medicines dropped in her eye by an oculist produced blindness, she is not bound to show the particular nature of the medicines.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. ⇐18.]

6. EVIDENCE ⇐571—MALPRACTICE—EXPERT TESTIMONY—EFFECT.

In an action for negligently blinding one of plaintiff's eyes, where the claim was merely that defendant administered the wrong kind of medicine, and not that he erred in judgment, expert testimony as to the cause of the accident is merely advisory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. ⇐571.]

7. EVIDENCE ⇐220 — ADMISSIONS — WHAT CONSTITUTE.

Testimony by the deputy sheriff, who served summons on defendant to answer an action for negligently blinding one of plaintiff's eyes, that the office assistant, when asked by defendant if she had a record of plaintiff's case, stated plaintiff was the teacher in whose eye he dropped iodine, putting it out, and that defendant said nothing, is admissible as an admission, for under the circumstances, defendant would naturally have denied the charge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. ⇐220.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

Action by Mary Coffey against Flavel B. Tiffany and Joseph W. Howard. From a

judgment for plaintiff, defendants appeal. Affirmed. For opinion of Supreme Court on certiorari, see 182 S. W. 996.

Scarritt, Scarritt, Jones & Miller, of Kansas City (Denton Dunn, of Kansas City, of counsel), for appellants. Atwood & Hill and Park & Brown, all of Kansas City, for respondent.

JOHNSON, J. This is a malpractice suit. Defendants are practicing physicians in Kansas City and specialize in diseases of the eye. Each has had long experience in that profession and is recognized as a skillful and able practitioner. During the events in controversy Dr. Howard had his office with Dr. Tiffany and practiced both independently and as the assistant of Dr. Tiffany. Plaintiff, a spinster 47 years of age, was a teacher of piano music and lived with her sister, who was a school-teacher. She had always been near-sighted, and had worn glasses since early youth. According to her evidence she had had no other trouble with her eyes, and used them without difficulty in the instruction of pupils, of which she had a large class. On Saturday, February 6, 1909, she gave a well-attended piano recital, at which she turned the music for the performers and to all outward appearances her eyesight at that time was unimpaired. A number of witnesses who knew her intimately testified that, aside from short-sightedness, her eyes seemed normal and strong before she consulted defendants. Plaintiff testified that:

"A few days before that [the piano recital] I noticed before the left eye what apparently seemed to be little black specks, and they were annoying to me, as they would come and go, and sometimes I would take my hands as if to brush it away, and then it was gone."

On Monday morning following the recital, plaintiff attempted to call Dr. Tiffany by telephone to arrange for the examination, and, if necessary, treatment, of her left eye, for these floating specks. He was away on a vacation, but the young woman who was in his office as clerk answered the telephone and arranged for plaintiff to come to the office the next day, and when plaintiff, accompanied by her sister, called, pursuant to this arrangement, the clerk received her, asked her a number of questions, and recorded her answers in a large record book. Plaintiff stated:

"She said to me that she would like to have me state what I came for, and she began by taking my name and address, and age, and then she asked me about my eyes. She said: 'I see you wear glasses.' I said I had worn them for near-sightedness since I was nine years of age, and then I told her as nearly as I can remember just what I told you, about these little black specks floating before my eyes, coming and going, and that the glasses I was then wearing had been fitted by an optician, instead of by an oculist, and that I thought I would let Dr. Howard see if he could give me—if they were correctly fitted, and then he could examine my eye, and see if there was anything wrong with it. Q. Did this conversation take place in the presence of Dr. Howard? A. Yes, sir."

Plaintiff then inquired of the clerk about the fee of Dr. Tiffany, and was assured that "if no one had sent me she did not think he would be exorbitant." Dr. Howard, who was attending to Dr. Tiffany's practice in his absence, then proceeded to examine plaintiff's eyes and made the usual chart tests. Plaintiff testified:

"Then he covered up my right eye, and said for me to read it with the left eye alone. I began testing the eye. I said that was the eye that had specks before it, but I did not say whether I could or could not see—was just beginning—when very suddenly he took his hand that way (indicating), and turned it around in front of me, and said, 'How many fingers did I hold up?' I said, 'Why, three fingers.' I said, 'I did not mean, Dr. Howard, I could not see out of the eye; I meant that I had had a specky condition, and I wondered about it.' And then he said he would try some other lens, to see if he could find anything I could see further with, and he tried two or three different glasses, and it was just about the same with each glass. I did not see any different, and I told him so; and he seemed in something of a hurry. He said he believed the glasses were fitted correctly, but we would go into the dark room, and he would examine the eye, and we went into the dark room. * * * After he covered the right eye, threw the light into the left eye, and took up a glass and began looking in the eye, and he looked for a period and then he says, 'I don't see anything wrong with the eye at all;' and after awhile he says, 'There is nothing the matter with the blood vessels, that is certain, for the reflex is too good,' and he spoke several times how good the reflex was. Then he told me to close my eyes, and he took his fingers and pressed on the ball of my eye, on top of the lid, and he says, 'The tension is good; there is no retinal trouble; the tension is good.' Then he took up the glass again, and he says, 'Well, it does seem to me that way at the back of your eye I can see some little black specks;' and I says, 'What would that indicate, if you saw them? Anything serious?' He said, 'Oh, no; nothing serious; it might indicate it needed flushing;' and I supposed that he meant my system, but I did not inquire into it specially. * * * I told him I would pay for the examination, and he told me to wait until Dr. Tiffany returned; that he attended to those matters. I went out into the other room, my sister and I, and started to put our wraps on."

While they were putting on their wraps, Dr. Howard came in and requested them to remain longer.

"He said," plaintiff and her sister testified, "he felt as if he would like to put something in, to dilate the pupil, and then make another examination the next day. * * * He dropped something into the eye, into the corner of the eye; and we sat down, and in probably five minutes he came and dropped something in again; and then he came back again in about not longer than five minutes, and I have not been able to recall whether he dropped anything in that third time or not, but I think that he did; but, at any rate, he told us to go downstairs, and sit for a little while, that he was not through putting in yet, that he would be down and put some more in. * * * After a little time he came down and dropped in again, after starting to put it in my sister's eye, and finally saw the difference, and put it in my eye, and then he told me he wanted me to come back next morning for another examination of the eye. * * * I didn't notice anything especially out of the way that afternoon, excepting that I did notice a peculiar dryness."

Plaintiff returned alone to the office the next day. She states that Dr. Howard—"looked at the eye, and said the pupil was not as large as he wanted it, and I protested. It seemed to me it was about as large as it could be. * * * He said, 'No,' it was not as large as he wanted it, and he dropped into my eye again, and told me to sit down and he would drop it in until it was as large as he wanted it, and he dropped it in at intervals until he had dropped in about six times. * * * He said it was large enough, and we would go into the dark room, and he would make another examination, and we went into the dark room, and only stayed there a short time, with the same result. He said he didn't find anything wrong, and we came out into the other room, preparatory to my leaving, when he said to me: * * * 'I would like to put some different kind of medicine into your eye.' He said: 'It will turn it red, make it swell up, and look very badly, but,' he says, 'that will all pass away, and your eye will be clear, and I believe that is everything you will need for your eye.' * * * He put two medicines in. * * * He took up one bottle first, from the swinging table in front of where I was sitting. It was a rather large bottle, about that long and wide (indicating). It had some kind of dark fluid in it, I noticed it specially; but he did not use it, put it down, then he took up a smaller bottle, and put that down, and turned away for an instant, and turned back for something else, and took something out of the bottle. * * * and he dropped into the corner of my eye quite a quantity of something. I remember, after he done it, it ran down my cheek. I had to wipe it away with my handkerchief. * * * It was so severe it seemed * * * the eye was paralyzed; not much feeling in it at that time."

It was near the noon hour, and plaintiff returned home. Immediately after leaving the office her face began to swell, and other symptoms of injury to the eye ensued and grew in intensity during the afternoon. She gave lessons until 3 o'clock, when she found herself unable to go on with her work. She thus describes her condition:

"The left side of my face was swollen a great deal. * * * The left eye was entirely closed. * * * The right eye was partially closed, and the swelling extended into my neck and forehead."

On looking into a mirror that evening she discovered that:

"My left eye was about half open, the lid drooping; but I could not see anything out of it at all. * * * It felt as though it was still tightly swollen shut. It was difficult for me to think it was not, owing to the fact that, when I closed the right eye, I could see nothing at all—could not see the light or anything."

Plaintiff's sister telephoned Dr. Howard about the condition of her eye, and the next day plaintiff again visited defendant's office. She testified:

"He [Dr. Howard] turned around, and the first thing he said was, 'Well, well; such a thing would not have happened once in a hundred times.' I told him I was greatly distressed, because of the fact I could not see anything at all. He said, 'Never mind,' it would become right—it was lasting longer than he had expected, something of that kind. Then I appealed to him if the sight would come back, and he said, 'Yes,' that everything would become right again; and then I asked him if he knew anything to do, * * * and he got something and dropped it into the eye. I asked him if it was for the relief of the condition, and he said,

'Yes,' and he dropped it in several times, and finally he came over to me and said he believed he would use that differently—that he would 'put it right on the pupil,' is what he said. And he worked something—I supposed it was a dropper, but I can't say; I did not see it—right under the lid, about the central part of my eye, and he pressed very hard on it, and then what I supposed to be drops, eye drops, flew out all over my eye, and it caused me to jump, and it pained me, and of course I could not see at all, but I did not know what effect it had on the eye."

Plaintiff asked when Dr. Tiffany would return, and was told that he was expected the following Monday (this was Thursday), and that she would be notified. On that day she and her sister found him at his office, were introduced to him by the clerk, and the following conversations and events occurred: Plaintiff testified:

"I told him I had made three visits, and I told him that I wanted to see him; but they said Dr. Howard was acting for him, and was his assistant, and that he was as competent as he, and I might just the same see him, just the same as Dr. Tiffany. * * * He [Tiffany] said that was correct; that I was, in fact, his patient; and then he could not see us just then, but that he would see us a little later, and Dr. Tiffany and Dr. Howard went out of the room, and remained out probably for about 15 minutes; then Dr. Tiffany came back by himself, and he came over, and said he would see us then. Then he did stop, and asked Miss McAllen [the clerk] to read from the large book, and she read a little—I didn't hear what she read, and we went into the same dark room. * * * I told him of the swelling and the paralyzed condition, and the lid was drooping over the eye still, and was still red, and he took up a glass, and looked a little, and said he could not make an examination in the condition it was in; but he said Dr. Howard had not done anything in the treatment of the eye, that there was nothing wrong with it, and my sister spoke up and said, 'You see the condition she is in; if the treatment did not hurt her any, what is the trouble with her?' He said he didn't know that, but he did know the treatment did not hurt her, and she asked him while Dr. Howard came into the room, I think just about that time, and he said, 'There is no reflex in this eye at all. * * * and * * * there was none the first morning she came in.' My sister said, 'Dr. Howard, didn't you tell us the first morning we were in here that the blood vessels were all right, because the reflex was so good?' Dr. Tiffany said, 'You are looking for trouble.'"

Plaintiff disclaimed any thought of making trouble and appealed to him to use his skill to remedy the condition of the eye. We quote further from her testimony:

"He asked me what I thought Dr. Howard did. I said, 'Well, he put the medicine in my eye, again, again, and again.' I said, 'If what he put in was atropine or belladonna, it seemed almost criminal to use such a deadly poison so repeatedly on any one.' * * * Q. What did Tiffany say to that? A. I don't recall that he made any answer to that, but I went on and said, 'You see the pupil of my eye, it is still very large, it has not gone down at all, and it seems to me at this time it ought to be going down a little bit,' and he took his thumb and fingers, that way (indicating), and he says, 'I can take it down that quick, but I don't want to.' I said 'Why?' He said, 'It might injure the eye.' Q. What was then said by either Grace, Dr. Tiffany, or yourself—anything about trying to help you, treating you, or how you would be treated? A. Yes; after I told him I

didn't think of making him any trouble at all, he began—he said I had shown confidence in Dr. Tiffany, in coming to him, and he would see what he could do for the eye, if I wanted him to. I told him I understood that his treatment would be just the same as Dr. Howard's, and he said it would. I said my experience made me afraid of that kind of treatment, and then he said, 'Just go, then.' And we got right up then. Q. He said what? A. 'Just go.'"

Plaintiff is totally blind in the left eye and the vision of the right eye is greatly impaired. She had been making \$100 per month teaching music, but since the injury her earning capacity is so greatly reduced that she is unable to earn more than \$20 per month. She is corroborated in her testimony by her sister, the pupil whom she was compelled to excuse on the afternoon of her injury, and by numerous friends whose testimony tends to show that the medicine put into her eye produced an immediate and profoundly injurious effect upon it.

She brought this suit August 18, 1909, six months after the injury. The summons was served by a deputy sheriff, who was introduced as a witness by plaintiff, and testified to what occurred at defendants' offices when Dr. Howard was served. Dr. Tiffany was not in, and after the papers were served on Dr. Howard he and the witness went downstairs (the offices were on two floors), when Dr. Howard called upstairs to the clerk who had received plaintiff, and asked if she "had a record of the Mary Coffey case." The clerk answered she had, and that plaintiff "was the school-teacher that he dropped iodine in her eye and put it out." Dr. Howard, who was standing by the side of witness, said nothing. Each defendant objected to this testimony, and the court sustained the objection of Dr. Tiffany, but overruled that of Dr. Howard. After severing her relation of patient to defendants, plaintiff consulted and was treated by other specialists, but without benefit. She did not call them as witnesses, nor did she offer any expert evidence.

Dr. Howard testified that when plaintiff first consulted him—

"she said that on the preceding Thursday morning—five days before, when she awakened—her left eye felt like it was full of water and she was unable to see out of it, and that she had not been able to see out of it since, until on the day before it had cleared up a little bit. I then placed her in front of the chart, * * * which was 20 feet away, on the opposite side of the room, bright light reflected on it, and asked her to remove the glasses she was wearing, and read for me as much as she could on the chart. She could not see any letters on the chart with both eyes. * * * With the right eye she had to go within 2 feet of the chart—that is, the left eye was covered—she went within 2 feet of it, to see the large letter, which is about 3½ inches long. She could distinguish it when she got that close to it, tell what it was, with the right eye; but with the left eye she could not see it, no matter how close it was."

Witness then examined her glasses, and found she was wearing "a minus eight dioptric lens." He further tested her left eye, and discovered she was practically blind

in that eye, being able to distinguish only between light and darkness. He turned his attention to the right eye, and after trying different lenses found that with "a minus 16 lens he could give her a 20 per cent. vision in that eye." In other words, his testimony is to the effect that plaintiff's eyes were 80 per cent. defective at that time, as it is conceded they are now and were immediately after the treatment he gave her. He took plaintiff into the dark room and examined her eyes with an ophthalmoscope. In the right eye he could get a bright reflex from the retina, could see the optic nerve and blood vessels, and learned from these disclosures that nothing was wrong with that eye but "a high case of myopia" or short-sightedness. The fact that plaintiff was wearing "a minus 8 dioptic lens indicated a malignant myopia, as lenses of more than 6 dioptics are not used except in malignant—i. e., progressive cases which frequently end in total loss of sight. As we understand the expert evidence of defendants, progressive cases are due to a very low grade of inflammation in posterior parts—the choroid and sclera—caused by the constant tendency of the retina to come forward and meet the focus of light, and this inflammation finally gets into the vitreous humor and breaks it down, until it becomes too opaque to permit the transmission of light rays. After examining the right eye, Dr. Howard looked into the left with the aid of the ophthalmoscope and—

"could not get any reflex; it was dark so I could not see anything in the eye; the reflex was lost. * * * It [the vitreous humor] was cloudy, turbid; I could not see through it; I could not project any light through it, could not project the strongest light through it. * * * A person in that condition would be practically blind in that eye."

Witness then examined both eyes as to tension and hardness, and found them normal, so that the affection of the left eye, which caused its blindness, consisted of the opacity of the vitreous humor, and this condition was produced by the slow, but insidious, inflammatory process we have described. Following these tests and examinations witness dropped a 1 per cent. solution of atropine sulphate into the left eye to dilate the pupil, to see—

"if I possibly could get any light into it. * * * That was the only eye that was diseased. I could look into the other eye; that is, the only one that she came for the purpose of having me examine as to its blindness."

After the lapse of fifteen minutes witness again examined the eye and found that:

"By using the strongest lights I had, I could not get any light into the eye—that is, into the posterior eye. * * * The reflex was lost. * * * The vitreous humor was turbid, cloudy, so I could not get any light through it. * * * There was no sight."

He told plaintiff she was blind in that eye, and then took her to the treating room and dropped an eight per cent. solution of dionin into her eye, telling her that it would make

the eye red, make it water, and make the conjunctiva (lining of the lids) swell some. Witness states he put in this drug "to clear up the cloudy condition of the vitreous."

When plaintiff came to the office the next day (Wednesday) witness examined the eye with the ophthalmoscope and found no vision—no reflex—and that he could not project light through the humor, which remained as cloudy and opaque as on the preceding day. Again he dropped in the solution of dionin for the same purpose as before. The examination made the following day showed no improvement. Witness stated that there was nothing abnormal in the appearance of plaintiff's face, no swelling of the face, eye, or eye region, and no change in the condition of the eye. Under the dictation of the witness, the clerk, Miss McAllen, entered the history of the case in the big book, and this record, which is in evidence, agrees with his testimony as to the history, diagnosis, and treatment of the eye. Witness denies telling plaintiff that the reflexes of her eye were good, and states that he did not hear Miss McAllen make any such assertion as that attributed to her by the deputy sheriff. Miss McAllen contradicted the deputy in her testimony.

Dr. Tiffany testified that, when plaintiff and her sister called upon him, "Dr. Howard and the office girl gave me a little history of the case, and brought the book to me, and showed me the data they had in the book, which embraced her history, age, vocation, and so on; also the vision of the right eye and the blindness of the left;" that plaintiff heard these recitals and did not dissent; and that he took her into the dark room and examined her eyes with the ophthalmoscope. He found the right eye "very highly myopic," and as to the left eye he states:

"I could not see the fundus or back part because of this opacity of the vitreous, a very dense opacity, which would not permit it to illuminate the back part of the eye."

He said to Dr. Howard, in the presence of the Misses Coffey, that there was no reflex in the left eye, and Dr. Howard replied, "That is what the book shows," without evoking any dissent from plaintiff or her sister. Witness further testified to the absence of any swelling in the face or other abnormal appearance. He did not deny that he charged the women with "looking for trouble," nor that he ordered them to leave his office.

The expert witnesses introduced by defendants agree that a 1 per cent. solution of atropine sulphate is harmless, and is generally used by specialists to dilate the pupil when it is desired to project light into the posterior of a diseased eye, and that aside from occasionally producing a temporary swelling of the conjunctiva the dropping of an 8 per cent. solution of dionin into the eye is harmless, and is done by oculists to clear up opacity in the vitreous humor, by increasing the lymphatic circulation and thereby draw-

ing off the foreign and deleterious infusion. One of the experts, on cross-examination, suggested that some persons have a peculiar idiosyncrasy to atropine poison; but the opinion evidence as a whole strongly tends to show that both of the solutions used by Dr. Howard are perfectly harmless and will not produce the condition of the eye and face plaintiff claims followed the last treatment given on her second visit. Inasmuch as she suffered no ill effects from the first day's treatment, which Dr. Howard states consisted of the application of atropine sulphate, it is fair to assume that she was free from the idiosyncratic trait just mentioned, and the conclusion is irresistible that her eye was not poisoned either by atropine sulphate or by dionin. The real issue contested at the trial was whether or not her evidence tends to show that Dr. Howard by mistake and with negligence dropped a poisonous and destructive drug into her left eye on the occasion of her second visit to his office.

This issue was submitted to the jury and resolved in favor of plaintiff, and a verdict for damages in the sum of \$10,000 was returned against both defendants. Plaintiff filed a remittitur, with all accrued interest, and judgment was rendered for her in the sum of \$7,500. Both defendants appealed, and their principal contention is that the court erred in overruling their demurrers to the evidence. Since the evidence relating to the conversation in the presence of the deputy sheriff was admitted against only one of the defendants, we shall postpone our inquiry into its admissibility until after the disposition of the questions presented by the demurrers, and in the consideration of those questions we shall regard the record as containing no direct evidence that iodine was put into the eye of plaintiff by mistake.

Plaintiff relies upon circumstantial evidence to take her case to the jury, and our first task is to ascertain and pronounce the rules of law which define the liability of physicians for injurious errors in practice, and which control the analysis of circumstantial evidence where such evidence alone is relied upon to support an actionable charge of malpractice.

[1-3] The petition alleges that the injury—"was directly caused and occasioned by the careless, negligent, and unskillful acts of the defendants and the failure of said defendants to exercise ordinary care and skill in the treatment of plaintiff."

There is no suggestion in the evidence that defendants, or either of them, were incompetent or unskillful. On the contrary, they appear in the record as oculists of the highest attainments in their profession, and the case presents no issue of an error of judgment, either in diagnosis or treatment, but turns on the question of whether or not a competent, experienced, and skillful oculist inadvertently and negligently used a virulent

poison when he intended to use a harmless drug.

The gist of the action being negligence, the burden is on plaintiff to establish by proof, first, that a negligent error was made by Dr. Howard in the treatment of her eye; and, second, that such negligence was the direct cause of her injury. *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172. A physician or surgeon is not an insurer that he will effect a cure, nor that his diagnosis or treatment of the case will be free from honest errors of judgment. He is not required to come up to the highest standard of skill known to the profession, and when he accepts employment is bound only to exercise such reasonable care and skill as usually is exercised by physicians and surgeons in good standing. *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813.

"A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice." *Staloch v. Holm*, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712.

In that case the court properly recognized the distinction between matters of science and those of art. As to the former, an honest error of a legally qualified physician or surgeon cannot afford a cause of action, no matter how injurious it may be to the patient; while in matters of art—i. e., in the performance of surgery, or in the application of remedies—his negligent errors are held to be governed by the ordinary rules of negligence. Thus, a physician should not be held liable for erroneously, but honestly, deciding to perform a surgical operation upon a patient, for that would be an error in a matter of science, and the law would be too harsh and severe should practitioners of medicine or surgery be held to know at their peril what were best to be done in a given case. But a surgeon who uses an unclean or rusty knife in an operation, or a physician who administers a dose of medicine without knowing what it is, would be guilty of failing to exercise reasonable care, since an ordinarily careful surgeon or physician would not use an unclean knife, or administer a medicine without knowing what it is. Plaintiff contends that her evidence accuses Dr. Howard, not of a wrong diagnosis or of an erroneous selection of an improper solution to drop into her eye, but of negligence in using a solution without discovering, as he should have done, that it was not the one he intended to use, but was a poison he would not have thought of using.

The answer of defendants to this contention is that there is no proof that he dropped anything into her eye but a 1 per cent. solu-

tion of atropine sulphate and an 8 per cent. solution of dionin, and that plaintiff's conclusion to the contrary rests entirely upon conjecture and speculation. We agree with counsel for defendants that mere proof of a failure to cure, or that a bad result appeared to follow the physician's treatment, of itself, would raise no presumption of absence of proper skill and attention, or of negligence in giving the treatment. We exclaim with Thayer, J., in *Haire v. Reese*, 7 Phila. (Pa.) 138:

"God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

And we agree with Taft, J., in *Ewing v. Goode* (C. O.) 78 Fed. 442, that:

"If * * * a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

The practice of healing, throughout the ages, has been esteemed one of the noblest and most useful of human activities. It is to the interest of mankind that it should engage the attention of men of the highest ability, skill, and devotion to the conservation and development of the race, and the law will not array itself against this manifest interest by allowing the stamp of guilt or recreancy to be placed upon an honest failure to cure, since every physician, no matter how careful and skillful he may be, must fail in many cases to benefit his patients.

[4, 5] But, as we view the evidence of plaintiff, her cause does not rest upon mere proof of a bad result following a treatment selected in good faith and properly applied by a physician of recognized skill and ability. The facts and circumstances adduced by her cannot be harmonized with the assertion of Dr. Howard that he dropped nothing into her eye but harmless solutions of atropine sulphate and dionin, and show beyond question that something was put into her eye, on the occasion of her second visit, which poisoned it and put out its sight. Her evidence that her eyes were not seriously impaired or affected when she visited him is reasonable, as is also the evidence that her eye and face became swollen and inflamed immediately after the treatment in question. In the consideration of the demurrers to the evidence, we must accept these as proved facts, despite the contradictory evidence of defendants that she was blind in the left eye when first she consulted them. As a whole the evidence will support the hypothesis that plaintiff went to defendants' office with a comparatively well eye, received a treatment that immediately put out its sight, and that the application to her eye of a 1 per cent. solution of atropine sulphate or of an 8 per cent. solution of dionin could not and would not have produced such an injury. Under

such hypothesis, which is well supported by reasonable and credible evidence, the inference follows, not as one built upon other inferences or conclusions, but as one forced by its evidentiary elements, that Dr. Howard, despite his assertions to the contrary, put some other liquid into her eye than that he thought he was using. Of course, he did this unintentionally, and in the mistaken belief that he was using the proper solution; but such a mistake cannot be considered in any other light, under the rules we have discussed, than as one not of science, but as the result of a lack of reasonable care, and therefore one for which an action will lie in favor of the injured patient. It is similar in character and legal effect to the negligence of a surgeon in using an unclean knife or saw in an operation, or in sewing up a sponge in an abdomen operated upon, or of a physician in giving a dose of medicine to a patient out of the wrong bottle.

[6] It did not devolve on plaintiff to prove the kind of poison defendant put in her eye. Her evidence, showing beyond question that she was poisoned, is sufficient to make a case to go to the jury. Nor did her burden of proof require the introduction of expert evidence to support her charge of negligent poisoning. There may be instances where expert evidence should be treated as more than advisory, but in malpractice cases such exceptional weight is found to be accorded to opinion evidence only in cases where the issue is the alleged incompetency or unskillfulness of the physician, and has no place in a case, such as the present, where the alleged negligent act of a competent physician is of a nature to be readily understood by men of common knowledge and understanding.

In answer to the argument that the evidence leaves the cause of plaintiff's injury in the field of debate and conjecture, since the blindness of the eye may have been caused by malignant myopia, we say that this argument rests alone on defendant's evidence. The evidence of plaintiff, which is credible and substantial, describes a condition of her eye that will not admit of the theory that she had malignant myopia, or was afflicted with inflammation of the posterior parts of the eye, or with any breaking down or impairment of the vitreous humor. The evidence of plaintiff presents no alternative hypothesis of the cause of the injury, but points to the pleaded negligence as the sole cause.

[7] The argument against the admissibility of evidence relating to the conversation at the office of defendants in the presence of the deputy sheriff is based on the view that the maxim, "*Qui tacet consentire videtur*" (he who is silent is understood to consent), should be applied with the utmost caution, and that the occasion in question did not imperatively require of Dr. Howard the denial of his clerk's assertion that he had put out

plaintiff's eye with iodine. Speaking of the maxim, it is said in Greenleaf on Evidence (16th Ed.) § 198:

"It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in. A distinction has accordingly been taken between declarations made by a party interested and a stranger; and it has been held that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so. It may be impertinent, and best rebuked by silence."

In *State v. Hamilton*, 55 Mo. 520, it is said that:

"Unless it is shown that the party is immediately concerned, and that, unless he did speak, his silence might fairly be construed into an admission, the declarations will not be admissible."

In *Banks v. Nichols*, 48 Mo. App. 385, such tacit admissions are made to depend on the facts, first, of whether the party accused understands the accusation and comprehends its bearing; and, second, "whether the truth of the facts embraced in the statement is within his own knowledge, or not, whether he is in such a situation that he is at liberty to make any reply, and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it."

If the accusation had been made in the presence of plaintiff or her agent, there could be no question but that the failure of defendant to deny it would bring the charge and his silence within the rule of the maxim; but the officer was not the agent of plaintiff, and had nothing to do with the judicial inquiry into the cause, and therefore a closer and more difficult question is presented. Had the charge come from an impertinent stranger, no admission of its truth could be implied from the silence of the accused. It did not come as an impertinence, but in answer to a question asked by the accused of the young woman, who was a sort of factotum in the office of defendants, received their patients, inquired into their business, and kept the office record of cases treated by defendants. The question asked by Dr. Howard called for information kept by her in the course of her employment for the benefit and future use of her employers, and her answer was in direct response to that question. It purported to give him the facts relating to the history of the case as she had received them from him, and it would have been most unnatural for him not to deny such a charge if it were false, no matter who was present. It was just as though she had said: "You told me you put out the woman's eye, and that is the history of the case in this office." A charge of that kind, if false, would bring a denial from any man under any circum-

stances. The evidence was properly admitted.

We have examined carefully into the objections made by defendants to portions of the arguments of counsel for plaintiff to the jury, and have come to the conclusion that the arguments did not transcend the bounds of propriety. There is no prejudicial error in the record.

Affirmed. All concur.

FARMERS' BANK OF DEEPWATER v. OGDEN et al. (No. 11101.)

(Kansas City Court of Appeals. Missouri.
May 14, 1915.)

1. PRINCIPAL AND SURETY ~~65~~59—CONTRACTS—CONSTRUCTION.

The contract of a commercial surety, being prepared by it, is to be construed most strongly against it and in favor of the party to be indemnified.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. ~~65~~59.]

2. PRINCIPAL AND SURETY ~~65~~75—CONTRACTS—CONSTRUCTION.

A surety bond given by the president of a banking institution provided that, if the employer or any officer of the employer suspects or has notice of any fact tending to indicate that the principal is, or may be, unreliable, the employer shall immediately notify the surety, and, if he neglect, the surety shall not be liable for any act of the principal thereafter committed. After the bond had been given the cashier of the bank and directors received information that the president had, without authority, indorsed the cashier's name on a note which he indorsed and negotiated. The maker's name was also forged, but that was not known. Held that, as the president was an officious person, prone to exercise his own authority, and as his solvency and honesty were unassailed, the surety was not discharged because not notified, unless the act of the president was such that ordinary business men would deem it required investigation indicating him to be unreliable, deceitful, dishonest, or unworthy of confidence.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 128; Dec. Dig. ~~65~~75.]

3. PRINCIPAL AND SURETY ~~65~~162—ACTIONS—EVIDENCE—JURY QUESTION.

Whether the act of the president of a bank in indorsing the cashier's name to a note without authority, indicated him to be unworthy of confidence within the bond, requiring the surety to be notified of such facts under penalty of discharge, held for the jury.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 442-445; Dec. Dig. ~~65~~162.]

4. PRINCIPAL AND SURETY ~~65~~79—LIABILITY OF SURETY—ACT OF PRINCIPAL.

Where the plaintiff bank was unable to make a loan to a customer, and its president introduced the customer to another bank, and recommended that it make the loan, which was to be secured by a chattel mortgage, and the president thereafter secured the credit card made out to the customer, erased his name, and substituted that of his own, securing the funds, the president in such transaction was acting as

the agent of the bank, and the surety on his official bond was liable.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 125; Dec. Dig. ¶79.]

5. PRINCIPAL AND SURETY ¶79 — BONDS — "DEFAULTER."

Though the officers of plaintiff bank had heard rumors that the president had, in his youth, been sentenced to the penitentiary for larceny, and failed to notify the surety on the president's bond of that fact, the surety was not discharged under a provision of the bond that, if the employé had at any former period been a defaulter, and such fact was known to the employer at the time of the execution of the bond, it should be void; for the expression "defaulter" is used in reference to the wrongful misapplication of money with which one has been intrusted, and does not necessarily mean an offender (citing 2 Words and Phrases, Defaulter).

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 125; Dec. Dig. ¶79.]

6. PRINCIPAL AND SURETY ¶75 — BONDS — CONSTRUCTION.

In such case the failure of the bank to notify the surety of the rumors that the president had been convicted of larceny will not discharge it under a provision requiring the employer to notify the surety of any fact coming to its notice after the beginning of the term for which the bond was written, indicating the employé to be unworthy of confidence.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 125; Dec. Dig. ¶75.]

7. PLEDGES ¶16—ACTIONS—EVIDENCE.

In an action to recover on the bond given by the president of the plaintiff bank, evidence held to show that bank stock which he misappropriated had been pledged to the bank and delivered to the custody of the cashier.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 24-26; Dec. Dig. ¶16.]

8. BANKS AND BANKING ¶180 — LOANS — BANK STOCK.

While Rev. St. 1909, § 1086, prohibits a bank from taking its own stock as security for a loan, the statute applies only to a loan contemporaneously made, and permits the taking of such security to prevent loss upon a debt previously contracted.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 684-685½; Dec. Dig. ¶180.]

9. PRINCIPAL AND SURETY ¶142—ACTION—DEFENSE.

Where the state bank examiner closed plaintiff bank and demanded as a prerequisite to its reopening for business that certain assets, including claims against the defaulting president, be eliminated and cash substituted, such claims were not satisfied so as to prevent action on the president's bond, because the directors took up the indebtedness under the express understanding that any money recovered from the president's surety should be delivered to them in reimbursement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 390, 391; Dec. Dig. ¶142.]

Appeal from Circuit Court, Henry County.

Action by the Farmers' Bank of Deepwater against John Ogden and others. From a judgment for plaintiff, the defendant Globe Surety Company appeals. Affirmed.

Haff, Meservey, German & Michaels, of Kansas City, for appellant. Parks & Son and W. E. Owen, all of Clinton, for respondent.

ELLISON, P. J. Plaintiff is a banking institution, and defendant a surety company issuing contracts of surety insurance indemnity to banks against loss through the failure of its officers "to well and faithfully perform the duties" pertaining to their respective offices. The present case arises out of a bond given by John Ogden, plaintiff's president, with defendant as surety. The judgment in the trial court was for the plaintiff.

The specific undertaking for which defendant stands as surety is—

"to make good and hold the employer [plaintiff] harmless for any loss occasioned through the dishonesty of said employé, or through any act of his done or omitted, in bad faith, through negligence or without authority, until all his accounts with the employer have been fully settled and satisfied, occurring at any time after," etc.

The bond is executed upon 14 conditions. The first and fourth, being those here involved, are as follows:

"First. If the employé has at any former period been a defaulter, and if such fact be known to the employer at the time of the execution of this bond, or at the time of the appointment of such employé by the employer, this bond shall be void, and the employer shall not be entitled to recover hereunder for any loss sustained by or through any act of such employé."

"Fourth. If at any time after the beginning of the term for which this bond is written the employer, or any officer of the employer, suspect, or if there comes to the notice of the employer, or any officer of the employer, any act, fact, or information tending to indicate that the employé is or may be unreliable, deceitful, dishonest, or unworthy of confidence, the employer shall immediately notify the company, and, if he fail or neglect so to do, the company shall not be liable for any act of the employé thereafter committed," etc.

Ogden came to Deepwater, the scene of the transactions resulting in this litigation, from another part of the state, where, in his youth, he had a criminal history unknown in his new location. He was a man of good habits and amiable manners. He was a church member, and took much interest in the betterment of conditions materially and socially, and had been elected mayor of the town. He so impressed himself upon the community that he took leading position in its affairs with general consent, approbation, and confidence. After several years' residence there, in which he prospered socially and financially, he organized the plaintiff bank and became its president. In that position he proved too weak for the tempting opportunities for wrongdoing, and soon began the career which wrecked the bank and again made him an inmate of the penitentiary.

[1-3] The first count in the petition is based upon a transaction by which Ogden, acting as plaintiff's president, on November

11, 1912, obtained a credit card of the People's National Bank of Clinton, a correspondent of plaintiff, for \$1,498.80, "for the use of A. J. Tally." The People's Bank gave the card to Ogden, as president of plaintiff bank, and he surreptitiously erased Tally's name on the card and inserted his own, and then deposited it with the assistant cashier of the plaintiff bank, and appropriated the proceeds to his own use. Defendant denies liability on two grounds: One, that plaintiff learned of Ogden's having committed a forgery in what is called the O'Hare note and failed to notify defendant as required in the first and fourth conditions, just quoted; and, second, that Ogden was not acting as plaintiff's agent in the Tally transaction.

The bond as originally executed took effect the 31st of August, 1911, to continue in force for one year. When it expired it was renewed for another term, expiring in August, 1913. The following incident came to the knowledge of plaintiff's officers in October, 1912: Some time in December, 1911, Ogden forged a note for \$1,800, payable to plaintiff bank, purporting to be executed by George O'Hare. He negotiated this note to the Lowry City Bank, indorsing it with his own name as president of plaintiff bank, and also himself signing or indorsing the name of the plaintiff's cashier thereon. A circumstance not connected with any suspicion of the note caused the Lowry City Bank to ask that it be paid, and to that end its cashier spoke to plaintiff's cashier about it one evening while the latter was at a neighbor's house, and the latter denied having indorsed the note. It was then shown to him, and he looked at the indorsement only. He saw Ogden had indorsed it as president of the bank, and that his indorsement as cashier was not his signature, but was in Ogden's handwriting. He then handed it back to the Lowry Bank's cashier saying that he would see Ogden about it next morning. In a few days Ogden paid the note to the Lowry Bank, and thus it became a closed incident so far as that bank was concerned.

It afterwards developed that O'Hare's name as maker was also forged, but this was not known at the time we are referring to. Plaintiff's cashier, having thus become possessed of knowledge of Ogden having signed his name to the indorsement without authority, did not notify defendant, but he did speak of it to the vice president and to one of the directors, and neither of these notified defendant. The latter therefore insists that it is not liable on the Tally transaction under that part of the fourth condition above quoted, which requires notice when the employer becomes possessed of knowledge of "any act, fact, or information tending to indicate that the employe is or may be unreliable, deceitful, dishonest, or unworthy of confidence," and it asked, and the trial court refused, an

instruction to that effect. The court took plaintiff's view that Ogden's act in signing the cashier's name did not come within the terms of the condition, unless it was a forgery, and that there was room for the conclusion by plaintiff's officers that Ogden had not intended to commit that crime. Adopting this view, the court made a jury question of it by an instruction to the effect that information these officers had must be such as would lead a reasonably prudent person, under the same or similar circumstances and surroundings, to believe that Ogden was unreliable, deceitful, dishonest, and unworthy of confidence.

Justification for this view is said to be found in testimony given by these officers and others that Ogden was thought to be a man of high character; that he had everybody's confidence; that he was a man of great egotism and self-assertion, who made himself the head and front of every transaction with which he was connected; and that these officers attributed the act of signing the name of the cashier of a bank of which he was president boldly, without attempt at disguising handwriting, to such characteristic. Besides, the cashier of plaintiff bank, as we have said, had no knowledge or suspicion that the O'Hare note was a forgery. He knew that Ogden had sold a farm to O'Hare and had taken a note for part of purchase money, and it never occurred to him that Ogden was doing anything more than assuming a right as president of the bank to indorse it with the cashier's name along with his own. He knew him as a prosperous man living in the "finest home" in the town, and loaned him \$500 of his own money the Monday following this information. The director testified that:

"It did not make me question John Ogden's honesty a bit. * * * I just thought he did it because he and Grob [the cashier] were there together in the bank, and that he could sign his name to it, too."

The propriety of the court's action on those instructions is the question for decision. It may be stated at the outset that defendant's obligation as surety is not so limited and circumscribed with protective requirements as that of an ordinary surety who acts for accommodation without gain to himself. Organized companies and corporations have now taken up suretyship as a business which they prosecute throughout the country for profit, and their engagements are considered more in the nature of guaranty insurers. These contracts are made out by themselves, and their terms, when subject to two meanings, are construed in favor of the party to be indemnified: *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977; *Roark v. Trust & Deposit Co.*, 130 Mo. App. 401, 110 S. W. 1; *Boppert v. Surety Co.*, 140 Mo. App. 675, 126 S. W. 768; *Rule v. Anderson*, 160 Mo. App. 347, 142 S.

W. 358; *People v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

But, as said by this court in an opinion by Judge Johnson:

"The express limits placed by such contracts on the obligation of the surety must be respected, else courts will be making contracts for persons which they did not make * * * for themselves." *Moore v. Title Guaranty Co.*, 151 Mo. App. 256, 131 S. W. 477.

And so it is said by the Supreme Court of the United States that:

"This rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon." *Guarantee Co. v. Mechanics' Co.*, 183 U. S. 402, 419, 22 Sup. Ct. 124, 131, 46 L. Ed. 253.

In considering this phase of the case we are not overlooking a construction of the contract which we think should be given to it, viz., that where it turns out there was guilt, the surety company should have been given an opportunity to investigate for itself, and that the bank's bona fide conclusion that nothing was wrong ought not to bind the company. The real question is: Where, in fact, there was guilt, has anything come to the knowledge of the bank in regard to the employé which can reasonably be said to require inquiry or investigation? But, while this is true, it is, of course, not every act of a bank officer coming to the knowledge of the bank which must be reported to the surety company. The act must be of such character as to impress a business man of ordinary prudence and judgment that it should be looked into to see if it fell within the terms of the condition above quoted. If the act be such, the circumstances considered, that all reasonably prudent men of ordinary judgment would have but one opinion of it, that is, to bring it to this case, would consider that it indicated that Ogden was either "unreliable, deceitful, dishonest, or unworthy of confidence," then it would become the duty of the court, in the absence of notice, to peremptorily declare to the jury the defendant was not liable. But, if the circumstances are such that an act which ordinarily might be bad appears to be so clearly innocent that men of ordinary prudence and judgment would think it did not even require investigation, the jury should be so instructed. We think this view is supported by *American Surety Co. v. Pauly*, 170 U. S. 133, 146, 147, 18 Sup. Ct. 552, 42 L. Ed. 977.

[4] We think the claim that Ogden was not acting as agent for plaintiff in this Tally transaction is not sustained by the record. The facts are that Tally was a customer of plaintiff bank and desired a loan of \$1,500, and plaintiff bank did not feel able, at the time, to accommodate him, but Ogden, as its president, went with Tally to the People's National Bank at Clinton, introduced him, explained the situation, and recommended

that the latter bank make the loan, which was to be secured by chattel mortgage on some cattle. The bank agreed to make the loan in the following way: A chattel mortgage was executed (which, however, turned out to be invalid), and it made out a credit card to Tally for the amount reading, "We credit \$1,498.80 for use of A. J. Tally," and addressed it by indorsement to the plaintiff bank, and delivered it to Ogden, with the agreement that the plaintiff bank should not pay out the money to Tally until one of its officers "could come down and examine the chattel security." Every just inference and fair intendment disclosed in the record shows that the Clinton bank was dealing with Ogden as president of plaintiff bank. He received the credit card and substituted his own for Tally's name and placed it to his credit in the plaintiff bank, afterwards using the proceeds.

[5] As we stated at the outset, it appears that Ogden, when a "boy," had lived in a distant part of the state, and that he had been convicted, with some others, of stealing a set of harness from a barn, and sentenced to the penitentiary. This was some 12 or 15 years before his coming to Deepwater. Two years before the organization of the plaintiff bank, and in the midst of a political campaign, rumors prevailed that he had been in the penitentiary. Among others who heard these rumors were several citizens who afterwards became directors of plaintiff bank. Upon this defendant insists that plaintiff violated both the foregoing conditions of the bond. Defendant's agent who took the application for the bond now in contest also heard these rumors. But, whatever influence the latter's knowledge may have on defendant's right, we do not think the foregoing conditions cover or apply to the point in question. The first is that if plaintiff knew that Ogden had "at any former period been a defaulter." Information that one had served a term in the penitentiary for stealing a set of harness is not information that he is a "defaulter." One may be a bad man and have forfeited public confidence in many ways, and yet not be a defaulter. This bond, being a contract with a bank assuring the fidelity of one of its principal officers, makes clear that the word "defaulter" is used in reference to the wrongful misuse or misapplication of money with which the officer has been intrusted. "It describes one whose speculations have brought him within the cognizance of the law." 2 Words and Phrases, 1930; *State v. Kountz*, 12 Mo. App. 511. In the sense here used, the word does not mean an act which may be merely a "default," or "fault," or "offense," even though the offense may be a felony, as, for instance, arson or rape.

[6] Nor do the provisions of the fourth condition relate to knowledge of Ogden's past criminal history. It reads, "If at any time

after the beginning of the term for which this bond is written" the plaintiff bank suspects, or notice comes to it, of his being dishonest, etc. This, as it states, refers to information which plaintiff may receive after the period the bond takes effect. So we conclude that no ground exists for interference with the court's action as it affects the Tally transaction declared on in the first count.

[7] The second count in plaintiff's petition is based upon Ogden having wrongfully abstracted from the plaintiff bank stock which he held in it, and which he had pledged to plaintiff as security for money which he had theretofore borrowed of it. The judgment for plaintiff on this count was in the sum of \$2,112. An examination of the record shows abundant evidence to sustain the judgment. We think there is no substantial merit in defendant's claim that this stock was not, in fact, pledged and possession delivered to the bank. It was in a stock book, not in Ogden's possession, but placed in possession and control of the cashier in pledge as security for money then due the plaintiff, in whose possession it was to remain until the indebtedness was paid. The cashier kept it in the vault, and it seems clear that there was sufficient evidence to justify a finding of a pledge to the bank with possession in the cashier. The question was duly submitted to the jury by an instruction for plaintiff, and defendant did not ask any on that subject.

[8] But it is said the statute (section 1086, R. S. 1909) disables a bank from taking its

own stock as security for a loan. The statute does forbid taking such security for a loan contemporaneously made, but it permits such security "to prevent loss upon a debt previously contracted in good faith."

[9] It appears from the record that the state bank examiner closed the plaintiff bank, and that he demanded, as a prerequisite to its reopening for business, that certain assets or claims owing to it (including Ogden's indebtedness) "be eliminated from the assets" and cash substituted. To this end there was a meeting of the directors, and they "took up" that indebtedness, but with the express understanding, stated on the minutes, that any money recovered by the bank on the bond in suit, "shall be turned over to these directors to reimburse themselves for this advancement." Other parts of the minutes of the meeting recognize that the bank was to prosecute the bond. In these circumstances defendant's point that plaintiff's claim against Ogden was paid and its right of action on the bond was destroyed is not well made. Exactly the contrary is shown to have been intended by the parties. We may add that no defense of this nature was pleaded.

There were some minor points made which we think should not affect the judgment. Our conclusion on the principal matter involved in the oral and written arguments being that it presented a jury question and it having been duly submitted, it is our duty to accept the verdict as concluding the questions of fact.

The judgment is affirmed. All concur.

McINTOSH MINING CO. et al. v. RED CLOUD ZINC CO. OF ARKANSAS et al. (No. 118.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. CHATTEL MORTGAGES —278—RELEASE—VALIDITY—EVIDENCE.

In a proceeding to enforce a deed of trust on real and personal property given plaintiff after a deed of trust which was a prior lien on the personalty had been released, evidence held to show that the deed of trust having priority was for the benefit only of the beneficiary named, and not for the general creditors of the mortgagor, so the release was valid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 567; Dec. Dig. —278.]

2. CHATTEL MORTGAGES —138—VALIDITY—BONA FIDES OF HOLDER.

An Arkansas corporation, which was indebted to plaintiffs, transferred its property to a Delaware corporation; that corporation agreeing to assume payment of the debts. The holder of a deed of trust on the corporate property, including its personalty, surrendered his deed of trust which was a prior lien on the personalty, so that the Delaware corporation could execute a trust deed in favor of plaintiffs. Held that, as the holder was entitled to release his trust deed, the trust deed to plaintiffs was valid as to the personal property against general creditors of the corporation, regardless of whether plaintiffs were innocent holders for value.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. —138.]

Appeal from Marion Chancery Court; T. H. Humphries, Chancellor.

Action by the Red Cloud Mining Company of Rush, Arkansas, against the Red Cloud Zinc Company of Arkansas and others, consolidated with an action by the McIntosh Mining Company and others against the Red Cloud Zinc Company of Arkansas and others. From a decree for plaintiffs in the original action, plaintiffs in the second action appeal. Affirmed.

The issues, and such of the facts as are undisputed, are correctly stated by counsel for appellees substantially as follows: On the 3d of August, 1909, the Red Cloud Mining Company of Rush, Ark., conveyed certain mining lands situated in Marion county by warranty deed to Paul A. J. Koehler and Dwight O. Wheeler for a consideration of \$75,000. \$5,000 was paid in cash, and Koehler and Wheeler executed their notes for the balance and a mortgage on the lands to secure the same. Koehler and Wheeler, on the 10th of August, 1909, conveyed the same lands to the Red Cloud Zinc Company of Arkansas, which company assumed the indebtedness of Koehler and Wheeler to the Red Cloud Mining Company of Rush, Ark. On the 4th day of January, 1911, the Red Cloud Zinc Company of Arkansas executed to Sam W. Williams, as trustee for Martin W. Littleton, a mortgage upon the above lands, and also upon certain personal property, consisting of mill machinery, etc., to secure a purported indebtedness of the com-

pany to Littleton of \$25,000. This mortgage was a first mortgage on the personal property named therein, owned by the Red Cloud Zinc Company of Arkansas, but was subject to the prior mortgage on the land given by Koehler and Wheeler to the Red Cloud Mining Company of Rush, Ark. On the 16th of June, 1911, the Red Cloud Zinc Company of Arkansas sold its property, real and personal, to the Red Cloud Zinc Company of Delaware, and as a part of the consideration the latter company assumed the indebtedness due to the Red Cloud Mining Company of Rush, Ark. In January, 1912, the notes of Koehler and Wheeler for the original purchase money were past due, and payment was demanded. The Red Cloud Zinc Company of Delaware, which had assumed this indebtedness, and Martin W. Littleton, who was one of the principal stockholders and owners of that company, desiring to secure an extension of time in which to pay the indebtedness, proposed that if the Red Cloud Mining Company of Rush, Ark., would accept a partial payment of \$8,000, the Red Cloud Zinc Company of Delaware would execute its note for the balance in lieu of the notes of Koehler and Wheeler and would cause the mortgage upon the personal property executed to Sam W. Williams, trustee for Martin W. Littleton, to be released, and would execute a new mortgage to the Red Cloud Mining Company of Rush, Ark., upon the lands and personal property, so that that company would have a first mortgage upon the personal, as well as the real, property. The proposition as made was accepted by the Red Cloud Mining Company of Rush, Ark., and the payment was made and the mortgage executed according to the agreement.

The mortgage to Williams, trustee for Littleton, was released, and new notes and mortgage were executed to the Red Cloud Mining Company of Rush, Ark., and Chas. M. Green, trustee. One note was for \$8,000, due July 1, 1912, and there were four other notes for \$14,791.33 each, dated January 12, 1912, due respectively one, two, and three years after date, bearing interest at the rate of 5 per cent. per annum. Each of these notes contained a provision that failure to pay the same when due would mature the entire indebtedness. On the 13th of April, 1913, default having been made in the payment of the notes then past due, suit was instituted in the Marion chancery court by the Red Cloud Mining Company of Rush, Ark., and Chas. M. Green, as trustee, to foreclose the mortgage given to secure the indebtedness. On the 30th of April, 1913, the McIntosh Mining Company and H. H. Gallup, claiming to be general creditors of the Red Cloud Zinc Company of Arkansas, instituted suit in the Marion chancery court against the Red Cloud Zinc Company of Arkansas,

the Red Cloud Zinc Company of Delaware, the Red Cloud Mining Company of Rush, Ark., and Chas. M. Green, its trustee, Chas. Le Vasseur, Sam Williams, individually and as trustee for Martin W. Littleton, the Bank of Yellville, Walter Layton, and the Dupont Powder Company, whereby they sought judgment for the indebtedness alleged to be due them, and set up that the mortgage executed by the Red Cloud Zinc Company of Arkansas to Sam W. Williams, as trustee for Martin W. Littleton, was for the purpose of obtaining money with which to pay the general creditors of said Zinc Company, and that Littleton was trustee for the general creditors, and alleged that Littleton had no right to release this mortgage, and prayed that the mortgage executed to Sam Williams, as trustee for Littleton, on the 4th of January, 1911, be revived and foreclosed upon the personal property.

On the 27th of October, 1913, the Red Cloud Mining Company of Rush, Ark., and Chas. M. Green, its trustee, answered the complaint of the McIntosh Mining Company and Howard H. Gallup, in which they denied that the mortgage executed by the Red Cloud Zinc Company of Arkansas, on the 4th of January, 1911, to Williams as trustee for Martin W. Littleton, was executed for the purpose of securing any claim or claims of general creditors, but set up that the same was executed for the purpose of securing the individual indebtedness of the mortgagor company to Martin W. Littleton. They further alleged that, if the mortgage referred to in the complaint was executed for the purpose of securing general creditors, such fact did not appear upon the face of the mortgage; that the Red Cloud Mining Company of Rush, Ark., and Green, trustee, had no notice of such facts, and that, the mortgage having been released by Littleton and Williams, his trustee, plaintiffs had no claims or right in connection with the personal property mentioned in their complaint superior to the rights of the Red Cloud Mining Company of Rush, Ark., and that, if plaintiffs had any rights, they were inferior and subject to the rights and liens of the Red Cloud Mining Company of Rush, Ark., and Chas. M. Green, trustee; that, long prior to the filing of the complaint by the McIntosh Mining Company and Gallup, satisfaction of the mortgage had been duly entered on the records in Marion county for the purpose of enabling the Red Cloud Zinc Company of Delaware to execute to the Red Cloud Mining Company of Rush, Ark., and to Chas. M. Green, trustee, its first mortgage upon both the personal property, mill, and machinery, as well as the land mentioned in plaintiff's complaint, all of which, the defendants alleged, was at the time well known to the plaintiffs, their agents and attorneys, and acquiesced in by them.

The two suits were consolidated. The

cause was submitted upon the pleadings, and depositions of witnesses, and exhibits and documentary evidence made exhibits, together with certain admissions and stipulations; and the court made findings in accordance with the undisputed facts above set forth, to which no objections are urged on this appeal. And further found that the mortgage of January, 12, 1912, executed by the Red Cloud Zinc Company of Delaware, to Chas. M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark., was a first lien upon all real estate and personal property therein mentioned, and that, as between Chas. M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark., and the McIntosh Mining Company and H. H. Gallup with reference to the personal property involved, in favor of Green, trustee, and the Red Cloud Mining Company of Rush, Ark. The court further found that the McIntosh Mining Company and H. H. Gallup were estopped from asserting any claim upon said personal property superior to the claims of Green and the Red Cloud Mining Company of Rush, Ark. The court found that the Red Cloud Zinc Company of Arkansas, and the Red Cloud Zinc Company of Delaware, were indebted to the McIntosh Mining Company in the sum of \$1,156.82 and to H. H. Gallup in the sum of \$915, and declared the said sums a lien upon the property second and inferior to the lien of Chas. M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark. The court also found that the McIntosh Mining Company and H. H. Gallup, as well as the other general creditors of the said Red Cloud Zinc Company of Arkansas, and the Red Cloud Zinc Company of Delaware, were entitled to participate with Martin W. Littleton in the mortgage executed to Martin W. Littleton and Sam W. Williams, trustee. The court rendered a decree, among other things foreclosing the mortgage on the personal property in favor of Chas. M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark.

The record recites the following:

"To the refusal of the court to hold that the claims of the McIntosh Mining Company and H. H. Gallup are superior and prior to the claims of Chas. M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark., the McIntosh Mining Company at the time objected and excepted, had their exceptions noted of record, and prayed an appeal to the Supreme Court, which is granted."

Other facts will be stated in the opinion.

Walker & Walker, of Fayetteville, for appellants. Allyn Smith, of Cotter, for appellees.

WOOD, J. (after stating the facts as above). [1] First. The first and principal question to be determined is whether or not the mortgage of January 4, 1911, executed by the Red Cloud Zinc Company of Arkansas, to Sam W. Williams, as trustee for Martin W. Littleton, to secure the sum of \$25,000, was

executed for the purpose of enabling Littleton to raise a fund of \$25,000 for the benefit of the general creditors of the Red Cloud Zinc Company of Arkansas, or whether it was for the purpose of indemnifying Littleton individually against any loss that he might sustain on account of a loan he had been instrumental in procuring for the Red Cloud Zinc Company of Arkansas, and which he had personally guaranteed. This was an issue of fact.

Witness Williams, who drew the mortgage of January 4, 1911, testified concerning it substantially as follows: Jesse M. Littleton and Capt. Charles Le Vasseur were present and gave witness the information from which to draft the mortgage. Littleton stated to him the purpose for which the mortgage was drawn in the presence of Le Vasseur. Witness did not know anything about that mortgage having been intended for the purpose of securing any person other than Littleton. The first that witness heard of such a purpose "was a short time before Mr. Allyn Smith filed this suit, in which he claimed it."

Jesse M. Littleton testified on this issue as follows:

"On the 4th day of January, 1911, I was president of the Red Cloud Zinc Company of Arkansas, and director in said company, and owned the majority of the stock in said company. On said date the Red Cloud Zinc Company of Arkansas did execute to Sam Williams, trustee, for the benefit of Martin W. Littleton, a mortgage on its real and personal property in Arkansas, and my means of knowing that said mortgage was executed is that I was present at the stockholders' and directors' meetings authorizing the execution of the note and mortgage, and as president of the company I executed it for the company. The purpose of the execution of the mortgage was to secure payment to Martin W. Littleton of the sum of \$25,000, he having advanced to the company, through me, \$15,000, and I having borrowed and paid in to the company \$10,000. It was to secure the two amounts."

After explaining that his brother had furnished to the company of which witness was president the sum of \$15,000, and that he himself had advanced the company the sum of \$10,000, he then reiterates:

"It (the mortgage) was executed for the purpose of securing him (Martin W. Littleton) for the sum that had already been advanced and which every officer of the company knew had been advanced in cash, and there was no thought of the general creditors being protected under the mortgage at that time, and there was no hint of it and no intention of it."

Martin W. Littleton testified concerning this as follows:

"I procured for the Red Cloud Zinc Company of Arkansas a loan of \$15,000 from the Trust Company of America, the payment of which obligation I guaranteed, and this mortgage was executed to secure me against loss on account of my guaranteeing said loan."

On behalf of the appellants, Charles Le Vasseur testified concerning this issue substantially as follows: He was a stockholder and secretary of the Red Cloud Zinc Company of Arkansas. As the Red Cloud Zinc Com-

pany of Arkansas, at the beginning of 1911, was indebted to its general creditors in excess of \$25,000, to protect its general creditors it executed to Martin W. Littleton, for no other consideration, a mortgage for the sum of \$25,000. At the time of the execution of the mortgage, the Red Cloud Zinc Company of Arkansas did not owe Martin W. Littleton anything. The amount due its general creditors was a large amount. It was understood that the object of the \$25,000 trust deed to Martin W. Littleton was to raise money to pay the general creditors of the Red Cloud Zinc Company of Arkansas. Martin W. Littleton did not pay any money to the Red Cloud Zinc Company of Arkansas at the time of the execution of the trust deed to him on January 4, 1911.

George De Burghen testified that:

"At the time of the execution of the trust deed of January 4, 1911, for \$25,000, the Red Cloud Zinc Company of Arkansas was not indebted to Martin W. Littleton in any amount."

Witness was present at a general meeting of the stockholders, and it was understood and agreed at the time of the execution of this \$25,000 mortgage of January 4, 1911, that if Martin W. Littleton failed to raise money thereon he was to hold said trust deed for the benefit of and to secure the general creditors of the Red Cloud Zinc Company of Arkansas. Martin W. Littleton did not pay one cent to the Red Cloud Zinc Company of Arkansas, at the time of the execution of the \$25,000 trust deed to him.

It will thus be seen that there was a sharp conflict in the evidence on the issue as to whether or not the deed of trust of January 4, 1911, was executed for the benefit of general creditors of the Red Cloud Zinc Company of Arkansas, or whether it was executed for the purpose of securing Martin W. Littleton individually from loss on account of a loan which he had obtained for that company and for which he had become personally liable. The deed of trust or mortgage itself shows on its face that it was executed to Sam W. Williams as trustee for Martin W. Littleton. The testimony of the draftsman of the instrument shows that such was its purpose, and the testimony of Jesse M. Littleton, who was representing his brother, Martin W., and Martin W. himself, was to the same effect. While the testimony of Le Vasseur and De Burghen tended to show to the contrary, the preponderance of the evidence clearly shows that the instrument was what it purports to be, to wit, a deed of trust to Sam W. Williams, in favor of Martin W. Littleton.

[2] 2. The next question is whether or not the mortgage executed by the Red Cloud Zinc Company of Delaware, on the 12th day of January, 1912, to Charles M. Green, trustee, and the Red Cloud Mining Company of Rush, Ark., of the personal property mentioned therein, and in controversy here, gave to the Red Cloud Mining Company of Rush, Ark.,

and Charles M. Green, trustee, a first lien on such property.

It appears that on the 16th day of June, 1911, the Red Cloud Zinc Company of Arkansas sold its property, including the personal property in controversy, to the Red Cloud Zinc Company of Delaware (hereinafter called the Delaware Company), and as a part of the consideration of that sale the Delaware Company assumed and agreed to pay the indebtedness due to the Red Cloud Mining Company of Rush, Ark. The mortgage of January 12, 1912, was executed in pursuance of an agreement between the Red Cloud Mining Company of Rush, Ark. (hereinafter called the Rush Company), and the Delaware Company, and Martin W. Littleton, who was one of the principal stockholders in the latter company. The indebtedness due the Rush Company which the Delaware Company had assumed was long past due, and, in order to procure an extension of time of payment, an agreement was entered into by the Delaware Company and Martin W. Littleton, on the one hand, and the Rush Company, on the other, to the effect that the Delaware Company would pay to the Rush Company the sum of \$8,000 upon the indebtedness due, and that the Delaware Company would execute its notes for the balance due in lieu of the notes of one Koehler and one Wheeler, evidencing the original indebtedness to the Rush Company, and as a further consideration for this extension of the time of payment that the deed of trust executed to Sam Williams, trustee for the benefit of Martin W. Littleton, on January 4, 1911, should be released, and the personal property included therein should be embraced in the new mortgage to be executed by the Delaware Company to the Rush Company. This arrangement was carried out on the part of the Rush Company by its surrendering the notes of Koehler and Wheeler and accepting the \$8,000 cash paid and the notes and mortgage of the Delaware Company, and on the part of the latter company by the execution of the notes and mortgage to the Rush Company, and on the part of Littleton by releasing the deed of trust given for his benefit.

Since the deed of trust of January 4, 1911, as we have found, was executed for the benefit of Martin W. Littleton individually, and not to him as trustee for the benefit of the general creditors of the Red Cloud Zinc Company of Arkansas, it follows as a necessary corollary to such finding that Littleton was the owner of this deed of trust and had the right to do with it as he pleased. The general creditors of the Red Cloud Zinc Company of Arkansas, among whom were the appellants, had no rights in that deed of trust, and hence they had no right to object to the release of such deed of trust by Martin W. Littleton. The agreement which he and the Delaware Company entered into with the Rush Company was one which they had a

right to make, and gave to the Rush Company a first lien on the personal property included in its mortgage, and the chancery court was correct in its finding to that effect.

3. In view of the above findings, it is unnecessary to discuss the question as to whether the Red Cloud Mining Company of Rush, Ark., was an innocent holder for value, and also the question as to whether or not the appellants were estopped. These interesting questions, ably presented in briefs of counsel, necessarily pass out under the conclusion which we have reached on the principal issue of fact above mentioned.

The decree is in all things correct, and it is therefore affirmed.

FLEMING v. OATES. (No. 110.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. HIGHWAYS \Rightarrow 184 — USE OF HIGHWAY — FRIGHTENING HORSES—AUTOMOBILE—SUFFICIENCY OF EVIDENCE.

In an action for injuries in a runaway caused by an automobile's frightening horses, evidence held sufficient to warrant finding that defendant failed to exercise proper care to avoid frightening the team.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. \Rightarrow 184.]

2. HIGHWAYS \Rightarrow 176 — USE OF HIGHWAY — FRIGHTENING HORSES—DUTY OF AUTOMOBILIST TO STOP—STATUTE.

Act March 24, 1911 (Acts 1911, p. 102) § 12, providing that it shall be the duty of the driver of an automobile to stop until a horse-drawn vehicle shall have passed when it appears that the horse is about to be frightened by the car, and imposing liability for damages arising from its violation, has no application to the case of an automobilist, who, approaching from the rear a horse-drawn vehicle going in the same direction ahead of him, observes that the team appears to be frightened, since such a requirement would impede travel almost to the extent of denying the use of the road to the driver of an automobile.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. \Rightarrow 176.]

3. HIGHWAYS \Rightarrow 184—USE OF HIGHWAY— FRIGHTENING HORSES — DUTY OF AUTOMOBILIST TO STOP—QUESTION FOR JURY.

Where the driver of an automobile approached from the rear a horse-drawn vehicle going in the same direction, the team of which appeared to be frightened, the question whether the automobile driver, who failed to stop, exercised ordinary care to avoid frightening the team, was for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. \Rightarrow 184.]

Appeal from Circuit Court, Conway County; M. L. Davis, Judge.

Action by Mrs. Fount Oates against Charles Fleming. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded for new trial.

W. P. Strait, of Morrilton, for appellant. Edward Gordon, of Morrilton, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to have arisen from

the negligent act of appellant in frightening a team of horses drawing a hack in which appellee was riding. It is alleged that the team became frightened from the automobile driven by appellant, and that he was guilty of negligence in failing to exercise proper care after discovering that the team was frightened.

Mrs. Oates, the appellee, resided in Oklahoma, and came to Conway county, Ark., to visit her relatives. She was met at Plummerville by her brother, who, at the time the injury occurred, was taking her out to a village north of Plummerville. As they drove along the public road, appellant approached with an automobile, going in the same direction, and passed them at the foot of a long hill. The horses became frightened, and turned over the hack, and appellee received personal injuries, for which the jury allowed her a small amount of compensation.

[1] According to the narrative of appellee and her brother, who was driving the hack, appellant was warned that the team was frightened, but, notwithstanding that fact, he dashed by at a high rate of speed without making any effort to prevent the horses becoming further frightened. Mrs. Oates testified that they had just met another automobile, which to some extent frightened the team, and that when she saw the appellant in his automobile coming over the top of the hill she rose up in the hack and waived to appellant and called out to him, begging him not to pass them, but that appellant came on at a high rate of speed with the machine making a great deal of noise, and that as he passed them the team became very much frightened and ran away, and that turned the hack over. The testimony of appellee is corroborated by that of her brother, and perhaps by other witnesses. It was sufficient to warrant a finding that appellant failed to exercise proper care to avoid frightening the team of horses.

On the other hand, the testimony adduced by appellant and his witnesses tends to show that he was free from any fault, and that the injury was caused by recklessness of appellee's brother, who was driving the hack, and who, it is claimed, was intoxicated at the time. Appellant testified that as he came over the hill he saw the team near the bottom of the hill, and that he shut off his engine and glided on down the hill as usual, and that as he approached, the team was turned slightly to the left to permit him to pass, and that he did pass in safety, but that the horses veered a little to the right and the driver dropped the reins and lost control of them, which caused the horses to turn and upset the hack.

It is thus seen that the testimony presents a sharp conflict as to whether or not appellant was guilty of any negligence which caused the team to become frightened. The law of the case has been pretty well settled

by the decisions of this court in discussing the relative rights of travelers on the road in different modes of conveyance, and the relative rights of automobilists and pedestrians. *Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632, 32 L. R. A. (N. S.) 1177; *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214; *Butler v. Gabe*, 171 S. W. 1190, L. R. A. 1915C, 702.

There are many grounds urged here for the reversal of the judgment, but we content ourselves with a discussion of one which involves the consideration of two instructions given by the court over appellant's objections, as follows:

"(2) You are instructed that if you find from the evidence that the defendant knew, or by the use of ordinary care could have known, that the team which was hitched to the said wagon was frightened at the approach of his automobile, and that he failed to stop said automobile and stop his engine, but continued toward said team, and that as a result of his failure to stop said automobile and engine the team ran away and thereby plaintiff was injured, you will find for plaintiff in such sum as in your judgment the evidence justifies."

"(12) Whenever it shall appear that any horse, ridden or driven by any person upon any of said streets, roads, and highways, is about to become frightened by the approach of any such motor vehicle, it shall be the duty of the person driving or conducting such motor vehicle to cause the same to come to a full stop until such horse or horses shall have passed, and, if necessary, assist in preventing accident. Any person convicted of violating this section shall be fined in any sum not to exceed \$200."

[2, 3] Instruction No. 12 is an exact copy of section 12 of the Act of March 24, 1911 (Laws 1911, p. 102) regulating the use of automobiles upon public highways; but our conclusion is that that section has no application to the facts of the present case, and that the court erred in giving it to the jury as one of the instructions in the case. The substance of the statute is also embraced in instruction No. 2. The purpose of that statute was to require drivers of automobiles to come to a full stop when they observe that an approaching horse, ridden or driven by another traveler, is about to become frightened. The statute imposes an absolute duty on the driver of the automobile to stop, and liability for damages arises from a violation of that statute. We think, however, that the statute was not intended to impose the absolute duty upon the driver of an automobile to stop his machine because a team in front, going in the same direction, appears to be frightened, but under those circumstances it is left to a trial jury to say whether under all the circumstances of the case the driver of the automobile has been guilty of negligence.

Doubtless the Legislature took into consideration the hardship of requiring the driver of an automobile to stop his car merely because a team in front of him appears to be frightened. The automobile, of course, travels faster than vehicles drawn by horses, and if this statute applied, it would prevent the

driver of an automobile from passing the slower vehicle. On the other hand, it is perfectly reasonable to require the driver of a machine, when meeting another traveler driving a team, to stop and let the team pass. The Legislature doubtless had this distinction in mind in failing to put into the statute a positive requirement that an automobile overtaking another kind of vehicle should stop, for such a requirement would impede travel almost to the extent of denying the driver of an automobile the use of the road. The lawmakers evidently intended to omit any definite requirement applicable to a state of facts such as is shown in this case, so that the question of negligence or due care could rest upon settled principles on that subject. This case should have been submitted to the jury on the question whether appellant exercised ordinary care to avoid frightening the team, without giving to the jury the statute which imposed the absolute duty of stopping until the team got out of the way.

For the error in giving those two instructions, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

E. O. BARNETT BROS. v. WRIGHT.
(No. 116.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

MECHANICS' LIENS ¶291 — **FORECLOSURE** — **ADMISSION OF AMOUNT DUE** — **SET-OFF** — **FAILURE TO PROVE.**

Where, in a suit to foreclose a mechanic's lien, plaintiffs introduced a written statement made by defendant, in which he admitted owing \$57.50, and defendant in his answer admitted making the statement, but alleged a failure of full performance whereby he was compelled to expend \$11.50 in completing the work and offered to confess judgment for \$46, but made no proof of such answer, it was error to enter judgment for plaintiff for only \$46, instead of \$57.50 admitted by defendant's statement to be due.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. ¶291.]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by E. O. Barnett Bros. against John W. Wright to enforce a mechanic's lien. From a judgment in their favor for less than the amount demanded, plaintiffs appeal. Reversed.

Oscar Barnett, of Malvern, for appellants.
E. H. Vance, Jr., of Malvern, for appellee.

HART, J. Appellant instituted this action in the circuit court to enforce a mechanic's lien for the price of labor performed by one John Alexander in the construction of a house for appellee. This is the second appeal in the case. The opinion on the former appeal is the law of the case, and reference is made to it for a more detailed statement of the issues. See *E. O. Barnett Bros. v.*

Wright, 172 S. W. 254. All the questions raised by the present appeal, except as to the amount for which judgment should have been rendered, were settled on the former appeal, and need not again be discussed. After the case was remanded to the circuit court, the appellee offered to confess judgment in favor of appellants for \$46, but denied that he owed them any greater sum. No proof was introduced by him to sustain his contention. Appellants introduced a statement in writing made by appellee in which he admitted he owed appellants a balance of \$57.50. Appellee in his answer admits that he executed this instrument, but states that the laborer failed to fully perform his contract, and that he completed the work for the laborer at a cost of \$11.50, and therefore asked that this amount be deducted from the \$57.50, and offers to confess judgment in favor of appellants in the sum of \$46.

It was incumbent upon him to prove the allegations of his answer. Not having done so, the court erred in rendering judgment against him only for the amount he offered to confess judgment for, viz., \$46. The court should have rendered judgment against him for the sum of \$57.50, the amount appellee admitted in the written statement he owed appellants.

For this error the judgment will be reversed, and the cause remanded for a new trial.

MONK et al. v. LITTLE et al.
(Nos. 87, 143.)

(Supreme Court of Arkansas. Jan. 3, 1916.
On Rehearing, Jan. 31, 1916.)

1. RELIGIOUS SOCIETIES ¶24 — **JURISDICTION OF COURTS TO DETERMINE PROPERTY RIGHTS.**

A suit by members of a church against parties also claiming to be members to obtain the right to the custody of the church building and to restrain defendants from the use thereof involved property rights, and the chancery court properly assumed jurisdiction.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 154-157; Dec. Dig. ¶24.]

2. RELIGIOUS SOCIETIES ¶23 — **PROPERTY RIGHTS—DIVISION IN CHURCHES.**

At a regular meeting of a church congregation L. was elected pastor for the ensuing year, and by a tie vote W.'s petition for restoration to membership and for a letter of dismission was denied; L. and ten others voting against his petition. Thereafter five members, without any notice to the congregation, met and voted to exclude L. and ten other members from membership in the church, and a division resulted in the church, one faction recognizing L. as its pastor, and another electing M. as their pastor. Subsequently both factions agreed to call a council of ministers and members of churches of their denomination to hear the case and give its advice, and such council, having been called, agreed that W. was entitled to be restored to membership. At the first meeting of the congregation thereafter a motion to abide by the decision of the council was carried, but a motion that W. be given the desired letter was lost, and L. and his followers refused to join in granting

such a letter. An association of churches of that denomination recognized M.'s faction, and the messengers to the association elected by it. It was, however, the rule of the church that the individual church congregation was its own governing body, and that councils, associations, and conventions were not church adjudicators. *Held*, that L. and his followers were entitled to the control of the church property, as in a church governed by the congregation the majority, if they have adhered to the organization and to the doctrines of the church, represent it, and L. was elected at a regular church meeting, and the attempt to expel him and his followers was without authority.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147-153; Dec. Dig. ¶ 23.]

3. RELIGIOUS SOCIETIES ¶12—ECCLESIASTICAL TRIBUNALS—FORCE OF DECISIONS.

The selection of persons to sit as a council did not make the council the governing body, nor require the congregation to abide by its decision, and its action was only advisory upon the congregation, and not controlling.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 87-98; Dec. Dig. ¶12.]

4. RELIGIOUS SOCIETIES ¶12—ECCLESIASTICAL TRIBUNALS—FORCE OF DECISIONS.

The act of the association was advisory merely, and its decision was not binding upon the civil courts.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 87-98; Dec. Dig. ¶12.]

On Rehearing.

5. RELIGIOUS SOCIETIES ¶23 — PROPERTY RIGHTS—DIVISION IN CHURCHES.

L. and his followers were not in rebellion to the constituted church authorities or subject to expulsion because they did not vote to grant the letter to W., and they were entitled to the church property, even though the council's action was adopted by the congregation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147-153; Dec. Dig. ¶ 23.]

Appeal from Chancery Court, Sebastian County; W. A. Falconer, Chancellor.

Suit by John B. Little and others against Charles M. Monk and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

John P. Woods and Daniel Hon, both of Ft. Smith, for appellants. Jephtha H. Evans, of Booneville, for appellees.

HART, J. John B. Little and others, claiming to be members of the Little Flock Primitive Baptist Church, brought this suit in equity against Charles M. Monk and others, also claiming to be members of said church, to obtain the right to the custody of the church building of said religious society and to restrain the defendants from the use thereof.

The Little Flock Primitive Baptist Church was organized some 20 years ago in the community of Cross Roads, in Dayton township, Greenwood district of Sebastian county, Ark., and at the time of the controversy which finally caused this suit contained about 45 members. The church in question was an independent religious society of the Primitive

Baptist faith. On the 2d day of April, 1907, the church property in controversy in this suit was conveyed by warranty deed from the owner to the Little Flock Church of the Primitive Baptist denomination and to its successors and assigns forever. Since the organization of the Little Flock Church, its regular time of meeting has been the second Sunday and Saturday of each month. At its regular meeting in July, 1912, a member who had been expelled from the church asked to be restored to membership and for a letter of dismission. John B. Little, who was then pastor, and ten others of the congregation, voted against his restoration, and eleven others of the congregation voted for it. So the vote resulted in a tie, and the petition of the excluded member for restoration to the church was denied. The congregation then proceeded to elect a pastor for the ensuing year, and John B. Little was again elected as its pastor. Thereafter, on the 6th day of August, 1912, the defendant M. Barton, with four others, who were then members of the Little Flock Church, without any notice to the congregation, met and voted to exclude John B. Little and ten other members of the church from membership in it. Since that time there has been a division in the church, a part of the congregation worshipping with John B. Little as its pastor and claiming to represent the church, and an equal number, having elected Dr. Monk as their pastor, worshipped with him, and also claimed to represent the church.

In December, 1911, the two factions, if such they may be called, agreed to call a council of ministers and members of the Primitive Baptist Churches to hear the case and give its advice. A council of eight, consisting of seven ministers and one layman, mostly from other states, assembled and heard the case. In May, 1912, the council rendered its decision as follows:

"We, your council, have unanimously agreed that the consideration of the evidence considered is sufficient to convince us that the acknowledgment made by W. H. Wheeler is sufficient to secure membership in any Baptist Church of our faith and order."

John B. Little and ten other members of the congregation refused to abide by the finding of the council, and, as above stated, refused to join in granting the church letter to W. H. Wheeler at the regular meeting in July, 1912. The faction which had chosen Little as pastor selected messengers to an association of churches of the Primitive Baptist faith; and the faction which had elected Charles Monk as its pastor also selected messengers for this association. The latter were recognized by the association.

The Little Flock Primitive Baptist Church was an independent religious society, and the congregation was its governing body. According to its rule, the action of the majority of the church members at a regular church

meeting is the action of the church and is final and binding, unless changed by the regular action of the church itself. Councils, associations, and conventions are not church adjudicators. The individual church congregation is the sole and only judge of its actions.

The chancellor found in favor of the plaintiffs, and decreed that they were entitled to the possession and management of the church property, and the defendants were ordered to surrender possession thereof to the plaintiffs. They were also enjoined from in any way using said property without the consent of the plaintiffs. From the decree entered of record, the defendants have duly prosecuted an appeal to this court.

[1] We think the decision of the chancellor was correct. In the case of *Sanders v. Baggerly*, 96 Ark. 117, 131 S. W. 49, a union between the Cumberland and Presbyterian churches was involved, and the court held that civil courts will not assume jurisdiction of controversies over matters purely of church doctrine or discipline where no property rights are involved. The court further held that even in cases involving civil or property rights, when questions arise concerning matters of church doctrine or discipline which have been decided by a church court vested with such jurisdiction by church laws, the civil courts accept as final and conclusive decisions of the ecclesiastical court. In the case before us property rights are involved, and the court properly assumed jurisdiction of the case.

[2-4] In the case of *Hatchett et al. v. Mount Pleasant Baptist Church et al.*, 46 Ark. 291, the court expressly held that in a congregational church the majority, if they have adhered to the organization and to the doctrines of the church, represent the church. The court said they control in the government of the church and have a right to select its pastor and control its property. The opinion in the case was delivered by Judge Battle, who was specially fitted to speak on the subject, not only because of his learning and eminence in the law, but also because of his long and close connection with the Baptist faith. Under the principles announced in that case it may be said that the plaintiffs in the case before us elected a pastor at a regular church meeting and are entitled to the control of the church property. The attempt to expel them on the 6th day of August by Barton and four others was without authority, unless it can be said that the action of the council was binding upon the church, and that Little and others put themselves in rebellion to the governing body of the church by refusing to abide by the decision made by the council.

As we have already seen, the congregation was the governing body of the church, and the action of the majority of the congregation is controlling. The selection of eight persons to sit as a council did not constitute the council the governing body nor require

the congregation to abide by its decision. The council was a voluntary one, and its action was only advisory upon the congregation, and was not controlling.

Counsel for appellants rely upon the principles of *Arthur v. Norfield Polish Congregational Church*, 73 Conn. 718, 49 Atl. 241, but in that case a majority of the congregation at a regular church meeting voted to accept the decision of the council, and by that act made the decision of the council the decision of the congregation. In the instant case, at a regular meeting of the congregation, the action of the council was called up for consideration, and a majority of the congregation did not vote to accept it. The council not being a judicatory, its action was not conclusive of any rights.

So it may be said in regard to the association. The fact that it recognized the messengers selected by the defendants is not an ecclesiastical decision of the governing body of the church that the defendants are right. The act of the association was advisory merely, and its decision is not binding upon the civil courts.

According to our own decisions, the congregation was the sole judicatory of the church. To the same effect see *Mason v. Lee*, 96 Miss. 186, 50 South. 625. See, also, case note to *Mack v. Kime*, 24 L. R. A. (N. S.) 696.

It follows from what we have said that Little and other members of the congregation were not legally expelled from the church, and that they are entitled to the control of its house of worship and other property.

The decree will therefore be affirmed.

On Rehearing.

[5] Counsel for appellants in their brief on motion to rehear claim that we did not take into consideration a part of the church record in rendering our decision. The part to which they refer is the proceedings on Saturday before the second Sunday in May, 1912, which was the first meeting after the council rendered its decision. The record shows that the members of the church met for divine service, and that there was a call for the peace of the church; that it was stated that the church was not in peace; that there was a motion and a second that the church abide by the decision of the council and accept its advice; that the motion was carried; that there was then a motion and second that Wheeler be given a letter; and that this motion did not carry. This was considered by us on our former opinion. The record in the case was very voluminous, and we did not deem it necessary to state the facts at length. The whole object of calling the council and asking its advice was to obtain a letter for Wheeler, who had removed to the state of Oklahoma. So it will be seen that, when the record is read together, the object of the proceeding was not accomplished; that is, a letter was not given to Mr. Wheeler. That this was the object and purpose of the whole

meeting is evidenced by the fact that matter was again brought up at the July church meeting and the church again refused to grant a letter to Mr. Wheeler.

Even if we are mistaken in this, it cannot be said that appellees were in rebellion to the constituted church authorities because they did not vote to grant a letter to Mr. Wheeler, and that they were subject to expulsion from the church. A few of the members met, not at a regular church meeting, at the home of a private individual, and attempted to remove appellees from the church. Their whole action was irregular and without sanction of church authority. Appellee Little was the pastor of the church, and he and the other trustees rightfully held charge of the church property. The court so held and ordered appellants to surrender possession of the property to appellees.

The motion for rehearing will be denied.

BOWLING v. CARROLL (No. 109.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. LANDLORD AND TENANT §154—COVENANT TO REPAIR FENCES—DAMAGES FOR BREACH.

The measure of damages for breach of a lessor's covenant to repair fences is what it would have cost the lessee to make the repairs, not the difference between the stipulated rent and the rental value without the repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 558-566; Dec. Dig. § 154.]

2. LANDLORD AND TENANT §152—COVENANT TO REPAIR FENCES—DUTY OF TENANT ON BREACH.

The lessor breaching his covenant to repair fences, the lessee is not required to make repairs or otherwise be liable for damages to the orchard by cattle getting in through want of such repairs, though it was stipulated that the lessee should take the best of care thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538-543, 545-549, 551-557; Dec. Dig. § 152.]

3. LANDLORD AND TENANT §152—COVENANT TO REPAIR FENCES—NOTICE TO REPAIR.

The lessee cannot recover damages for breach of the lessor's covenant to make needed repairs of the fences, unless he gives the lessor notice and reasonable time to make repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538-543, 545-549, 551-557; Dec. Dig. § 152.]

Appeal from Circuit Court, Fulton County; J. B. Baker, Judge.

Action by J. P. Bowling against J. W. Carroll. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

C. E. Elmore, of Mammoth Springs, for appellant. Lehman Kay, of Salem, for appellee.

McCULLOCH, C. J. Appellant, J. P. Bowling, was the plaintiff below, and instituted this action against J. W. Carroll to recover damages done to the plaintiff's farm, which

had been leased to the defendant under a written contract. The contract of lease contained a covenant that the lessor should "repair all fences that may need repairing and put same in good condition by Spring," and also contained a stipulation that the lessee should "take the best of care of said premises, and especially the orchard." The plaintiff alleged in his complaint that defendant had permitted stock and cattle to go into the orchard and destroy the growing fruit trees, grape vines, etc., and thereby caused damage in the sum of \$150. He also alleged that the defendant had destroyed fencing and posts of the value of \$20, and shingles of the value of \$2, and barn logs of the value of \$3.20, besides other damages to the premises.

The defendant filed an answer denying that he had permitted the damages alleged in the complaint, and also filed a cross-complaint against the plaintiff asking damages in the sum of \$144 on account of the plaintiff's failure to perform his contract with respect to repairing the fence. The case was tried before a jury, and the trial resulted in a verdict in favor of the defendant for the sum of \$50. The sum of \$130 was the amount stipulated in the contract for the rental price of the premises for the year in question, and the agreement was that the rent should be paid on demand. The full amount was paid by the defendant—the last payment of \$75 being made in April of that year. The payment included a credit of \$5, which was allowed to the defendant for repairing the fence. The contention of the plaintiff is that he had the fence repaired, and that when the defendant made some complaint on account of repairs, they examined the premises carefully, and defendant agreed to make the repairs on the fence that were found to be necessary, or that he desired to be made, for the sum of \$5, which was allowed as a credit on the rent. The defendant denied that he agreed to make all repairs for \$5, but testified that he only agreed to repair a certain portion of the fence for that sum, and he says that when he made the last payment the plaintiff promised to complete the repairs on the fence, but never did so. The defendant did not in fact make any repairs on the fence, except the portion he claimed he was to do for the stipulated sum of \$5. He testified that it would have cost about \$60 to put the fence in good repair; that is to say, in addition to the amount which the plaintiff himself spent and that which the defendant did in the way of repairs. The proof shows very clearly that cattle got into the orchard and the vineyard and did considerable damage to the premises.

[1] There are various assignments of error with respect to giving and refusing instructions. We will not undertake to discuss all of the assignments, but will mention only two which we deem important. The first one

worthy of discussion relates to the giving, over plaintiff's objection, of instruction No. 5, which reads as follows:

"You are instructed that if you find that the plaintiff failed to make such repairs on the premises as by the contract he was bound to make, and that defendant was damaged by reason of plaintiff's failure to make such repairs, and if you further find that defendant had paid the \$130 rents, you will find for the defendant on this item the difference between the rental value of the place without such repairs, unless you further believe from a preponderance of the evidence in this case that defendant agreed to repair said fence himself."

This instruction was erroneous for the reason that it lays down the wrong measure of damages for breach of the lessor's covenant to make repairs. In *Varner v. Rice*, 39 Ark. 344, it was said:

"If the landlord failed to repair the fence, according to his covenant contained in the written lease, the defendants may recoup as damages what it would have cost them to make such repairs, but not the indirect and consequential damages flowing from such failure to repair, such as the destruction of crops by the trespasses of cattle."

The same rule has been announced in other decisions of this court. Instruction No. 5 told the jury that the measure of damages would be "the difference between the rental value of the place without such repairs," meaning, we presume, the difference between the price paid by the plaintiff and the rental value of the place without the repairs. That statement is contrary to the decisions of this court and calls for a reversal of the case.

[2] Error is assigned in the refusal of the court to give instruction No. 9, which reads as follows:

"You are further instructed that if you find, by a preponderance of the evidence, that plaintiff failed to repair the fence according to the covenants contained in the written contract, that the defendant could recover only the amount that it would cost to make such repairs, and this would not justify defendant permitting and allowing cattle and stock to damage said orchard."

This instruction was correct in the statement as to measure of damages upon breach of the lessor's covenant to make repairs, but the latter part of the instruction was misleading in stating that the plaintiff's failure to make repairs "would not justify defendant permitting and allowing cattle and stock to damage said orchard." The jury might have understood from the instruction that the defendant was bound to make the repairs, and would be liable for any damages to the orchard on account of his failure to do so. The contract did not compel the defendant to make the repairs at all, and he could not be subjected to liability for damages caused by the plaintiff's own fault in breaking the contract. The contract in express terms required the lessee to take care of the premises, but it did not impose any obligation on him to make repairs. He had the right to take the premises as he found them and hold them without expending anything in the way of

repairs. He had the right to make the repairs, however, and recoup the cost of same against the claim for rent, but he was not compelled to do so, and his failure to do it did not subject him to liability for damage to the orchard. The instruction was erroneous because it might have misled the jury, and the court was correct in refusing to give it.

[3] Another of plaintiff's instructions refused by the court reads as follows:

"(10) You are instructed that before the defendant would be entitled to any damages by reason of the failure of the plaintiff to make repairs on said fence (if you find he failed to make said repairs as set out in contract), you must find that defendant gave notice, and that plaintiff had a reasonable time and opportunity to make said repairs."

This instruction stated the law, and it should have been given. Plaintiff testified that he made all the repairs claimed to be necessary by the defendant, and he cannot be held to have broken his contract, unless he received notice that further repairs were necessary. There was a conflict on that point, and the jury should have been instructed concerning it. The defendant claimed that he notified the plaintiff, and that the latter promised when he received the last installment of rent to make the necessary repairs, but there was a conflict on that point.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

SAIN et al. v. BOGLE et al. (No. 89.)

(Supreme Court of Arkansas. Jan. 3, 1916.)

1. DRAINS ⇐14 — DISTRICTS — PETITION TO ESTABLISH — LIABILITY FOR ATTORNEY'S FEE.

Under Acts 1911, p. 196, § 4, a drainage district is not liable for fees of attorneys in drawing up petition to establish it; there being no provision for their employment, except by commissions appointed after establishment of the district.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐14.]

2. DRAINS ⇐14 — DISTRICTS — ATTORNEY'S FEES—RECOVERY.

The statute contemplating the employment of only one firm of attorneys for a drainage district, that more may recover fees of it, they must show that additional counsel were necessary, and that their employment was authorized by the county court.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐14.]

3. ATTORNEY AND CLIENT ⇐140—COMPENSATION.

What is a reasonable attorney's fee for services performed is usually one of fact to be determined from the weight of evidence.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 336-349; Dec. Dig. ⇐140.]

4. EVIDENCE ⇐571 — OPINION EVIDENCE — COMPENSATION.

While expert opinion on the value of an attorney's services is admissible, it is not con-

clusive, but is merely to be considered with all the evidence in determining the just and reasonable compensation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. ¶571.]

5. ATTORNEY AND CLIENT ¶140—COMPENSATION—MATTERS TO BE CONSIDERED—"REASONABLE ATTORNEY'S FEE."

In determining a reasonable attorney's fee, there may be considered the amount and character of the services, the labor, time, and trouble involved, the nature and importance of the litigation or business, the amount or value of the property involved, the skill or experience called for, and the professional character and standing of the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 336-349; Dec. Dig. ¶140.]

For other definitions, see Words and Phrases, First and Second Series, Reasonable Attorney's Fee.]

6. DRAINS ¶14—DISTRICTS—ENGINEERS—COMPENSATION.

The civil engineers for a drainage district are entitled to only such fees as are expressly or by necessary implication allowed by statute.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. ¶14.]

7. DRAINS ¶14—DISTRICTS—COMPENSATION OF ENGINEERS.

Engineers are not entitled to compensation from a drainage district for services performed looking to the establishment of a drainage district, abandoned because not practicable; the language of the bond required by the statute being that the signers thereof will pay such expenses if the district is not formed.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. ¶14.]

8. DRAINS ¶19—DISTRICTS—DISSOLUTION—COMPENSATION OF ENGINEERS.

Where a drainage district is dissolved before its engineers have performed any work in the construction of the improvement, such work is not to be considered in fixing their compensation.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ¶19.]

Appeal from Monroe Chancery Court; Jno. M. Elliott, Chancellor.

Claims of G. Otis Bogle and others against the Cypress Creek Drainage District were allowed. T. A. Sain and others appeal on behalf of the District. Reversed and remanded, with directions.

S. S. Jefferies, of Clarendon, for appellants. Jno. B. Moore, of Clarendon, and Taylor, Jones & Taylor, of Pine Bluff, for appellees.

HART, J. This case came up on an appeal by the Cypress Creek drainage district from an order of the chancery court allowing an engineer's fee in favor of White & Watson in the sum of \$7,500 and an attorney's fee in favor of G. Otis Bogle and Thomas & Lee in the sum of \$4,000, in a proceeding to settle up the claims and affairs of the drainage district. The material facts are as follows:

In September, 1911, G. Otis Bogle, as a representative of certain landowners in Monroe county, Ark., filed a petition to establish a drainage district running south from Brinkley and to a point near Keevil. The district

was to be established under the General Acts of 1909, as amended by the Acts of 1911. See Acts 1909, p. 829, and General Acts 1911, p. 193.

J. B. White, a member of the firm of White & Watson, civil engineers, heard of the contemplated establishment of the district, and went to Brinkley to interview Mr. Bogle on the subject. He asked that his firm be appointed as engineers for the district, under the statute, and Mr. Bogle replied that the district would only comprise 12,000 or 14,000 acres of land, and he did not know whether the landowners whom he represented would be willing to go to that expense. Mr. White replied that on account of the smallness of the district his firm would not charge anything for a preliminary survey if, in case the district should be formed, his firm should be appointed engineers for it. The preliminary survey was made by Mr. White's firm, and it reported that the proposed district was not practicable, because it had no outlet; that, in order to make the proposed district, a feasible one it would be necessary to extend it 25 miles further south to obtain an outlet for the water.

During the fall of 1911 certain landowners who owned land south of the proposed district above referred to went to the firm of Thomas & Lee, at Clarendon, Ark., and asked them to prepare a petition for the organization of a drainage district. This district was to run south from Keevil, and was not to contain any land in the district contemplated by the landowners represented by Mr. Bogle. Thomas & Lee put the landowners off for a time, but, upon being pressed to get up a petition, finally agreed to do so. About this time Mr. Bogle came to see them, and after a consultation it was agreed that a district should be formed which should embrace both the lands in the district first contemplated by the landowners represented by Mr. Bogle and those owned by the parties represented by Thomas & Lee.

On the 10th day of January, 1912, certain landowners in Monroe county filed a petition with the county court to establish a drainage district embracing approximately 150,000 acres of land in Monroe county, Ark., the district to be established under the general act to provide for the creation of drainage districts in this state, approved May 27, 1909, and the act approved April 28, 1911, amendatory thereof. The petition was prepared by the firms of Thomas & Lee and G. Otis Bogle, and these two firms of lawyers prepared all the papers necessary for the formation of the district. The county court made an order establishing the district on the 11th day of March, 1912, and on the same day appointed G. Otis Bogle and Thomas & Lee attorneys for the district, but this order was not entered of record until the 6th day of April, 1912. On January 10, 1912, in compliance with the provisions of the statute, a bond was

signed by certain landowners and by the aforesaid attorneys, conditioned that the petitioners would pay the expense of the preliminary survey if the drainage district was not formed. White & Watson were appointed engineers for the district, and the commissioners agreed to pay them 5 per cent. for their services. This included the preliminary survey, the locating survey of the drainage ditch, and the supervision of the construction of the proposed improvement. The contract made with the engineers was prepared by the aforesaid attorneys. After the district was ordered established the commissioners advertised for bids for the construction of the proposed improvement. A. V. Wills & Son were the successful bidders, and it was proposed to issue bonds in the sum of \$350,000 to construct the improvement. Steps looking to the preparation of the contract with Wills & Son were taken by the attorneys, but no formal contract was prepared.

Certain landowners then filed a suit in the chancery court attacking the legality of the formation of the district. This suit was successfully defended by the attorneys for the district, and no appeal was taken from the decision of the chancery court holding that the district was legally organized. The chancellor rendered his decision while the Legislature of 1913 was in session, and those who opposed the district applied to the Legislature for relief. The Cypress creek drainage district was dissolved by the Legislature of 1913, and an act was passed conferring jurisdiction upon the Monroe county chancery court to wind up its affairs. The act provided that all parties having claims against the district should be required to present the same to the chancery court for adjudication, and that a receiver should be appointed to collect the tax assessed under the act for the purpose of paying the debts of the district. Section 2 of the act provided that no claims should be allowed except such as were created and incurred by order of the county court in the matters properly chargeable against the district. See Acts 1913, p. 902. The court allowed White & Watson \$7,500 for their services as engineers for the district, and G. Otis Bogle and Thomas & Lee a fee of \$4,000 as attorneys for the district.

It is insisted by counsel for the drainage district that the facts in the record show fraud and collusion on the part of the engineers and attorneys for the district. We do not deem it necessary to set out the facts pertaining to this branch of the case; for, in our opinion, the facts fall short of showing fraud or collusion as charged. We are of the opinion, however, that the fees allowed the attorneys for their services and the compensation allowed the engineers are excessive, but our opinion is not based on the ground of fraud or collusion between the attorneys and the engineers. Our conclusion is reached for the reasons which we shall now state:

[1] We shall first take up the question of the attorney's fees. It may be stated in the outset that, like all other cases, the attorneys must look for pay for their services to those who employ them unless there is some special provision of the statute for their payment otherwise. Section 4 of the drainage act of 1911 provides that the county court shall appoint three commissioners after it has established the drainage district; that upon their qualification the board shall prepare plans for the improvement within the district as prayed in the petition and procure estimates from competent engineers as to the cost thereof. The section further provides that for this purpose the board may employ such engineers and other agents as may be needful, such engineers to give bond as required in section one of the act, and that it may provide for their compensation, which, with all other necessary expenditures, including services of such attorneys as the county may employ, shall be taken as part of the cost of the improvement. See Acts 1911, p. 197.

It will be remembered that the act of 1913 gave the chancery court jurisdiction to wind up the affairs of the district, and provided that no claims should be allowed except such as were created and incurred by order of the county court in the matters properly chargeable against said district. This brings us directly to a consideration of what services of the attorneys are properly chargeable against the district.

Section 4 of the drainage statute above referred to is the only section of the drainage act which provides for the employment of attorneys. From a careful reading of that section it is apparent that the framers of the statute did not intend to require the landowners affected by the drainage district to pay the attorneys for their services in getting up the drainage district. It is apparent from the decree of the chancellor and from the record in the case that the attorneys were allowed fees for services in getting up the district. In this the chancery court erred. The attorneys were not and could not be appointed under the statute until after the drainage district was established by the county court. They were appointed on the 11th day of March, 1912, and the statute did not contemplate, as we have already seen, that they should be allowed any compensation for services performed by them prior to that date. The record shows that the only services performed by them after this time was some work done by them looking to the preparation of a contract between the drainage district and A. V. Wills & Son, the successful bidders. No contract between the drainage district and the contractors was ever prepared by the attorneys. The only other service performed by the attorneys was in the defense of the suit in the chancery court brought by certain landowners seeking to attack the legality of the

formation of the district. This suit was successfully defended by the attorneys, and almost immediately thereafter the Legislature passed an act to dissolve the district.

[2] When we take into consideration the services performed by the attorneys which became legal charges against the district, measured by like services performed in other cases, we think the sum of \$1,000 would be a reasonable compensation for the attorneys. In making this allowance we take into consideration that the statute contemplates the employment of but one firm of attorneys, and compensation is allowed on that basis. See *Seitz v. Meriwether*, 114 Ark. 289, 169 S. W. 1175. Though we hold that the statute contemplates the employment of but one attorney or firm of attorneys by the county court, we do not wish to be understood as holding that the act prevents the employment of other counsel in the sound discretion of the court in proper cases to aid in litigation against the district. There is nothing in the record, however, from which it could be inferred that additional counsel was necessary in the present case, and in order to charge for the services of more than one firm of attorneys it was incumbent upon the attorneys to show the necessity of the employment of additional counsel, and that such employment was authorized by the county court.

[3] In the case of *Lilly v. Robinson Merc. Co.*, 106 Ark. 571, 153 S. W. 820, we held that the question of what is a reasonable attorney's fee for services performed in a case where such inquiry arises is usually one of fact to be determined from the weight of the evidence.

[4] Again, in *Bell & Carlton v. Welch*, 38 Ark. 139, it was held that the court or jury required to fix the compensation for an attorney can only assess such fee upon proper proof, which may include the testimony of other attorneys as to what would be a reasonable fee under the circumstances, taking into consideration the value of the services actually rendered. See, also, the case note to 20 Ann. Cas. at page 53.

Though it is settled that the testimony of duly qualified witnesses given as expert opinion evidence is admissible on the issue of the value of the services of an attorney, it is equally well settled that the opinion evidence of such expert witnesses is not conclusive; but such evidence is to be taken in consideration with all other evidence in the case in arriving at a conclusion as to the just and reasonable compensation for the services performed. *Lilly v. Robinson Merc. Co.*, supra, and case note to 20 Ann. Cas. 56.

[5] We think it fairly deducible from our own cases and from the case note above referred to that in determining what is a reasonable attorney's fee it is competent and proper to consider the amount and character of the services rendered, the labor, time, and trouble involved, the nature and importance of the litigation or business in

which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys.

The record in the case before us shows that Judge Hemingway, a former justice of this court, in behalf of his firm, was present and took part in the trial in the chancery case in which the legality of the formation of the district was involved, and that his firm charged and was allowed \$200 for their services. So, when the principles of law above announced are applied to the facts in this case, we think the sum of \$1,000, as above stated, a reasonable compensation to be allowed the attorneys for the services which were a legal charge against the lands of the district.

[6-8] What we have said in regard to the principles of law governing the compensation to be allowed to attorneys applies with equal force to the engineers. They are entitled to only such fees as are expressly or by necessary implication allowed by the statute. Civil engineers were introduced who testified that the engineers in this case were entitled to a much larger fee than was allowed them by the county court, but in arriving at their opinion they took into consideration the fact that the engineers had performed services in the smaller district, which was abandoned because it was not practicable. The engineers were not entitled to anything for services performed by them looking to the establishment of that district. It is only when a district is formed that the engineers are entitled to compensation for preliminary surveys. The bond required shows this to be so. If the district is not formed, the language of the bond required by the statute is that the signers thereof will pay such expenses. It also appears to us that the experts in their evidence took into consideration the amount of work to be performed by the engineers in the construction of the improvement. No work of this sort was performed by the engineers, and they are not entitled to any compensation for it. An examination of the whole record leads us to the conclusion that the testimony upon this branch of the case was not fully developed. In arriving at the fee to be allowed to the engineers the court should have considered only the services for which they were legally entitled to charge. Under the statute, in fixing the amount to be allowed the engineers, the court should have been governed by the rules and principles of law applicable to the fees to be allowed the attorneys for the district. This was not done by the court, and for that error the judgment in favor of the engineers must also be reversed, and, the testimony on this branch of the case not being fully developed, the cause will be remanded, with directions to the chancellor to allow either

party a reasonable time within which to take additional proof.

It follows from the views that we have expressed that the decree must be reversed, and the cause remanded, with directions to the chancellor to render a decree in accordance with this opinion.

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NELSON, Constable, et al. v. HARPER.
(No. 112.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§39—CONDITIONS—RELEASE—VALIDITY.

In the absence of statute to the contrary, a provision in an assignment for the benefit of creditors that as a condition precedent to participation in the funds assigned, the creditors should release the debtor, would render the assignment void, even though all the debtor's property was included.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 154-164; Dec. Dig. §39.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§39—RIGHTS OF CREDITOR—STATUTE.

Under the statute a creditor cannot ignore his debtor's assignment for the benefit of creditors, and subject the property to the payment of his debt, though the assignment stipulates that the assignor shall be released from further payment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 154-164; Dec. Dig. §39.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§75, 208—VALIDITY—ASSIGNEE'S INVENTORY AND BOND.

Such instrument, under which the assignee took possession of the property and directed an inventory, which was made, was not affected as an assignment for the benefit of creditors, although the assignee did not comply with Kirby's Dig. § 336, in regard to filing his inventory and bond with the clerk of the chancery court.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 297, 674, 675; Dec. Dig. §75, 208.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS
§193—GARNISHMENT—PROPERTY SUBJECT.

Property of a debtor in possession of a trustee under an assignment for the benefit of all his creditors could not be reached by garnishment issued at the instance of one of the creditors to have his claim satisfied in full and levied by a constable with notice of the assignment and the assignee's possession, as the fund must go to all the creditors pro rata.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 196, 594-601; Dec. Dig. §193; Garnishment, Cent. Dig. § 118.]

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Action by R. G. Harper, trustee, against John D. Nelson, as Constable, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

The Monroe Grocer Company, Limited, recovered judgment against one J. P. Gathright for \$52.25. Execution was issued and levied by the constable upon certain goods as the property of Gathright. R. G. Harper (appellee) instituted this suit against the plain-

tiff in execution and the constable to recover the possession of these goods. Harper claimed title to the property under an instrument purporting to be a deed of assignment by Gathright for the benefit of creditors in which he conveyed to Harper "as trustee for the use and benefit of all his creditors" all of his property, the deed reciting:

"Consisting of lands and personal property, the personal property consisting of a stock of merchandise located at my store building at Strong, Ark., and all book accounts and notes due me by sundry parties arising from the sale to them of merchandise and otherwise, all of said property, both real and personal, being described in said inventory attached hereto as aforesaid."

The instrument further reciting:

"This assignment conditioned, however, that the same is made with the understanding that all my creditors accept the same in full of their said debts, fully releasing me from the further payment therefrom."

And the instrument contained the further recital:

"It is further agreed by the undersigned that all my rights and equity of redemption in and to all lands heretofore mortgaged by me to other creditors is hereby assigned to said R. G. Harper as trustee, for the use and benefit of my said creditors, except the land mortgaged to J. D. Gathright, being my homestead. A further condition of this assignment being that the terms hereof are to be accepted by said creditors within a reasonable time from date hereof."

Among other things in the agreed statement of facts is the following:

"That said R. G. Harper as assignee did not make or cause to be made an inventory of the stock of merchandise before the execution and delivery of the assignment, but did cause to be made an inventory of the same prior to the issuing of the execution on the judgment mentioned, and that J. D. Nelson as constable, before levying the execution, was duly notified of the assignment, that immediately after the assignment the said R. G. Harper, through J. D. Gathright, took possession of said stock of merchandise, directing the said J. D. Gathright to at once take an inventory of the same and which inventory was at once taken and in the hands of R. G. Harper before the issuance of said execution, and the keys of the storehouse were not delivered to the said R. G. Harper until after the levy of the execution; that no inventory or bond was ever filed by the said R. G. Harper with the circuit clerk of Union county under the law governing assignments, or otherwise; that no bond was ever made."

The mortgage referred to in the instrument purporting to be an assignment was introduced, with the instrument purporting to be the assignment, in evidence, and it showed that Gathright mortgaged to his son 194 acres of land, three mules, and a lot of cows and calves, to secure an indebtedness of \$900.

The court found that the plaintiff (appellee) had title to the property, and rendered judgment in his favor for the same.

Neil C. Marsh, of El Dorado, for appellants. R. G. Harper and W. E. Patterson, both of El Dorado, for appellee.

WOOD, J. (after stating the facts as above). [1] A provision in an assignment

which requires, as a condition precedent to participation in the funds assigned, that the creditors shall release the debtor is; according to the prevailing American rule, oppressive and renders the assignment void, even though all the debtor's property is included. "This," say the authors of Ruling Case Law, "is on the ground that an insolvent debtor has no right to dictate terms which shall make him independent of his legal obligations, and that it is contrary to justice and against public policy to allow debtors to coerce their creditors into releasing their debts." 2 R. C. L. 670, 671, and note. This doctrine was announced in *Collier v. Davis*, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 753, overruling *Clayton v. Johnson*, 36 Ark. 406, 38 Am. Rep. 40, where the contrary was held.

Under the above rule the condition in the instrument under review requiring all the creditors of Gathright to release him from further payment of their debts as a condition precedent rendered the instrument void under the general rule as to assignments for the benefit of creditors, in the absence of a statute to the contrary.

[2] Under the old rule in regard to assignments for the benefit of creditors, any of the creditors of Gathright could have ignored the assignment and subjected his property to the payment of their debts. But this is not the rule under our statute.

In *Richmond v. Mississippi Mills*, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413, we said that, where a debtor executed an instrument, in whatsoever form, or by whatsoever name, with the intention of having it operate as an assignment and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment.

The court was warranted in finding, under the agreed statement of facts, that the instrument under consideration constituted an assignment, and it had the effect to transfer the title to the property mentioned therein to Harper as trustee for the use and benefit of all the creditors.

[3] The agreed statement of facts shows that Harper took possession of the property through J. D. Gathright, and directed him to make an inventory, which was done; and while Harper, as assignee, did not comply with the requirements of the statute in regard to filing his inventory and bond with the clerk of the chancery court (Kirby's Digest, § 336), that did not operate to divest the title out of him as trustee or change the character of the instrument, under the statute, as a general assignment for the benefit of all the creditors.

[4] In *State National Bank v. Wheeler-Motter Merc. Co.*, 104 Ark. 222, 148 S. W. 1033, an insolvent mercantile firm sold its stock of goods for the sum of \$1,010, and turned the proceeds over to one B. H. Kuhl, for the purpose of distributing the same pro

rata among its creditors. The transaction was merely verbal, and not evidenced by any written assignment. Kuhl was vice president of the State National Bank, and the money deposited was placed to his credit on the books of the bank. The amount was sufficient to pay 25 per cent. of the debtor's liabilities. Most of the creditors agreed to accept the pro rata of 25 per cent., but the plaintiff creditor declined to accept that sum and brought suit in the circuit court against the debtor to recover the amount of its debt, and sued out a writ of garnishment against the bank to appropriate the funds in its hands to the payment of plaintiff's claim. The circuit court directed a verdict for the plaintiff for the full amount of its claim against the bank as garnishee. In reversing the ruling of the trial court we said:

"In the absence of a statute, funds or other property held under a void assignment for the benefit of creditors is subject to garnishment at the action of any creditor or of the assignor; but that rule is changed in this state by a statute, which provides that if, for any cause, an assignment shall be declared void, 'the same shall then be considered and treated as a general assignment of all his property, not exempt from execution, for the benefit of all his creditors pro rata, and said property shall be disposed of and distributed for their benefit under the orders and directions of the chancery court'."

—citing *Tapp v. Williams*, 83 Ark. 182, 103 S. W. 161, where we said:

"The assignment of the debtor's assets for the benefit of all the creditors must, under the statute, go to all the creditors pro rata. No one of them has the right by garnishment to subject the trust fund to the payment of all his debt to the exclusion of the debts of the others."

The doctrine of the above cases, under the agreed statement of facts, is applicable here. At the time the goods were levied on by the constable under the execution, he had notice of the assignment, and that the assignee, Harper, was in possession of the property under and by virtue of such assignment. Under the facts of the above cases we held that trust funds in the hands of a trustee or assignee for the payment of all creditors of a debtor could not be reached by garnishment issued at the instance of one of the creditors to have his claim satisfied in full; that the assignment of the debtor's assets for the benefit of all the creditors must, under the statute, go to all the creditors pro rata.

There is no well-grounded distinction between trust funds held for the payment of debts and goods held in trust for the same purpose. If trust funds under the facts in the above cases could not be reached by garnishment, it necessarily follows that the goods held in trust under the facts of the instant case cannot be reached by execution. The remedy of appellant grocer company for the satisfaction of its judgment, as pointed out in *Tapp v. Williams*, supra, was in equity against the trustee for the payment of its claim pro rata.

The judgment of the circuit court is therefore correct, and it is affirmed.

STOKES v. STATE. (No. 114.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. CRIMINAL LAW §260—RIGHT OF APPEAL—PLEA OF GUILTY.

Where defendant, after entering a plea of guilty before a justice of the peace to an information sufficiently charging him with abandonment of his wife and child in violation of Acts 1909, p. 134, and after his punishment had been fixed by the justice, his plea not having been withdrawn, appealed to the circuit court, such appeal should have been dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 587-609; Dec. Dig. §260.]

2. CRIMINAL LAW §1028—RIGHT OF APPEAL—PLEA OF GUILTY—DEFECTIVE ACCUSATION.

Accused does not lose his right of appeal by entering a plea of guilty where the accusation states no offense, but may attack the accusation on appeal for the first time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2615-2618; Dec. Dig. §1028.]

3. CRIMINAL LAW §273—"PLEA OF GUILTY"—SENTENCE.

A "plea of guilty," being a formal confession of guilt before the court, leaves the court with power only to pass sentence as upon a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 631, 632, 634; Dec. Dig. §273.]

For other definitions, see Words and Phrases, First and Second Series, Plea of Guilty.]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Harry G. Stokes entered a plea of guilty in a justice's court, of the crime of abandoning his wife and child, and being convicted of such crime on his appeal to the circuit court where he withdrew such plea, he appeals. Reversed, and appeal from justice's court dismissed.

E. L. Matlock, of Van Buren, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. The deputy prosecuting attorney of Washington county, Ark., filed an information before a justice of the peace of said county charging the defendant, Harry G. Stokes, with the statutory crime of abandoning his wife and child. See Acts 1909, p. 134. The defendant entered a plea of guilty, and his punishment was fixed by the justice of the peace at a fine of \$75, and imprisonment for 60 days in the county jail.

Within the time allowed by statute he prayed and was granted an appeal to the circuit court of Washington county. When his case came on for trial in the circuit court he was permitted to withdraw his plea of guilty, and to enter a plea of not guilty. He was tried and convicted in the circuit court and the jury fixed his punishment at a fine of \$350 and one year's imprisonment in the county jail. From the judgment of conviction, the defendant prosecutes this appeal.

[1] The circuit court should have dismissed the appeal of the defendant. The de-

fendant entered his plea of guilty before the justice of the peace. In doing so he confessed himself guilty in the manner and form as charged against him in the information.

[2] Where the facts alleged in an information or indictment do not constitute an offense, the defendant has lost nothing by pleading guilty, and on appeal may attack the indictment or information for the first time. Fletcher v. State, 12 Ark. 169.

In the instant case we have not set out the information. It was filed under Act 52 of the Acts of 1909, and charged the defendant with the crime of wife abandonment. It was substantially in the language of the act, and no objection has been made or could be made as to its form.

[3] The defendant pleaded guilty when he was arraigned before the justice of the peace, and sentence was there pronounced against him. His plea of guilty, as received by the court and recorded, was an admission of any offense well charged in the information. Unless it was withdrawn by leave of the court, there would be nothing left to be done but for the court to pass sentence upon him. The reason is that a plea of guilty is a formal confession of guilt before the court in which the defendant is arraigned, and the court can then only pass sentence as upon a verdict. State v. Wright, 96 Ark. 203, 131 S. W. 688; Clark's Criminal Procedure, pp. 373, 374.

In the case of Commonwealth v. Mahoney, 115 Mass. 151, the court held that a plaintiff who pleads guilty to a complaint in the municipal court and appeals to the superior court is not entitled to a trial by jury, and that unless the plea is withdrawn by special leave of the court in which it is made or a motion is interposed in arrest of judgment for legal defects apparent on the record, the commonwealth is entitled to have sentence passed. See, also, Commonwealth v. Winton, 108 Mass. 485, and 12 Cyc. 801.

It follows that the circuit court erred in not dismissing the appeal of the defendant, and for that error the judgment will be reversed, and the appeal of the defendant from the justice of the peace court to the circuit court will be dismissed. It is so ordered.

MOREHEAD et al. v. HARRIS. (No. 117.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. BILLS AND NOTES §327—NEGOTIABLE INSTRUMENT—"BONA FIDE HOLDER."

To constitute one a "bona fide holder" of a negotiable instrument, it is essential that he take it bona fide for a valuable consideration in the usual course of business before maturity, without notice of any existing defense and of dishonor thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. §327.]

For other definitions, see Words and Phrases, First and Second Series, Bona Fide Holder.]

2. BILLS AND NOTES \S 171, 342 — **NEGOTIABLE INSTRUMENT—INDORSEMENT WITHOUT RECOURSE—NOTICE OF DEFENSES.**

That the payee of a negotiable note indorsed it without recourse did not impair its negotiability or put the indorsee on notice of any infirmity or defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 415, 830-841; Dec. Dig. \S 171, 342.]

3. BILLS AND NOTES \S 337—**NOTICE OF DEFECTS—RECORDED MORTGAGE.**

That a recorded mortgage given to indemnify the indorsers of a negotiable note indicated that the note was indorsed by S. and three others, when, in fact, it was not indorsed by S., did not charge a transferee of the note with notice that it was signed by the three indorsers on the condition that it should not be delivered or become effective until signed by S., where it did not appear that inquiry of the payee would have have disclosed this fact.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 818, 856-863; Dec. Dig. \S 337.]

4. BILLS AND NOTES \S 537—**NEGOTIABLE INSTRUMENT—ACTION BY BONA FIDE HOLDER—EVIDENCE—INSTRUCTION OF VERDICT.**

Where in a transferee's action on a negotiable note there was no evidence that plaintiff had notice of any equitable defenses, or of facts which would have put him on inquiry, or was not a bona fide holder, the court properly instructed a verdict for plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1862-1893; Dec. Dig. \S 537.]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by W. M. Harris against J. T. Morehead and others. From judgment for plaintiff, the defendants not named appeal. Affirmed.

W. M. Harris brought this suit upon a promissory note as follows:

"\$1,000.00. June 5, 1914.

"January 1, 1915, after date, we promise to pay to the order of Geo. W. Fowler, one thousand and no/100 dollars, at Malvern, Ark., for value received, with interest at 10 per cent. per annum from date until paid.

"[Signed]

A. W. Morehead.
"T. S. Fisher.
"J. T. Morehead.
"D. S. Bray."

Appellee claimed to be the bona fide holder for value thereof, having purchased the note before maturity in the usual course of business.

A. W. Morehead answered, admitting the execution of the note, but appellants denied that it was negotiated and sold to plaintiff in the due course of trade for a valuable consideration. They alleged that Morehead was principal in the note and they were sureties, and that same was delivered without their knowledge and consent to the payee, that they agreed to sign the note as sureties in order to enable A. W. Morehead to purchase a half interest in a livery stable in Malvern, upon the condition that J. E. Stanley would also sign the note as a surety, and that they understood that said Stanley was to sign the note, and that it was

not to be delivered in case he did not do so.

It was further alleged that Fowler, the payee, also knew that such was the fact, and that the note was not signed by J. E. Stanley, and was delivered contrary to their agreement and understanding to the said payee, without such signature, and that they would not have signed the note if they had known said Stanley would refuse to sign same, and that the payee, Fowler, knew that such was the fact.

It was further alleged that the note was transferred by Fowler to appellee, Harris, with fraudulent intent, and that he had knowledge of all the facts relative to the execution of the note at the time of the purchase thereof, and was not a bona fide holder.

The note was executed by all the parties as it appears, but the three appellants testified that they agreed to and did sign the same as sureties only upon the condition that it was to be likewise signed by J. E. Stanley and was not to be negotiated or delivered unless signed by him, and that Stanley refused to sign the note after agreeing to do so, which fact, however, was not known to them at the time.

A. W. Morehead, the principal, executed a mortgage conveying the interest in the property he purchased with the note to indemnify the signers thereof, mentioning the three appellants, and also J. E. Stanley, against any loss by reason of becoming sureties. When the note was presented to Fowler without the signature of Stanley, he looked it over and accepted it in payment of the property to be sold to A. W. Morehead. He later purchased the farm of appellee and gave this note in part payment, transferring the same by indorsement without recourse before maturity.

Harris made some inquiries before purchasing the note, and went to the clerk's office and asked the clerk who had prepared the papers, the note and mortgage, whether it was a good note and secured by a mortgage. The clerk turned to the record of the mortgage and opened it before him and told him he thought the note was good, not knowing at the time that it had not been signed by J. E. Stanley, and was discussing the solvency or financial responsibility of the makers of the note only. When he came to Stanley, Mr. Ault spoke up and said the note had not been signed by Stanley, but was gilt-edge paper, as it was. Harris also discussed it with an attorney, who told him that it was a good note, having in mind only the financial condition of the signers, and not knowing anything about the conditions surrounding the execution of it.

Harris testified that he sold his place to Fowler and took the note in part payment therefor, after making inquiries as to the financial condition of the signers; that he

had no knowledge whatever or information at the time of any defect or irregularity in the paper, or of any defense to it, because of the conditions under which it was executed. He admitted that the clerk opened the record of the mortgage before him, but said he did not read it, and did not know that Stanley was expected to sign it in the first instance, and had no information that the others would not have executed the note but for his agreement to sign it, and that it was not to be delivered without such signature.

The court declined to give appellants' requested instructions submitting the question of appellee's knowledge of the alleged defect or infirmity in the paper, and instructed the jury to find a verdict for the plaintiff for the amount of the note, which was done, and judgment rendered therefor, from which this appeal is prosecuted.

H. B. Means and J. C. Ross, both of Malvern, for appellants. W. R. Donham, of Benton, for appellee.

KIRBY, J. (after stating the facts as above). Appellants contend that appellee had such notice of the defect and infirmity in the paper or of the equitable defense thereto as to prevent his being a bona fide holder thereof.

[1] Before one can become a bona fide holder of a negotiable instrument, he must take it: (1) Bona fide; (2) for a valuable consideration; (3) in the usual course of business; (4) before maturity; (5) without notice of any existing defense and of dishonor thereof. If the purchaser can be charged with notice of the defense or defect of title, he is not a bona fide holder of the instrument. Such notice, of course, must exist at the time the paper is transferred to him or before he paid for it. *Hogg v. Thurman*, 90 Ark. 97, 117 S. W. 1070, 17 Ann. Cas. 383; *Bank of Monette v. Hale*, 104 Ark. 388, 149 S. W. 845.

[2] The fact that the payee of the note indorsed it without recourse did not impair the negotiable character of the instrument, nor put the indorsee, appellee, upon notice of any infirmity therein or defenses thereto between the original parties. He purchased the note in the usual course of business before maturity, for a valuable consideration, upon investigation of the financial responsibility of the makers, after being informed that the payee would indorse it without recourse.

[3] The testimony does not show that the payee had any knowledge of the conditions existing or the understanding of the appellants with Morehead, the principal of the note at the time they signed it, and the only testimony tending to show any knowledge upon the part of appellee of any fact relative to the making of the note was the exhibition of the record of the mortgage to him, where-in the three appellants signers thereof and

one Stanley were indemnified against loss by reason of its execution. The clerk, after opening the mortgage record of the instrument and while telling the appellee his opinion of the financial responsibility of the signers of the note, mentioned Stanley, where-upon Mr. Ault, who was present said "Stanley did not sign the note, but it is iron-clad even with Jim Morehead and Tom Fisher on it." This, at most, put the intending purchaser upon notice that at the time of the execution of the mortgage, it was intended that Stanley should sign the note, but the note had been taken by the appellee without the signature of Stanley, and his reason for failing to sign the instrument could not have developed knowledge of the fact or charged the purchaser with notice of the alleged understanding existing between Morehead, the principal, and appellants at the time of signing the instrument nor would an inquiry of the payee and ascertainment of his reason for taking the paper without the signature of Stanley have brought home to the purchaser any knowledge of the condition upon which the other appellants claimed to have signed the note.

Appellee testified that he had no knowledge of the fact even that Stanley was mentioned in the mortgage, not having read it; that he investigated only to determine the responsibility of the parties to the note, and had no information whatever of any defect or infirmity in the paper or of any defense thereto as between the original parties at the time he purchased it before maturity and for value.

[4] There being no testimony to show that appellee had any notice of any equitable defense existing or any facts that should have put him upon inquiry, and the burden of proof being upon appellants to show such fact, the court did not err in instructing the verdict in his favor. The makers of the note could not avail themselves of the defense attempted to be set up as against appellee, who was a bona fide holder of the instrument sued on. *Lanier v. Mortgage Co.*, 64 Ark. 39, 40 S. W. 466; *Southern Sand & Material Co. v. People's Savings Bank & Trust Co.*, 101 Ark. 266, 142 S. W. 178.

The judgment is affirmed.

ARKANSAS NAT. BANK v. JOHNSON.
(No. 115.)

(Supreme Court of Arkansas. Jan. 17, 1916.)
TRIAL 252—ABSTRACT—INSTRUCTIONS.

Where H. obtained drafts from plaintiff under circumstances amounting to larceny, and not for a bet, though there had previously been a pretended bet by H. on behalf of plaintiff, which it was pretended had been won, as part of the scheme to get possession of plaintiff's drafts and money, and the question of liability to plaintiff of defendant bank which collected the drafts and paid out the money, depended on its having notice of the larceny, giving the abstract in-

struction that drafts given for a wager are void, and that, if defendant paid the money collected to a person under the belief that he had won the drafts at gambling, such payment would not relieve him of liability to plaintiff, was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by Matt Johnson against the Arkansas National Bank and another. Judgment for plaintiff, and defendant Bank appeals. Reversed and remanded for new trial.

Rector & Sawyer, of Hot Springs, for appellant. Martin, Wootton & Martin, of Hot Springs, for appellee.

HART, J. Appellee sued appellant and one Ed Spear, alleging that there had been stolen from him certain drafts and a certificate of deposit and money, aggregating the sum of \$5,125, and that appellant and Spear received and converted the same to their own use, knowing them to have been stolen.

Appellant answered that it had no knowledge of the drafts having been stolen, and that, if it received said drafts and certificate of deposit, it received them from Spear in good faith and without knowledge or notice of any defect in Spear's title, and paid the proceeds over to him before the institution of this action. There was a trial before a jury, which resulted in a verdict and judgment in favor of appellee against the appellant bank and Spear. The bank alone has appealed.

Briefly stated, the facts are as follows: Matt Johnson, a farmer from North Dakota, came to Hot Springs, Ark., in December, 1912, for the benefit of his health. A few days after his arrival a stranger, who called himself Anderson, made his acquaintance. Anderson said he was from Minnesota and had just sold a piece of land for \$14,000 cash which was deposited in a bank at Fargo, N. D. Anderson cultivated the acquaintance of Johnson, and they went around the city a good deal together. They visited the race track, and while there Anderson told Johnson of seeing a man in Minnesota who had won a large sum of money betting on horse races. A few days after this they went out to the ostrich farm, and while there saw a man standing off to one side counting what seemed to be large sums of money. Anderson called Johnson's attention to this man, and told him he was the man he had seen win such a large sum of money in Minnesota. Anderson then accosted the man and told him of seeing him betting on the races in Minnesota. This man at first denied his identity, but subsequently admitted that he was the man. He gave his name as Hamilton, and told them he represented some men who won large sums of money on horse races; that the men he represented had inside information, so that in each race they knew which

horse was going to win; that he traveled around over the country betting large sums of money for these men; and that they always telegraphed him in advance which horse was going to win, so that they never lost anything. They finally went into the pool room which was situated near the ostrich farm, and Hamilton apparently placed some bets on two or three races and won. Anderson and Johnson were then persuaded to bet on another race. Johnson finally put up what money he had, a draft for \$100 and a deposit slip on the Arkansas National Bank for \$130, and he and Anderson also wrote out a check for \$10,000 each. Hamilton took the checks and drafts and went into the pool room. In a short time he came back with a card showing that he had made a bet for them and the name of the horse he had bet on. A little later he got a telegram saying he had won. Hamilton gave Anderson the betting card, and Anderson went into the pool room and presented the card. The man there began to figure out how much they had won, and Anderson said to him:

"We have got some drafts and checks here you may as well give back to us in place of that much money."

The men then took up the checks and drafts and said:

"We do not know whether these papers are any good or not. We are not allowed to accept bets of drafts. I wasn't here when this bet was made, and my assistant had no authority to take this kind of bet. You will have to show me that you have the money represented by your checks."

Johnson was with Anderson, and they then went back into another room where Hamilton was and told him about it. Hamilton asked Johnson how much he thought he could raise on short notice, and Johnson replied about \$5,000. Anderson stated that he had \$14,000 deposited in a bank at Fargo, N. D. Their checks amounted to \$20,000, and Johnson's \$5,000 and Anderson's \$14,000 thus made \$19,000. Hamilton agreed to put up the balance. Johnson went to his home in North Dakota and procured a draft for \$4,500 and \$345 in money. The draft was turned over to Ed Spear for collection. He deposited it in the Arkansas National Bank for collection. The draft was collected by the bank, and the proceeds checked out by Spear.

Proof on the part of the appellee tended to show that no money was bet on the horse races, and that the whole transaction was a scheme on the part of Anderson and Hamilton to obtain Johnson's money. Counsel for appellant admit this, and also admit that money obtained by Hamilton and Anderson from Johnson was, under such circumstances, larceny. It was the theory of appellee that Spear had knowledge of the circumstances under which Anderson and Hamilton obtained the money from Johnson, or at least that appellant and Spear were possessed of sufficient information which, if pursued by a man of ordinary prudence, would lead to

knowledge of the circumstances under which Hamilton and Anderson received the money and drafts from Johnson.

Testimony was adduced by appellee tending to show that the bank had received drafts for a large amount from Spear at different times for collection, under precisely similar circumstances; on the other hand, evidence was adduced by the appellant bank tending to show that it had no knowledge whatever of the circumstances under which Spear received the drafts and certificate of deposit, and that it received them from him for collection in good faith in the ordinary course of business.

The facts in the present case are precisely similar to the facts in the recent case of *Rumping v. Arkansas National Bank*, 180 S. W. 749. In that case the court held that the circumstances under which the assignment of the drafts were obtained from Rumping amounted to larceny or to obtaining money under false pretenses. The principle applicable for determining whether or not money obtained under circumstances similar to those in the present case amounts to larceny is well stated in the case of *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506. There the court said:

"Where one honestly receives possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses. But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny."

To the same effect see *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862; *State v. Dobbins*, 152 Iowa, 632, 132 N. W. 805, 42 L. R. A. (N. S.) 735, and case notes.

In the instant case Anderson and Hamilton were confederates. There was not to be a bona fide race. They intended to keep the money they received from Johnson. Johnson never intended to part with the title to his money or drafts. Although he voluntarily gave the drafts and money to Hamilton, he did not part with the title to the same. Therefore Anderson and Hamilton obtained his drafts and money feloniously and were guilty of larceny.

Counsel for appellant assign as error the action of the court in giving at the instance of appellee instruction No. 5, which is as follows:

"In this state the law provides that all bills or notes given for a bet or wager are void, and, if you believe from the evidence that the defendants or either of them paid the money collected on the drafts in question to any person under the belief that such person had won them at gambling, such payment would not relieve him of responsibility to plaintiff."

The court erred in giving this instruction. As we have already seen, the drafts and certificate of deposit were received by Hamilton under such circumstances as amounted to larceny. Anderson and Hamilton made use of the bet as a device to secure possession of Johnson's money. The bet was not a real one, but was merely colorable or simulated for the purpose of obtaining possession of Johnson's drafts and money, and was obtained under such circumstances that it was larceny in Hamilton's appropriating it. Therefore the instruction in question was abstract, and had no proper place in the case. The court erred in giving it, and it was so held in the recent case of *Rumping v. Arkansas National Bank*, supra, to which reference is made for a more extended discussion of the assignment of error, which we do not deem it necessary to repeat here.

Finally, it is insisted with great earnestness by counsel for appellant that it had no knowledge and was not in possession of facts leading to knowledge that the drafts and certificate of deposit in question were received by Hamilton under circumstances which would amount to larceny, and that on this question, under the ruling of *Rumping v. Arkansas National Bank*, supra, the judgment should be reversed, and the cause of action against it dismissed.

We expressly refrain from passing upon this question, for the reason that the testimony on this branch of the case may be different on a retrial of it, or it may be that additional testimony may be secured by either party which would turn the scale in his favor.

For the error in giving instruction No. 5, as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

WESTERN COAL & MINING CO. v. HARRISON. (No. 127.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. MASTER AND SERVANT \S 211—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a self-dumping cage was a standard apparatus in general use in coal mines and in all cases some coal escaped and fell down the shaft, a coal miner assumed the risk of injury from falling coal as one of the incidents of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. \S 211.]

2. MASTER AND SERVANT \S 295—INJURIES TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS.

A coal miner was injured by coal which fell down the shaft. To defendant's instruction that if the jury believed the cage used was of a pattern in general operation and that in the ordinary operation of such cages coal would fall down the shafts, the miner could not recover if his injuries were caused by coal which so fell, the court added "provided you believe from the evidence that the falling of the coal was not caused by the negligence of defendant." Held, that as, if the facts were as detailed in the in-

struction there could be no recovery, the risk being assumed, the addition of the proviso was error tending to mislead the jury into thinking that the defendant would be liable, even if the injury occurred as set out in the instruction, unless they found it was not caused by some other negligence of the company.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.]

3. TRIAL § 203—INSTRUCTIONS—REFUSAL.

The refusal of an instruction correctly applying the law to the facts of the case in a concrete way where it was not covered by any other instruction, is error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. § 203.]

Appeal from Circuit Court, Franklin County; James Cochran, Judge.

Action by Kelley Harrison against the Western Coal & Mining Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The plaintiff, Kelley Harrison, brought suit for damages for personal injury, alleged to have been caused through the negligence of the appellant company by being struck with coal falling down the main shaft from unloading the cars, because of the dumping blocks being too low. It was also alleged that the defective condition of the blocks was known to the defendant, and that its pit boss agreed to repair same. The answer denies all the allegations of the complaint, and pleads contributory negligence and assumed risk as defenses.

It appears from the testimony that a piece of coal fell down the shaft and struck and injured appellee while he was at work at his accustomed duties. The testimony shows that he had been at work about a week at the sump at the bottom of the shaft engaged in pulling loaded coal cars on the cage or elevator to be hoisted, when the coal fell and struck him. He stated that he had spoken to the pit boss who agreed to see the superintendent and have the dumping blocks raised or the defect complained of repaired, and that he continued his work only on the promise and expectation that repairs would be made, but knew that it had not been fixed up to the time of the injury.

Many witnesses testified that the dumping blocks were not too low, and that it made no difference about their height, so long as they dumped or turned up the cars that were being unloaded. Some testified that if they were too low the cars were not completely turned, and some of the coal remained in, and when the cars were swung back over the shaft, spilled coal down into it. The testimony shows also that coal frequently fell from the cars in unloading because of the oscillation or shaking of the cars when they came to the top and on account of their being loaded high with coal above the top of the car that this coal lodged upon the buntons at times and fell down the shaft from the

buntons because of the shaking of same, being displaced in unloading cars.

It was undisputed that more or less coal fell down the shaft nearly all the time in unloading and dumping the cars, so much so that the sump had to be cleaned up once a day. The pit boss denied having made any agreement to repair or raise the dumping blocks, and the testimony shows that they had been in use for two or three years at the tippie and several witnesses stated that they were of the kind and class in general use in other coal mines of the locality.

Wm. McKinley stated he had been superintendent of mines for 30 years, and was acquainted with the operation of shaft mines and the method used in hoisting coal; "that self-dumping cages are in general use in such mines; that, in dumping coal off the cars where such cages are used, pieces of coal will fall down the shaft, and there is no way to prevent it; some can be prevented by the engineer being careful, but not all," said that the fact that the dumping blocks were from 6 to 8 inches too low would not cause any greater amount to fall back, and if they were so constructed as to be high enough to dump the coal it would not make any difference as to the height.

Robt. Boyd stated he had had 51 years' experience in coal mines, had been state mine superintendent, and was familiar with shaft coal mines and the method of mining and hoisting coal where the self-dumping system was employed, and that this method was in general use by operators in Arkansas in every field in which he had worked. "That coal will fall down in being hoisted and unloading—there is no way to prevent it. It is one of the ordinary things attending hoisting and unloading of coal on self-dumping cages and cannot be prevented."

Others testified that they were familiar with the hoisting shaft and self-dumping cages at the mine where the injury occurred, and it was constructed as appliances are ordinarily constructed in mines operated by careful and prudent men, and such cages are in general use by coal miners throughout the United States.

Hogan said it was impossible to prevent coal falling down the shaft during the operation of such cages. Miners ordinarily load cars above the level of the bed, and the motion and shaking of the cage in hoisting as well as the movement in dumping causes pieces of coal to fall off and roll down the shaft. In ordinary operation of cages, coal falls off the cars and lodges in the buntons and then falls down, and that the liability of the cager and persons working at the bottom to be hit was but an ordinary risk of the work.

H. L. Adams testified he had 20 years' experience in mines and was familiar with the self-dumping cages used, "and that such cages were in ordinary use in well-conducted and

prudently operated coal mines;" they are constructed practically alike; there is no way to prevent coal from falling down the shaft in hoisting or unloading coal by this method; it is impossible on account of the miners loading cars above the bed and the vibration of the car in hoisting and the tilting of it by a self-dumping apparatus will cause pieces of coal to fall off the car. He said further that persons working around the bottom of the shaft knew this, and it is one of the dangers of the work in which they are engaged, and that if the blocks are in such position as the cars will dump, their being too high or too low has no effect as to the falling of the coal. If it is entirely too low, the car will not dump at all.

The court instructed the jury, refusing to give appellant's requested instruction numbered 8 as follows, and in giving it over its objection as amended, by adding the proviso:

"If the jury believe that the cage used by defendant at the time plaintiff was injured was a self-dumping cage, and known by plaintiff to be such, and that such cages as were then operated by defendant were in general use in like coal mines operated by persons of ordinary prudence and caution, and further believe from the evidence that in the ordinary and usual operation of such cages coal will fall down the shafts when the cages are used in the ordinary and usual way, then plaintiff cannot recover if the evidence shows his injuries were caused by coal which fell down the shaft while coal was being hoisted and dumped in the usual and ordinary way by such self-dumping cages: Provided you believe from the evidence that the falling of the coal was not caused by the negligence of defendant."

From the judgment on the verdict against it, this appeal is prosecuted by the coal company.

Ira D. Oglesby, of Ft. Smith, for appellant. G. O. Patterson, of Clarksville, for appellee.

KIRBY, J. (after stating the facts as above). [1-3] It is contended that the court erred in refusing said instruction as requested, and in amending same, and giving it as amended, over appellant's objection.

The testimony is undisputed that the appliances in use at the time of the accident were installed 2 or 3 years before, and it is not disclosed but that same were and had remained in the position and condition all the time until the date of the injury; that it is the kind of hoisting apparatus in use in shaft mines, and it was not shown by plaintiff to have been improperly constructed. One of his witnesses testified that the blocks were not high enough it seemed, and that the cage would hang and coal would drop; but he also stated that coal always fell back, and had been doing so since the time the mine was opened, and that where self-dumping cages were used that coal

would fall down the shaft and there was no way to prevent it.

Another witness, who testified that the blocks were too low, also stated that coal would fall anyway in the unloading of cars, and could not be prevented. The evidence may be said to be uncontradicted also that coal was frequently loaded several inches above the bed of the cars, and rolled off in the ordinary hoisting of the cars, and fell down the shaft or lodged on the buntons, and later fell down when shaken off by unloading operations.

Said instruction numbered 8 correctly stated the law, and appellant was entitled to have it given to the jury without amendment or modification. It applied the law to the facts of the case in a concrete way, and no other instruction covered the point. The refusal to give it was error, since it does not appear that no prejudice resulted therefrom.

If the jury had found that the injury occurred as recited in the instruction, the defendant was entitled to a verdict, and in any event to have the question submitted to the jury without the proviso. The burden of proof was upon the plaintiff to show that the injury occurred because of the negligence of the coal company, and the jury might have been misled by this proviso into thinking that the coal company would be liable for the injury, even if it occurred as set out in the instruction, unless they found that it was not caused by some other negligence of said company. It may be that the testimony is sufficient to warrant the inference that the injury occurred by coal falling from the self-dumping cages in the unloading of it, because the dumping blocks were too low, which is the only negligence alleged, and an injury caused by the falling of the coal because the cars were loaded above the bed or some of the coal that had lodged on the buntons was shaken off, would not have warranted a verdict.

If the apparatus in use was standard equipment in general use in such coal mines as the evidence tended to show, and the instruction told the jury, the injury to the appellee by the falling of coal down the shaft in the unloading of it was but an ordinary risk of his employment which he assumed in working as he did at the bottom of the shaft at the sump, knowing that the coal would fall. He necessarily knew the danger from the falling coal, it being obvious to any one of ordinary intelligence, and the testimony shows that he had been injured a few weeks previous to this injury, for which this action was brought, while engaged in his work at the bottom of the shaft.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

LITTLE ROCK RY. & ELECTRIC CO. v. BAXLEY. (No. 130.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

STREET RAILROADS \S 114—**KILLING ANIMAL**—**NEGLIGENCE**—**SUFFICIENCY OF EVIDENCE.**

Evidence in an action for the negligent killing of plaintiff's horse in the nighttime by defendant's street car held sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 239-250; Dec. Dig. \S 114.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by W. D. Baxley against the Little Rock Railway & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellant. Winn & Pierce, of Little Rock, for appellee.

SMITH, J. This is an action brought by appellee for damages for the alleged negligent killing of his horse by the operation of a street car of the appellant company at the intersection of Sixteenth and College streets, in the city of Little Rock. The accident occurred at night on the 29th of October, 1913.

It is the contention of appellant that no actionable negligence is shown by the testimony, and that the testimony, together with all reasonable inferences that may be drawn therefrom in favor of appellee, is not sufficient to entitle appellee to have the question of appellant's negligence submitted to the jury. The jury returned a verdict in appellee's favor for the sum of \$40, and the sufficiency of the evidence to support this verdict is the only question raised on this appeal.

The motorman in charge of the car testified that he did not see the horse until his car was within about 20 feet of the animal and that the horse at the time was coming across the track; that he had only time in which to reverse his power, and that this was done; and that the effect of this action was to lock the wheels of the car and reduce its speed, but that the distance was too short when he first discovered the horse to avoid striking it. The motorman's evidence was to the further effect that the accident happened at about 9:30 p. m., that the horse was only 10 or 12 feet from the track when he first discovered it, and that the car was not running at an excessive speed.

It is urged that, upon the authority of the case of Little Rock Ry. & Elec. Co. v. Newman, 77 Ark. 599, 92 S. W. 864, a verdict should have been directed for the street car company. But the opinion in that case expressly states the fact to be that there was no proof that the motorman saw, or could have seen, the animal there struck in time,

by the use of ordinary care, to have prevented striking it. Here the motorman admits having seen the animal, although he denies that he saw it in time to avoid the injury. But while his statement appears plausible and reasonable, we cannot say that the action of the jury in not accepting it was arbitrary; but, upon the contrary, we are of opinion that the circumstances of this case are such that reasonable minds might fairly differ in the inferences to be drawn from the testimony, and that the case was therefore properly submitted to the jury.

The proof shows that the street was 50 feet wide, and was straight for some distance, and that there was sufficient light for the horse to have been seen for a distance of 300 feet. The motorman testifies that the horse was grazing near the track, and we cannot say that the evidence is insufficient to support a finding that the motorman could and would have seen this horse in time to have stopped his car, had he been keeping a reasonably diligent lookout.

The judgment of the court below will therefore be affirmed.

STUCKEY et al. v. NORWOOD et al. (No. 129.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

ATTORNEY AND CLIENT \S 166—**ASSISTANT ATTORNEY**—**DIVISION OF FEE**—**FINDING—EVIDENCE.**

In an action by a firm of attorneys to recover a share of the fee collected by other attorneys, with whom they were associated in the trial of a cause, evidence held sufficient to support the court's finding that plaintiffs had been employed in the case, and were entitled to recover on quantum meruit a fee of \$1,500.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 368-372; Dec. Dig. \S 166.]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by M. M. Stuckey and others against Hal. L. Norwood and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Campbell & Suits, of Newport, for appellants. Mehaffy, Reid & Mehaffy, of Little Rock, for appellees.

SMITH, J. The parties to this litigation, and the principal witnesses in the case, are lawyers of eminence, and, through their joint efforts, secured a judgment in the case of McMichael v. St. Louis, Iron Mountain & Southern Railway Company for \$35,000. Upon appeal to this court this judgment was reduced to \$25,000, and affirmed for that amount. 115 Ark. 101, 171 S. W. 115. After the judgment had been collected, a controversy arose between two of the law firms engaged in the case over their respective shares of the fee which they had charged their client. The evidence in the case is

voluminous, and is somewhat conflicting and acrimonious, and we will not undertake to set out even a summary of the evidence of the various witnesses, but will only state our conclusion in regard to it.

McMichael sustained a very serious injury, and for some time his recovery was regarded as very doubtful, and he was brought up to Little Rock for an operation and for treatment. His brother-in-law employed the firm of Norwood & Grant to represent McMichael and to sue for his damages. This contract was later reduced to writing, and by its terms it was provided that the attorneys should receive as their compensation one-third of any sum recovered from the railroad company. Before any suit was brought, Judge M. M. Stuckey, of the firm of Stuckey & Stuckey, of Newport, had been consulted by members of McMichael's family, but had not been employed. In this manner he learned that some lawyer, whose name was at the time unknown to him, had consulted McMichael and had been employed in the case. Judge Stuckey called Mr. Grant, of the firm of Norwood & Grant, over the telephone, and advised him of that fact, whereupon Grant immediately prepared a complaint and sent it to the circuit clerk at Newport, with directions that it be filed and process issued on it at once. This was done, and after the institution of that suit Grant stated to Judge Stuckey that he would want him to assist in the trial of the case. Only the names of Norwood & Grant were signed to this complaint. After filing this complaint, Grant discovered that a trial of the case could not be had at the ensuing term of the circuit court, and advised the attorney for the railroad company to make no preparations for trial at that term. Whereupon a new suit was brought in the Independence circuit court, and the original suit was dismissed. The names only of Norwood & Grant were signed to this second complaint, as attorneys for the plaintiff.

In the meantime Norwood & Grant discovered that the other attorney concerned in the case was Mr. Frank Pace, of Little Rock, and these gentlemen took up with each other the adjustment of their respective contractual rights as attorneys for McMichael. Pace had a contract which provided for a contingent fee of 50 per cent., but his contract was made subsequent to the one held by Norwood & Grant, but Pace knew nothing of the other contract at the time his own was made. The parties and attorneys met at Newport, while the case was pending in that county, to settle the conflicting claims of the attorneys. Grant had said to S. M. Stuckey, of the firm of Stuckey & Stuckey, that he would meet Pace for this purpose, and Stuckey told him that whatever he did would be satisfactory to him. Grant and Pace conferred with McMichael, and it was agreed that both firms should remain in the case; McMichael stating that he did not care how many attorneys

were in the case, provided they took, as the whole fee, only one-half interest in the judgment to be recovered. Pace agreed to remain in the case under his original contract, and to pay Norwood & Grant the amount called for by their contract, which was to remain in full force and effect, and to accept as his part the balance remaining after paying Norwood & Grant. After this conference Grant called at the office of Stuckey & Stuckey to advise them of his agreement with Pace, but when he reached the door of that office he was told by S. M. Stuckey that Judge Stuckey, who was the senior member of that firm, was not in, whereupon, without going into the office, Grant stated:

"It is all agreed upon satisfactorily. We work upon the contract that McMichael had with Mr. Pace and third it."

It is clear that the Stuckeys understood this statement to mean that a contract had been made whereby the total fee was one-half of the amount recovered, and that this sum should be divided equally among the three law firms concerned in the case, and that they continued in the case with this understanding. It is equally clear, however, that the other attorneys in the case, with the possible exception of Mr. Grant, did not so understand the agreement. Pace testified that he discussed and agreed with Grant on the per cent. of the fee which he should have for his own services, but that he did not know Judge Stuckey was in the case until he was so advised by Grant on the train going to Newport, and that the extent of the understanding was that he should be paid one-third of the fee, and that Norwood & Grant should receive the per cent. called for by their contract. Norwood testified that until after the trip of Grant and Pace to Newport he had never heard Stuckey's name mentioned in connection with the case, and when advised that Grant had employed him he demanded and received an explanation of that connection, and, in response to Norwood's question about what the fee would be, Grant said: "He will take anything we want to give him."

A Mr. Richardson was also retained in the case, and he testified that Grant told him Judge Stuckey had been employed in the case as local attorney when the case was pending at Newport, and that he had followed up the case in this employment. Richardson was himself employed as local attorney, and was paid a fee of \$500.

There were two written contracts for the employment and payment of attorneys, and the firm of Stuckey & Stuckey was not mentioned in either of them. Nor does Stuckey claim to have been employed by McMichael. His employment came through Grant. It was shown that Grant had removed from Newport to Little Rock, and that while at Newport Grant and Stuckey had been associated in a good many cases together, in all of which the fee had been divided equal-

ly, and Stuckey expected this to be done in McMichael's case, both because of his previous dealing with Grant and because of the statement made by Grant to Judge Stuckey's brother. But it was not shown that Norwood knew anything of this custom; indeed, as has been said, he knew nothing of the employment until six months after his contract with McMichael had been made.

The evidence is practically undisputed that Stuckey's rights depend upon his contract with Grant, who was Norwood's partner, and, as such, had the right to make contracts relating to the business of the copartnership. The court below recognized this fact, and stated to Grant the importance of his testimony, and thereafter asked the questions to which the following answers were given:

"Q. Did you ever say anything to him [Judge Stuckey] after the conversation in which he notified you that some other party had a contract with McMichael, that you wanted him to act with you in the case, or did you just proceed without anything being said about it? A. Well, we proceeded along, and, in his office, I told him we wanted him to do some assistance in the case. Q. Did he know the terms of your agreement with McMichael? A. Yes, sir; I think he did. I think McMichael told him, and his wife told him. That's my recollection about it. And I guess I told him. Q. When you informed him you wanted him to assist you in the trial of the case, did you say anything to him about the terms on which you wanted him to assist you? A. No, sir. Q. Now, Mr. Grant, you know what you meant by that statement [at Stuckey's office door]. Now, I want to know: Did you mean to convey the idea to Mr. Stuckey's partner that you three were to divide the fee equally, or did you mean to indicate to him, as your sentence would imply, that you had made an agreement by which Mr. Pace was to have one-third of the fee obtained? A. Judge, I made that statement. Now, what I had in my mind, I don't know. Q. Did you intend at that time to make a contract with him by which he was to receive one-third of it? Was that your idea? A. I didn't intend to make any contract at all with him. Q. That's what I mean. You didn't intend at that time to make any contract, did you? A. I wasn't making any contract. I just made that statement to him there at the door. Now, he could consider it whatever way it might be considered. Q. I wanted to get your intention. A. Yes, sir; I expected Judge Stuckey to be in the case, and I expected him to render services in the case, and expected him to be paid for his services. Q. Was it your intention, without reference to what Judge Stuckey or his partner might have thought about your remark—did you intend at that time to make an agreement with him by which he was to have as much as you and Mr. Norwood? A. I didn't intend to make any future agreement with him. Q. Did you intend to make any kind of an agreement by that remark? A. I intended him to understand he was in the case. Q. You had already told him he was in the case? A. Yes, sir. Q. But you hadn't fixed the terms? A. No, sir. Q. At that time, did you intend, by that remark, to make a contract with him by which he was to receive as much as you and Mr. Norwood? A. I expected him, from that statement, to be reasonably compensated."

In response to other questions the witness stated that it was his intention for them to fight along, and when they got through with the case divide the money; but he stated

that there was no agreement for any specific amount in case of a recovery.

It is perfectly manifest, from an examination of Grant's evidence, that he is in entire sympathy with Stuckey. Indeed, he very candidly avowed this friendship, and it may be assumed that he stated his agreement with Stuckey as favorably as the truth would permit. The record shows that Pace and Norwood led in the trial of the case, and briefed it, both in the Supreme Court on its original submission, and upon the petition for a rehearing, and while the proof shows that Judge Stuckey was a lawyer of experience and learning, and could, no doubt, have tried the case as successfully and skillfully as the attorneys who did try it, the fact remains that it was tried by Norwood and Pace, and that the service rendered by Judge Stuckey was similar to the service rendered by Mr. Richardson; that is, as local attorney assisting and advising in the case.

Pace was paid his part of the fee without question, and the evidence in regard to the discussion which took place between Norwood and Stuckey concerning Stuckey's compensation after the judgment had been collected makes it evident that, even at that time, both Norwood and Pace regarded Judge Stuckey as only local counsel in the case. The court found from this evidence that Stuckey & Stuckey had no contract for a specific portion of the fee, but that they had been employed in the case and were entitled to recover quantum meruit, and allowed a fee of \$1,500. We cannot say that this finding is clearly against the preponderance of the evidence.

The decree of the court below is therefore affirmed.

CRUOE v. MITCHELL. (No. 132.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. MECHANICS' LIENS \S 263—ENFORCEMENT—PARTIES—STATUTE.

Under Kirby's Dig. \S 4978, requiring a contractor to defend at his own expense any action brought by a person other than himself to enforce a lien under the lien law, section 4986, providing that in such suits the parties to the contract and all other persons interested in the controversy and in the property charged with the lien may be made parties, and section 4988, providing that the court shall make such orders in the case as will enforce the rights of all interested parties, a complaint in a materialman's suit against the owner of buildings and land for material sold to the contractors was defective because not making the original contractors parties to the suit.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. $\S\S$ 471-481; Dec. Dig. \S 263.]

2. PARTIES \S 84—DEFECT—SPECIFIC DEMURRER—PLEADINGS IN SUIT TO ENFORCE MECHANIC'S LIEN.

Under Kirby's Dig. $\S\S$ 6093, 6094, 6096, in effect providing that, when there is a defect of parties appearing on the face of the complaint, the objection shall be taken thereto by specific demurrer, and that unless so taken the defect

is waived, an answer in a materialman's suit against the owner, specifically directing the court's attention to the defect of parties defendant, a cross-complaint, including a general demurrer, and a motion to have the contractors made parties and the cause transferred to equity should have been treated as a specific demurrer raising the objection that plaintiff was not entitled to maintain a suit because of the defect or nonjoinder of parties appearing on the face of the complaint.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. ¶84.]

3. MECHANICS' LIENS ¶272 — SUIT TO ENFORCE—PLEADINGS.

To a complaint in an action to enforce a materialman's lien against the owner, an answer alleging that the defendant owner did not know and had no sufficient information upon which to base a belief, and hence could not say whether the indebtedness was past due and unpaid or owing to plaintiff, and denying that defendant owed the debt or that the plaintiff could recover from him, and that defendant had paid the contract price to the contractor, indulging every fair and reasonable intendment to support the pleading, raised the issue as to whether the indebtedness was past due and unpaid and whether it constituted a foundation for the enforcement of a lien on defendant's property.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 514-524; Dec. Dig. ¶272.]

4. APPEAL AND ERROR ¶1042 — HARMLESS ERROR—DEFECT IN COMPLAINT.

The dismissal of the answer and cross-complaint of the defendant owner in a suit to enforce a materialman's lien, and proceeding to hear the cause of the complaint, defective in that it did not make the contractor a party defendant, was necessarily prejudicial to defendant, notwithstanding the contractor appeared in court and testified that he had bought the material sued for by plaintiff which had been used in the erection of defendant's building, and that defendant was indebted to him; as defendant was entitled to have the cause heard upon issues presented by a sufficient complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. ¶1042.]

Appeal from Circuit Court, Conway County; M. L. Davis, Judge.

Suit by E. E. Mitchell against C. E. Cruce to enforce a materialman's lien, with answer and cross-complaint, including a general demurrer. Judgment for plaintiff dismissing the cross-complaint, and defendant appeals. Reversed and remanded, with directions to sustain the demurrer to the complaint.

Appellee instituted this suit against appellant to recover judgment and to enforce a materialman's lien against certain buildings and the land upon which the same were situated in the town of Morrilton, Ark. The appellee alleged in his complaint that he was the owner of the firm of E. E. Mitchell & Co.; that the firm on the dates and in the manner set out in an itemized statement made a part of the complaint, sold to contractors John Patton, Jim Hanna, and Jim Scanlan, who erected the C. E. Cruce building on lot 6 in block 8 of Fitzhenry property, in the town of Morrilton, material for the purpose of erecting said building in the sum of \$149.86; that all of the material was

used in the erection of the building mentioned. The complaint alleged that the plaintiff had filed his lien as the statute required, after having given notice to C. E. Cruce. The complaint makes a copy of the notice and the lien exhibits. The appellee alleged that he had acquired a lien upon the building and ground and prayed that same be declared and that the property be sold, etc.

To this complaint appellant interposed an answer and cross-complaint, in which was included a general demurrer. Among other things in the answer, appellant alleged that he had paid off and discharged to John Patton, Jim Hanna, and Jim Scanlan all and fully the contract price agreed upon for the erection of said building; that John Patton, Jim Hanna, and Jim Scanlan were to complete said building out of the material furnished them and according to the plans and specifications, and that in violation of their contract they refused so to do, to appellant's damage in the sum of \$750. He further set up that the indebtedness sued on was "primarily the indebtedness of the said John Patton, Jim Hanna, and Jim Scanlan, and that, if same is due and payable, they are primarily liable therefor, and are necessary and proper parties to this suit." He further set up that, if the indebtedness constituted a lien against his property, he was entitled to be subrogated to the rights of Mitchell & Co., and to have judgment against Patton, Hanna, and Scanlan for any amount that he might be required to pay to discharge any lien that might be declared against his property in favor of Mitchell & Co. He also embodied in his answer a motion to transfer to equity, and prayed that Patton, Hanna, and Scanlan be made parties, that appellee should recover nothing, and that the appellant (defendant) should have his title to the land quieted and confirmed, or, in the alternative, that if he was adjudged to pay the debt, and same was declared a lien on his property, he be subrogated to the rights of Mitchell and have judgment against Patton, Hanna, and Scanlan for any amount that he might be required to pay in order to discharge any lien that might be declared against his property.

The motion to make the original contractors parties and to transfer to equity was overruled. The appellee thereupon entered a general demurrer to appellant's answer and cross-complaint, which the court sustained. And, the appellant electing to stand upon the pleadings as drawn, and refusing to plead further, the court entered an order dismissing appellant's answer and cross-complaint, motion to make the original contractors parties defendant, and to transfer to equity. The case was then heard by the court upon the original complaint, oral testimony, and certain documentary evidence, and the court found in favor of the appellee against appellant in the sum of \$149.86, and entered a

judgment against appellant for that sum, and declared the same a lien on the property, with orders for its sale, etc., in case the judgment was not paid. The appellant filed a motion for a new trial, setting up, among other things, that "the court erred in refusing defendant's motion to make John Patton, Jim Hanna, and Jim Scanlan parties defendant herein," that the court erred in sustaining plaintiff's demurrer to the answer, cross-complaint, and motion to transfer to equity, and that the judgment was contrary to the evidence. The motion was overruled, and appellant duly prosecutes this appeal.

W. P. Strait, of Morrilton, for appellant.
Edward Gordon, of Morrilton, for appellee.

WOOD, J. (after stating the facts as above). [1] The question presented by this appeal is whether or not the original contractors are necessary parties in a suit by a materialman against the owner to have a lien declared and enforced on a building for the erection of which material has been furnished. The question is settled by the recent case of *Simpson v. J. W. Black Lumber Co.*, 114 Ark. 464, 172 S. W. 883. In that case, after setting out the statute (Kirby's Digest, § 4978) making it the duty of the contractor to defend at his own expense any action brought by any person other than the contractor to enforce a lien under the law providing for such liens, we said:

"The contractor was a necessary party, and should have been made codefendant with the owners, who knew nothing about what amount of materials had been furnished nor how much of the materials furnished had gone into the construction of the improvement. He was a necessary party both for his own and the owner's protection. The owners had the right to look to him for the payment of any judgment that might be recovered against their property for materials furnished, having contracted with him to supply such materials and paid him the contract price for the improvement, and cannot be compelled to resort to another action against the contractor for the recovery of such sum of money in which the contractor would be at liberty to claim that he did not owe the materialman the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor to defend all such actions and be bound by the judgment rendered"—citing authorities.

See, also, in addition to the authorities there cited, *Eberle v. Drennan*, 40 Okl. 59, 136 Pac. 162, 51 L. R. A. (N. S.) 76.

As shown above, section 4978 of the Digest requires that in suits of this kind the original contractors shall defend the case at their own expense. Section 4986 provides that in such suits to enforce liens created by the statute "the parties to the contract and all other persons interested in the controversy and in the property charged with the lien" may be made parties. And section 4988 provides that the court shall make such orders in the case as will protect and enforce the rights of all interested therein.

It appears from all these provisions that

the lawmakers contemplated, not only that the contractors in such suits are proper parties, but that they are necessary and indispensable parties for the determination of the amount of the debt as the foundation for which a judgment or decree may be rendered and declaring and foreclosing a lien on the property for its payment.

[2] Counsel for appellee does not controvert this proposition of law, but insists that appellant, by filing a general demurrer to the complaint, waived the defect or nonjoinder of parties. Appellee relies upon the provisions of sections 6093, 6094, and 6096 of Kirby's Digest, which, in effect, provide that, when there is a defect of parties appearing upon the face of the complaint, objection shall be taken thereto by a specific demurrer, and that, unless so taken, when the objection appears upon the face of the complaint, the defect is waived, citing *Murphy v. Myar*, 95 Ark. 38, 128 S. W. 359, Ann. Cas. 1912A, 573, and other cases holding to that effect. But these cases have no application here, for the reason that the trial court's attention was specifically directed in appellant's answer and cross-complaint, which also embodied a motion to have the contractors made parties and the cause transferred to equity, that the contractors were necessary parties to the maintenance of appellee's suit. The court should have treated the allegations of appellant's answer and cross-complaint, embodying the motion to make the contractors parties, as a specific demurrer, raising the objection that the plaintiff was not entitled to maintain his suit because of a defect or nonjoinder of parties appearing upon the face of the complaint. Such was the legal effect of the whole pleadings by the appellant, and to hold otherwise would be putting form before substance. The complaint of the plaintiff was therefore fatally defective because it failed to make the original contractors parties to the suit, and the court erred in not so holding.

[3] But, if it be conceded that the complaint was not fatally defective on this ground, and that it alleged a cause of action, then the answer traversed the allegations of the complaint and raised an issue for determination before a jury. The appellant in his answer alleged as follows:

"That he does not know and has no sufficient information upon which to base a belief, and therefore cannot say whether or not said indebtedness is past due and unpaid or in any way owing to said E. E. Mitchell; but for further answer denies that this defendant owes said debt or that the plaintiff is entitled to recover therefor from him;" "that he had paid off and discharged to John Patton, Jim Hanna, and Jim Scanlan all and fully the contract price," etc.

These allegations were sufficient to raise the issue as to whether the indebtedness was past due and unpaid and as to whether or not there was such an indebtedness as would constitute the foundation for the creation and enforcement of a lien on appellant's property.

In *Dickerson v. Hamby*, 96 Ark. 163, 131 S. W. 674, we said:

"In determining whether a pleading, complaint, or answer makes sufficient allegations to constitute a cause of action or to state a defense, every fair and reasonable intendment must be indulged in to support such pleading. If the averments are incomplete, ambiguous, or defective, the proper mode to obtain correction is by motion to make the allegations more definite and certain."

[4] Appellee contends that the appellant is not prejudiced by the ruling of the court in dismissing the answer and cross-complaint of the appellant and in proceeding to hear the cause on the complaint of the appellee, because, he says, the contractors appeared in court and testified that they bought the material sued for by appellee, and that same was used in the erection of appellant's building and was correct, and also testified that appellant was still indebted to them for the erection of the aforesaid building in the sum of \$575, all of which was denied by appellant. But, as we have seen, the complaint which the court treated as the basis for hearing this evidence was fatally defective, and the court erred in allowing the appellee to ground any right of action upon it.

Appellant was entitled to have the cause heard upon issues presented by a sufficient complaint. The cause could not progress to judgment without necessary parties, and appellant was necessarily prejudiced by a judgment based upon a complaint that did not state a cause of action.

For the error in not sustaining the demurrer to appellee's complaint the judgment is reversed, and the cause remanded, with directions to sustain the same.

KOHN v. SMITH. (No. 118.)

(Supreme Court of Arkansas. Jan. 17, 1916.)

1. JUDGMENT \S 138 — OPENING DEFAULT — DILIGENCE.

Kirby's Dig. \S 4431-4433, empowers the court to vacate judgments after the term in accordance with the procedure prescribed therein. Plaintiff herein, defendant in an action in justice court, after judgment in his favor, was advised by defendant herein, plaintiff there, that he intended to take an appeal, and the case was docketed in the circuit court under the same title as in the justice court. Plaintiff testified that he had frequently inquired and had been informed that there was no case against him on the docket of the circuit court, and his attorney on similar inquiries was informed that there was no case pending against his client. Held, in his suit to set aside a default judgment in the circuit court that, as there was no fraud in procuring it, or anything to mislead plaintiff as to the status of the case, his failure to defend resulted from his own lack of diligence, so that the circuit court was not warranted in setting aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 249-251, 254; Dec. Dig. \S 138.]

2. JUDGMENT \S 144 — OPENING DEFAULT — GROUNDS — CLERICAL MISPRISION.

In such case, where the docket in the circuit court showed the style of the case as it had

been tried in the justice court and the name of plaintiff as one of the defendants therein, and where a proper investigation by plaintiff would have discovered the case pending in the circuit court for trial, there was no clerical misprision to justify a setting aside of its default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 255; Dec. Dig. \S 144.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Suit by A. L. Smith against Myer Kohn, trustee, to vacate a default judgment. Judgment vacated, and defendant appeals. Reversed, and cause remanded, with instructions to dismiss the complaint to set aside the default judgment.

W. T. Tucker, of Little Rock, for appellant. J. W. House, J. W. House, Jr., and A. F. House, all of Little Rock, for appellee.

KIRBY, J. This appeal comes from a judgment of the circuit court, vacating and setting aside a judgment rendered in favor of appellant by default. It is a proceeding under section 4431, Kirby's Digest, the grounds alleged coming within subdivisions 3 and 4 thereof for misprision of the clerk and for fraud practiced by the successful party obtaining the judgment.

It was also alleged that the judgment was procured without notice, and that plaintiff was prevented from defending the suit on account of unavoidable casualty and misfortune, and that the plaintiff and his attorney had repeatedly inquired of the clerk of the circuit court where the cause was pending for trial, when it would be reached and had been always informed that there was no such case on the docket.

A demurrer was interposed and overruled, and an answer filed, and plaintiff and his attorney testified, and also the attorney of appellant. It appears from the testimony that appellant first brought suit in a justice court against Jno. J. and Orville O. Scoggins and A. L. Smith, that upon the trial it developed that he had no cause of action against Scoggins and the suit was abandoned as to them, the justice taking the case under advisement as to Smith. He later rendered judgment in Smith's favor, from which an appeal was taken to the circuit court.

Appellant's attorney notified Smith's attorney that he intended to take an appeal, and perfected his appeal. The case was docketed in the circuit court as it had been in the justice's court, Myer Kohn, trustee, v. Jno. J. & Orville O. Scoggins and A. L. Smith, the judge's docket showing the names of the parties and their attorneys, the date of the setting of the case for trial, and the judgment by default upon said date.

Smith testified that he had been informed that an appeal had been taken, and went

frequently to the circuit clerk to inquire about it and was always informed that there was no case on the docket against him. His attorney also testified that he had made like inquiries and been told that there was no case pending against his client, Smith. He stated further that the calendar showing the setting of the case was not sent to his firm by the clerk as was usual of all cases in which they were interested.

[1] The attorney for appellant notified Smith's attorney that he intended to take the appeal, and upon the day the case was set for trial in the circuit court called for him over the phone, and was informed he was attending chancery court and not in. The term expired after the rendition of the default judgment, and it was some months thereafter before this suit was filed, it being alleged that the fact was not sooner discovered.

No attempt was made to show there was any fraud practiced by the successful party in procuring the judgment, and there is no evidence indicating a disposition or intention upon his part to mislead the appellee about the status of the case. His attorney was notified that an appeal had been taken, the transcript was lodged in the circuit court, and the case docketed there, showing his name in the style of it and his attorney's name on the docket, although it is true that the index did not show his name in the style of the case. He had notice that an appeal had been taken, and if he failed to attend and defend the suit because of statements made by the clerk of the circuit court, which satisfied him without making sufficient investigation to discover the fact, his failure to make defense resulted from his lack of diligence, rather than through any fault on the part of the appellant, who called the attention of his attorney thereto, or the firm, or attempted to do so upon the day the judgment was taken. He had but to ask the clerk to show him the docket of the only two cases thereon in which Myer Kohn was appellant, in both of which the said Scoggins, whom he knew had been sued jointly with him in the justice court from which the appeal was taken, were appellees, a casual examination of which would have disclosed the pending suit against him and the date set for the trial thereof.

[2] There was no misprision of the clerk shown that would justify setting aside the judgment. The docket in fact showed the style of the case as it had been tried in the justice court, and the name of appellee as one of the defendants, and a proper investigation by appellee would have discovered that the case was pending in the circuit court for trial.

The court has power to vacate or modify judgments after the expiration of the term in accordance with the procedure prescribed by said sections 4431-4433, Kirby's Digest, and

this court is of opinion that no sufficient showing was made under the allegations of the complaint to warrant its action in setting aside the judgment by default herein. *Blackstad Merc. Co. v. Bond*, 104 Ark. 48, 148 S. W. 262; *Ayers v. Anderson-Tully Co.*, 89 Ark. 163, 116 S. W. 199; *Bank v. Neel*, 53 Ark. 113, 13 S. W. 700, 22 Am. St. Rep. 185.

Some authorities are cited by appellee in support of his contention, but the cases were decided under statutes materially different from ours, excusable negligence being recognized as a ground for such relief in said jurisdictions.

The judgment is reversed, and the cause remanded, with instructions to dismiss the complaint to set aside said default judgment.

ST. LOUIS COOPERAGE CO. v. JACKSON. (No. 86.)

(Supreme Court of Arkansas. Jan. 3, 1916.)

ACCOUNT STATED \Leftrightarrow 8 — RIGHT TO ATTACK — MISTAKE.

Where, in an action for a balance due on an alleged account stated, the undisputed evidence showed that by a mistake of defendant's bookkeeper, apparent on the face of the books, there was a mistake in the account submitted to plaintiff, and that plaintiff was overpaid before the mistake was discovered, plaintiff was not entitled to recover such balance, though it be assumed that the account became an account stated; an account stated being subject to attack for fraud or mistake.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 50-56; Dec. Dig. \Leftrightarrow 8.]

Appeal from Circuit Court, Monroe County; Thos. C. Trimble, Judge.

Action by Wiley Jackson against the St. Louis Cooperage Company. From judgment for plaintiff, defendant appeals. Reversed and dismissed.

Manning, Emerson & Morris, of Little Rock, and G. Otis Bogle, of Brinkley, for appellant. C. F. Greenlee, of Brinkley, for appellee.

HART, J. Wiley Jackson sued the St. Louis Cooperage Company to recover \$198.27 alleged to be due him for bolts made by him for the cooperage company. He recovered judgment both in the justice of the peace court and in the circuit court to which it was appealed. From the judgment rendered against it, the defendant has duly prosecuted an appeal to this court.

The plaintiff was engaged in getting out bolts for the defendant at a stipulated price, and the defendant agreed to pay him 90 per cent. of the agreed price when the bolts were taken up. The remaining 10 per cent. was to be retained in order to guarantee that the plaintiff would load the bolts on the cars.

The defendant took up bolts made for it by the plaintiff and rendered to the plaintiff an account showing that it held back \$443.

27; and that subsequent to that time the defendant paid plaintiff the sum of \$200, and also the sum of \$45, leaving a balance due plaintiff of \$198.27. This account counsel for plaintiff contends became an account stated.

Assuming, without deciding the question, that the account sued on became an account stated, still it was subject to attack for fraud or mistake. *May & Ellis Co. v. Farmers' Union Merc. Co.*, 179 S. W. 490; *Godfrey v. Hughes & Hall*, 114 Ark. 312, 169 S. W. 958; *Hamilton-Brown Shoe Co. v. Choctaw Merc. Co.*, 80 Ark. 438, 97 S. W. 284.

The undisputed evidence shows that defendant's bookkeeper made a mistake in keeping the account of the plaintiff. The mistake is apparent on the books themselves. For instance, there is an item of 296 feet, 18 inches, white oak, 3.44 cords, at \$12. This should have been credited as amounting to \$41.30, but the bookkeeper actually credited it as \$413.04. Another item should have been credited as \$348.34, but was credited as \$384.34, making an error of \$36.

Without considering this latter error, however, as we have already stated, the first error is apparent from the books themselves. The evidence on the part of the employees of the defendant company, which is undisputed, shows that the subsequent payments were made before the mistake was discovered. The undisputed evidence, therefore, shows that the defendant overpaid the plaintiff for all the bolts made by the plaintiff for it which were taken up.

It follows that the judgment must be reversed; and the cause of action having been fully developed, the case will be dismissed here.

HALL v. HUFF. (No. 98.)

(Supreme Court of Arkansas. Jan. 10, 1916.)

1. JUDGMENT §518—PROCEEDINGS TO VACATE OR ANNUL—"DIRECT ATTACK."

Under Kirby's Dig. § 4431, providing that the court in which a judgment or final order has been rendered shall have power after the term to vacate or modify it by granting a new trial for certain causes specified, a motion under the statute to vacate or set aside a judgment rendered at a former term is a direct attack on the judgment; a "direct attack" being any proceeding instituted for the express purpose of annulling, vacating, or modifying the judgment or decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. §518.

For other definitions, see Words and Phrases, First and Second Series, Direct Attack.]

2. EXECUTION §163—PROCEEDINGS TO QUASH—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a proceeding to quash an execution against W. on a judgment against W. and J. on the ground that the judgment was entered without any service upon W. or any notice on his part that he had been made a party to the suit, evidence held to show by a preponderance

thereof that J.'s attorney did not enter an appearance for W.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 473-483; Dec. Dig. §163.]

Appeal from Garland Chancery Court; Calvin T. Ootham, Special Chancellor.

Proceeding by W. H. Hall against C. Floyd Huff. From a decree dismissing the petition, Hall appeals. Remanded, with directions.

See, also, 114 Ark. 206, 169 S. W. 792.

On the 15th day of March, 1915, W. H. Hall filed a petition in the chancery court of Garland county to quash an execution issued in the case of C. Floyd Huff against J. H. Hall for the sum of \$1,100. His petition alleges that on the 11th day of February, 1915, the said execution was delivered to the sheriff, who threatened to levy the same upon the property of the plaintiff. A copy of the execution is attached to the petition. The plaintiff Hall further states that the judgment upon which the said execution was issued was rendered without service on him and is void.

The facts are as follows:

On the 30th day of April, 1912, C. Floyd Huff instituted an action against J. H. Hall to recover possession of an undivided one-third of certain real estate situated in the city of Hot Springs, in Garland county, Ark. On March 17, 1913, Huff filed what he styles an amendment to his complaint, in which he states that since the institution of the suit he has learned that a part of the land described in his complaint belonged to W. H. Hall instead of J. H. Hall, and asks that W. H. Hall be made a party defendant, and that all the allegations contained in his original complaint be considered as having been made against W. H. Hall in like manner as if he had been made a defendant with J. H. Hall. He prayed that upon a final hearing of the cause he be given the same relief against W. H. Hall that he asked for in his original complaint against J. H. Hall.

On March 17, 1913, the defendant J. H. Hall filed a motion to strike from the files the amendment to the complaint just referred to, and the grounds upon which the motion is based are stated therein. The motion was signed by Wood & Wood, attorneys for J. H. Hall. This firm of attorneys consisted of Judge J. B. Wood and his son Scott Wood. Judge J. B. Wood died in June, 1913. In September, 1913, Jethro P. Henderson, the chancellor, caused an order to be entered stating his disqualification to hear and determine the cause because he had formerly been the law partner of Judge J. B. Wood and was interested in the litigation in its incipency. The record shows that in September, 1913, subsequent to this time, a special chancellor was elected, who heard and determined the cause, entering a decree in favor of the plaintiff, Huff, against the

defendants J. H. Hall and W. H. Hall in the sum of \$1,100.

On February 21, 1914, the defendant J. H. Hall, through his attorney, Scott Wood, prayed and was granted an appeal to the Supreme Court. On June 22, 1914, the Supreme Court rendered an opinion (114 Ark. 206, 169 S. W. 792), reversing the decision of the chancellor and ordering the cause remanded, with directions to dismiss the complaint of the plaintiff, Huff, for want of equity. On the 11th day of February, 1915, the plaintiff caused an execution to be issued and placed in the hands of the sheriff, with directions to levy upon the property of W. H. Hall.

The plaintiff and his attorney testified that some time after the original complaint was filed against the defendant J. H. Hall they learned that W. H. Hall owned a part of the property embraced in the complaint; that thereupon an amendment to the complaint asking that W. H. Hall be made a party defendant to the suit was filed; that Judge J. B. Wood, who represented the defendant J. H. Hall, agreed in open court that he would enter the appearance of W. H. Hall and that the answer which he had filed on the part of J. H. Hall should also inure to the benefit of W. H. Hall.

They stated that they did not know whether the chancellor acted upon the motion of Judge Wood to strike from the files of the court their amendment to the complaint. They also stated that they did not know what judge occupied the bench at that time.

Judge Jethro P. Henderson, the regular chancellor, testified that he had formerly been a law partner of Judge Wood; that he had no personal recollection whatever about whether Judge Wood entered the appearance of W. H. Hall; that it was his uniform practice to make a notation on the docket where the appearance of a client was entered by an attorney; that it was insisted by counsel for both parties that he was disqualified; that he went over the facts of the case fully and prepared a written opinion in the case, but before it was delivered concluded that he might be disqualified, and on that account did not deliver his opinion; that on account of his former partnership with Judge Wood he concluded that he might perhaps have been connected with the firm when the employment of Judge Wood was first made by Hall.

The chancellor did not certify his disqualification until after Judge Wood's death. The record shows that he certified his disqualification in the case of "C. Floyd Huff v. J. H. Hall." The record does not show that W. H. Hall was mentioned as a defendant in the case until the final decree was rendered.

W. H. Hall testified that Judge Wood was not employed by him nor authorized to enter his appearance to the suit in question; that he did not know that any judgment had been rendered against him until some time after

the decision of the case in the Supreme Court; that he was a witness in the original case against his father, but never at any time authorized Judge Wood to enter his appearance to that suit. Other facts will be referred to in the opinion.

The chancellor entered a decree dismissing the petition of W. H. Hall, and from the decree rendered in favor of Huff, Hall has appealed.

Davies & Davies, of Hot Springs, for appellant. James E. Hogue, of Hot Springs, for appellee.

HART, J. (after stating the facts as above). [1] Though it is not so denominated, the present proceeding was evidently instituted under section 4431 of Kirby's Digest to vacate a decree rendered at a former term of the chancery court on the ground that it was entered without notice to him. See *Holman v. Lowrance*, 102 Ark. 252, 144 S. W. 190; *Foohs v. Bilby*, 95 Ark. 302, 129 S. W. 1104.

A motion under the statute to vacate or set aside a judgment rendered at a former term is obviously a direct attack on the judgment. The effect of the present proceeding is to attack the judgment against W. H. Hall in favor of C. Floyd Huff rendered at a former term of the chancery court by setting it aside on the ground that no service of summons was had on the said W. H. Hall, and that his appearance to the suit had not been entered. A direct attack on the judgment or decree has been defined to be any proceeding which is instituted for the express purpose of annulling, vacating, or modifying it.

[2] On the part of W. H. Hall it is contended that the decree in the former suit against him in favor of Huff was entered without any service upon him or any notice on his part that he had been made a party to the suit. The chancellor found against him on this issue, and the correctness of his decision in this respect we consider to be the most serious question in the case.

After a careful consideration of the whole record in this case we have reached the conclusion that the finding of the chancellor is against the preponderance of the evidence. In arriving at that conclusion we do not wish to be understood as casting any reflections upon the integrity or good faith of Huff or his attorney. We simply mean to say that when the record is considered in all its aspects and bearings, we think the preponderance of the evidence shows that they were mistaken in saying that Judge Wood entered the appearance of W. H. Hall. It appears that Hall had several actions pending against him in regard to property in Hot Springs, and that Judge Wood was attorney for him in all these cases, and it is likely that they have confused the appearance of Hall entered in some of these cases with

the present case. Though they have testified positively that Judge Wood entered the appearance of W. H. Hall, they have stated that they did not remember what chancellor was on the bench at the time or what disposition, if any, was made of Judge Wood's motion to strike their amendment to the complaint from the files of the court.

Judge Wood died in June, 1913, and his motion to strike the amendment to the complaint from the files was filed on March 17, 1913. Judge Henderson must have occupied the bench at that time. He testified that counsel for both parties insisted that he was qualified to try the case, and that he first considered all the testimony and prepared an opinion in the case, but afterwards concluded that he was disqualified, and certified his disqualifications. The record shows that he certified his disqualification after Judge Wood died. It also shows that he certified his disqualification in the case of Huff v. J. H. Hall. W. H. Hall was not mentioned. This was not long after it is claimed the appearance of W. H. Hall had been entered by Judge Wood.

According to the testimony of Chancellor Henderson he had no recollection of Judge Wood having entered W. H. Hall's appearance, and he stated that it was his settled practice to make a notation on his docket when the appearance of a client was entered by an attorney. The record shows that his docket does not show that the appearance of W. H. Hall was entered to the action.

Scott Wood, who was the partner and son of Judge Wood during the whole proceeding, prayed an appeal to the Supreme Court for J. H. Hall, but did not ask one for W. H. Hall. The defense of the two Halls to the action would have been practically the same.

The record also shows that W. H. Hall was much interested in the case, and assisted his father in the management thereof throughout the whole proceeding.

The two last-mentioned facts, when considered together, are convincing testimony that neither Scott Wood nor W. H. Hall knew that the latter had been made a party to the suit, and that judgment had been rendered against W. H. Hall.

As above indicated, we think the state of the record turns the scale in favor of Hall, and are of the opinion that a preponderance of the evidence sustains his contention. Both Huff and his attorney were lawyers and are members of the bar of this court as well as of all the inferior courts in this state. As such they no doubt participate in the trial of many cases during the course of the year and have confused another appearance in some other case with the facts testified to in this case.

This brings us to the question of whether or not the defendant Hall has a meritorious

defense to the action in which the judgment against him was obtained. On this question but little need be said. The issues against the two defendants were the same. What would constitute a defense for J. H. Hall would constitute a defense for W. H. Hall also. The transcript in the original suit was introduced in evidence in the present proceeding, and this court rendered a decision reversing the decree against J. H. Hall and ordering the cause remanded, with directions to dismiss the complaint against him for want of equity. See *Hall v. Huff*, 114 Ark. 206, 169 S. W. 792.

The case will therefore be remanded, with directions to enter a decree in favor of the appellant.

WOOD, J., not participating.

BROWN v. NORRED. (No. 123.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. APPEAL AND ERROR ⇐1001 — REVIEW — VERDICT.

A verdict supported by substantial evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ⇐1001.]

2. CONTRACTS ⇐280—PERFORMANCE—SUFFICIENCY.

Where defendant, who had contracted to dig a drain, engaged plaintiff to clear part of the right of way for the drain, plaintiff, having cleared the land as other subcontractors had done, was entitled to recover; no directions having been given as to the manner of the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1249-1280; Dec. Dig. ⇐280.]

Appeal from Circuit Court, Clay County; J. F. Gautneay, Judge.

Action by Edward Norred against W. R. Brown. From a judgment for plaintiff, defendant appeals. Affirmed.

G. B. Oliver, of Corning, for appellant. L. Hunter, of Piggott, for appellee.

HART, J. Edward Norred sued W. R. Brown to recover an amount alleged to be due him for clearing 14 acres of right of way of a drainage ditch. He recovered judgment, and the defendant has appealed.

The facts are as follows: The Central Clay Drainage District was created by the act of the Legislature of 1911, and the district entered into a contract with the defendant, Brown, to construct three ditches, including the cutting of the right of way. Brown entered into a contract with George Holford to clear the right of way. Holford entered into a contract with one Petty and others to clear a part of the right of way for him. The plaintiff, Norred, also entered into a contract with Holford to clear 14 acres of right of way, and was to receive therefor the sum of \$14 per acre and \$1.35 per acre for the wood. Under his contract, he was to

cut down all trees on the right of way and to cut a part of it into wood. The only point in dispute between the parties is as to the height of the stump; it being claimed, on the one hand by Norred, that he cut down the trees in compliance with his contract, and, on the other hand by Brown, that Norred violated his contract by cutting the stumps too high.

Norred testified in his own behalf, and said that when he made the contract with Holford no specifications were given him as to how the timber should be cut; that he called up Brown and asked him if Holford had the right to let the ditch contract for him, and that Brown asked him what price he was to receive; that he told Brown, and the latter then replied that that was all right, to go ahead and do the work and he would see that he got his money; that he then began to clear the right of way at a point where Petty left off and that he cut the trees as low as Petty did; that the right of way he was clearing was through a cypress brake, and he could not cut the trees any lower on account of the swell at the butt.

Other witnesses for Norred testified that he cut the trees as low as Petty and Nelson, who had cleared a part of the right of way, and had cut them just as low as he could to get above the swell; that he cut them from 4 to 7½ feet high.

On the part of the defendant, witnesses were introduced who testified that the trees were cut too high, and that it would be impossible to work the dredgeboat in there at the present height of the stumps, that the stumps were so high the crane which carried the dipper would strike against the stumps so that the dirt could not be dug and removed from the right of way.

[1, 2] It may be conceded that the preponderance of the testimony was in favor of the contention of the defendant; but the case was submitted to the jury under proper instructions, and we cannot disturb the verdict of the jury in favor of the plaintiff, there being testimony of a substantial character to sustain it.

In the case of St. Louis, Iron Mountain & Southern Ry. Co. v. Bogan, 78 Ark. 173, 95 S. W. 448, Bogan entered into a contract to clear a part of the right of way at a stipulated price. The contract was in writing, and further provided that the work should be done according to plans and specifications of the railway engineers in charge. The defendant was sued for the amount alleged to be due for clearing the right of way, and offered to introduce in evidence the plans and specifications. The court refused to permit them to introduce them in evidence, and the refusal of the court was assigned as error. There, as here, no copy of the plans and specifications were delivered to

the subcontractor, and he made his contract with the principal contractor, and not with the owner. There, as here, the subcontractor complied with the directions given him. That is to say, according to the testimony of Norred and his witnesses, he was given no specific directions as to how to clear the right of way, but did the work in substantially the same manner as was done by other subcontractors. In the Bogan Case, it is true, the engineers inspected his work from time to time and approved it; but, as we have already seen, the contract there specifically provided that it should be done according to the plans and specifications. In the case before us, no plans and specifications were delivered to the plaintiff, and, according to his own testimony and that of his witnesses, he cleared the right of way in substantially the same manner as was done by the other subcontractors. It is true his testimony was flatly contradicted by the testimony adduced in favor of the defendant. The conflict in the testimony, however, was settled by the verdict of the jury in plaintiff's favor.

The case was submitted to the jury under proper instructions, and the judgment will be affirmed.

HENDRICKS v. HODGES, Secretary of State.
(No. 121.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

JUDGES ~~§~~ 3—STATES ~~§~~ 28—POSTPONING
DATE—STATUTES—EFFECT.

Acts 1915, p. 402, being entitled an act fixing the time for the general election in the state, being a re-enactment of the then existing statute, with a change only in the date, from the second Monday in September to the Tuesday next after the first Monday in November, so as to postpone the state election to the time of and consolidate it with the national election, and the presumption in such a case being that no changes other than those clearly expressed in the language of the new statute were intended, and it being a rule of statutory construction that the literal meaning may be put aside in order to carry out the obvious intention as otherwise indicated, the statute—though providing that on such Tuesday in November, 1916, and every two years thereafter, there shall be held an election for all state, county, and township officers whose term is fixed by the Constitution at two years, and state Senators when the terms for which Senators shall have been elected shall expire before the next general election, and judges of the Supreme and circuit courts, when the term of office of any judge shall expire before the next general election—will not be construed as requiring the election in 1916 of successors to Senators and judges previously elected, whose terms will expire in 1918 between the date when an election would have been held under the old law and the date when one will be held under the new law, which construction in the case of Senators would make the act violative of Const. art. 5, §§ 3, 15, providing for half of the Senators being elected at one biennial election and the other half at the next election, and for their terms beginning with the dates of their election, and in the case of both Senators and judges would, by implication, repeal Kirby's Dig. §§ 647, 2850, clearly contemplating that

officers elected shall immediately take office and enter on the discharge of their duties, but the statutes will be construed as merely changing to a later date the time of holding elections, with the incidental effect of postponing the commencement of terms of office of officers then elected, which violates no provision of the Constitution; the officers previously elected continuing in office, under Const. art. 19, § 5, after expiration of their terms till their successors are elected and qualified.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10; Dec. Dig. ¶¶ 3; States, Cent. Dig. §§ 34-36; Dec. Dig. ¶¶ 28.]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by G. W. Hendricks against Earle W. Hodges, Secretary of State. Judgment for defendant, and plaintiff appeals. Affirmed.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellant. Mehaffy, Reid & Mehaffy, of Little Rock, Abe Collins, of De Queen, J. C. Hawthorne, N. F. Lamb, Eugene Sloan, and J. R. Turney, all of Jonesboro, and James E. Hogue, of Hot Springs, for appellee.

McCULLOCH, C. J. The General Assembly of 1915 enacted a statute amending the election law of the state so as to change the date of the regular biennial election from the second Monday in September to the "next Tuesday after the first Monday in November," thus fixing a uniform date for all biennial elections, both state and national.

The statute reads as follows:

"Section 1. That on the next Tuesday after the first Monday in November, 1916, and every two years thereafter there shall be held an election in each precinct and ward in this state for the election of all elective state, county and township officers whose term of office is fixed by the Constitution at two years; and state senators in their respective districts when the terms for which Senators shall have been elected shall expire before the next general election; and for judges of the Supreme and circuit courts when the terms of office of any judge shall expire before the next general election; and for United State Senators and for Representatives in Congress of the United States for each Congressional district; and for prosecuting attorneys." Acts 1915, p. 402.

Appellant conceives that the new statute requires the election of circuit judges in the year 1916, and, as he is a candidate for that office in the Sixth judicial circuit, he seeks to compel the Secretary of State to receive and file his pledge, conformable to the statute known as the *Corrupt Practices Act* (Acts 1913, p. 1255, § 4), which requires all candidates for district offices to file with the Secretary of State, more than 30 days before a primary election, a pledge in writing stating that they are familiar with the requirements of said statute and that they will in good faith comply with its terms.

The sole question presented for decision on this appeal is whether or not circuit judges must be elected at the election to be held during the year 1916. The contention is that the terms of circuit judges end on October 31,

1918, and that their successors must be elected in the year 1916 for the reason that it is the election next preceding the expiration of the terms. If that contention be sound, those offices will be filled at the election held nearly two years before the terms end.

It must be conceded that a literal reading of the statute sustains the contention, for the statute provides in so many words that the election shall be "for judges of the Supreme and circuit courts when the terms of office of any judge shall expire before the next general election." There are several reasons why it is apparent that the framers of the statute did not intend what a literal meaning of the statute, as a whole, would imply. In the first place, the statute provides that Senators of the United States shall be elected at each biennial election, but we know that the lawmakers did not intend to accomplish that result, inasmuch as the Constitution of the United States fixes the terms of Senators at six years. In the next place, the interpretation contended for by learned counsel for appellant would require all of the state senators, those whose terms begin in the year 1918 as well as those whose terms begin in the present year, to be elected at the next election to be held in November, 1916. It is inconceivable that that was the intention of the framers of the statute, for it is certainly contrary to the policy of the state to elect Senators so long a time before the commencement of their service. Besides, it would be in direct conflict with the express letter of the Constitution, which provides that the terms of Senators shall begin with the dates of their election. Article 5, § 15, as amended by the seventh amendment. It would also conflict with that section of the Constitution (article 5, § 3) which provides that terms of Senators shall be divided into two classes to be filled at alternate biennial elections. Senators could not, therefore, be elected in 1916 for terms to begin in the year 1918, and that part of the statute is void if we give its language a literal meaning.

The statute would, under that interpretation, also be in conflict with another statute with reference to the election and qualification of officers, which there is little reason to believe that the lawmakers meant to change. We refer to the statute (Kirby's Digest, § 2850) which provides that the State Board of Election Commissioners shall, within 30 days after the time allowed to make the returns of elections by county commissioners, cast up the votes and determine the result, and that all of the officers required by law "shall be immediately commissioned by the Governor." Also, Kirby's Digest, § 647, which provides that all state and county officers who are required by law to be commissioned by the Governor "are required to forward the legal fee for their commissions to the Treasurer of State within sixty days after

their election, and they shall, after said commissions have been received, forward within fifteen days their duplicate oath to the Secretary of State, to be by him recorded and filed in his office." The purpose of those statutes was to fix a time for canvassing the returns and to put a limit upon the time in which officers may qualify. The statute clearly contemplates that officers elected shall immediately take office and enter upon the discharge of the duties thereof. Yet, if the interpretation contended for be sustained, the Legislature has by this new statute now under consideration postponed for nearly two years the taking of office by those who are elected thereto. Surely the lawmakers have not intended, merely by implication, to change the whole policy of our laws and to repeal other statutes without giving more clear expression of that intention.

If we take into consideration the history of the legislation in this state fixing the time for holding elections, it becomes clear that there was no intention on the part of the Legislature to do more than to postpone the date of the state election so as to conform to the date of the national election. In other words, it was manifestly the sole purpose of the Legislature to consolidate elections in the state. The title of this act is "An act fixing the time for the general election in the state of Arkansas," and it was a copy of the then existing statute, except that the date is changed and the clause inserted about the election of United States Senators and Representatives in Congress.

It will be remembered that the Constitution of 1874 was submitted to the people for adoption on October 13, 1874, and the act of submission provided for the election of officers thereunder on the same date. The schedule of the Constitution (section 20) provided that all officers thus elected should "qualify and enter upon the duties of their office within fifteen days after they shall have been duly notified of their election." The Constitution fixed the first Monday in September as the date for biennial elections in the state, but provided that the General Assembly could fix a different time. Article 3, § 8. The first General Assembly after the adoption of the Constitution of 1874, which met in January, 1875, enacted a general election law, fixing the first Monday in September as the date for the regular biennial elections. Acts 1874-75, p. 94. The first section of that statute was in the form of the present statute, with the changes indicated above. In 1907 the General Assembly passed an amendatory statute changing the date of the general election from the first Monday in September to the second Monday in September, still preserving the identical language of the old statute. Acts 1907, p. 163. Now, in interpreting the amendatory statute, we ought to follow the well-established rules of statutory construction, and one of those rules is that, where a statute is re-enacted in sub-

stantially the same form as the old one, the presumption should be indulged that the lawmakers intended no changes other than those clearly expressed in the language of the new statute. 28 Am. & Eng. Ency. 649; *McDonald v. Hovey*, 110 U. S. 629, 4 Sup. Ct. 142, 28 L. Ed. 269. That idea was expressed by this court in the recent case of *State v. Memphis Railway & Bridge Co.*, 174 S. W. 248. In *State of Arkansas ex rel. v. Trulock*, 109 Ark. 556, 160 S. W. 516, we said that amendatory words of a statute are subject to the same rules of construction as any other parts of the statute, and that "the literal meaning may be put aside in order to carry out the obvious intention of the lawmakers as otherwise indicated." In that case we quoted with approval the following from the work of Mr. Sutherland on *Statutory Construction* (volume 2, § 376):

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statutes; and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."

We ought therefore to indulge the presumption that the Legislature did not intend to change the whole policy of our laws in order merely to bring about the consolidation of elections, for in framing the statute the only change actually made in the language was that of inserting the new date and also the mention of other officers (Senators and Congressmen) to conform to the requirements of national election law.

Attention is called in one of the briefs to the policy which has always been observed by the Legislature of providing for the election of officers before the expiration of the term of the incumbent so that no vacancy would occur. This may be conceded to be true, and yet it does not necessarily follow that the Legislature failed to observe that policy in passing this statute. While it is true that terms of constitutional officers expire on October 31st, and that the election in 1916 will take place after the expiration of the terms, it does not follow that there is any constitutional inhibition against the exercise of such a power by the Legislature which would result in a change in the commencement of the new terms. It is argued in one of the briefs that the whole statute is void because it necessarily results in the extension of terms of county officers, and in other quarters it is argued that the Legislature, for that reason, must be presumed to have intended the election of circuit judges before the expiration of the terms, rather than have an election a week or more after the expiration of the terms. There is no intention manifested by the Legislature to extend the terms; that is to say, there is no intention to pass a statute merely for that purpose. If an extension of the terms of those now in office necessarily results from a construction of the

statute which postpones the election of officers until the election to be held during the year in which the terms expire, it is a mere incident to the change in the dates of elections, and is not deemed the primary purpose of the lawmakers. The Constitution fixes the duration of terms, but does not in express words fix the beginning of terms. The precise date of commencement of terms was worked out by this court in construing the meaning of the framers of the Constitution, and it was found that, because of the fact that the terms were to begin at the earliest date that officers who were elected could be commissioned, October 31st was the date of commencement of all terms for constitutional officers. *Jewett v. McConnell*, 112 Ark. 291, 165 S. W. 954; *State ex rel. v. Cotham*, 172 S. W. 280.

There is an express grant in the Constitution to the Legislature of the power to change the dates of biennial elections. Article 3, § 8. The only limitation upon that power is that elections shall be held biennially, and, of course, the Legislature has no power to provide otherwise. Within those limitations, the Legislature has absolute power to change the dates, and this necessarily implies the power to change the dates of the beginning of terms in order to conform to the changes in the dates of elections. It is not to be thought that the framers of the Constitution meant to fix an unchangeable date for the beginning of the terms, and at the same time give complete power to the Legislature to change the date of elections. The change in the date of the term therefore results as a mere incident to the change in the date of the election, and we find nothing in the Constitution which prohibits that.

It is true we have held that the Legislature has no power to extend the duration of terms. *Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *State ex rel. Wood v. Cotham*, supra. Mr. Justice Smith, in the case first cited above, used language which is more emphatic than accurate in saying that the terms could not be extended for a single day. That language must, however, be construed with reference to the point that was then under consideration, and it is merely an authority for the statement that, where the Constitution itself fixes the duration of terms, it is beyond the power of the Legislature to extend them. It must be limited, however, to the further view that there is no intention found to prevent the Legislature from carrying out the authority conferred upon that body to change the date of elections, and that any short or reasonable change in the beginning of terms, as an incident to the change in the dates, is not forbidden. There are numerous authorities cited on the briefs of counsel which sustain the view that we are attempting to express now, to the effect that, even in the face of constitutional provisions fixing the duration of terms of office, unless there is an express provision fixing the beginning of terms, and the

power is conferred upon the lawmakers to change the dates of elections, there may be a change in the beginning of terms as a mere incident to the change in the date of elections.

The correctness of this view of the law is emphasized by the fact that the framers of our Constitution have put into that instrument a provision that:

"All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." Article 19, § 5.

The framers of the Constitution doubtless had such an emergency as the present one in mind when that provision was framed. At least, it is adapted to this emergency and prevents a vacancy occurring on account of the short postponement of the filling of the office by reason of the changed date of the election to a date subsequent to the expiration of the terms. The Legislature having power incidentally to change the beginning of the terms, the beginning of terms of all officers subsequently elected will be changed so as to conform to the new date fixed for elections. What the precise date for beginning of the new terms, under the new election law, will be, it is unnecessary, on this occasion, to determine.

Among the cases on this subject some of which admit the power of the Legislature to incidentally change the dates of beginning and ending of terms of constitutional officers, the following are found to be directly in point: *Wilson v. Clark*, 63 Kan. 505, 65 Pac. 705; *State v. Menaugh*, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418; *Gemmer v. State*, 163 Ind. 150, 71 N. E. 478, 66 L. R. A. 82; *State v. Galusha*, 74 Neb. 188, 104 N. W. 197; *State ex rel. Jones v. Foster*, 39 Mont. 533, 104 Pac. 860; *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778; *Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Attorney General v. Ranson*, 73 Mo. 78. See, also, note to *State v. Plasters*, 3 L. R. A. (N. S.) 887.

In *Wilson v. Clark*, supra, in speaking of a statute of the state of Kansas, passed for the purpose of consolidating elections, the Supreme Court of that state said:

"No constitutional provision has been found which expressly or by implication limits the Legislature in fixing [the commencement of] the terms of district judges and county officers. A limit to the duration of terms is prescribed, but when the term shall begin and end is fairly within the authority and discretion of the Legislature. * * * The policy of the statute, as we have seen, is to secure uniformity in the beginning of official terms, and also to avoid the expense, agitation, and other disadvantages of frequent elections. * * * If the Legislature had postponed elections an unreasonable length of time, longer than was necessary to effect the avowed purpose, and so long as to betray an intention to make the offices appointive by preventing the people from choosing their officers at stated intervals and for regular terms, or if it appeared that it was done merely to extend official terms and as a favor to incumbents of offices, there might be occasion for judicial interference and condemnation."

Our conclusion is that the terms of office expiring in the year 1918 are not required to be filled at the biennial election held during the present year, and that, inasmuch as appellant's candidacy is premature, the Secretary of State was correct in refusing to accept and file his pledge in conformity with the governing statute.

Judgment affirmed.

MYERS v. HINES et al. (No. 145.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. CHATTEL MORTGAGES — 112 — PERFORMANCE OF CONTRACT—RIGHT OF MORTGAGEE.

The owner of a business, who turned it over to another to manage, taking a mortgage on a team of horses and a wagon to secure the manager's faithful performance of the contract, was entitled to the proceeds of the sale of the mortgaged property where the business was insolvent when possession was retaken by the owner and the manager had withdrawn as salary about \$4,000, while the contract entitled him to net profits only, and those accruing before failure, on account of the manager's method of bookkeeping, could not be ascertained.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 196; Dec. Dig. —112.]

2. PRINCIPAL AND AGENT — 35 — CONTRACT TO MANAGE BUSINESS—RIGHT OF OWNER.

Where the owner of a business turned it over to another to manage by contract providing the manner in which his advances should be repaid, but not binding the manager to the payment thereof, upon insolvency of the business and its resumption by the owner the latter was not entitled to judgment against the manager for the balance of the money advanced after payment to the owner by the receiver of the amount received from sale of the assets.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 224-228; Dec. Dig. —85.]

3. RECEIVERS — 154 — APPOINTMENT—PROPERTY—COSTS.

Where the appointment of a receiver for a business was improperly asked by one employed by its owner to manage it, and whose compensation was dependent upon there being net profits, the business being insolvent when the solvent owner resumed possession, the cost of master and receiver was assessable against the manager in his suit to wind up the business.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. —154.]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Suit by E. C. Hines and another against W. J. Myers. From a decree for plaintiffs, defendant appeals. Reversed, and cause remanded, with directions.

Appellees brought this suit to wind up the affairs of an alleged partnership, doing business under the firm name of the Harrison Lumber Company, and for an accounting, and asked the appointment of a receiver, alleging the insolvency of the partnership, and that W. J. Myers, a member of the firm, had wrongfully taken possession of the assets and books of account of the concern. A receiver was appointed on the application of E. C. Hines, appellee, and appellant

moved to vacate the order of appointment. Appellant, answering, denied that any partnership existed, and alleged that the business was his own and conducted for him by appellees, under the terms of a written contract by which he was to furnish certain sums of money and to have interest at a stipulated rate thereon, and appellees were to conduct the business and receive as their pay the net profits after certain deductions were made under the provisions of the contract, under the terms of which also a team and wagon was to be furnished by appellees, and a lien was given thereon to secure the faithful performance of the contract on the part of E. C. Hines; that he had furnished \$9,000 for the conduct of the business, and in January, 1912, declined to make any more advances and elected to terminate the contract, and possession of the business and assets was given by appellees; that "an invoice was made by agreement of plaintiff and defendant of all stock and material on hand and a statement of expenses, the values in said invoice being named by plaintiff; and that plaintiff refused to settle by such invoice after agreeing to do so. It was further alleged that plaintiff had failed to keep proper books and accounts of the business, and had paid to himself without authority and incurred losses in the sum of \$1,300, prayer that the complaint be dismissed and the receivership be dissolved, for costs, etc.

The plaintiff, E. C. Hines, and the representatives of N. C. Hines, deceased, filed an amended complaint alleging the date of the commencing of the business, the death of N. C. Hines, that same had been prosperous and was indebted to the plaintiffs in certain named amounts; that at the time the defendant took wrongful possession of the business it was of the value of more than \$10,477.33; that under the terms of the contract there was due to plaintiff, E. C. Hines, more than \$3,000, which defendant refused to pay or to make a settlement. It also alleged that the transactions of the business of the concern were of a complicated nature and required the stating of an account by a master, and prayed for an accounting and judgments in favor of the heirs of N. C. Hines for \$1,500 and an additional judgment for \$3,000 for E. C. Hines and a continuance of the receivership, and a master to state an account.

The master and receiver were appointed, and an account was stated, and the inventory taken by the receiver showed the total assets of the concern, which the court found from the receiver's report to be \$10,477.97, and from the master's report the amount due W. J. Myers \$9,093.66, for money advanced to the business, with interest, and from the receiver's report outstanding accounts and claims against the concern amounting to \$1,871.78, making a total of liabilities of

\$10,965.44, \$487.87 more liabilities than assets, and that there could be no actual net profits except such amounts as were paid to plaintiffs for salary each month.

The court found also that the master's report was correct, "figured on basis of daily sales and estimated profits," but held it was necessary, in order to ascertain the net profits, to take into consideration the actual value of all assets on hand at the time the concern ceased to do business, and that there was no way to ascertain the net profits from the books kept; that the business was conducted under the terms of a written contract from the 9th day of November, 1909, till the 15th day of February, 1912, when W. J. Myers took possession and executed a receipt to E. C. Hines for all the property of the concern, in which it was recited that the rights of both parties were reserved. He also found that under the terms of the contract E. C. and N. C. Hines were employees of the defendant, their compensation stipulated in the contract, that the business was not a partnership, and that said E. C. and N. C. Hines were to be paid for their services out of the net profits arising from the business, and that under said contract the net profits were to be ascertained by the sale of the property, out of the proceeds of which the money furnished by W. J. Myers should be returned to him, and then all the expenses and liabilities of the concern should be paid, and that the balance should represent the net profits.

The written contract was introduced in evidence showing the terms under which the business was to be conducted. It provides:

"It is agreed by and between both parties to this contract that said Myers shall employ and does hereby employ the said two parties of the second part to manage and run said business for him in his name, and as his agent" for a specified period.

It then provides what books and accounts shall be kept by them, how the business shall be conducted and the reports made, and requires them to furnish a wagon and team for use in the business, and "for their services * * * said parties of the second part shall have and receive from said party of the first part all the net profits arising from the business," after deducting certain specified amounts and interest, payments for insurance, rent, and expenses incident to the business, which net profits were to be ascertained as found by the court and already set out above. The contract contained also a mortgage of the team and wagon to secure the faithful performance of its obligations by Hines, which provided that:

"They shall promptly pay, deliver, and account for, to said party of the first part, all moneys, goods, wares, and merchandise received by them under the contract."

It was also shown that the inventory taken by the parties before the bringing of the suit showed the liabilities of the company

amounted to \$10,723.80, and the assets only to \$9,686.65.

The undisputed testimony shows that W. J. Myers had advanced for use in the business \$9,000, which was to be returned and had not been, that Hines drew out of the business, during its continuance, \$3,938.44, and that the receiver realized from the sale of the assets about 60 per cent. of the inventory price. The court allowed \$300 for the services of the master and \$500 for the receiver and his attorneys, and directed it to be paid out of the funds, and also held that the proceeds of the team and wagon sold should be paid to E. C. Hines. Myers prosecuted this appeal from the decree rendered.

Troy Pace and T. D. Crawford, both of Little Rock, for appellant. E. G. Mitchell and Guy L. Trimble, both of Harrison, and W. N. Ivie, of Rogers, for appellees.

KIRBY, J. (after stating the facts as above). [1] Appellant contends that the court erred in failing to adjudge him entitled to the proceeds of the sale of the horses and wagon mortgaged to secure the faithful performance of the contract and the return of all moneys received by appellees, and also in refusing to render judgment in his favor against the appellee E. C. Hines for the balance of the money furnished to him under the terms of the contract for carrying on the business over the amount realized from the assets of the business upon its being wound up, and in assessing against the fund realized from the sale of the assets the costs of the master and receiver. Under the terms of the contract and mortgage the appellee was bound to the faithful performance of the contract, and the team and wagon was mortgaged to secure his faithful performance of it, and bound to the payment and accounting for all moneys received by Hines under the contract.

The business was insolvent when it was taken possession of by the appellant, Myers, was shown to be so by the books kept by Hines, which also showed that he had withdrawn from the business, as salary, about \$4,000, and the assets, valued as in his own inventory made at the time Myers took possession of the business, were more than \$1,000 less than the liabilities. The court found that it was impossible to ascertain the net profits of the business before the failure of it from the books kept by said appellee.

Under these circumstances we are of the opinion that the chancellor erred in holding that appellant was not entitled to the proceeds of the sale of the horses and wagon under the terms of his mortgage from appellee.

[2] Appellant's second contention, that the court erred in not rendering judgment against the appellee Hines for the balance of the amount of money shown to have been advanced him after payment by the receiver of the

amount realized from the assets of the business, is not well founded. The business was his own, as shown by the terms of the contract, and conducted by appellees as his agent, and the written contract provided the manner in which his advances should be repaid, and did not bind said Hines to the payment thereof, except in that portion of it mortgaging the wagon and team as security for the return thereof.

[3] The third assignment, complaining of the assessment of the costs of the master and receivership against the fund realized from the sale of the assets of the business, must be sustained. The business was known to be insolvent, and shown to be so by the books, as kept by appellee Hines, who also knew that his compensation depended upon there being net profits, and consisted of such net profits to be determined as provided by the written contract. The insolvent business had been taken charge of by appellant, the owner of it, who was financially responsible, and not alleged to be insolvent, and there was no necessity for the appointment of a receiver to take charge of said business and deprive the owner of his property and dissipate it in expenses of a master and receiver at the instance of said appellee, who had no interest in it to be protected or preserved. The payment of the expense of the master and receiver out of the funds was improper and unwarranted, and, said master and receiver having been appointed at the instance of appellee, the cost of their compensation should be assessed against said appellee, who improperly procured their appointment, and not against the receivership fund realized from the sale of appellant's property, and the court erred in holding otherwise. 23 Am. & Eng. Enc. of Law, 1107; High on Receivers, § 809a; 34 Cyc. 368; Highley v. Deane, 168 Ill. 266, 48 N. E. 94; Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113; Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288; Willis v. Sharp, 58 Hun, 608, 12 N. Y. Supp. 120; Weston v. Watts, 45 Hun (N. Y.) 219.

The decree is accordingly reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

REYNOLDS v. POLK et al. (No. 149.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. APPEAL AND ERROR ⇐173—RESERVATION OF GROUNDS OF REVIEW.

Where the adverse parties failed to deny the allegations of a defendant's cross-complaint, but depositions were taken on all sides of the issues raised and were read in evidence on trial without objection, defendant's insistence that the allegations of his cross-complaint should be taken as confessed, made for the first time on appeal, came too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. ⇐173.]

2. APPEAL AND ERROR ⇐1022 — REVIEW — FINDINGS.

Where an entire question was referred to a master, whose report was heard and approved by the court, and no specific objections to its correctness or the findings of the court are pointed out from which the Supreme Court can say that error was committed or a mistake made, the findings will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. ⇐1022.]

Appeal from Randolph Chancery Court; G. T. Humphries, Chancellor.

Action by the Allen-West Commission Company against W. D. Polk and others. From a decree against defendant D. W. Reynolds, he appeals; while defendants Polk and the Bank of Corning prosecute cross-appeals. Decree affirmed.

E. G. Schoonover and S. A. D. Eaton, both of Pocahontas, for appellant. Appellee, pro se.

SMITH, J. This action was commenced by a complaint filed by the Allen-West Commission Company, hereafter called the Commission Company, against W. D. Polk, the Bank of Corning, and the heirs at law of Ervin Reynolds, deceased, in which it was alleged: That said Commission Company had recovered certain judgments against Ervin Reynolds, which became liens on the lands involved in this controversy. That the said Ervin Reynolds had conveyed said lands to W. D. Polk for an alleged consideration of \$4,000, said conveyance being in form a deed, but in fact a mortgage. That the said Ervin Reynolds had deposited with the Bank of Corning, as collateral for certain notes executed to its order by him, a large number of notes payable to his order, and that many of these notes had been collected. There was a prayer that Polk and the Bank of Corning be compelled to collect the balance due on the notes so held and the proceeds of such collections applied as credits on the notes to their order, and that the deed to Polk be declared a mortgage and that the lands be ordered sold, and that any balance of the debt secured by said mortgage be paid and the remainder be applied to the satisfaction of the judgment in favor of the Commission Company. There was an amendment to this complaint in which it was alleged that Ervin Reynolds had fraudulently conveyed certain town lots to his wife. D. W. Reynolds, the father of Ervin Reynolds, was made a party defendant, and as to him it was alleged that he had collected the rents on the lands for the years 1912 and 1913, and it was prayed that he be required to pay over these rents to be applied to the satisfaction of the debts due by his son Ervin Reynolds.

Polk and the Bank of Corning filed answers and cross-complaints in which they alleged that the Cherokee Store Company, of

which Ervin Reynolds was a stockholder and an officer, was largely indebted to the Bank of Corning, and that to secure this indebtedness the said Ervin Reynolds executed his note and gave a mortgage on certain of the lands in controversy. There was a prayer for judgment for balance due, and for a decree of sale of the mortgaged lands.

D. W. Reynolds filed an answer and cross-complaint, in which he denied that Ervin Reynolds was ever the owner of the lands in controversy, but stated the fact to be that he purchased said lands from one Thos. H. Reynolds and paid the entire consideration, but had inadvertently had the deed made to his son Ervin Reynolds. That immediately after his purchase he entered into the possession of said lands and has since remained in the open, notorious, actual, exclusive, and adverse possession of said lands, claiming to be the owner thereof. He denied the validity and existence of any deed or mortgage made by the said Ervin Reynolds, and alleged the fact to be that said Ervin Reynolds had no sufficient mental capacity to make contracts. There was a prayer for an accounting with Polk and the Bank of Corning, and that the deed to Polk be canceled, and that it be decreed that the heirs of Ervin Reynolds had no title to the lands.

Answers were also filed by the heirs of Ervin Reynolds, in which all allegations adverse to their interests were denied. An amended answer was filed by Polk and the Bank of Corning, in which it was denied that the deed to Polk was a mortgage, or was intended as a security for debt, but it was alleged to be what it purported to be; that is, a warranty deed.

The evidence is in irreconcilable conflict, as all the parties to the litigation offered evidence in support of their respective contentions, and we are unable to say that the chancellor's findings of fact are contrary to the preponderance of the evidence. These findings were to the effect that appellant purchased the lands in controversy and took the deed in the name of Ervin Reynolds; that the legal title to said lands was in Ervin Reynolds by virtue of said deed and that the equitable title was in D. W. Reynolds until December 10, 1900, when Ervin Reynolds executed to his father a promissory note for \$1,768, with 10 per cent. interest per annum; that appellant had a lien on said lands to secure the payment of said note, and that said lien is prior and paramount to all other liens; that appellant had collected the rents on said lands for the years 1900 to 1909, inclusive, and for the year 1912, and had paid certain taxes and made certain repairs, and that the rents should be applied towards the extinguishment of the debt due from Ervin Reynolds to appellant, and that appellant should be charged with such rents and credited with whatever amounts he had paid out for taxes and repairs. The court further found that

Ervin Reynolds, on June 14, 1906, executed a mortgage to Polk to secure a note for \$3,000, with interest, and that on July 12, 1909, Ervin Reynolds and wife executed a deed to Polk for the lands in controversy; that said deed on its face was an absolute conveyance in fee simple, but that it was given for the purpose of securing the payment of the said \$3,000 and interest, and was, in effect, a continuation of the mortgage given by Ervin Reynolds and wife to Polk on June 14, 1906; that Polk had collected rents for the years 1910 and 1911 and had paid taxes for the years 1909 to 1912, inclusive, and certain ditch taxes and repairs; that the said note should be credited with the rents collected, less the taxes and repairs, and that Polk had a lien on the lands described to secure the amount due him, but that he has no lien on the lands to secure the payment of anything due from Ervin Reynolds either to himself, or the Bank of Corning, other than the note for \$3,000.

The court further found that the judgments of the Commission Company, less certain credits, were a lien on the lands in controversy.

It was decreed that the lien of appellant for any remainder that might be due him should be prior to all other liens, and that the lien of Polk and the Bank of Corning was prior and paramount to the lien of the Commission Company. A foreclosure of these various liens was decreed, and a master was appointed to ascertain the amount due each of the parties, and the report of this master which was filed at the following term of the court was approved, and the property ordered sold in satisfaction of these various liens.

Cross-complainant D. W. Reynolds thereupon prayed an appeal from the original decree in the cause finding against him on his claim of ownership of the lands in controversy and holding him accountable for the rents thereof; and cross-appeals have been prosecuted by Polk and the Bank of Corning.

[1] It is first insisted that the Commission Company failed to deny the allegations of appellant's complaint, and that the allegations thereof should be taken as true and confessed, and that the answer of Polk and the Bank of Corning is a negative pregnant and does not deny the allegations of appellant's cross-complaint, which should therefore be taken as confessed. But it is said, in answer to this contention, that depositions were taken on all sides of the issues here raised, and were read in evidence at the trial in the court below without objection, and that these objections are raised here for the first time. And such seems to be the case, and appellant's objections to this proof, therefore, now come too late.

The chancellor made a finding that the title to the lands in controversy passed out of the appellant and vested in the said Ervin

Reynolds on the 6th day of December, 1900, when Ervin Reynolds executed his promissory note for \$1,768, with interest at 10 per cent. It would have been more accurate to have said that D. W. Reynolds had a bond for title from Thos. H. Reynolds, and that when the balance of the consideration was paid the title was taken in the name of Ervin Reynolds and not in that of appellant, and that this action was not an inadvertence as claimed, but was done designedly, and the note for \$1,768 evidenced the amount which D. W. Reynolds expected his son Ervin Reynolds to pay him for the land.

[2] It is insisted that Polk, for himself and for the Bank of Corning, had in his hands collateral notes which were sufficient to, and which did, discharge any indebtedness due him or the bank by Ervin Reynolds. But this entire question was referred to a master, whose report was heard and approved by the court, and no specific objections to the correctness of this report and to the findings of the court are pointed out from which we can say that error was committed or a mistake made.

Cross-appeals were prayed by Polk and the Bank of Corning, and a number of questions of law are discussed by the learned counsel, who have filed briefs herein. But as we think the findings of the chancellor, on the questions of fact involved in the case, are supported by the evidence, it is unnecessary to discuss these questions, and the decree is therefore affirmed.

HARRY v. WILLIAMS. (No. 134.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. JUDGMENT \S 883—SET-OFF—STATUTE.

Under Kirby's Dig. § 6238, providing that judgments for the recovery of money may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments, where defendant's judgment for the recovery of money against plaintiff, who recovered judgment for a larger amount, was based upon a liability growing out of the transaction which formed the basis of plaintiff's cause of action, defendant could set off his judgment as against plaintiff's, since it reduced the latter's right to recover and did not prevent him from claiming his constitutional exemptions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1669-1688; Dec. Dig. \S 883.]

2. APPEAL AND ERROR \S 293 — QUESTIONS REVIEWABLE—QUESTIONS OF FACT.

Under Kirby's Dig. § 6215, providing that a new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court, where there is no motion for new trial filed in the case the Supreme Court cannot inquire into the correctness of the trial court's decision on the issues of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1395, 1700-1703, 1705, 1706; Dec. Dig. \S 293.]

3. APPEAL AND ERROR \S 298 — QUESTIONS REVIEWABLE—QUESTIONS OF FACT.

The rule that the Supreme Court cannot inquire into the correctness of the trial court's

decision on issues of fact where no motion for new trial was filed in the case applies to all trials at law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1395, 1700-1703, 1705, 1706; Dec. Dig. \S 293.]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by J. C. Harry against W. T. Williams, in which defendant moved to set off a judgment in his favor for the recovery of money against a judgment for a larger amount in favor of plaintiff. From a judgment allowing the set-off as prayed, plaintiff appeals. Affirmed.

J. E. London, of Alma, and J. B. Karnoff, of Ft. Smith, for appellant.

McCULLOCH, C. J. This controversy arose in the circuit court of Sebastian county, Ft. Smith district, by motion of appellee filed in that court to set off, pro tanto, a judgment in his favor, for the recovery of money, against a judgment for a larger amount in favor of appellant. Both judgments were rendered in that court, and on hearing the motion the court allowed the set-off as prayed for in appellee's motion. When the motion came on to be heard, appellant filed a schedule of his exemptions, claiming as exempt from seizure under process the judgment against appellee. In the judgment entry, the court recited its reasons for the decision to be:

"That the said Cicero Harry is not entitled to claim as exempt against the judgment that said W. T. Williams holds against him, but that the said judgment be set off, they having each grown out of the same transaction and in the nature of a counterclaim, being debts and credits and the balance due being in favor of the said Cicero Harry, he is entitled only to the amount owing by W. T. Williams to him in excess of what he owes the said W. T. Williams."

[1] It is contended on behalf of the appellant that the decision of the court was erroneous under the doctrine of this court in *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114, where it was held that a set-off judgment could not be allowed where it prevented one of the judgment debtors from claiming his constitutional exemptions. The statute provides that judgments for the recovery of money "may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments." Kirby's Dig. § 6238. In the case cited above, Pittman recovered a judgment against Atkinson & Co., and the latter subsequently purchased a judgment rendered against Pittman in favor of one Tomlinson and sought to set off the judgment thus purchased against the judgment in Pittman's favor. This court decided that Pittman was entitled to claim as exempt his judgment against Atkinson & Co., and that the latter could not deprive him of his constitutional exemptions by the purchase of another judgment.

The facts in the present case, as recited by the trial court in its judgment entry, are different from those in the case just cited, and do not call for the application of the rule there announced. Here the court found that appellee's judgment against appellant was based upon a liability which grew out of the same transaction which formed the basis of appellant's cause of action against appellee. That being true, appellant never had the right to claim his right of action against appellee as exempt from appellee's claim against him, for the simple reason that the two causes of action having grown out of the same transaction, one extinguished the other pro tanto. In other words, it reduced appellant's right to recover the amount of his debt due from appellee, and never formed a part of his constitutional exemptions.

[2] There was no motion for new trial filed in the case, and therefore we are not permitted to inquire into the correctness of the court's decision on the issues of fact. That is a necessary step before a case can be brought here for review. In *Douglass v. Flynn*, 43 Ark. 398, this court said:

"Error of law in giving or refusing instructions to a jury is good ground for a motion for a new trial. So, also, any error of law announced by a judge in trying law and fact, which bears upon the finding of the facts, would be. But error of law announced as the basis of a judgment, or decree, upon giving facts, found or admitted, would not be remedied by a new trial. Parties are not required in such cases to importune judges for a reconsideration. If the error appears in the record it is sufficiently questioned by appeal."

[3] A motion for a new trial is necessary where a case has been disposed of on "an issue of fact after a verdict by a jury or a decision by the court." *Kirby's Digest*, § 6215. This applies to all trials at law. *School District v. School District*, 64 Ark. 483, 43 S. W. 501; *Hare v. Shaw*, 84 Ark. 32, 104 S. W. 931, 120 Am. St. Rep. 17.

Judgment affirmed.

NATIONAL UNION FIRE INS. CO. v. SCHOOL DIST. No. 55. (No. 137.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. INSURANCE — 130 — CONTRACTS — APPLICATION — ACCEPTANCE.

Where an insurance agent accepted an application and the premium, but failed to forward them to the insurer and the application provided that no liability should attach until approval and issuance of a policy by the insurer, there was no contract of insurance; there being no obligation on the part of the company to accept the application which its agent could only receive and forward.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. —130.]

2. PRINCIPAL AND AGENT — 92 — POWERS OF AGENT — LIABILITY OF PRINCIPAL.

When an agent acts within the scope of his authority, the principal is bound.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 245, 246, 250-253, 592; Dec. Dig. —92.]

3. NEGLIGENCE — 2 — LIABILITY — BREACH OF DUTY.

Negligence and liability therefor cannot be predicated on a state of facts which imposes no legal duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. —2.]

4. INSURANCE — 130 — CONTRACT — APPLICATION — ACCEPTANCE.

Mere delay in passing on an application for a policy of insurance cannot be construed as an acceptance of the application and consent to be bound by it, nor can a cause of action for negligence be based on such delay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. —130.]

5. INSURANCE — 129 — POWERS OF AGENCY FOR INSURER — LIABILITY OF PRINCIPAL.

A soliciting insurance agent, authorized only to secure applications, accept premiums, and forward to the insurer for approval, could not bind the insurer by stating that a certain policy of insurance would be issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 180-182, 1849, 1850; Dec. Dig. —129.]

6. INSURANCE — 93 — POWERS OF AGENCY FOR INSURER — KNOWLEDGE OF AUTHORITY.

One applying for a policy to a soliciting insurance agent cannot assume that his authority is unlimited to bind his principal on the agent's statement, but is presumed to have known the extent of the agent's authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 123; Dec. Dig. —93.]

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

Action by School District No. 55 against the National Union Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause dismissed.

On the 17th of February, 1913, R. H. McDermott, acting for the directors of school district No. 55 of Clay county, made a written application to the National Union Fire Insurance Company for a policy of insurance, covering the school building and its contents. The application, together with \$20 in payment of the premium, was delivered to T. A. Wynne, soliciting agent of the company. The policy of insurance applied for was never delivered, and on the 6th of January, 1914, the building and contents were totally destroyed by fire. This suit was instituted on the 8th of October by the appellee against appellant to recover damages on account of the loss. The undisputed facts are as follows:

T. A. Wynne was a soliciting agent of the appellant, having authority to take applications, receive premiums, and to forward applications for policies to the company or its general agent for acceptance or rejection. On February 17, 1913, appellee made application to Wynne for a policy of insurance on its school building and contents, to take effect April 2, 1913. Wynne received the first premium, but did not transmit the application to the insurance company, and the policy was never issued. The insurance company was, at the time, writing insurance on property of

the character mentioned, and Wynne had taken applications and the company had accepted same and issued policies on risks of the same character. The application which the appellee signed contains information concerning the ownership, the value of the property, its occupancy, and such matters. It contained also this stipulation:

"It is understood and agreed that this application shall not be construed as a contract of insurance against said company until the same shall be approved by the officers of said company, which approval shall be evidenced by the issue and delivery of its policy."

The court, in effect, told the jury in its instructions, over appellant's objection, that if Wynne was the agent of the appellant and had authority as such to receive applications for insurance, and to forward same to the company and receive the payment of premiums thereon, that if he neglected for an unreasonable length of time to forward the application to the company, and if the company would have issued its policy if the application had been forwarded, and if they found that by reason of such neglect on the part of the appellant's agent the appellee suffered the loss complained of, they should find in its favor.

The appellant asked the court to instruct the jury to return a verdict in its favor, which the court refused, to which ruling of the court the appellant duly excepted. The appellant also asked the court, in effect, to tell the jury that the taking of the application for the insurance and the receipt of the insurance premium would not constitute a contract of insurance between the school district and the company, that Wynne, being a mere soliciting agent, had no power to bind the company to the issuance of an insurance policy, and that it was the duty of the appellee to ascertain the scope of his authority before paying the premium; and if it failed to do so, the loss was at its peril.

The jury returned a verdict in favor of the appellee for the amount claimed, to wit, \$500. A judgment was entered against the appellant in favor of the appellee, and this appeal has been duly prosecuted.

Spence & Dudley, of Piggott, for appellant.
Appellee, pro se.

WOOD, J. (after stating the facts as above).
[1, 2] The court correctly instructed the jury that "there was no contract of insurance in this case." The only issue presented by this appeal is whether or not an insurance company is liable for the negligence of its agent in failing to send to the company an application for insurance, where the only authority of the agent is to solicit applications for insurance, to deliver policies when issued, and to receive and receipt for initial premiums.

When an agent acts within the scope of his authority, the principal is bound. *Railway v. Ryan*, 56 Ark. 247, 19 S. W. 839.

Now in the written application of appellee for a policy of insurance it is stated:

"It is understood and agreed that this application shall not be construed as a contract of insurance against said company until same shall be approved by the officers of said company, which approval shall be evidenced by the issuance and delivery of its policy."

Under the express terms of this proposal on the part of appellee for insurance it is stipulated that there shall be no contract of insurance until the company shall approve the application and evidence its approval by the issuance of a policy. Under this stipulation of appellee, even if the soliciting agent had promptly forwarded the application to the company, the latter was under no legal obligation to issue the policy to appellee. The authority of the soliciting agent to receive and forward the application if strictly followed did not impose upon the appellant any legal duty.

[3] If the application had been promptly transmitted and received, appellant would not have been liable until the policy was actually issued. *Cooksey v. Mutual Life Ins. Co.*, 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26; *People's Mut. Ins. Co. v. Powell*, 98 Ark. 166, 135 S. W. 823. Negligence and liability therefor cannot be predicated upon a state of facts that do not impose any legal duty.

[4] The better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance cannot be construed as accepting such application and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay. *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163, and other cases cited in appellant's brief.

[5, 6] The soliciting agent, with only the limited authority shown by the undisputed evidence, could not bind the company by stating that a policy would be issued. *American Ins. Co. v. Hornbarger*, 85 Ark. 337, 108 S. W. 213. Appellee could not assume or presume that the special agent, with only limited authority, could bind his principal by any statements he made concerning his own authority. Appellee must be held, under the undisputed evidence, to have known the extent and nature of the authority of appellant's special agent. *U. S. Bedding Co. v. Andre*, 105 Ark. 111, 150 S. W. 413, 41 L. R. A. (N. S.) 1019, Ann. Cas. 1914D, 800.

It follows that appellee, under the undisputed evidence, had no cause of action, and the trial court erred in not so declaring.

The judgment is therefore reversed, and the cause is dismissed.

SANDERS et al. v. W. B. WORTHEN CO.
(No. 124.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. APPEAL AND ERROR ⇐242—TRANSFER OF CAUSE—WAIVER OF MOTION—STATUTES.

Under Kirby's Dig. §§ 5991, 5993, providing that plaintiff's error as to the kind of proceedings shall not cause abatement or dismissal, but merely a change into the proper proceedings by amendment in the pleadings and transfer of the action to the proper docket, and that such error is waived by failure to move for its correction when and as prescribed, or unless excepted to at the time, where the record shows no order of the trial court passing upon defendant's motion to transfer the cause from the chancery court to the circuit court, defendant will be deemed to have waived the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. ⇐242.]

2. APPEAL AND ERROR ⇐523 — RECORD — TRANSCRIPT OF TESTIMONY.

It was proper for the parties to agree that the testimony should be transcribed and used as depositions, and such transcribed testimony became a part of the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2372-2374; Dec. Dig. ⇐523.]

3. APPEAL AND ERROR ⇐516—RECORD—RECITAL OF TRANSCRIPT.

The recital of the transcript as to a discussion between the attorneys for the defendant and the court relative to its jurisdiction did not become a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2340; Dec. Dig. ⇐516.]

4. APPEAL AND ERROR ⇐520—RECORD—ORDER OVERRULING MOTION TO TRANSFER.

Counsel for defendants, moving to transfer the cause from the chancery to the circuit court, to preserve their objections to the jurisdiction of the chancery court should have caused entry of record of an order overruling the motion to transfer, which order would have become part of the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2359-2363, 2366, 2374; Dec. Dig. ⇐520.]

5. BANKS AND BANKING ⇐127 — TITLE TO CHECK.

Prima facie, in the absence of a contrary intention of the parties, express or implied, when a bank receives a check and places the amount to the credit of its customer, the title of the check is vested in the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310; Dec. Dig. ⇐127.]

6. BANKS AND BANKING ⇐127—RECEIPT OF CHECK—TITLE—SUFFICIENCY OF EVIDENCE.

In an action by a bank which received a check, payment of which was later stopped by the drawer, evidence held sufficient to justify the chancellor in finding that it was the intention of the parties that title to the check should pass to the bank when it received it and credited the amount to its customer's account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310; Dec. Dig. ⇐127.]

7. BANKS AND BANKING ⇐127 — CHECKS — GENUINENESS OF SIGNATURE — SUFFICIENCY OF EVIDENCE.

In an action by a bank which credited to its customer's account the amount of a check, pay-

ment of which was afterwards stopped by the drawer, evidence held sufficient to warrant the chancellor in finding that the drawer signed the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310; Dec. Dig. ⇐127.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by the W. B. Worthen Company against Gladys G. Sanders, J. A. Alexander, and others. From a decree for plaintiff, the named defendants appeal. Affirmed.

W. B. Worthen Company, a banking corporation organized under the laws of the state of Arkansas, instituted this action in the chancery court against Gladys G. Sanders, R. G. Ortagus, agent, J. A. Alexander, trustee, and the Exchange National Bank. The material allegations of the complaint are as follows:

That on March 31, 1915, Gladys G. Sanders drew a check for \$500 payable to R. G. Ortagus, agent, or order, on the Exchange National Bank, of Little Rock, Ark.; that at the time Gladys G. Sanders had an account in her name in the Exchange National Bank in the sum of something more than \$1,000; that on April 2, 1915, Ortagus indorsed the check and deposited it to his account with W. B. Worthen Company, and the next morning drew out checks on his account aggregating the sum of \$500; that on the same day, but later in the day, Gladys G. Sanders changed her account with the Exchange National Bank and placed it in the name of J. A. Alexander, trustee, and that she notified the bank not to pay the check and the bank refused to pay same.

The prayer of the complaint was that a temporary restraining order be granted restraining the Exchange National Bank from paying any check of the said J. A. Alexander, trustee, and that the latter be enjoined from making any disposition of the funds held in his name for Gladys G. Sanders, and that on final hearing plaintiff have judgment against Gladys G. Sanders and Ortagus for the sum of \$500, that Alexander be declared a trustee for Gladys G. Sanders, and that the Exchange National Bank and Alexander, as trustee, be required to pay into the registry of the court a sufficient amount of the funds to pay the judgment against Gladys G. Sanders.

The cashier of the Exchange National Bank testified substantially as follows:

I am familiar with the signature of Gladys Sanders and she signed the check for \$500 payable to Ortagus; the \$500 check came into the bank about 10 o'clock through the clearing house; each morning at 10 o'clock each bank checks up the other banks; if Exchange National Bank has checks on Worthen Company and Worthen Company have checks on the Exchange National Bank the checks are exchanged if they are equal; if they are not equal then one owes the other the difference, which is paid; under the rules of the clearing house we have from 10 o'clock in the morning until 2 o'clock in the afternoon to return checks; within that time

we received a request from Gladys G. Sanders not to pay the \$500 check for the reason that it was a forgery; when we received the message not to cash the check we sent it back to Worthen Company and they sent our bank the money for it; on that day Gladys G. Sanders had an account in our bank in her own name for \$1,114.53; after notifying our bank not to pay the check she came in on the same day and transferred her account to J. A. Alexander, trustee for Gladys G. Sanders.

Gordon N. Peay, president of W. B. Worthen Company, testified in effect as follows:

The \$500 check in controversy is dated March 31, 1915; Ortagus deposited it in our bank on the afternoon of April 2, 1915, and it was credited to his account and then went into the general clearing to be presented the following morning, as was the custom; on the following morning between 9 and 10 o'clock Ortagus drew checks in various small sums for \$500 on his own account to cover his pay roll; our bank cashed the check for \$500 by cashing the checks of Ortagus on his account and our bank is out that much money now; Ortagus has made no other deposits since that time and did not at the time have any funds to meet the checks given by him to cover his pay roll, except the \$500 check in controversy; I am an expert on signatures and from a comparison of the signature to the \$500 check with the admitted signature of Gladys G. Sanders I find the signature to the \$500 check is the genuine signature of Gladys G. Sanders.

Gladys G. Sanders testified in her own behalf and denied that she signed the check in question. She also testified as to the circumstances which induced her to give the check to Ortagus; but as these facts are not necessary to a decision of the issues raised by the appeal, they need not be stated here.

The chancellor found the issues in favor of the plaintiff, and decreed that plaintiff, Worthen Company, have and recover of Gladys G. Sanders the sum of \$505.25, with the accrued interest. It was further decreed that the Exchange National Bank and J. A. Alexander, trustee, pay into the registry of the court a sufficient amount of the funds on deposit with the bank to the credit of J. A. Alexander, trustee, to satisfy the judgment. Gladys G. Sanders and J. A. Alexander have appealed.

Henry G. Reigler, of Little Rock, for appellants. Coleman & Lewis, of Little Rock, for appellee.

HART, J. (after stating the facts as above). The defendant Gladys G. Sanders asked that the case be transferred from the chancery court to the circuit court, and now assigns as error the action of the chancellor in failing to transfer the cause.

[1] Under the record as presented we need not decide whether this cause was of equitable cognizance. Section 5991 of Kirby's Digest provides that an error of the plaintiff as to the kind of proceedings adopted shall not cause an abatement or dismissal of the action, but merely a change into the proper proceedings by amendment in the pleadings and a transfer of the action to the proper docket.

Section 5993 of Kirby's Digest provides that such error is waived by failure to move

for its correction at the time and in the manner prescribed in the statute, and that such errors are waived, unless excepted to at the time.

The record does not show any order of the court passing upon the motion of the defendant to transfer the cause from the chancery court to the circuit court, and under the sections of the statute above referred to the defendant will be deemed to have waived her motion.

The transcript does contain the following language:

"It is agreed that the testimony shall be taken by a stenographer, the notes written and transcript used as depositions, same being taxed as costs. After reading the complaint of plaintiff by Mr. Lewis and reading the answers by Mr. Reigler, a discussion arose between the attorneys for the defendants with the court as to its jurisdiction, the attorneys for defendants stating that plaintiff had an adequate remedy at law and no cause to enter this court. The court refused to transfer this cause, holding that it was within proper jurisdiction, to which defendants excepted."

[2-4] It was proper to agree that the testimony should be transcribed and used as depositions. The testimony of the witnesses, when transcribed, under the agreement, became a part of the record. The recital of the discussion between the attorneys for the defendant and the court did not become a part of the record. The subject of the record on appeal in chancery cases has been considered by this court in several cases. The case of *Rowe v. Allison*, 87 Ark. 206, 112 S. W. 395, cites many of our earlier cases on the subject and clearly points out what is necessary to bring matters into the record in chancery cases. Counsel for the defendants should have caused an order to be entered of record overruling the motion to transfer the cause to the circuit court. Such an order would have become a part of the record on appeal. Not having done so, defendants will be deemed to have waived their objections to the jurisdiction of the chancery court.

The statement above referred to as appearing in the transcript is not even authenticated by the stenographer's certificate or by the certificate of the clerk; but even if it were, as above stated, that would be insufficient to make it a part of the record on appeal. This brings us to a consideration of the case on its merits.

[5] When a check is taken to a bank and the bank receives it and places the amount to the credit of the customer, the title to the check is vested in the bank. The rule as stated is not an absolute rule, but it is *prima facie* merely and yields to the intention of the parties, express or implied, from the circumstances. *Southern Sand & Material Co. v. People's Savings Bank & Trust Co.*, 101 Ark. 266, 142 S. W. 178; *Arkansas Trust & Banking Co. v. Bishop*, 178 S. W. 422; *Fayette National Bank v. Summers*, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694, and case note.

[6] Tested by this rule, the decision of the chancellor was not against the preponderance of the evidence, and must be upheld on appeal. The facts as disclosed by the record show that both banks are situated in the city of Little Rock and diagonally across the street from each other; that Ortagus deposited the check in question one afternoon, and the check was credited to his account; that the bank kept the check until the next morning, when it was carried to the clearing house in due course; that before that time Ortagus had checked the amount out in various small amounts to meet his pay roll; that the Worthen Company had no notice whatever of any infirmities in the check.

Under these circumstances, the chancellor was justified in finding that it was the intention of the parties that the title to the check should pass to the bank when it received it and credited the amount thereof to the account of Ortagus.

[7] The chancellor was also warranted in finding that Gladys G. Sanders signed the check. It is true that she denied signing it, but the record shows that she also denied signing another check made payable to Ortagus, but afterwards admitted having signed it. The assistant cashier of the Exchange National Bank testified that he knew her signature, and that the signature to the check was her genuine signature; and the president of the Worthen Bank compared the signature to the check with the admitted genuine signature of Gladys G. Sanders and testified that the signature to the check was the genuine signature of Gladys Sanders.

The decree is affirmed.

PRESCOTT & N. W. RY. CO. et al. v. HOPKINS. (No. 148.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. MASTER AND SERVANT ⇨231—INJURIES TO SERVANT—TRESPASSER.

Where an employé of a lumber company was killed while riding on the train of a subsidiary railroad company, evidence that he stated he was going to ride on the train, but that he might have to fight his superior, is admissible to show that he knew the rules prohibiting riding on such train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. ⇨281.]

2. CARRIERS ⇨238 — MASTER AND SERVANT ⇨89—INJURIES TO SERVANT—TRESPASSER.

Where a lumber company and a subsidiary railroad company had passed rules forbidding employés of the lumber company to use the trains for their own benefit, and an employé knew that fact, he was a trespasser when riding on a train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 937; Dec. Dig. ⇨238; Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. ⇨89.]

3. MASTER AND SERVANT ⇨89—RULES—ENFORCEMENT.

A master may reinstate rules which have been abrogated by noninsistence at any time it

sees fit, and, on reinstating rules forbidding servants to ride on a logging railroad, servants riding in violation are trespassers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. ⇨89.]

4. CARRIERS ⇨238 — CARRIAGE OF PASSENGERS—TRESPASSERS.

One riding on a work or logging train, not purporting to carry passengers, in violation of the rules of the company, is a trespasser.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 973; Dec. Dig. ⇨238.]

5. CARRIERS ⇨246 — CARRIAGE OF PASSENGERS—ACTIONS—BURDEN OF PROOF.

In an action for the death of one killed while riding on a work or logging train, where deceased was not a member of the crew, plaintiff had the burden of proving deceased was entitled to ride.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1275, 1284, 1296; Dec. Dig. ⇨246.]

6. CARRIERS ⇨243 — CARRIAGE OF PASSENGERS—DUTY.

It is the duty of one desiring to take passage on a work or logging train to inquire of proper persons if he may do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 981-983, 1109; Dec. Dig. ⇨243.]

7. RAILROADS ⇨276—INJURIES TO PERSONS ON TRAINS—TRESPASSER.

Where deceased was a trespasser on a logging train, defendant was not liable for negligence in running the train, not having willfully or wantonly injured him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. ⇨276.]

8. APPEAL AND ERROR ⇨1175—DETERMINATION—REMAND.

Where the case was fully developed, and it appeared plaintiff was not entitled to recover, but that defendants were entitled to a peremptory instruction, judgment for plaintiff should be reversed, without remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. ⇨1175.]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Action by Ed Hopkins, as administrator, against the Prescott & Northwestern Railway Company and another. From a judgment for plaintiff, defendants appeal. Reversed and dismissed.

This suit was instituted by the appellee as the administrator of the estate of W. E. Sanders, deceased, against the appellants, Prescott & Northwestern Railway Company, hereinafter called the Railway Company, and the Ozan Lumber Company, hereinafter called the Lumber Company, in which appellee sought to recover for the benefit of the widow and children of Sanders, damages which he alleged accrued by reason of the joint negligence of the appellants resulting in the death of Sanders.

Appellee alleged that the Lumber Company owned and operated a large sawmill at Prescott, in Nevada county, Ark., and had its principal place of business there, and that it maintained a branch office in Pike county, Ark.; that the Railway Company was a subsidiary corporation to the Lumber Company,

and operated a line of railroad from Prescott into Pike county; that the principal business of the Railway Company was to transport logs for the Lumber Company; that the line of railroad ran into the interior of Pike county on the west side of the Little Missouri river, where it hauled off the logs on a large tract of land belonging to the Lumber Company; that the Lumber Company, having cut out the timber there and wanting to move, so as to log a tract of timber on the east side of the river, made a contract with the Memphis, Dallas & Gulf Railway Company, and the Dodson Construction Company whereby they were authorized to use the line of the Memphis, Dallas & Gulf Railway Company to haul the logs from the east side of the river; that the trains, in hauling these logs, were jointly operated by the Lumber Company and the Railway Company; that on the 9th of February, 1914, it was the custom of the employees of the Lumber Company to ride on the log trains, which custom was known to and acquiesced in by the officers and managers of both appellants; that on that day Sanders was in the employ of the Lumber Company, cutting and hauling logs, and that it became necessary for him to go from the Lumber Company's camps to Murfreesboro, and he took passage on appellant's log train with the assent of the crew in charge thereof; that the train consisted of a locomotive and a number of flat cars; that the engine was run with the tender in front; that the engineer in charge of the train was inexperienced and incompetent; that the track was in bad condition; that by reason of the negligence of the Railway Company in running the train, with the tender in front and at an excessive rate of speed, under the above conditions, the track slid off of the dump and the engine turned over, catching Sanders and so injuring him that he died five days later. Appellee asked judgment on account of damages for pain and suffering endured by Sanders before his death in the sum of \$10,000, and for pecuniary injuries on account of loss of contributions to his wife and children in the sum of \$15,000.

The appellants answered jointly, in which they denied the material allegations of the complaint, and, among other things, set up the defenses that Sanders went upon the locomotive without right and in violation of the rules and regulations of the appellants, and that he knew he was violating the same when he got upon the locomotive; that he was on the locomotive at his own convenience and pleasure, and not in the performance of any duty to the appellants; that he was a trespasser in thus going upon the train, and that he assumed the risk of doing so.

At the conclusion of the testimony the appellants prayed for instructions directing the jury to return a verdict in their favor, which the court refused. The jury returned a verdict in favor of the appellee in the sum of

\$8,000. One of the grounds of the motion for a new trial was that the verdict was contrary to the evidence. Another ground was that the court erred in refusing appellant's prayer for a directed verdict. The motion for a new trial was overruled. Judgment was rendered against appellants, and they have duly prosecuted this appeal.

J. C. Pinnix, of Murfreesboro, and McRae & Tompkins, of Prescott, for appellants. Langley & Steel, of Murfreesboro, and W. P. Feazel, of Nashville, for appellee.

SMITH, J. (after stating the facts as above). A majority of the court has reached the conclusion that under the undisputed evidence Sanders, at the time of the injury resulting in his death, was a trespasser upon the train, and that therefore the appellants owed him no duty and were not liable in damages for his injury. This conclusion makes it unnecessary to discuss the other numerous questions presented on this appeal, and we will proceed to set out and discuss only the evidence relating to the issue as to whether or not Sanders, at the time of his injury, was a trespasser.

[1, 2] Witness Lowe, on behalf of the appellee, testified on this issue substantially to the effect that, acting under instructions from one Fletcher Smith, who had the control and management of the appellants' business, especially the operation of their log and work trains, he was bringing the work train, consisting of two flat cars and the engine, from the log camp to Murfreesboro; that Sanders was there when they started; that there were five or six negroes on the cab and seven or eight on the cars. There were some negro women in the coal car. The negro men that were on the cab and cars belonged to his crew. Neither witness nor any one else made any objection to Sanders riding on the train. Ever since witness had been on the job, it had been the custom for the employees of the company to ride on the work trains or log trains, and had been the custom for log cutters and loggers to ride on this train, and witness never heard any objection to it. The employees rode these trains when they were not going to and from their work. On one occasion a lot of camp hands were witnesses, and they went back to the camp on the flat cars of the log train. Witness testified, over the objection of counsel for appellee, that after they had started he heard Sanders say as follows:

"I may have to fight Fletcher Smith to ride this train, but I am going over there."

There was no notice sticking up in the cab containing a warning that nobody could ride. The injury occurred on the morning of February 23, 1914. This train had been running over there something like since the 24th of January. Witness stated:

"If I am not mistaken it was the 24th of January when they brought the first steel on this side."

Witness had never seen Fletcher Smith run workmen off of the engine. He had never seen Fletcher Smith object to anybody riding these trains or the engine, except one gambler and one hobo; never heard Smith say it was against the rules to ride those trains, and had never been advised by anybody connected with the company that it was against the rules.

Witness General Smith testified that a number of times he had seen plenty of people riding on appellant's train, on this side of the river and the other side, when Fletcher Smith was on the train, and he never heard him make any objections to anybody riding. He had seen other employes besides those who were operating the trains, and others, riding thereon. If there was a rule against anybody riding, except the men connected with the train, witness knew nothing about it.

Witness Littlefield testified that he had worked for the appellant, driving a log team, off and on for about three years. During the time he was working he was in the habit of riding the work trains whenever he got ready—"just anywhere over the woods, and down to the commissary, and all around." No objection was ever urged to it. He rode the trains when Fletcher Smith was on them, and he never heard him object to it. Smith was the general boss out there. Things went according to his orders. Witness worked a month or a little better on the side of the river where the injury occurred, but was not at work when Sanders was injured.

One witness, a tiemaker, testified that he never heard of it being against the rules for employes to ride the logging and work trains until after Sanders was killed. Many other witnesses testified to the same effect, but the above states the evidence as strongly in favor of the appellee as the jury were warranted in finding, and it tends to show that there was a custom upon the part of appellants to permit their employes, who were not assisting in the operation of the train, to ride on these logging and work trains on business for the company and when they were not about the company's business; also to permit those who were not employes to ride on these trains. The jury might have found from this testimony that Fletcher Smith, who was the roadmaster of the Railway Company and the general foreman of the Lumber Company, and who was charged with the enforcement of the rule, knew of this custom and acquiesced in it, even after the appellants had moved their logging operations to the east of the river where the injury occurred.

On the other hand, the appellants introduced witnesses whose testimony tended to prove that before appellants moved their logging operations to the east side of the river, where the injury occurred, it was the custom to carry passengers on their logging

and work trains, but that after they moved their logging camps to the east side of the river the custom of permitting passengers to ride on their trains was abandoned, and that after appellants had moved to the east side of the river no person, whether employe or otherwise, was permitted to ride on their logging and work trains, except those employes who were handling the trains. The appellants were using the Memphis, Dallas & Gulf tracks, and the contract with that company provided that no persons whomsoever, except the train crews, should be permitted to ride on their logging and work trains, and that a failure to observe the provision on the part of the appellants would forfeit their right to use the track of the Memphis, Dallas & Gulf Railway Company; that in pursuance of this contract warning notices were posted in all the engines, and there was a warning notice in the engine on which Sanders was riding, to the effect that no employe, except members of the regular train crew, would be permitted to ride on the locomotive or the car of that train, except in a car provided for that purpose; that on the pilot beam of the engine on which Sanders was riding, and at the back end of the tender, there was posted a sign, "Keep Off;" that appellants' trainmen were instructed by appellants' foreman and manager, Smith, not to let any one ride their engines; that the employes were furnished a time-card on which was printed a rule of the company to the effect that no one was permitted to ride on the trains, except the employes having charge thereof; that the engineers and conductors were held responsible for violations of these rules.

John Karber, a witness on the part of the appellants, testified that he was an engineer on one of their log trains at the time Sanders was injured. Sanders told witness the day before the wreck that he was going over to Norvell, and figured going on the work train. Sanders asked witness whether or not he could go over, and witness replied: "I don't know; that it was against the rule." This witness further testified that it was against the rules of the company for a man to ride on the work trains, and that this was generally known among the men and generally discussed among them.

Witness Thornton testified that he was an engineer in the employ of the Ozan Lumber Company; that in the week before Sanders was killed Sanders tried to ride on witness' engine, and witness told him that he could not carry him—that it was against the rules. Witness was asked this question:

"Now, what did he say about coming to Murfreesboro? A. He said he was going to come up here, and he expected he would have to have a fight with Fletch to ride. I told him I didn't think he could ride at all. There was no way for him to go, and he said he was going if he had to have a fuss."

Witness John Lyons testified that at the time of the injury to Sanders he was an engineer for the Ozan Lumber Company and saw Sanders the morning he was injured. Sanders asked witness to let him (Sanders) ride on the train, and witness states what took place as follows:

"I told him it was against the company's rules; that I was not going to run the engine myself. He says: 'Who is going to run the engine?' He asked me if it was Mr. Thornton. I told him: No; it was Mr. Smith. Mr. Smith was going to run the engine. Sanders said he just had to go; he said he was going to go; he would scrap Fletcher Smith all the way over there and back."

Witness Wm. Marlow testified that he was in the employ of the Lumber Company and saw Mr. Sanders on the morning he was killed. Witness relates what took place between Lowe and Sanders as follows:

"He [Sanders] said that morning when he came down he wanted to go to Murfreesboro, and Mr. Lowe came to wake us up that morning. We were boarding at Mr. Lowe's. He said he was going over, and Mr. Lowe was deviling him something about coming down. He told him he could not come down, and he told him he would fight it out with Fletch. Q. You say you heard Mr. Sanders say he was coming down here and then fight it out with Fletch Smith? A. Yes, sir."

Witness testified that he was a fireman on one of appellant's trains, and that at that time they had strict orders from Fletcher Smith, the foreman, to keep men off the trains.

Witness Russ Stephens testified that he was in the employ of the Lumber Company at the time Sanders was killed; saw him that morning before he left the camps. He told witness that he was going to Norvell. Witness was asked:

"What did he say with reference to riding on the train and knowing it was against the rule?"

And he answered:

"He made a statement that he was going over on the engine if he could get on there, and wanted to know who was going to run the engine, and some one of us made the remark that Mr. Smith was going to run it, and he said he would go down to the junction—that is, the set-out—and go down as far as Murfreesboro, and have it out with Fletch from over there; something like that."

Now, the undisputed testimony shows that it was against the rules of the appellants for employes, not engaged in the work of operating their trains, to take passage on these trains. The only question about which there is a conflict in the testimony is as to whether or not the rule had been habitually violated within the knowledge of those employes of appellants whose duty it was to see that the rules were enforced. The above testimony of witnesses on behalf of the appellants tends to show that those whose duty it was to enforce the rules informed Sanders that it was against the rules for him to ride on the train on which he received his injury, and it shows conclusively that Sanders declared his purpose to go on this train, although he might

have "to fight Fletcher Smith," the foreman and manager, who had given directions to the employes in charge of the train to enforce the rules. A majority of the court is of the opinion that this testimony as to the declarations of Sanders, and showing his knowledge of the rules and his purpose to violate the same, notwithstanding any protest that might be made by the foreman and manager of appellants, constituted him a trespasser. Although appellee objected to the testimony as to these declarations of Sanders, it was not hearsay, and was competent, as the trial court held, to prove the affirmative fact that he made such declarations.

The testimony was competent, because the acts and declarations of Sanders showed that he had knowledge of the rules of appellants, and also of the duty and desire of Fletcher Smith to enforce them. The knowledge of Sanders of the rules and the attitude of his mind towards them were material in determining the issue as to whether or not he was a trespasser. The testimony as to his declarations, made just before and at the time of his riding the logging train, was in explanation of his conduct in so doing, and showed conclusively that such act upon his part constituted him a trespasser. The above testimony showed that, whatever might have been the custom of appellants in regard to the enforcement of their rules against employes riding the trains prior to the day of the fatal injury to Sanders, at least on that day he had knowledge of the rules forbidding him to ride, and was conscious of the fact that appellants were seeking to enforce the same through their foreman, Fletcher Smith.

[3] Although appellants may have acquiesced in the violation of their rules down to the very day of the injury to Sanders, constituting an abrogation of those rules to that time, nevertheless they had the right to reinstate the same, and to insist on their enforcement whenever they saw fit. *Hobbs v. Texas & Pacific Ry. Co.*, 49 Ark. 358, 5 S. W. 596.

[4] One who takes passage upon a work or logging train not purporting to carry passengers, in conscious violation of the rules of the company, and with the express purpose of riding, notwithstanding any efforts that might be put forth for the enforcement of the rules, is a trespasser. See *Kruse v. Railway Company*, 97 Ark. 137-140, 133 S. W. 841; *Purple v. Railroad Co.*, 114 Fed. 123-132, 51 C. C. A. 564, 57 L. R. A. 700. See, also, *Railway Co. v. Reed*, 76 Ark. 106, 88 S. W. 836, 113 Am. St. Rep. 78.

[5] The train upon which Sanders was riding being a logging or work train, and Sanders not being a member of the crew operating such train, the burden was upon appellee to show that Sanders had a right to take passage upon such train. *Hutchinson on Carriers*, §§ 1000, 1001; *Eaton v. Railroad*, 57 N. Y. 382, 15 Am. Rep. 513.

[6] It is the duty of one who desires to take

passage upon such train to inquire whether he may do so. See cases supra; *Railway v. Atchison*, 47 Ark. 74, 14 S. W. 468; *Railway Co. v. Rosenberry*, 45 Ark. 256-263; 8 Thompson on Negligence, § 2562; Elliott on Railroads, § 1576. Witness Lowe, who was running the engine at the time Sanders was killed, and who had charge of the work train, testified that after they started Sanders said:

"I may have to fight Fletcher Smith to ride on this train, but I am going over there."

This testimony, and the testimony to the same effect by other witnesses, was, in the opinion of the majority, undisputed. There was nothing to justify the court or jury in arbitrarily disregarding this testimony.

[7] It conclusively shows that Sanders was a trespasser, and that as such the appellants owed him no duty, except not to willfully and wantonly injure him after discovering his peril, and they were therefore not liable in damages for the injury resulting in his death.

[8] The court erred in refusing to grant appellants' prayer for a peremptory instruction, and for this error the judgment is reversed, and, as the cause seems to have fully developed, the same is dismissed.

STATE v. GREENVILLE STONE & GRAVEL CO. et al. (No. 139.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. APPEAL AND ERROR ¶78—MATTERS REVIEWABLE—FINALITY OF ORDERS.

Kirby's Dig. § 1188, gives the Supreme Court appellate jurisdiction over final judgments and orders only in certain instances, including: "(4) Whenever the decision of any motion involves the constitutionality of any law, * * * or where the decision of any such motion has been or shall be placed * * * upon the unconstitutionality of such law." Defendants demurred to the complaint on constitutional grounds, and the demurrers were overruled, and the defendants appeal. *Held*, that the orders overruling the demurrers were not appealable, even under the fourth clause of the statute, since they were not final orders; the mere fact that a constitutional question was involved being insufficient to make them final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. ¶78.]

2. APPEAL AND ERROR ¶78—MATTERS REVIEWABLE—FINALITY OF ORDER.

Where the court sustained demurrer to one count of a complaint, but made no final order dismissing that portion of the complaint, its order was not appealable, since it did not finally dispose of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. ¶78.]

Appeal from Chicot Chancery Court; Z. T. Wood, Chancellor.

Action by the State against the Greenville Stone & Gravel Company and another. From orders overruling demurrers to certain counts of the complaint, defendants appeal, and from an order sustaining a demurrer to one count, the State appeals. Appeals dismissed.

This suit was instituted by the state, through the Attorney General and specially employed counsel, against the Greenville Stone & Gravel Company and the Greenville Sand & Gravel Company, hereinafter designated as the companies, to recover for sand and gravel alleged to have been taken by the companies from the bars and beds of the Mississippi river.

The complaint set up that the companies were foreign corporations, and were in fact but one corporation, being owned and controlled by the same persons under different names; that the state owned and was in possession of the lands, including sand bars and gravel beds along the west bank of the Mississippi river from which the companies had removed the sand and gravel; that since 1909 the companies had been dredging, taking, and removing sand and gravel from beds and bars belonging to the state, and had sold the same to their commercial customers, and had entered into another contract for the future sale and delivery of sand and gravel; that 1,000,000 yards of sand and gravel had been sold to certain railroad companies, and that it was unknown how much sand and gravel was to be delivered under the new contract in the future. The state asked for a discovery from the books of the companies as to the amount of sand and gravel that had been taken between the years 1909 and 1915, inclusive.

The complaint covers a period for sand and gravel between the year 1909 to the 29th day of March, 1913, before the law was passed making it unlawful to take sand and gravel from the navigable streams in the state, and also a period from the latter date, when such law was passed, to the 11th day of March, 1915, during which time the act of March 29, 1913, was in effect; and also covering a period from the 11th day of March, 1915, to the date of the institution of this suit, during which time Act 138, approved March 11, 1915, relating to the taking of sand or gravel, etc., from the beds and bars of navigable streams in this state, was in full force and effect. The complaint asked for an injunction, a discovery, and all proper relief.

The companies interposed demurrer No. 1, which was a general demurrer to the complaint as a whole; special demurrer No. 2 to that portion of the complaint which seeks to recover for sand and gravel taken prior to the act of March 29, 1913; special demurrer No. 3 to that portion of the complaint which seeks to recover for sand and gravel between March 29, 1913, and March 11, 1915; and demurrer No. 4 to that part of the complaint which seeks a discovery.

The court overruled the general demurrer, and also all of the special demurrers, except No. 2. The court sustained demurrer No. 2. Each of the orders of court overruling the

companies' several demurrers, except No. 2, recites as follows:

"The court having heard the argument of counsel, and being advised in the premises, doth order and adjudge that said demurrer be and the same is hereby overruled, and defendants praying an appeal in open court and it appearing to the court that a constitutional question is involved in said demurrer, it is ordered that an appeal be and the same is hereby granted upon defendants entering into bond as required by law to be approved by this court."

The order of the court sustaining demurrer No. 2 recites as follows:

"The court, having heard the argument of counsel and being advised in the premises, orders and adjuges that said demurrer be and the same is hereby sustained; and, complainant praying an appeal from this order of the court, it is ordered and adjudged that said appeal be and the same is hereby granted."

R. W. Wilson, of Monticello, for appellants. Percy & Percy, of Greenville, Miss., Wallace Davis, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). [1] The orders overruling the demurrers of the companies to the complaint of the state are not final orders from which an appeal will lie.

Section 1188 of Kirby's Digest provides:

"The Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of all inferior courts of the state in the following cases and no other:

"First. In a judgment in an action commenced in the inferior courts, and, upon the appeal from such judgment, to review any intermediate order involving the merits and necessarily affecting the judgment.

"Second. In an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action; and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part of an answer, or any pleading in an action. * * *

"Third. In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from. * * *

"Fourth. Whenever the decision of any motion involves the constitutionality of any law of this state, or where the decision of any such motion has been or shall be placed, in the opinion of the judge making such decision, upon the unconstitutionality of such law, then an appeal shall lie and may be made from such decision or from the order entered upon such decision."

This court, in numerous cases, has held that it is only from a final order or judgment of the lower court that an appeal can be taken to this court. See cases collated in 1 Crawford's Digest, "Appeal and Error," 1 d, p. 54. See, also, cases cited under section supra, Kirby's Digest.

In *Davie v. Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170, Chief Justice Cockrill, speaking for the court, said:

"The right of appeal is limited in general to final judgments and does not extend to interlocutory orders. * * * The object of the limitation is to present the whole cause here for de-

termination in a single appeal, and thus prevent the unnecessary expense and delay of repeated appeals."

And the court held in that case, concerning the first subdivision of the above section, that it—

"does not undertake to grant the right of appeal from an interlocutory order, but provides only what the law was without it, that such an order can be reviewed on appeal from the final judgment."

What was said by Judge Cockrill for the court in that case concerning the first subdivision is equally true also of the fourth subdivision, which the trial court, in the instant case, invoked and embodied in its orders overruling the companies' demurrers and granting an appeal.

We have reached the conclusion that, under the fourth subdivision, no appeal will lie from a decision of the lower court on any motion, even though it involves the constitutionality of any law of this state, unless the decision is a final order or judgment of the court. The mere fact that the constitutionality of a law may be involved in the decision on a motion would not of itself render the decision on such motion a final order or judgment. Under the statute giving it appellate jurisdiction over final orders and judgments, and no others, this court would not acquire jurisdiction on the decision of a motion involving the constitutionality of a law, unless such decision constituted a final order or judgment in the case. To hold otherwise would lead to interminable confusion in our decisions and to innumerable appeals from interlocutory orders not decisive of the final rights of the parties, and would thus thwart the very purpose of the law, which, as stated in *Davie v. Davie*, supra, was "to prevent unnecessary expense and delay of repeated appeals." It can readily be seen that a decision involving the constitutionality of a law, especially where the court holds that the law is constitutional, would not determine the final merits of the lawsuit at all. On the contrary, the decision on such a motion upon a cause of action, grounded upon the statute, holding that the statute was valid, would, in fact, be but the beginning of the lawsuit.

[2] II. While the court entered an order sustaining appellants' demurrer No. 2, to that portion of the complaint which seeks to recover for sand and gravel taken before the passage of the act of March 29, 1913, there is no final order or judgment of the court dismissing this portion of the complaint. We therefore, on appeal from this, have no jurisdiction to pass upon the issue as to whether or not the state is entitled to recover on the allegations of this portion of the complaint, the appeal being premature.

An order sustaining a demurrer to a complaint is in effect a holding that the complaint is of no avail and, it seems, is as near a final order as could be conceived that is

not so in fact; yet we have often, and in some very recent cases, held that:

"Where the trial court sustained a demurrer to a complaint, without entering any further order or judgment, its action was not final, and the order cannot be appealed from." *Adams v. Primmer*, 102 Ark. 380, 144 S. W. 522; *Atkins v. Graham*, 99 Ark. 496, 138 S. W. 878; *Moody v. Jonesboro, L. C. & E. Ry. Co.*, 83 Ark. 371, 103 S. W. 1134.

The appeals are premature, and are therefore dismissed.

HART and KIRBY, JJ., concur in the judgment only, and think the statute—fourth division of section—makes a judgment declaring a statute unconstitutional a final and appealable order.

GEISER MFG. CO. v. DAVIS. (No. 144.)
(Supreme Court of Arkansas. Jan. 31, 1916.)

1. TENDER \S 14—SUFFICIENCY—CONDITION.

Where the buyer of machinery offered to pay to the agent who sold it two notes of \$75 each of the purchase money if the agent surrendered old notes under an original contract of purchase, as to which the buyer had defaulted, there was no tender relieving the buyer from payment of the notes or divesting the title of the property from the seller, since the offer was conditional.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. \S 33-38; Dec. Dig. \S 14.]

2. SALES \S 481 — CONDITIONAL SALE — RETAKING POSSESSION BY SELLER.

The buyer of machinery by conditional sale, the seller reserving title until payment, could not maintain replevin for the machinery after permitting the seller to retake the property before payment or tender of the purchase price.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1449-1455; Dec. Dig. \S 481.]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

Replevin by R. C. Davis against the Geiser Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded, with directions.

This appeal is prosecuted by the Geiser Manufacturing Company from a judgment in replevin against it for the possession of certain mill machinery. It appears from the testimony that appellant sold to R. C. Davis a certain sawmill and machinery for a stipulated price, and that Davis executed a mortgage upon the property to secure the payment of the notes in accordance with the terms of sale, and having failed to perform his contract of purchase, in consideration of an extension of the time for making of certain of the payments, which he failed to make, executed and delivered a bill of sale to the mill and machinery to the appellant company and afterwards repurchased it under a written contract reserving the title in the seller, the Geiser Manufacturing Company until the purchase price was paid. Upon his failure to pay the notes due in accordance with the terms of the last contract, the company took possession of the

mill and machinery, and he brought the action of replevin. He admitted executing the contract of purchase or order for the property, but claimed that it was agreed to be sold to him for \$150, to be paid in two \$75 installments, and that he had offered to pay to the company's agent in the county these payments when due, upon condition that they surrender to him his old notes under the first contract, which they refused to do claiming the contract had not been performed. After appellant had taken possession of the mill and machinery, having torn it up and started away with it, the appellee offered to pay the balance of \$150 that he claimed was all he owed upon the property. He testified that he signed the written order for the mill and machinery upon the repurchase thereof, but that it had been changed, since he signed it, to include the payment of six \$100 notes in addition to the \$150 that he only in fact agreed to pay for it. He said it was sold to him for this price because of the prior payments made under the old contract. His letter of date two or three months before the last sale, offering to pay \$750 for the mill, was introduced in evidence. The court instructed the jury, and it returned a verdict in favor of appellee for the property and damages in the sum of \$160, and judgment was rendered thereon for appellee for the possession of the property and \$10 as damages; said amount being the excess of the damages found by the jury over the \$150, the amount admitted to be due by him to appellant on the purchase price of the machinery.

Festus O. Butt, of Eureka Springs, for appellant. C. A. Fuller, of Eureka Springs, for appellee.

KIRBY, J. (after stating the facts as above). The testimony is undisputed that the transaction was a conditional sale of the property by the manufacturing company to R. C. Davis, with a reservation of the title in said company until the purchase price was paid.

[1] It is further undisputed that the purchaser had not paid any part of the amount even of the purchase price he admitted he had agreed to pay up to the time the suit was brought, nor had he ever offered to do so in such a way as amounted to a tender of the amount due. His statement that he offered to pay to the agent said two notes of \$75 each of the purchase money, if the agent surrendered to him the old notes under the first contract, did not amount to a tender that would relieve him from the payment of said notes nor divest the title of the property from the seller, the manufacturing company. Such offer was conditional and did not amount to a tender. *Fields v. Danenhower*, 65 Ark. 400, 46 S. W. 938, 43 L. R. A. 519.

[2] The title remained in the seller until the purchase price was paid according to the terms of the sale, and the uncontradicted testimony shows that the purchaser had failed to pay the notes that he even agreed were due as part of the purchase money, and that the seller had resumed the possession of the property under his claim of ownership and the right thereto. Having the right to take possession of the property at any time before the money due for the purchase price thereof was paid, and having actually resumed possession of it before the payment or tender of the purchase price, it could not thereafter be replevined by the buyer who had failed to pay the purchase price and permitted the seller to retake the property. The title of the property and the possession thereof were thereafter rightfully in the manufacturing company, the owner, and the purchaser had forfeited his right and could not maintain replevin therefor. *Tiffany on Sales*, 138.

Upon the undisputed testimony, the court should have directed a verdict for the appellant. The judgment is reversed, and the cause remanded, with directions to enter a judgment restoring the possession of the property to said appellant manufacturing company. It is so ordered.

MONTAGUE v. ROBINSON. (No. 147.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. LOGS AND LOGGING — CUTTING LOGS — CONTRACTS — ACTION FOR BREACH — DEFENSES — MISTAKE.

The landowner contracted with defendant to give him certain portions of timber for the cutting of all the timber on his land. He pointed out the timber, and included some standing on land of another; but the contract recited that timber only on plaintiff's land was included. Thereafter he discovered that he had included too much timber in pointing it out to defendant, and so informed him, offering to release him; but defendant refused. *Held*, that defendant could not thereafter escape liability for breach, on the ground of mistake, since he entered on the performance of the contract with full knowledge of it.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 15-17; Dec. Dig. ¶ 8; *Contracts*, Cent. Dig. § 891.]

2. DAMAGES — LIQUIDATED DAMAGES — "PENALTY."

Where a logging contract stipulated for a bond conditioned on performance, by which the principal and surety were "held and firmly bound in the penal sum of \$600," the condition was a "penalty," and not liquidated damages, since it provided the same damages for any breach, although the true damages would be easily ascertainable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 164-169; Dec. Dig. ¶ 79.

For other definitions, see *Words and Phrases*, First and Second Series, *Penalty*.]

3. DAMAGES — PENALTY — CONTRACT PROVISIONS.

While the use of the word "penal" in a contract stipulating the damages to be paid on its breach is not controlling, it must be consid-

ered in determining the intention of the parties as to whether the damages provided were a penalty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 156; Dec. Dig. ¶ 77.]

Appeal from Circuit Court, Mississippi County; J. F. Gautney, Judge.

Action by M. H. Robinson against D. M. Montague and another, in which defendant Montague filed a cross-complaint. Judgment for plaintiff, and defendant Montague appeals. Reversed and remanded, with directions.

Appellant, pro se. A. G. Little, of Blytheville, pro se.

KIRBY, J. Appellee was the plaintiff in the suit below, and alleged in his complaint that he made a contract with appellant, Montague, whereby, for the consideration of the merchantable timber down and standing upon a tract of land described as the north half of section 4, township 14 north, range 12 east, the said Montague agreed to cut all the timber upon said tract of land three inches in diameter and over and to complete said contract within one year. Said contract further provided that, in the event the said Montague failed to cut all of said timber within the time mentioned, he should pay appellee the sum of \$600; and it was further provided that Montague should execute to Robinson a bond conditioned to indemnify Robinson against any loss by reason of Montague's failure to comply with said contract. The United States Fidelity & Guaranty Company became surety on this bond, which was conditioned that, if the said Montague should hold the said Robinson harmless against all loss by reason of any failure on the part of Montague to comply with said contract, the bond should be void.

The complaint contained two counts, the first of which alleged that the contract and bond sued on provide for the payment to Robinson of the sum of \$600 as liquidated damages in the event Montague failed to comply with the terms of his contract, while the second count alleged that the contract and bond sued on provide for the payment of such damages as Robinson might sustain by reason of Montague's failure to perform the contract. There was a motion to require appellee to elect between the counts of his complaint, which appears to have never been passed upon.

The answer denied any liability for liquidated damages, but admitted liability for such damages as Robinson sustained by reason of Montague's failure to comply with his contract, but denied there was any such failure.

[1] Montague filed a cross-complaint, in which he alleged that prior to the execution of said contract Robinson took him over the land and showed him the timber which he was to have in consideration of cutting down

the timber on the lands, and that some of the timber so shown him was not on the north half of section 4, but was on the south half of section 33, which lies immediately north of section 4. It is insisted that this error invalidated the contract and absolved the surety company. But it appears that, before Montague entered upon the performance of his contract, Robinson told him that he had made a mistake in showing him the line between sections 4 and 33, and offered to release him from his contract; but Montague declined to be released. In going over the land, Robinson showed Montague the four corners of the north half of section 4; but there was an error in the location of the line connecting the two north corners. Such being the case, and having entered upon the performance of his contract with knowledge of the mistake about the line, Montague is in no position to complain of the mistake. Especially so, when the proof is that he did not regard the mistake made as of sufficient importance to ask a rescission of the contract, or any change in the consideration therefor. Nor is there any change in the contract which the surety company undertook should be performed. The written contract called for the removal of the timber from the north half of section 4 and all parties agree that this is the land owned by Robinson and from which he wished the timber removed.

[2, 3] At the request of appellee, the court gave an instruction, numbered 3, which reads as follows:

"If you find for the plaintiff, you will find for him in the sum of \$600, with interest thereon at the rate of 6 per cent. per annum from June 5, 1912, to the present time."

It is earnestly insisted that this was an erroneous instruction, and we agree with appellants in this contention. It is insisted that it appears from the language of the bond itself that it is a penalty contract. It is recited in the bond that the principal and his surety are "held and firmly bound in the penal sum of \$600." The use of this word "penal" is not controlling, yet it must be considered in determining the intention of the parties to that contract. *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384. There are a great many cases which distinguish between penalties and provisions for liquidated damages, and several of these cases are found in our own Reports. The rule is settled that in the interpretation of such contracts we must place ourselves in the position of the contracting parties and view the subject-matter of their contract prospectively, and not retrospectively.

There is an increasing tendency on the part of courts to construe such contracts as stipulations for liquidated damages rather than as agreements for penalties. *Sun Printing & Pub. Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 866. And such contract should be so construed where, from a

prospective view of the contract, it appears that it was contemplated that damages would flow from a failure to perform the contract, that such damages would be indeterminate or difficult of ascertainment, and that the sum named bears some reasonable proportion to the damages which the parties contemplated might flow from a failure to perform. Another test frequently applied in determining whether a contract should be construed as containing a penalty, or as providing for liquidated damages, is this: Was it contemplated that the contract might be substantially performed, or that there might be a total failure to perform, and would the same sum be recoverable in either case? Where the contract's provisions answer this question affirmatively, it is construed to be a penalty. A case very similar on the facts, and one which announces the principle which controls here, is that of *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42.

Another instruction given by the court reads as follows:

"Plaintiff sues to recover damages for an alleged breach of the written contract offered in evidence. The execution of the contract is admitted. That being true, the burden is on the plaintiff to show that there was a breach of the contract, and that he was damaged as a result thereof, before he can recover."

The effect of the two instructions, when read together, is to tell the jury that they need only find that there was some breach of the contract and some damage as a result thereof, in which event they should find for the plaintiff in the full amount of the bond. The bond, so construed, would permit a full recovery of the sum named for any failure to perform, however slight, within the time limited, and when so construed it becomes a penalty, for here the damages are not difficult of ascertainment; indeed, appellee insists that the judgment should not be reversed, because they are proved, and are shown to exceed the judgment recovered.

The judgment will be reversed and remanded, and the instruction on the question of damages so modified as to permit the recovery only of such damages as the proof shows appellee sustained by any failure to perform the contract.

OWEN v. COX et al. (No. 119.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. DOWER §79 — AUTHORIZATION OF PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In a widow's action against her children and their grantees to require the assignment to her of dower in Arkansas lands, evidence held sufficient to justify a finding that plaintiff, after the death of her husband, authorized proceedings in the chancery court of the county where the land was situated whereby title to them was vested in her son.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 294-306; Dec. Dig. §79.]

2. JUDGMENT \Leftrightarrow 668—RES JUDICATA.

A widow, joined to settle her dower rights in land sought to be vested solely in her son after his father's death in a proceeding under Kirby's Dig. §§ 5770-5772, providing for the division and partition of lands held in joint tenancy, tenancy in common, or coparcenary, who did not claim dower, but joined in the prayer that the title, as against all of the parties, be vested in the son, was bound by the decree rendered therein, and could not thereafter assert dower against purchasers holding in faith of the record made by herself.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181-1183, 1188; Dec. Dig. \Leftrightarrow 668.]

Appeal from Randolph Chancery Court; Geo. T. Humphries, Chancellor.

Action by Sarah E. Owen against F. W. Cox and others. From a decree for defendants, plaintiff appeals. Affirmed.

F. G. Taylor, of Corning, for appellant. E. G. Schoonover, of Pocahontas, and G. B. Oliver, of Corning, for appellees.

MCCULLOCH, C. J. This is an action instituted by appellant, Sarah E. Owen, in the chancery court of Randolph county, against her children and their grantees to require the assignment to her of dower in a tract of land in that county left by her husband, Thomas R. Owen, who died in the year 1894. Thomas R. Owen died, as before stated, in the year 1894, leaving surviving the appellant, his widow, and four children, and he was the owner at the time of his death of several tracts of land in Butler and Wayne counties, Mo., and the tract in controversy situated in Randolph county, Ark. Dower in the Arkansas land was never assigned to the widow, nor does it appear that her dower in the Missouri land was ever assigned. This action was not begun until the year 1913, after the lands had been decreed by the chancery court of Randolph county to Madison Wiley Owen, one of the children of Thomas R. Owen, and by him conveyed to W. D. Polk. The decree of the Randolph chancery court just referred to was rendered in the year 1902 on the ex parte petition of appellant and the heirs of Thomas R. Owen. It was alleged in the petition in that proceeding that Thomas R. Owen had intended that the Randolph county tract of land should go to his son Madison W. Owen, and that said decedent had executed a nuncupative will. It is not alleged, however, in the complaint, that the will was ever reduced to writing in accordance with the statute, and it was not sought to enforce the will. The prayer of the complaint was that the title to the Randolph county tract of land be vested in said Madison W. Owen, and the court rendered a decree in accordance with that prayer; the language of the decree being as follows:

"It is by the court ordered, adjudged, and decreed that Wiley Owen take for his share of the lands belonging to the estate of Thomas R. Owen, deceased, as follows: (Here follows description of the land in controversy.) And that

the title of the same be vested in him and divested out of the other plaintiffs, and the same is hereby confirmed and held as firm and effectual forever."

Shortly after the rendition of the decree, Madison W. Owen sold and conveyed the lands, and they have been occupied adversely since the date of said sale. This action was brought one day before the lapse of seven years after the conveyance of the lands by Madison W. Owen.

[1] It is urged by appellant, in the first place, that the evidence shows affirmatively that the decree of the Randolph county chancery court, vesting the title to the lands in Madison W. Owen, was rendered without the knowledge or consent of appellant, and that she did not authorize the institution of proceedings in which that decree was rendered. We have considered the testimony carefully, and are of the opinion that it justified the finding that appellant authorized the proceedings. She denies that she knew anything about it, and so does her daughter, who was 19 years of age at the time she testified, and was therefore 8 years of age at the time the proceedings were had. On the other hand, appellant's son Madison W. Owen testified that his mother and the man who was advising her in her business affairs went with the witness to the office of the attorneys who instituted the proceedings in the chancery court, and discussed with those attorneys the matter of dividing the lands between the heirs of Thomas R. Owen. That witness stated that nothing specific was said to the attorneys about a suit in the court of Randolph county, but that it was understood in the conversation with the attorney that the lands in Randolph county were to be awarded to him (witness) and that the Missouri lands were to go to the other heirs. The attorneys who instituted the proceedings in the name of appellant and her children were reputable attorneys, and there was enough in the conversation with them, as detailed by witness Madison W. Owen, to show that they were authorized to take the necessary proceedings to carry out the intention of the parties in awarding the title to the Arkansas land to Madison W. Owen.

[2] There was also a proceeding in the Missouri courts dividing the Missouri lands between the other heirs, subject to the dower right of the widow, but nothing was said in the Arkansas decree about the dower interest of the widow. The proceeding was manifestly instituted under the statute of this state which provides that where lands are held in joint tenancy, tenancy in common, or coparcenary, "any one or more of the persons interested may present to the circuit court a petition praying for a division and partition of such premises according to the respective rights of the parties interested therein," and that "every person entitled to dower in such premises, if the same has not been admeas-

ured, shall be made a party to such petition." Kirby's Digest, §§ 5770-5772. The purpose of requiring the dower claimant to be made a party is to allow her to assert her claim, and appellant was joined for the purpose of settling her dower rights in the land. Instead of claiming dower in that particular tract of land, she joined in the prayer that the title as against all of the parties be vested in Madison W. Owen, and we are of the opinion that she is bound by the decree rendered pursuant to her own request. There being an estoppel by the record, it is too late for appellant now to assert dower against purchasers who hold in faith of the record made by appellant herself.

The decree denying appellant the right to dower in the lands in controversy is affirmed.

SANDS et al. v. LINCH. (No. 122.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. MASTER AND SERVANT — 286—INJURY— NEGLIGENCE — QUESTION FOR JURY — RUNNING RAILROAD MOTOR INTO SHEEP.

Under the facts, a finding of which was warranted by the evidence, in a railroad servant's action for injury from the railroad motorcar on which he was riding running into sheep, held, the question of negligence of the foreman in charge of the car was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010, 1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ¶ 286.]

2. MASTER AND SERVANT — 112—INJURY— NEGLIGENCE—VIOLATING STATUTE.

Though the statute requiring a railroad company to fence its right of way so as to prevent stock getting thereon, and making it liable for double the value of stock killed thereon if negligently not so fenced, is designed primarily for the protection of live stock and the benefit of the owners, noncompliance therewith may be considered on the question of negligence, where a servant of the company is injured by collision with sheep on the track of the motorcar on which he was riding.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218-223; Dec. Dig. ¶ 112.]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

Action by W. F. Linch against George L. Sands and others, receivers of the Missouri & North Arkansas Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Appellee sued the appellants for personal injuries, alleging that he was employed by appellants as a bridgeman, and was riding along on appellants' track on a motorcar that was in charge of a fellow employé, appellee having no duty to perform in relation thereto; that the car, through the negligence of these employés, was allowed to collide with a sheep, by which it was violently thrown from the track, resulting in severe injuries to the appellee, which he described in his complaint; that it was appellants' duty, under the law, to keep their right of way

fenced so as to prevent sheep from getting on the track, and that appellants had negligently failed to comply with that duty; that the employés had also failed to keep and maintain a careful lookout.

The appellants denied the allegations of negligence, admitted that it was their duty to maintain a fence along the right of way to keep stock off of the track, but alleged that the allegations of the complaint to that effect were surplusage, and moved to strike out such allegation. Appellants also set up the defenses of assumed risk and contributory negligence. The answer also contained a demurrer to that part of the complaint alleging that it was the company's duty to keep the right of way fenced. The demurrer to this allegation of the complaint was presented to the court and overruled.

The evidence, stated from appellee's viewpoint, and giving it the strongest probative force in his favor, tended to show that the appellee and several other employés of appellants who had been at work on appellants' bridge at the conclusion of their day's work were traveling on a motorcar to the section house. There were seven or eight men on the car. Henry Lenox was in charge of the operation of the car, and Jeff Hubbs was running it. A flock of fifteen or twenty sheep was observed alongside the track, which at that point was inclosed on either side by a wire fence. When the sheep were sighted, under the directions of Foreman Lenox the car was "slowed down." All of the frightened sheep went off of the right of way except two. These were within the inclosure going along by the side of the fence. Lenox then told the man who was running the car to "let her go," and it picked up speed and kept on increasing its speed until it struck the sheep. The motorman increased the speed under the directions of Lenox. He gave the order to put on more speed. At the time he gave this order the two sheep were inside the right of way. When the car struck the sheep all were thrown off, including the appellee, who was rendered unconscious and received the injuries for which he sues. From the point on the track where the car first slowed down to the point where the accident occurred it was some 250 or 300 yards. Appellee was sitting on the front part of the car on the corner.

The motorman testified that he could have stopped the car if he had known that everything was not in the clear, and that he would not have started the car at the high rate of speed if he had known there was a sheep on the right of way; that the sheep was on the foreman's (Lenox's) side, and he ordered witness (the motorman) to increase the speed, which he did at the time because he was thus ordered. The sheep began running through the fence all along, and had all escaped except the two. One of these, about

the time it got even with the car, hit a guy wire and was thrown back, and then headed for the track, making one or two jumps, and fell right on the rails, where the car hit it.

One of the witnesses stated that they were trying to make the hill, and that the car would not hardly make the hill with nine or ten employees aboard unless it had a pretty good speed. There was nothing that could have been done after the car started up at the increased speed ordered by the foreman to have kept the same from being derailed when it struck the sheep.

Witness Bailey testified that these two sheep were seen all the way from the time they left the bunch up till the time the car was derailed. Witness was watching them all the time because they were on the same side of the track that witness was on. The foreman, Lenox, testified that he supposed he could see the right of way ahead of him as well as witness Bailey could.

There was testimony to the effect that sheep ran through the fence wherever they came to it near the place of the accident; that the posts were rotten, and many of them were lying on the ground; that the company, through its section foreman, had been notified of this condition and requested to repair the fence; but that it failed to do so.

The court submitted the issue of the alleged negligence of appellants' employees in operating the car in instructions to which no objections have been urged here. The court also gave instructions, to which appellants duly saved exceptions, telling the jury, in effect, that if appellants had not used ordinary care in maintaining the right of way fence, and such negligence was a contributing cause of the injury, that appellee would not be chargeable with contributory negligence, and also instructed the jury that it was the duty of the company to keep the fence in good repair, under the statute, and that, if the company failed to discharge its duty in that respect, which caused the injury to plaintiff, as the proximate result thereof, the company would be liable to him in damages.

The court refused appellants' prayer asking the court, in effect, to tell the jury that the appellants owed the appellee no duty to keep the right of way fenced or to keep it in repair, and that, if appellee was injured by reason of such failure on the part of the appellants, he would still have no right of action. Appellants duly excepted to this ruling of the court. From a judgment in favor of appellee, this appeal has been duly prosecuted.

W. B. Smith, H. M. Trieber, and J. Merrick Moore, all of Little Rock, for appellants. Festus O. Butt, of Eureka Springs, for appellee.

WOOD, J. (after stating the facts as above).

[1] 1. Appellants contend that there is no

basis in the evidence for submitting to the jury the issue as to whether or not the appellants' foreman in charge of the operation of the motorcar was negligent. Giving the evidence its strongest probative force in favor of the appellee, the jury were warranted in finding that the car at the time of the injury was being propelled by the motorman under the directions of the foreman, Lenox; that the motorman would not have started up the car at the high rate of speed it was traveling at the time of the injury if he had known that there were still sheep on the right of way; that the foreman saw that these two sheep were still on the right of way, within the inclosure, when he told the motorman that the rail was clear and instructed him to "let her go," that is, turn on the gasoline and increase the speed of the car; that the foreman, by the exercise of ordinary care, could have seen that the car, at its increased speed, was overtaking the fleeing sheep; that for a distance of 250 or 300 yards the car moved with its increasing speed until it overtook the frightened sheep; that at the time the sheep, dazed by contact with the guy wire, jumped upon the track in front of the car while the same was going at too great rate of speed to avert the collision. These facts, which the jury were warranted in finding from the evidence, justified their conclusion. The evidence warranted these findings of fact, and made the issue as to whether the appellants were negligent in the manner of operating the motorcar one of fact for the jury.

[2] 2. The undisputed evidence shows that the appellants negligently failed to comply with the requirements of act 165 of the Acts of 1905. Section 1 of that act requires that the St. Louis & North Arkansas Railway Company shall fence its right of way in the counties of Carroll, Boone, and Searcy. Section 2 requires that the fence shall be built on both sides of the roadbed and anywhere on the right of way so as to prevent stock from crossing the tracks; that the fencing material shall be close enough to keep out of said inclosure mules, horses, cattle, hogs, sheep, and goats. Section 4 requires that the company shall keep the fences in good repair, and provides that, when in such condition, the company shall not be liable for any stock killed or injured on the tracks so fenced, but, if any stock is killed or injured on the tracks when the fence is not in good condition on account of the negligence of the company, the company shall be liable in damages in double the value of the animal so killed or injured. Section 5 renders a violation of the act a misdemeanor, and fixes a fine of not less than \$50 nor more than \$500 for failure to comply with same.

The instructions given and refused by the court presented the issue as to whether or not a negligent failure on the part of the railroad company to comply with the terms of the act, with the injury to the appellee as

the proximate result of such failure, would render the company liable to the appellee for damages on account of such injury. The appellant contends that the act was not passed for the protection of the employes, but was passed to prevent injuries to and the killing of stock, and was designed exclusively for the benefit of stockowners of live stock in the localities affected and who were damaged by reason of having their live stock killed or injured on account of a failure of the company to comply with the requirements of the statute. In *St. Louis & S. F. R. Co. v. Kitchen*, 98 Ark. 507-516, 136 S. W. 970, 973 (50 L. R. A. [N. S.] 828), we had under consideration a similar statute of Oklahoma. The court said:

"It has been decided under similar statutes, that the requirement is supposed to have been intended for the protection of all persons upon railroad trains who are exposed to dangers of travel, and that the person injured by reason of the omission to comply * * * was entitled to recover on account thereof." *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 522, 6 Sup. Ct. 110, 29 L. Ed. 463.

While the statute was designed primarily for the protection of live stock and for the benefit of the owners of such stock that might be injured by a failure to comply with the requirements of the act, nevertheless, where such failure is the proximate cause or contributes proximately to cause a personal injury of an employe of the company, or any one else, a breach of the statutory duty may be shown as evidence of negligence on the part of the company causing the injury. This principle is recognized in *Hayes v. Michigan Cent. Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. There the railway company, by municipal ordinance, was required to erect a fence upon the line of its road within the corporate limits for the purpose of protecting against injury to persons, and the court held that one who was injured by a failure to comply with the ordinance might recover if he established that the accident was reasonably connected with the want of precaution as the cause of the injury. Although the ordinance in that case was designed for the protection of persons generally against personal injury, yet the court shows that the same principle applicable under such an ordinance or statute is also applicable under those statutes that are passed for the protection of animals and for the benefit of their owners. For the court says:

"In the analogous case of fences required by statute as a protection for animals an action is given to the owners for the loss caused by the breach of the duty. And, although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

See, also, in this connection, *Bain v. Ft. Smith Light & Tr. Co.*, 172 S. W. 843, L. R. A.

1915D, 1021; *Pankey v. L. R. Ry. & Elec. Co.*, 174 S. W. 1170.

In the case of *Atchison, T. & S. F. Ry. Co. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768, the Court of Appeals had under review, in an action by an individual to recover damages for personal injuries, a statute of Missouri in purport very similar to the one now under review, and the court held that, where an employe on the train was injured by a derailment caused by an animal getting on the track through the failure of the company to erect and maintain fences as the statute required, the company was liable. The court, through Mr. Justice Brewer, after stating the contention of the company, being the same contention as that of appellants here, said:

"It is doubtless true that, when a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits, but it does not follow that, when a duty is so imposed, a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command."

While there are authorities to the contrary, we are of the opinion that the weight of authority in this country is in favor of the rule above announced by the Court of Appeals of the Eighth Circuit, which is in accord with what we held in *St. L. & S. F. R. Co. v. Kitchen*, supra. See many other cases cited in the brief of counsel for the appellee.

The judgment is therefore in all things correct, and it is affirmed.

LONOKE COUNTY v. REED. (No. 125.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. COSTS ⇐295—PROSECUTION OF OFFENSES —LIABILITY OF COUNTY.

The liability of a county for costs in criminal cases rests solely on the statute.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1109-1123; Dec. Dig. ⇐295.]

2. COSTS ⇐308—PROSECUTION OF OFFENSES —"Costs."

Fees of the attorney prosecuting a criminal case are a part of the "costs" of the case.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1166-1169; Dec. Dig. ⇐308.

For other definitions, see *Words and Phrases*, First and Second Series, *Costs*.]

3. STATUTES ⇐225 — CONSTRUCTION — STATUTES IN PARI MATERIA.

Statutes relating to the same subject must be construed together.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 302, 303; Dec. Dig. ⇐225.]

4. COSTS \Leftrightarrow 295—PROSECUTION OF OFFENSES— —LIABILITY FOR COSTS.

Kirby's Dig. § 2446, provides for taxation of costs on conviction in criminal prosecutions, and requires their payment by the county unless paid by the defendant. Section 2470 makes counties liable for the costs in criminal prosecutions where the defendant is acquitted without judgment against the prosecutor for costs, or when a nolle prosequi is entered. Section 2471 makes the county liable for the costs in case of conviction when the defendant is unable to pay them. Section 2469, enacted subsequent to sections 2470 and 2471, provides that fees in criminal cases shall be paid by the county if the defendant has not sufficient property to pay them, except that the county shall not be liable for fees in misdemeanor cases. *Held*, that the county is not liable for fees of the prosecuting attorney in a misdemeanor case; section 2469 having impliedly repealed all portions of acts enacted prior to its enactment, if in conflict with it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1109-1123; Dec. Dig. \Leftrightarrow 295.]

Appeal from Circuit Court, Lonoke County; Thos. C. Trimble, Judge.

Action by James B. Reed against Lonoke County. From a judgment for plaintiff, defendant appeals. Reversed, and claim dismissed.

Chas. A. Walls, of Lonoke, for appellant.
Joe T. Robinson, of Lonoke, for appellee.

HART, J. The question raised by this appeal is whether or not a county is liable for prosecuting attorney's fees in cases of conviction for misdemeanors where the defendant has no property and the county has not contracted to work its convicts pursuant to sections 1066-1074 of Kirby's Digest, or Act 207 of the Acts of 1909. The circuit court held the county liable, and the county has appealed.

[1-3] The liability of the county for costs in criminal cases rests alone upon the statute. This rule has been established by such a long and unbroken line of decisions in this state as to render citation of authority in support of it unnecessary. The costs include the prosecuting attorney's fee. *Phillips County v. Clayton*, 29 Ark. 246. Therefore the liability of the county depends upon the construction to be given to sections 2446, 2469, 2470, and 2471 of Kirby's Digest; it being a cardinal rule of construction that statutes relating to the same subject must be construed together.

[4] Section 2446 of Kirby's Digest is a part of section 286 of the Criminal Code as amended in 1871. It provides that in judgments against defendants a judgment for costs in addition to other punishment shall be rendered, and shall be taxed by the clerk for the benefit of the officers rendering the services, and, in case of failure by the defendant to pay said costs, shall be paid by the county where the conviction is had.

Sections 2470 and 2471 were originally sections 205 and 206 of chapter 45 of the Revised Statutes. The latter section has never

been amended. The former was amended by the act of February 5, 1889 (Laws 1889, p. 3). The amendment consisted in making the county liable for costs where a nolle prosequi was entered by the attorney for the state. As these two sections originally stood, it will be seen that the Legislature intended to make counties responsible for costs in cases, first, where the defendant is acquitted and there was no judgment against the prosecutor for costs, and, second, where the defendant is convicted but is unable to pay the costs. This is the effect of the decision in the case of *County of Ouachita v. Sanders et al.*, rendered at the January term, 1850, of this court, and reported in 10 Ark. 467. Subsequently the lawmakers amended the statute in regard to the payment of costs by the county. Section 2469 of Kirby's Digest is section 5 of the act of February 25, 1875 (Acts 1874-75, p. 169), being an act to establish fees. The original act used language somewhat different from the section of the Digest, and reads as follows:

"Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property belonging to the defendant cannot be found for that purpose, they shall be paid by the county where the conviction is had; except in cases where misdemeanors, when the county shall not be liable."

The effect of the enactment of this section of the act to establish fees was to amend sections 2470 and 2471 of Kirby's Digest, which were originally sections 205 and 206 of the Revised Statutes, and to exempt the county from liability for conviction for misdemeanors. This construction of the statute was recognized in the case of *Stalcup v. Greenwood District of Sebastian County*, 44 Ark. 31, when the court, construing the sections just referred to, said:

"It will thus be seen that in misdemeanors there is only one contingency upon which the county is responsible, viz., where the defendant is acquitted and there is no judgment against the prosecutor."

Subsequently section 2470 of Kirby's Digest, which was then section 2343 of Mansfield's Digest, was amended by an act approved February 5, 1889, so as to make the county liable for the costs where the prosecuting attorney entered a nolle prosequi.

To hold the county liable for costs in cases of conviction for misdemeanors where the defendant has no property, and where the prisoners have not been hired out by the county court pursuant to statute, would be to give no effect whatever to section 2469 of Kirby's Digest, which is section 5 of the act of February 25, 1875; for that section in plain terms makes an exception in cases of misdemeanors, and says that in such cases the county shall not be liable. This act was passed subsequent to the passage of sections 2446, 2470, and 2471 of Kirby's Digest, and would be repugnant to them, and repeals that portion of those sections which provided

that counties were liable in cases of conviction for misdemeanors.

It follows that the circuit court erred in making the allowance against the county for the fees of the prosecuting attorney, and for that error the judgment will be reversed, and the claim of the prosecuting attorney for fees will be dismissed here.

UNITED STATES ANNUITY & LIFE INS. CO. v. PEAK. (No. 88.)

(Supreme Court of Arkansas. Jan. 3, 1916.)

1. INSURANCE — 655 — ACTION ON POLICY — CHARACTER EVIDENCE — ADMISSIBILITY.

Where evidence was introduced showing circumstantially that the insured obtained a policy of life insurance by fraud, it was error to admit testimony as to his good character, since in civil cases each transaction must be ascertained by its own circumstances and not the character of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1685; Dec. Dig. 655.]

2. INSURANCE — 349 — LIFE INSURANCE — FORFEITURE — EVIDENCE.

Where the insurance agent discounted the insured's note for the first premium and remitted to the insurer the money due it on first premium, the failure of the insured to pay an installment on the note to the holder bank did not forfeit the policy for nonpayment of premium for the first year.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. 349.]

3. INSURANCE — 291 — LIFE INSURANCE — DUTIES OF INSURED.

Although, after applying for life insurance in one company, the insured was told by another examining physician of certain diseases which he had, he was not bound to so inform the first company unless he believed the second examiner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. 291.]

4. INSURANCE — 291 — LIFE INSURANCE — DUTIES OF INSURED — GOOD FAITH.

Where insured, after applying for life insurance in one company, but before receiving the policy, was told by another examining physician that he had Bright's disease, and he told the physician to make a microscopic examination, which confirmed the diagnosis, and he then arranged for treatment in the city to which he was about to go, his failure to disclose his condition to the first insurer was an intentional concealment of a material fact, which avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. 291.]

Appeal from Circuit Court, Chicot County; Turner Butler, Judge.

Action by Pearl S. Peak against the United States Annuity & Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee sued appellant to recover on a life insurance policy. The appellant is a life insurance company organized under the laws of the state of Illinois, and is authorized to transact business in the state of Arkansas. On August 14, 1913, Robert F. Peak,

of Readland, Ark. made application in writing to appellant for a policy of life insurance in the sum of \$5,000, payable to his wife, Pearl S. Peak, as beneficiary. In his application he represented and agreed that his answers to questions propounded by the company's medical examiner should be true and should be the basis of and the consideration for the contract of insurance applied for. On the same day Peak submitted to an examination by Dr. J. W. Nichols, the local medical examiner of the company. His medical examination, among other things, contained the following:

"Does the chemical examination of the party's urine show albumen or sugar (even in traces) or any abnormality? No."

Dr. Nichols did not obtain a specimen of the applicant's urine on the 14th. He asked Mr. Peak for a specimen, but Peak, having passed his urine before he went to the doctor's office, could not furnish it at that time. The doctor suggested that he would go to Mr. Peak's house the next day to get a specimen, but Peak said he might be gone. The next morning the doctor received a specimen of urine represented to be the urine of Peak. The specimen was delivered to the doctor by Mrs. Annie Peak, the applicant's mother. Dr. Nichols made a careful examination of the specimen of urine received by him from the applicant's mother on the morning of the 15th of August, 1913, and found it to be normal. He had no reason to suspect, after such an examination, that Peak was afflicted with Bright's disease.

On the 17th day of August, 1913, Peak was examined by Dr. C. P. Meriwether, of Little Rock, Ark., for insurance in another company. Dr. Meriwether testified as follows:

Peak looked to be in good condition. An examination, however, showed that his blood pressure was much higher than that of a normal man, and an examination of his heart showed an injured condition or hypertrophy. His urine was loaded with albumen and was of low specific gravity. I found no traces of sugar, but considerable albumen. I told Peak that he might have acute or chronic Bright's disease, and that he ought to go to his family physician, and that I could not tell much about it unless I should make a microscopic examination. At his request, I then made a microscopic examination. I found all kinds of casts. I then told him I thought he had Bright's disease. He told me that he was going to Roswell, N. M., and I told him that he ought to be under medical treatment all of the time. We got a medical directory and decided upon a physician at Roswell to whom he should go for treatment. It is not a scientific and medical possibility that the urine of Mr. Peak could have been in a normal condition on the 15th day of August, 1913, in view of the condition I found on the 17th, taking into consideration the condition of his heart, coupled with what I discovered on the microscopic and chemical examination.

Mr. Peak's application for insurance in appellant company was finally accepted on the 5th day of September, 1913. His policy was signed on the 22d day of August, 1913, and was mailed to the state agent of the company.

in Arkansas on September 6, 1913. The policy was delivered to Mr. Peak by the local agent of the company on the 17th day of September, 1913. The company first received information of Mr. Peak's physical condition as disclosed by the examination made by Dr. Meriwether on the 16th day of September, 1913. Immediately after it received the information, on the 17th day of September, 1913, the company sent a telegram to its state agent to hold the policy for further instructions. The state agent called the local agent over the telephone and directed him not to deliver the policy. The policy, however, had been delivered a few hours before by the local agent to Mr. Peak.

The insured died five months and two days after the policy was delivered to him, and Bright's disease of the kidneys caused his death. Mr. Peak executed a note for \$151.40 payable to the order of J. L. Carter, the local agent of the company, for the first year's premium. The local agent and the state agent deposited this note as collateral security for money borrowed by them of a local bank. They remitted to the company its share of the proceeds. In other words, they paid to the company that part of the premium which went to it. The note in question provided that it should be paid in monthly installments, and the monthly installment due June 14, 1914, was not paid. The company went to the local bank where the note was deposited as security and paid the note. The note was returned to Peak by registered mail on June 29, 1914. He tried to pay it, but the agents of the company refused payment.

Peak made no disclosure to the insurance company of what Dr. Meriwether had told him concerning his physical condition. If he had made such disclosure, the company would not have issued the policy and delivered it to him. Testimony was introduced on the part of the company tending to show that, if Peak's condition on the 17th of August was as testified to by Dr. Meriwether, his urine could not have been normal on the 15th of August, 1913. Several physicians testified to this fact. A physician for appellee testified, however, that his condition might have been normal on the 15th, and that it was possible that there might have been a rise in his blood pressure in 48 hours, at the end of which time casts might show. Testimony was also adduced in favor of appellee tending to show that the specimen of urine furnished to Dr. Nichols was genuine. Evidence was also introduced tending to show that the reputation of the insured for truth and morality was good. The jury returned a verdict in favor of appellee, and the cause is here on appeal.

L. A. Stebbins, of Chicago, Ill., and X. O. Pindall, of Little Rock, for appellant. Baldy Vinson and W. G. Street, both of Lake Village, for appellee.

HART, J. (after stating the facts as above).

[1] The cause was submitted to the jury on the theory that the main question of fact for their determination was whether or not the policy was obtained through fraud. The court instructed the jury that, if the insured was affected with Bright's disease at the time he made the application, such fact was material to the risk and avoided the policy if the insured either knew that fact or concealed it from the company, or purposely furnished the medical examiner of the company with a specimen of urine for examination which was not his own. The appellant to maintain the charge of fraud introduced considerable evidence tending to show that the specimen of urine examined by its medical examiner was a spurious specimen. The appellee then, by way of rebuttal, introduced witnesses who testified that they were acquainted with the general reputation of Peak for truth and morality in the neighborhood where he lived, and that that reputation was good. Counsel for appellant assigns as error the action of the court in admitting this testimony, and we think they are right. It is true there is some authority to the effect that in civil cases, where a party is charged with fraud and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good character. We think, however, the far safer rule is that in conformity to the general rules of evidence in civil cases each transaction should be ascertained by its own circumstances and not by the character of the parties. See 16 Cyc. 1263.

In the case of *Great Western Life Ins. Co. v. Sparks*, 38 Okl. 395, 182 Pac. 1092, 49 L. R. A. (N. S.) 724, the court held that in an action on a life insurance policy, where one of the defenses set up in the answer was that the insured had falsely and fraudulently answered certain questions propounded to him in his application for insurance, it was error to admit evidence to the effect that the general reputation of the insured for being a truthful and honest man in the neighborhood in which he resided was good for the purpose of rebutting direct evidence tending to establish the allegation of fraud. Many cases are cited in the opinion to sustain it, and many others are cited in an extensive case note to the opinion as reported. Then, too, we think this is the effect of our decision in the case of *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228. See, also, *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870; *Munkers v. Farmers' & Merchants' Ins. Co.*, 30 Or. 211, 46 Pac. 850; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

[2] It is also insisted by counsel for appellant that, in any event, the policy had lapsed for nonpayment of the installment due on the note on the 14th day of January, 1914. It will be remembered that the applicant executed a note for the first year's premium

payable to the order of J. L. Carter, the local agent of the company. Carter, who was the local soliciting agent of the company at Eudora, Ark., and the state agent of the company, deposited the note with a local bank as collateral security for borrowed money. Out of the proceeds, the agents paid to the company the amount due it out of the first year's premium and retained the amount of the commissions due them. The company accepted the amount sent it as payment of the amount due it, and there could thereafter be no forfeiture of the policy for nonpayment of the premium for the first year because the company treated the premium as paid.

[3] Finally, it is insisted by counsel for appellant that it was the duty of the applicant to disclose facts coming to his knowledge material to the risk while the appellant company had his application for insurance under consideration and before its acceptance. In short, they contend that it was his duty to disclose the fact that he had been told by Dr. Meriwether that he had chronic Bright's disease, and that his failure so to do avoided the policy. They contend that the subject-matter of the contract is the life of the applicant, and that, if after the application had been made and representations forwarded to the insurer to induce them to enter into the contract, there is a change in the subject-matter of the contract, considerations of fair dealing require the applicant to disclose the change, that good faith requires the applicant to disclose to the company every fact material to the risk which came to his knowledge at any time before the contract was closed. In support of their contention they cite *Piedmont & Arlington Life Ins. Co. v. Ewing*, Adm'r, 92 U. S. 377, 23 L. Ed. 610; *Harris v. Security Mutual Life Ins. Co.*, 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915C, 153. Several cases are cited in the opinions in these cases in support of the rule, and other cases are cited in the case notes to which they refer.

We do not adopt the reasoning of these cases in their entirety. We do, however, think the rule announced there was correct when applied to the facts of those cases. For instance, in the case in 92 U. S. 377, 23 L. Ed. 610, while negotiations were still pending between the agent of the company and the applicant touching the terms of the contract, the amount of the premium, and the mode of payment, a friend paid the premium to conceal from the agent the condition of the applicant, who was then in extremis and died in a few hours. The agent, in ignorance of the facts, delivered the policy, and the court held that no valid contract arose from the transaction. The court said:

"To hold that, when he was in extremis, an hour or two before he breathed his last, a friend could pay this small sum to an agent of the company, without the agent or the company

having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator \$5,000 within 60 or 90 days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

In the instant case, the policy had not been issued, but the applicant had done all that had been required of him. We do not think he would be required, as a matter of law, to disclose to the company the result of a medical examination for insurance in any other company regardless of the fact whether or not he in good faith believed what the medical examiner had told him. For instance, when the applicant went to Dr. Meriwether and was examined by him for life insurance in another company, and Dr. Meriwether told him that he found albumen in his urine and other indications of Bright's disease, the applicant would not be required to state this fact to appellant company unless he believed it to be true; for, if he did not believe the statement made by Dr. Meriwether, he could not be said to conceal a material fact from the company. He might believe that his kidneys were only temporarily affected and that the physician was mistaken in believing it to be Bright's disease.

[4] The testimony in the case before us, however, went further than this. After Dr. Meriwether had examined him and told him that the results of the examination indicated that he had Bright's disease, Peak became alarmed. Dr. Meriwether told him that he could not tell much about it until he made a microscopic examination, and as a result of this examination told him he thought he had chronic Bright's disease. The applicant then told him that he intended to go to Roswell, N. M., at once, and Dr. Meriwether selected a physician to treat him for Bright's disease while he was out there. Dr. Meriwether is a physician of good reputation, and there is nothing whatever in the record to dispute his testimony.

So it may be said that the result of Dr. Meriwether's examination of the applicant was to disclose to him that he had a fatal disease, the presence of which he could not be ignorant of, and the failure to disclose his knowledge that he had chronic Bright's disease was an intentional concealment on his part of a material fact, and his failure to communicate it to the company avoided the policy. Under the undisputed facts, we think there was an element of knowledge on the part of the applicant that he had Bright's disease, and that there was an intentional concealment of this fact from the company.

For the reasons given in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

FT. SMITH & W. R. CO. v. PENCE et ux.
(No. 150.)

(Supreme Court of Arkansas. Feb. 31, 1916.)

1. APPEAL AND ERROR §843 — REVIEW — QUESTIONS CONSIDERED—INSTRUCTIONS.

A wife was riding in the tonneau of an automobile which her husband was driving, and the machine was struck by cars of the defendant which were making a flying switch. They sued for the injuries received and the jury found for plaintiffs. *Held*, that in view of the verdict for the husband it need not be determined whether or not correct instructions were given on imputed negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.]

2. RAILROADS §350—OPERATION—INJURIES TO PERSONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence that plaintiff in driving an automobile slowed down on the hill approaching a railway grade crossing, and looked both ways and listened, but heard no bell or whistle, and that no one was on top the cars to keep a lookout, and that had there been a lookout the cars could have been stopped before they struck the automobile, warranted submission to the jury of the issues of negligence of the railroad and contributory negligence of the plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Actions by L. J. Pence and by his wife against the Ft. Smith & Western Railroad Company and others. Actions consolidated. Judgment for plaintiffs, and defendant railroad appeals. *Affirmed*.

Warner & Warner, of Ft. Smith, for appellant. Sam R. Chew, of Van Buren, for appellees.

SMITH, J. On January 23, 1914, the appellees were riding in an automobile on a pleasure trip with certain friends in the city of Ft. Smith, the car being driven by the appellee L. J. Pence, who was its owner. The party had been out from their homes in Van Buren some two or three hours, chiefly riding about Ft. Smith and its vicinity, and while returning from the south side of the city entered upon what is known as South D street, and proceeded westward on that street to a point where the said street is crossed by the tracks of the appellant railroad company near by its car shops and roundhouse. Just before reaching the railroad tracks the street along which appellees traveled descended from a considerable elevation some few hundred yards back so that the car was proceeding along a downward grade, which, however, passed to a practically level ground just before entering upon the railroad tracks. There were some seven or eight tracks parallel, including the main track, repair track, passing track, and others; these tracks being located some 12 to 16 feet apart. The street was about 50 feet

wide, and on the south side of it for some distance back from the tracks (that being the left side to the automobile approaching the tracks) the view was obstructed by certain buildings, the last of the buildings on that side of the tracks being what was called the paint shop and alongside which, running at right angles with the street, was a passing track, which was about 8 or 10 feet distant from the western wall of the paint shop. The cars which collided with the automobile and wrecked it were proceeding along this track from the south side of it northwardly towards the street. Appellee L. J. Pence was driving the car, and just as he came down the hill, about 50 or 60 feet distant from the track, perhaps not quite so far, it was claimed by himself and his wife that he reversed his lever from high to second and checked the speed of his car, but did not stop. His testimony shows that the car was running about 10 miles per hour before he reversed the lever, and that it was running at about that speed as it reached the track where it was struck by the box car. Four box cars, three of them being loaded with merchandise, were being moved along this track from the south side to a point some distance north of this street crossing, where they could be placed upon another track for unloading. After coupling up the cars they were put in motion by an engine and some 10 or 12 cars backing down to them and starting the four cars in question, giving them sufficient momentum, with a slight downward grade, to carry them to the point where it was sought to place them. The testimony is conflicting as to the rate of speed these cars were moving at the time of contact, but Pence himself thought they were moving at about 10 miles an hour. Employees of the appellant company thought they were moving at not exceeding 5 miles an hour. When the automobile reached the passing track, after the front wheels entered upon the track and were between the rails, it stopped and was standing in that position when the freight cars came in contact with it. The automobile was pushed some 60 or 80 feet along the track, having been partly turned over and slid or skidded along the rail, the top being up, and the occupants of the automobile were caught under the car and some of them seriously hurt, one of them receiving a flesh wound in his leg, which afterwards caused tetanus and his death. Mr. Pence was not injured, but his automobile was demolished, and his wife claimed to have received serious injuries, which resulted in a nervous trouble.

It was claimed by appellees that the appellant company was negligent in that it failed to keep a lookout upon the cars as they moved towards the crossing, and in the failure to give the required signal of

ringing the bell or blowing the whistle, in approaching the crossing at a dangerous rate of speed, and in the failure to have the cars equipped with brakes. These claims were all contested by the appellant, and upon some of them there was more or less of contradiction in the evidence. On behalf of appellant it was shown that a brakeman was upon the car which collided with the automobile, and was keeping a lookout, and made all efforts, after discovering the position of the automobile, which were possible to stop the cars.

It was contended that Mr. Pence was guilty of contributory negligence in crossing the track without taking the proper precautions of looking and listening and of stopping his car, and that Mrs. Pence, who was seated on the back seat, made no protest, or in any way sought to prevent her husband from driving upon the tracks as he did. Mr. Pence claimed damages to the automobile in the sum of \$950, and for personal injuries in the sum of \$500; the latter claim being abandoned at the trial. Mrs. Pence claimed for her alleged injuries damages in the sum of \$5,000, and at the trial Mr. Pence recovered judgment for \$600, and his wife for \$750, and this appeal has been prosecuted to reverse the judgment pronounced upon this verdict of the jury.

A great many instructions were asked on both sides, and a large number were given and exceptions saved to the action of the court in refusing to give others. But without setting out the instructions complained of it may be said that they present two questions of importance.

[1] The first of these is that the court did not properly submit to the jury the question of negligence on the part of Mrs. Pence. It is insisted that she should not recover both because of imputed negligence and because of the positive negligence of which she was guilty. It is urged that she knew, or should have known, the danger of her surroundings; that the tracks were ahead of the car in which she was riding, and that she made no protest, or objection, to going directly upon these tracks without the car being stopped, or without exercising any effort on her part to control in any manner whatsoever the movement of the car in which she was riding; that if she had insisted her husband, who was driving the car, would have stopped the car, or, indeed, would have taken another route and avoided entirely the crossing. It is certain that this collision would not have occurred had these parties not attempted to cross the tracks, but the injury occurred at a public crossing where appellees had the right to cross, subject only to the duty of using ordinary care for their own safety, in view of the uses of the various tracks being made by the railroad company. Appellees brought separate suits, which were consolidated and tried together, and the court

gave various instructions on the question of imputed negligence, and the right of Mrs. Pence to recover as distinguished from the right of her husband to recover, and we think the law of that question was fairly stated in the instructions which were given. But inasmuch as the jury found in favor of Mr. Pence, who was riding on the front seat of the car and engaged in driving it, and consequently charged with the duty of looking and listening and taking all necessary precautions to prevent injury, it can hardly be said to be important to determine whether or not correct instructions were given on the question of Mrs. Pence's imputed negligence. Nor is it contended that she was in any position of superior vantage, or that she could have done anything which her husband did not do to avoid this accident, unless, indeed, she might have suggested that they cross the tracks at some other crossing; and she would therefore have a right to recover if her husband had.

[2] The important question in the case is whether the undisputed evidence shows that appellees were guilty of contributory negligence in attempting to cross the railroad tracks under the circumstances detailed.

We think the instructions which were given submit the law of this question to the jury as fairly as it could have been submitted, provided it should have been submitted at all.

It is insisted that the undisputed testimony shows that, by looking in the direction from which the train of box cars was moving, when he could first have observed the track, Mr. Pence would have then been some 8 or 10 feet distant from the track and that he could then have stopped his automobile in a place of safety. That Mr. Pence was himself a locomotive engineer and any observation of his surroundings would have revealed to him that this was a dangerous crossing because of the obstructions which hid an approaching train from view.

Upon the part of appellee the proof is to the effect that the speed of the automobile was reduced, and that the occupants of the car looked both up and down the track before going on it to see if any cars were approaching the crossing, and that they not only looked but listened to see if they could hear the approach of cars, and that they heard no bell or whistle. Appellees are strongly corroborated in this statement by a Miss Farrier, and that there was no one on top of the string of cars, or elsewhere, to keep a constant lookout for persons and property as the cars approached the public crossing where appellees were run into, and that had such a lookout been kept the cars could have been stopped after the presence of the automobile on the track would have been discovered.

The law of this case has been discussed in a number of recent opinions, and we think

the instructions of the court are not in conflict with the rules there announced, and that under the circumstances the court properly submitted to the jury both the question of appellees' contributory negligence and of the negligence of appellant in failing to blow the whistle or sound the bell and to keep the lookout as required by Act No. 284, approved May 26, 1911, requiring railroad companies to keep a constant lookout on all moving trains.

In some respects the facts of this case are similar to the case of *St. L., I. M. & S. R. Co. v. Stacks*, 97 Ark. 405, 134 S. W. 315. It was insisted there, as here, that the undisputed proof showed that the party injured was guilty of contributory negligence in failing to look and listen and to stop before driving his wagon across the railroad track. It was there said:

"The evidence for appellee shows that neither the whistle was sounded nor the bell rung for the crossing; and while the omission of the engineer to give these statutory signals did not relieve appellee of the duty of looking and listening for the approach of trains, yet they are warnings which he had a right to rely on in determining whether a train was drawing near. According to appellee's own testimony, his view of an approaching train from the east was obstructed by box cars, both on the south and middle tracks. In such case, while the traveler must not relax his endeavor to see approaching trains, yet necessarily he relies to a great degree upon his sense of hearing to discover the approach of a train, and in doing this he listens not only for the noise made by the running of the train, but for the signals which the engineer is required to give by ringing the bell or sounding the whistle for the crossing. Appellee's testimony tends to show that he was in possession of all his faculties and continually exercised them during his passage over the crossing. The testimony adduced by him shows that the headlight was dim, and on that account its rays did not warn him. It is admitted that the steam had been shut off, and that the train was drifting or gliding in, and on this account the jury might have inferred that the train came in with little noise, and no smoke escaping to give warning of its approach; that it had rounded the curve before appellee came upon the crossing, and that for this reason he could not see it on account of the box cars obstructing his view. If he could not have seen it after it passed the curve, the jury might have found that it would have done no good for him to have stopped his wagon between the south and middle tracks to have tried to look between the box cars on those tracks."

Under the facts there stated it was held that the question of the traveler's contributory negligence was properly a question for the jury; and we think the facts of this case warranted the court in submitting to the jury the question of appellee's contributory negligence. *St. L., I. M. & S. R. Co. v. Prince*, 101 Ark. 315, 142 S. W. 499; *St. L., I. M. & S. R. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527; *Chitwood v. St. L., I. M. & S. R. Co.*, 104 Ark. 38, 148 S. W. 278.

Finding no prejudicial error, the judgment of the court below will be affirmed.

E. F. LEATHEM & CO. v. JACKSON COUNTY. (No. 128.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. COUNTIES § 124—CONTRACTS—RATIFICATION.

The county may ratify an unauthorized contract made in its behalf, if it is one which the county could have made in the first instance. [Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 185; Dec. Dig. § 124.]

2. COUNTIES § 124—FISCAL MANAGEMENT—POWERS OF COUNTY COURT.

Const. art. 7, § 28, gives county courts exclusive original jurisdiction in regard to disbursement of money for county purposes, and in every other case necessary to internal improvement and local concerns of the counties. Kirby's Dig. § 1375, invests county courts with original jurisdiction to audit, settle, and direct payment of all demands against the county, and in all other cases necessary to the internal improvement and local concerns of the counties. Section 7162 requires all collectors, sheriffs, clerks, constables, and other persons chargeable with moneys, to make settlement with the county court. Section 7167 provides for adjustment by the county court of accounts of delinquent officers. Section 7171 empowers the county court to re-examine, settle, and adjust prior settlements on showing of cause, and section 7174 provides for adjustment at any time within two years. Sections 1162 and 1163 provide for settlement by the county treasurer with the county court. A county judge contracted with the claimants as expert accountants to examine the books of certain officers of the county. *Held*, that the county court, being charged with the auditing and settlement of accounts, could employ expert accountants, and therefore could ratify a contract which it could have made in the first instance; such employment not being an illegal delegation of the power to audit, but necessary owing to the character of the work to be done.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 185; Dec. Dig. § 124.]

3. COUNTIES § 204—FISCAL MANAGEMENT—POWERS OF COUNTY COURT—AUDITING ACCOUNTS.

In such case, the power of the county court to audit the accounts of the county could not be taken away by the grant of similar powers to the circuit court, made under Kirby's Dig. §§ 625-640, passed subsequent to the enactment of the acts delegating the power to the county court; there being no such inherent power in the circuit court as vested under the Constitution in the county court, and such sections being designed to aid the circuit court in the enforcement of the criminal laws of the state.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 312, 316-321, 337; Dec. Dig. § 204.]

Appeal from Circuit Court, Jackson County; Dene H. Coleman, Judge.

E. F. Leathem & Co. filed a claim for services against Jackson County, which was allowed and ordered paid by the county court. On appeal to the circuit court, the allowance and the order of the county court ratifying the contract for such services were set aside. From that judgment, the claimants appeal. Reversed and remanded, with directions.

Jno. W. & Jos. M. Stayton, of Newport, for appellants. Otis W. Scarborough and Campbell & Suits, all of Newport, for appellee.

HART, J. The county judge of Jackson county employed appellants as expert accountants to examine the books and accounts of certain officers of said county at an agreed price. Subsequently the county court entered of record an order ratifying the employment of appellants and stating the reasons therefor. Appellants performed services under the contract in a satisfactory manner and presented to the county court a demand for \$500 to be applied on their contract. A taxpayer of the county filed a remonstrance. The county court made an order allowing the claim of appellants, and an appeal was taken to the circuit court. The circuit court held that there was no authority in law for the county court to make the contract with appellants, that the contract as made was void, and that the order ratifying it was also void. The allowance made to appellants was set aside, and the order of the county court ratifying the contract was also set aside. From the judgment rendered, appellants have duly prosecuted an appeal to this court.

[1] It will be noted that the county judge first made the contract with appellants. The county court subsequently entered of record an order ratifying the contract and setting forth the reasons which caused the court to make the contract. The county may, like an individual, ratify an unauthorized contract made in its behalf, if it is one the county could have made in the first instance. Such ratification will be equivalent to original authority. First Dill. Mun. Corp. (5th Ed.) § 797; *Steiner v. Polk County*, 40 Or. 124, 66 Pac. 707; *Cunningham v. Umatilla County*, 57 Or. 517, 112 Pac. 437, 37 L. R. A. (N. S.) 1051.

[2] The county court set forth at length in the order entered of record its reasons for making the contract with appellants. The county judge also testified at the trial of the case and gave at length his reasons therefor. It is not claimed or proved that the county court acted arbitrarily or capriciously in making the contract with appellants; nor was it claimed or proved that the contract was the result of fraud on the part of the county judge or collusion between him and appellants. The sole ground on which the contract and allowance was attacked was that the county judge was without authority to make the same. For this reason it will not be necessary to set out the reasons given by the county judge for making the contract. A board of county commissioners or supervisors ordinarily exercises the corporate power of the county. Such boards are in a sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to the county affairs. 11 Cyc. 388, 389.

By the Constitution of 1874 the county courts were made successors and continua-

tions of the former boards of supervisors of the county, and were given exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of their respective counties. *Dodson et al. v. Mayor and Town Council, Fort Smith*, 33 Ark. 508; *Worthen v. Roots*, 34 Ark. 356. Article 7, section 28, of our Constitution, reads as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, * * * the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. * * *"

Section 1875 of Kirby's Digest is as follows:

"The county court of each county shall have the following powers and jurisdictions: Exclusive original jurisdiction in all matters relating to county taxes; * * * to audit, settle and direct the payment of all demands against the county; * * * to disburse money for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

Section 7162 of Kirby's Digest provides that all collectors, sheriffs, clerks, constables, and other persons chargeable with moneys belonging to any county shall render their accounts and settle with the county court at each regular session thereof. Section 7167 of Kirby's Digest provides that, if any of the officers thus chargeable shall neglect to render their accounts or settle as aforesaid, the county court shall adjust the accounts for such delinquents according to the best information that can be obtained and ascertain the balance due the county. Section 7171 of Kirby's Digest provides that, upon good cause being shown for setting aside such settlements, the county court may re-examine, settle, and adjust the same. Section 7174 of Kirby's Digest provides that, whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the county court at any time within two years from the date of such settlement to reconsider and adjust the same. Sections 1162 and 1168 of Kirby's Digest provide for settlement by the county treasurer with the county court.

Thus it will be seen that, under our Constitution and laws, the county court had jurisdiction, and it was its duty to audit the accounts presented by its officers named in the statute for settlement, and if found correct to approve them, and if not to cause them to be corrected. Under the sections of the Constitution and statutes to which we have just referred the state of the officers' accounts belong properly to the jurisdiction of the county court, and their correctness was a proper subject of inquiry. Counsel for appellee concede that the county court represents the county, and that if it conceived it to be necessary to make a detailed investigation of the official affairs of the county, and to overhaul and restate the accounts of its

various officers, it has the power to do so; but they insist that the employment of an expert accountant by the county court to make such investigation is a delegation of authority, and that there is no law authorizing the county court to delegate its power in this respect to another.

Counsel for appellants have cited decisions from several states to the effect that, where the county court is the general fiscal agent of the county and is possessed of a supervisory power over the collection and preservation of its funds, it has implied power to employ an expert accountant to audit the official accounts and public records of county officers. In *Duncan v. Lawrence County*, 101 Ind. 403, commissioners, who in that state correspond to our county courts, employed an expert accountant to examine and report on the accounts of the treasurer of the county and the accountant having done the work asked payment for his services. It was held that the commissioners had full authority with reference to the adjustment of the accounts of public officials and as an incident thereto to employ an accountant. The grounds of this decision were that the statute of that state in cases of indispensable public necessity authorizes the making of such a contract. In the case of *Garrigus v. Board of Commissioners of Howard County*, 157 Ind. 103, 60 N. E. 948, it was contended that the title to the Indiana act was insufficient, that the act was therefore unconstitutional, and that the county board had no inherent authority to enter into the contract. The Supreme Court held the act valid, and further, if this was error, the board had very full powers to enter into contracts for the benefit of the property of the county, and that these powers were amply sufficient to sustain the contract. The claim was made there that the board could not delegate the performance of its duty to others, and the court, in overruling the contention, said:

"The complaint averred that 'the existence of these claims, and each item thereof, could be ascertained only by long, laborious, and careful search of experts.' Such a search was not that of 'auditing accounts of officers,' which the statute imposed upon the board. It was plainly a duty the board could not perform, but one which, from its nature, must be committed to others. The employment of the expert accountants for the purposes named in the agreement did not involve any abandonment or delegation of the official powers and duties of the board. The proceedings of the accountants were at all times subject to the supervision and control of the board, and the persons so empowered were mere agents and servants of the county."

See, also, *Perry v. Gardner*, 155 Ind. 165, 57 N. E. 908, and *Lockyear v. Board of Commissioners of Spencer County*, 180 Ind. 464, 103 N. E. 100.

The statutes of Kentucky give the fiscal court jurisdiction "to regulate and control fiscal affairs and property of the county," and the Court of Appeals of that state held that the statute authorized the court to

contract for the employment of an accountant for the purpose of investigating the affairs of the county officers. *Taylor v. Riney*, 156 Ky. 393, 161 S. W. 203. The court there said:

"The fiscal court is charged by the statute with the duty of looking after the fiscal affairs of the county, and this puts upon it the responsibility that attaches to any other business body, and, if it could not, when the occasion seemed to demand it, have an investigation made of the books and accounts and records of any one or more of the officers, agents, or employees of the county who have the control of or right to receive or pay out the funds of the county, the court could not, in any proper manner, perform the duty required of it in the management of the fiscal affairs of the county. There is scarcely a business institution in the state of any magnitude that does not have its books examined by some skilled accountant, and there are many good reasons why the fiscal court should be permitted to exercise this character of supervision over the persons charged with the collection or expenditure of the public funds."

In the case of *Blades v. Hawkins*, 240 Mo. 187, 112 S. W. 979, 144 S. W. 1198, Ann. Cas. 1913B, 1082, the court said that the statute of Missouri contained no grant of authority to the county court to employ an expert to audit and examine the books and accounts of the county and its officers; that if this authority existed it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute, or the performance of a duty specifically required of said tribunals. The court further said that in determining whether or not the county court had authority to employ such expert it must call to mind the duties of such a court. There, as here, the county court is the general fiscal agent of the county, and is possessed of a supervisory power over the collection and preservation of its funds. There, as here, various officials are required to report to and make settlements with the county court. The Missouri statutes contain provisions similar to our own in making it the duty of the county courts to adjust the accounts of delinquent officials and to ascertain the balance due the county. The court, after mentioning these statutes, said:

"The various provisions of the statutes demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine and investigate the accounts of the different officials and other persons, enforce the collection of money due the county, and order suits to be brought on the bonds of delinquents. In short, responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations is imposed on county courts. The question for decision is whether the express delegation of those powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this question ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it never has been held

that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised. 7 Am. & Eng. Enc. of Law (2d Ed.) 987, 989, and cases cited in the notes."

See, also, *Donlevy v. Sims*, 175 Ill. App. 290; *Harris v. Gibbins*, 114 Cal. 419, 46 Pac. 292.

We regard the cases cited as squarely in point and approve the reasoning quoted from the opinions, and for that reason it is not necessary to repeat what has been said on the subject. We are not without authority on the subject in our own court. In the case of *Lee County v. Abrahams*, 31 Ark. 571, the court held that, if the circuit court neglected to require the clerk of the circuit court to render an account during his term of office, the county court may, under its general jurisdiction, force him to settle. The court said:

"But if the circuit court neglected to rule him to report during his whole term of office, we see no reason why the county court, having original jurisdiction in matters relating to county taxes, etc., might not force him to a settlement"—citing *Miller's Dig.* § 214.

That section of *Miller's Digest* is section 22, chapter 41, of the Revised Statutes, and is the same as section 7167 of Kirby's Digest. In that case the county court employed a special attorney to examine the reports and settlements of all the county officers who were required by law to make a settlement with the county court of all funds in their hands belonging to the county and to report all delinquents. The report of the special attorney is copied in the opinion and shows that he performed such services as are usually performed by an expert accountant. It is true there is no express adjudication in that case of the right of the county court to employ a special attorney or expert accountant to audit the accounts of the county officers, but the question was not there raised. And the court by its silence recognized the authority of the county court to make the employment.

In the case of *Oglesby v. Ft. Smith District of Sebastian County*, 179 S. W. 178, 1199, we held that the county court has the power in proper cases to employ counsel other than the prosecuting attorney to represent the county in civil suits in which the county is interested. In that case we recognized that county courts can only exercise such powers and rights as are clearly granted by the language of the Constitution or acts conferring them, or such as are derived therefrom by necessary implication. If the county court in its discretion had the inherent power to employ an attorney to represent the interests of the county in a proper case, we do not see why it should not also have the power to employ an expert accountant, when it becomes necessary for the best interests of the county to do so.

[3] Finally it is insisted that the court was without authority because under chapter 22 of Kirby's Digest the circuit court is empowered to appoint three commissioners of accounts for each county, whose duty it shall be to examine the books of the county officers and report their findings to the circuit court. If we are correct in holding that under our Constitution and statutes the county court had the inherent power to make the contract under consideration, it is obvious that that power could not be taken away by granting similar powers to another court. Chapter 22 of Kirby's Digest was first passed in 1885, which was subsequent to the passage of the acts above referred to and discussed. The evident purpose of the Legislature in enacting chapter 22 of Kirby's Digest was to aid in the enforcement of the criminal laws of the state. Neither the circuit court nor the grand jury had any inherent power in the matter, but only had such power as was conferred upon them by the statute. The circuit courts could only act pursuant to the authority given them by the statute and are limited in the exercise of such power by the words of the statute. It is manifest that the Legislature by the passage of chapter 22 of Kirby's Digest did not intend to take away any of the powers of the county court with regard to the settlement and adjustment of the accounts of the county officers, and we are of the opinion that chapter 22 did not have that effect.

It is not contended that the county court abused its discretion in making the contracts in question. It therefore follows from what we have said that the circuit court erred in refusing to allow the claim of appellants and in setting aside the order of the county court making the contract with them.

For the error the judgment will be reversed, and the cause remanded, with directions to render judgment in favor of appellants.

SPENCE & DUDLEY et al. v. CLAY COUNTY. (No. 142.)

(Supreme Court of Arkansas. Jan. 31, 1918.)

1. COUNTIES — 138—ALTERATION OF BOUNDARIES—VALIDITY OF STATUTE—LIABILITY FOR FEES.

Where the county judge appoints attorneys to defend an action to test the validity of an act adding a township to the county, Kirby's Dig. § 7182, providing that, whenever an action is brought against the county assessor, tax collector, or clerk for performing any duty authorized by the revenue act or the laws of the state for the collection of public revenues, such officer shall be allowed and paid out of the county treasury reasonable fees of counsel has no application, although in such case the public revenue was indirectly affected by increasing the amount of taxable property in the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 203, 204, 206, 207; Dec. Dig. § 138.]

2. DISTRICT AND PROSECUTING ATTORNEYS — 3—ASSISTANT COUNSEL—APPOINTMENT.

Although Kirby's Dig. § 6393, requires the prosecuting attorney to defend all suits brought

against the state or county in his circuit, where action is brought by one county against another of the same judicial district, it is within the power of the county court to appoint counsel for the county, since the prosecuting attorney obviously cannot act for both counties.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. ¶3.]

3. DISTRICT AND PROSECUTING ATTORNEYS — ASSISTANTS — PAYMENT — ACCEPTANCE OF PART PAYMENT—EFFECT.

Where the county judge employed attorneys to defend a suit against the county, testing the validity of an act of the Legislature adding to its territory another township, and thereafter, on presentation of the claim, the county court allowed a portion thereof "for services in" the suit, which the attorneys accepted, and did not appeal, they were concluded by the order of allowance as to their fees in that suit.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. ¶3.]

4. COUNTIES — CONTRACTS — RATIFICATION—LIABILITY.

Where the county judge employed attorneys to defend a suit testing the validity of an act adding a township to the county, and thereafter told them to defend other suits arising from the same matter, and, on presentation of their claim for fees in the first suit, it was allowed in part by the county court, the allowance was a ratification of the whole contract, and the county was liable for the reasonable value of the services in all the suits.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. ¶124.]

5. DISTRICT AND PROSECUTING ATTORNEYS — ASSISTANTS—COMPENSATION.

The county court, which ratifies the appointment of counsel to defend an action against the county, cannot agree to pay a stipulated sum for the legal services, but the amount of compensation must be reasonable, and determined from all facts and surrounding circumstances.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. ¶3.]

Kirby, J., dissenting.

Appeal from Circuit Court, Clay County; J. F. Gautney, Judge.

Claim by Spence & Dudley and G. B. Oliver against Clay County. The County Court refused to allow the claim, and claimants appealed to the circuit court. From a judgment there against claimants, they appeal. Reversed and remanded with directions.

Spence & Dudley, of Piggott, and G. B. Oliver, of Corning, for appellants. L. Hunter, of Piggott, for appellee.

HART, J. At the October, 1914, term of the county court of Clay county, Ark., appellants presented for allowance a claim for legal services performed for the county. The claim was duly authenticated, and the amount claimed to be due was \$1,400. The county court refused to allow the claim, and an appeal was taken to the circuit court. The material facts adduced in evidence in the record are as follows:

The Legislature of 1895 passed an act detaching Blue Cane township from Greene

county and attaching the same to Clay county. Laws 1895, p. 244. In June, 1909, the Attorney General filed in the Supreme Court quo warranto proceedings to test the right of the officers of Clay county to exercise jurisdiction over the territory which had been added to that county by act of the Legislature of 1895. All of the county officers were made parties defendant to the action. The county judge of Clay county employed G. B. Oliver and Spence & Dudley to represent the county in the action. The attorneys accepted the employment and filed briefs and made an oral argument in the case. The court held that it had no jurisdiction, and the application for the writ was denied. See *State of Arkansas v. Clay County*, 93 Ark. 228, 124 S. W. 757. The opinion was delivered January 17, 1910. Immediately after that case was dismissed Huddleston & Taylor filed actions in the chancery courts of Greene and Clay counties to enjoin the officers of Clay county from levying and collecting taxes in the disputed territory. The case was finally disposed of in favor of Clay county in November, 1914.

At the April, 1911, term of the county court of Clay county, appellants presented their claim against Clay county in the sum of \$1,000 for attorney's fees in the quo warranto case. The record shows that the court examined and allowed the claim in the sum of \$600. This allowance was made after the suits in the chancery courts of Clay and Greene counties had been commenced. Appellants and the county judge who employed them testified that there was but one employment, and that this was made by the county judge, and that the same county judge was in office when the county court made the allowance of \$600 at the April term in 1911. Appellants testified that the county judge employed them to represent Clay county in any litigation that might arise in regard to the jurisdiction of the county over Blue Cane township. One of them testified that when they presented their claim in 1911 the county judge asked them how it would suit them for an allowance of only \$600 to be made then, as the litigation had not ended, and that they agreed to accept that amount in part payment of their fee. They also testified that the county judge told them to go ahead and represent the county in the litigation in the chancery courts. Appellants also introduced evidence tending to show that \$2,000 was a reasonable fee for the legal services performed by them in the whole matter. The county judge testified that he told Oliver in the beginning that he thought \$1,000 would be a reasonable fee in the whole matter, that the county was not able to pay fees like an individual, and stated that Oliver said he could not tell at that time how much the services would be worth, and that that matter could be settled after the litigation was ended.

The circuit court found that the present claim of appellants is founded upon the services rendered by them in the injunction proceeding against the collector and assessor of Clay county, and the claim of appellants having been presented against the county, and not against the collector and assessor of the county, the county judge had no authority as such to employ appellants to represent the collector and assessor, and that appellants had no valid claim against the county for the services performed by them in the injunction suit. The circuit court, therefore, adjudged that appellants take nothing by reason of their suit and that Clay county recover from them all its costs. The case is here on appeal.

[1] Section 7182 of Kirby's Digest provides in effect that, whenever an action may be brought against the county assessor, collector of taxes, or clerk of the county court for performing any duty authorized by any of the provisions of the revenue act or the laws of the state for the collection of public revenues, such officer shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending such action. We do not think this section of the statute has any application or bearing upon the present suit. This section is directed specifically to suits affecting the collection of the public revenue. It is true the public revenue was indirectly affected in the present action, but this was merely an incident to the suit. The object and purpose of the suit was to test the validity of the act of the Legislature which detached Blue Cane township from Greene county and attached the same to Clay county. In the recent case of *Leathem & Co. v. Jackson County*, 182 S. W. 570, we held that under the general powers granted to the county court under our Constitution and laws such court became the representative of the county, and was empowered to make contracts in behalf of the county in all cases where the local concerns of the county are involved. In that case we also held that where the county court is empowered to do an act purely administrative in its character, such as to make a contract, it may also ratify such act when done by the county judge in vacation, and thereby bind the county as effectually as if the contract was made by the county court in the first instance.

[2] Section 6393 of Kirby's Digest provides that the prosecuting attorney shall defend all suits brought against the state or any county in his circuit. Notwithstanding this section of the statute, we held in the case of *Oglesby v. Ft. Smith District of Sebastian County*, 179 S. W. 178, 1199, that the county court, under our Constitution and laws was empowered to employ other counsel when, in its judgment, the interests of the county were of sufficient importance to demand it, or in cases where the prosecuting attorney neglects or refuses to perform the duties im-

posed upon him by the statute, or where his other duties are of such a character that he does not have time to properly represent the county. The present case is manifestly one where the prosecuting attorney could not represent the county, and where the county court would be empowered to employ other counsel to represent the county and protect its interests. Greene and Clay counties are in the same judicial district and have the same prosecuting attorney; obviously the prosecuting attorney could not represent both counties, and would not be required to make a choice of which county he would represent. Therefore the county court was authorized to employ other counsel to represent the county. Many decisions from other states to the same effect are cited in 11 Cyc. 471.

[3, 4] In the case before us the undisputed evidence shows that the county judge employed appellants to represent Clay county in the litigation relating to the jurisdiction over Blue Cane township, and appellants testify that the county judge employed them to represent the county in all the litigation which might arise and agreed to pay them a reasonable fee therefor. The evidence also shows that after the quo warranto proceeding had been decided other suits were filed which had for their purpose to test the validity of the act of the Legislature detaching Blue Cane township from Greene county and attaching it to Clay county; that the county judge told appellants to represent the county in these suits; that while these suits were pending they presented their claim to the county court in the sum of \$1,000 for services which they had already performed in the quo warranto suit; that the county judge asked them if they would be satisfied with an allowance of \$600 as a part payment of their services, with the understanding that the balance should be allowed when the whole litigation should be ended; and that they agreed to this, and the county court granted them an allowance of \$600, stating specifically in the order that it was for legal services in the quo warranto case styled "*State of Arkansas v. Clay County*." No appeal was taken from this order of allowance, and appellants are concluded by it so far as their fees in the quo warranto case are concerned. The action of the county court in making this allowance was a ratification of the contract made by the county judge in the beginning. The same person was county judge at the time the original contract was made, and at the time the order of allowance was made at the April term, 1911, of the county court. We think the order of allowance had the effect to ratify the contract made by the county judge as an entirety. The contract made by the county judge with appellants was to represent the county in all the litigation looking to testing the validity of the act of the Legislature detaching Blue Cane township from Greene county and attaching it to Clay county. Appellants, after

the quo warranto case had been decided and other suits brought in the chancery courts, continued to represent Clay county until these cases terminated favorably to the county in 1914. They are entitled to a reasonable compensation for their services.

[5] As we have already seen, the county court was the representative of the county and was acting in a fiduciary capacity. It was the duty of the court to employ counsel to represent the interests of the county and to pay them a reasonable compensation for their services. He could not, like a private litigant, agree to pay them any amount he might see fit; and in determining what is a reasonable compensation all facts and surrounding circumstances should be considered.

From the views we have expressed, it follows that the judgment must be reversed, and the cause will be remanded, with directions to enter judgment in accordance with this opinion.

KIRBY, J., dissents.

BLACKWOOD TIRE & VULCANIZING CO. v. AUTO STORAGE CO.

(Supreme Court of Tennessee. Feb. 1, 1916.)

ACCESSION — DOCTRINE — EFFECT OF.

Where the purchaser of an automobile, title to which was retained by the seller, fitted the machine with tire casings, and the seller on nonpayment retook the machine, title to the tire casings passed to the seller, the seller of the casings not having retained title, for such is the rule of "accession," which denotes the right of the owner of corporeal property, real or personal, to any increase thereof from any cause, either actual or artificial.

[Ed. Note.—For other cases, see Accession, Cent. Dig. §§ 1-10; Dec. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Accession.]

Error to Circuit Court, Davidson County; T. J. McMorrough, Special Judge.

Action by the Blackwood Tire & Vulcanizing Company against the Auto Storage Company. A judgment of dismissal was affirmed on appeal to the Court of Civil Appeals, and plaintiff brings error. Affirmed.

Levine & Levine, of Nashville, for plaintiff in error. M. S. Ross, of Nashville, for defendant in error.

NEIL, C. J. The defendant sold an automobile to one Cooper, retaining title. Thereafter Cooper bought from the plaintiff, and had fitted to the machine certain tire casings; plaintiffs not retaining title. After this, the machine not having been paid for, the defendant retook possession, and sold it in the usual way; the tires furnished by plaintiffs still remaining on the machine. Cooper made no claim to the tire casings when defendant retook the machine, and made no objection to the sale. After the sale, however, at the instance of plaintiff, Cooper sold, or purported

to sell, these tire casings to the plaintiff; their value at that time to be credited against the charge which plaintiff had made against Cooper when these tire casings were furnished. On this alleged title plaintiff brought its suit against defendant and replevied the tire casings. The trial court dismissed the suit, and subsequently on appeal the Court of Civil Appeals affirmed this judgment. We think both courts were correct.

The controversy arises under the law of accession. As said in *Ruling Case Law*, vol. 1, p. 117:

"The word 'accession' is used broadly in the language of the law to signify the right which an owner of corporeal property, real or personal, has to any increase thereof from any cause, either natural or artificial. In this sense it is broad enough to include additions to the value of land by buildings, fences, etc., erected on it, a gradual deposit of soil by the action of water, value added to chattels by labor performed, the increase of animals, or any other mode by which additions to property are made. As a term of legal classification, however, accession is generally employed to signify the acquisition of title to personal property by its incorporation into or union with other property. * * *

"The general rule of the common law in regard to title by accession is that, whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to, and made part of, some other thing which is the principal, or its nature has been changed from personal to real property, but if the thing itself, by such acquisition, was changed into a different species, it belongs to the new operator, who has only to make satisfaction to the former proprietor for the materials which he has so converted."

The proposition contained in the last clause of the authority quoted seems not, however, to apply in favor of a willful trespasser.

As between mortgagor and mortgagee, the rule is that repairs made by the former, or at his instance, become a part of the property, and go with it, and inure to the benefit of the mortgagee. In *Southworth v. Isham*, 5 N. Y. Super. Ct. (3 Sandf.) 448, it appeared that a mortgagor of a vessel removed the old sails, which were worn out, and put on new ones, and then the vessel passed into the possession of the mortgagee. It was held that the new sails passed, as in case of repairs, and that the mortgagor could not maintain trover for the sails. In that case the court quoted with approval the following passage from the opinion in the case of *Holly v. Brown*, 14 Conn. 266:

"If during the term of a mortgage upon a printing establishment, the types and other materials belonging to it are removed, and new ones supplied in their place, if the new types and materials were procured for the purpose of replenishing the establishment mortgaged, and of supplying the place of articles belonging to it, which had been lost or destroyed by use, and were attached to and incorporated with it, they would become a part of the establishment, and by right of accession belong to the owners of it. They would form an incident to, and follow the title of, the printing establishment, to which

they were attached, which would be the principal thing. As if the borrower of a watch should replace its crystal, or of a musical instrument one of its strings, keys, or pipes, which had been lost, destroyed, or become useless in his service, in which case they would belong to the lender."

In *ex parte Ames*, Fed. Cas. No. 323 (1 Low. 561), it was held that, where a mortgage was made in Massachusetts on an unfinished locomotive, the mortgagee could hold, by accession, the additions afterwards made by the mortgagor before his bankruptcy. In *Harding v. Coburn*, 53 Mass. (12 Metc.) 333, 46 Am. Dec. 680, it was held that where unfinished articles of manufacture are mortgaged, and the mortgagor afterwards adds labor and material to them, the mortgagee will hold them as against a creditor of the mortgagor, if they remain substantially the same as when mortgaged.

In *Comins v. Newton*, 92 Mass. (10 Allen) 518, it was held that a rifle having a skeleton stock at the time a mortgage was made on it was not so substantially changed by having a new wooden stock, and a new and different kind of lock substituted for the original by way of repair, as to terminate the lien of the mortgage.

The case of *Clark v. Wells*, 45 Vt. 4, 12 Am. Rep. 187, while apparently out of harmony with the underlying principle of the foregoing cases, is, upon attentive examination, found not to be so. In that case it was held that where one, at the instance of a bailee, put new wheels and axles on a stage wagon, taking the bailee's note for the repairs, under an agreement that until payment the repairs furnished should remain the property of the repairer, and, before payment, the owner of the wagon retook it into his possession and sold it to a third person, the repairer might maintain trover against the purchaser for the wheels and axles. While it was said in the opinion that, unlike bolts and thills, the repairs furnished did not become accessions to the principal chattel, yet the court further placed its decision on the ground that the repairer had retained title to the said wheels and axles. The statement of facts in the present case shows that the title to the tire casings was not retained by the Blackwood Tire & Vulcanizing Company. The case just referred to therefore does not impugn the general principle that repairs made by a mortgagor, or at his instance, will inure to the benefit of the mortgagee. We are not to be understood as approving *Clark v. Wells*, nor do we criticize it. The point as to the retention of title to repairs placed on an article of personal property does not arise in the case before us, and therefore we do not pass on it.

In the case before the court it is to be noted that the plaintiff in error sold the tire casings outright, to Cooper, and he permitted these casings to go with the machine into the

hands of the defendant in error without objection, and in like manner permitted the sale of the machine with the tire casings attached, and never attempted to retake these casings until later, and then in furtherance of the effort of the plaintiff in error to regain them, and that for this purpose he endeavored to make sale of them at that time to the plaintiff in error. We think it must be laid down as a general principle that the mortgagor, in making repairs on property which he has mortgaged, must be held, in the absence of some distinct evidence to the contrary, to have intended such repairs as a fixed improvement to such property, since the amelioration inures not only to the benefit of the mortgagee, but to his own benefit as well, in the enhancement of the value of his property, to the end that it may go further toward relieving him of the mortgage debt in case sale should be made.

In the case before us, not only was Cooper subject to the presumption indicated, but his acts in permitting the machine to go back into the hands of defendant in error, without objection on the subject of the tire casings, and to be sold in like manner, indicate as a fact that it was his purpose to make a fixed addition to the property. The plaintiff in error, acquiring his title from Cooper, must stand in his shoes.

In what has been said we have assumed that a sale of personal property with title retained to secure the purchase price would, in respect of the matter in hand, be governed by the same principles that would control a mortgage, and we so hold. At least in such sales the title retained is but a form of lien. *Planters' Bank v. Vandyck*, 4 Heisk. 617; *Manufacturing Co. v. Buchanan*, 118 Tenn. 238, 250, 99 S. W. 984, 8 L. R. A. (N. S.) 590, 12 Ann. Cas. 707; *Ice & Coal Co. v. Alley*, 127 Tenn. 173, 178, 154 S. W. 536; *Automobile Co. v. Bicknell*, 129 Tenn. 493, 167 S. W. 108.

On the grounds stated, we are of the opinion that the judgment of the Court of Civil Appeals, sustaining that of the trial court dismissing the action of the plaintiff in error, must be affirmed.

PERRY et al. v. YOUNG et al.

(Supreme Court of Tennessee. Feb. 1, 1916.)

1. JUDGMENT \S 17—PERSONAL JUDGMENTS—CHARACTER OF NOTICE.

No personal judgment can be rendered against a nonresident served with notice only by publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 25-33, 157, 422; Dec. Dig. \S 17.]

2. EQUITY \S 32—JURISDICTION—ACTIONS "QUASI IN REM."

The insured in a life policy who had assigned it to his mother, who thereafter died, sued to reform the policy to conform with the assignment agreement between himself and his

mother, that on his mother's death the policy should revert to him. The insurance company appeared by the insurance commissioner. Other resident defendants were personally served. Nonresident distributees of the assignee were served by publication in a collateral attachment proceeding against their distributive shares in the policy. Defendant insurance company demurred to the jurisdiction, alleging that the court had no jurisdiction of the nonresident distributees. *Held* that, since the suit was to settle the interests of only those made parties, it was quasi in rem, so that the court, having jurisdiction of the res, or the policy, had jurisdiction of the whole cause and could by its judgment bind the nonresident distributees.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. ¶32.]

Fancher and Buchanan, JJ., dissenting.

Certiorari to Court of Civil Appeals.

Action by Thomas A. Perry and others against Frank Young and others. Certiorari to review a judgment of the Court of Civil Appeals overruling an order of the chancery court sustaining a demurrer to the bill. Affirmed and remanded.

Jeff McCarn and Pendleton & De Witt, all of Nashville, for plaintiffs. W. L. Granbery and H. E. Palmer, Jr., both of Nashville, for defendants.

NEIL, C. J. The bill in this case was filed in the chancery court at Nashville on the 25th of September, 1913, by Thomas A. Perry, and his sister Minnie L. Perry, and his sister Betale Bostick and her husband, W. E. Bostick, against Frank Young and his wife, Mattie Young, and the Mutual Benefit Life Insurance Company of New Jersey.

The bill alleged, in substance, that complainant Thomas A. Perry, some time before the occurrence complained of, had caused to be issued to him a policy of life insurance in the sum of \$2,000 on his life, payable to himself; that he had assigned this policy to his mother; that the purpose and understanding between him and his mother was that this assignment should be so worded as that the policy should belong to him in case she died before his death; that by oversight this latter provision was left out; that he had sought recently to borrow money from the insurance company on this policy, but it declined to lend unless all of the distributees of his mother should consent to it; that he endeavored to get the defendants Frank Young and wife to agree, as required by the insurance company, but they declined to do so. The bill alleges, in effect, that the complainants and the defendants represent all of the distributees of the deceased mother. The purpose of the bill is to have the policy reformed so as to conform to the original agreement for the assignment made between the complainant Thomas and his mother. The bill charged that the present interest of Mrs. Young, the granddaughter of complainant's deceased mother, would only be \$100, and asked and obtained an attachment, and caused the same to be levied

on that interest. A publication was ordered and made for the said Frank Young and wife which indicated the matter in controversy, that is, the policy of insurance, giving its number and the name of the company that issued it, so that the notice showed the matter about which the litigation was projected. The insurance company accepted service of the bill through its accredited agent, the insurance commissioner. This company then filed a demurrer making the point that the court had not acquired jurisdiction of Young and wife, and therefore its decree would not protect the insurance company; the point being this: That those parties could not be made defendants by publication, but that personal service would be required to bind their interest. The bill shows that they are residents of Texas, and, of course, personal service is impossible. They have not entered their appearance, but as to them the bill stands on the order of publication and the publication thereof.

The chancellor sustained the demurrer filed by the insurance company. On appeal to the Court of Civil Appeals that court overruled the chancellor. The case was then brought to this court on the writ of certiorari, and the ground of demurrer before mentioned urged in the chancery court and in the Court of Civil Appeals is urged again here.

[1, 2] We think the Court of Civil Appeals reached the right conclusion. No personal judgment is sought against Young and wife, and none could be rendered against them on publication. The court, however, has before it the insurance company that issued the policy, the complainants Thomas and his two sisters, who represent three of the four distributees of the deceased assignee, and Mrs. Young, the fourth distributee. The court also has within its control the policy of insurance which is the legal evidence of the claim against the insurance company, and the assignment on the back of it, and has the res itself, the claim against the insurance company through having the latter company before it. The policy is not actually exhibited with the bill, but it appears from the allegations of the latter that the property is in the possession of the complainant Thomas A. Perry, and he has submitted himself to the jurisdiction of the court, and it is within its power at any moment to order the actual filing of the policy in the cause.

The court, thus having control of the res, can settle the status and rights of the parties with respect to the insurance policy, although one of the persons interested therein, under the assignment as it now stands, is a nonresident, and made a defendant only by publication. Our statute (Shan. Code, § 6115) provides that suit may be instituted wherever any material defendant is found, unless otherwise provided by law. The insurance company in the present case was a material

defendant found in Davidson county. Section 6121, subsec. 4, as to bills against non-residents, provides that they may be filed in the district or county in which the cause of action arose or the act on which the suit is predicated was to be performed, or in which the subject of the suit or any material part thereof is. Subsection 5 provides that, whenever attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county or district in which the property, or any material part thereof sought to be attached is found at the commencement of the suit. Section 6162 declares that personal service of process on a defendant in a court of chancery is dispensed with when such defendant is a nonresident of the state. The following sections direct how the fact of nonresidence is to be made known, and the order of publication made, and how long the order shall be published, what it shall contain, etc. No question is made on these technical matters.

The present case belongs to the class of quasi proceedings in rem. Such proceedings are sufficiently described in 23 Cyc. 1410, by the author of Black on Judgments, in the following language:

"Judgments dealing with the status, ownership, or liability of particular property, but which are intended to operate on these questions only as between the particular parties to the proceeding, and not to ascertain or cut off the rights or interests of all possible claimants, are so far in rem that jurisdiction may be acquired by the seizure or control of the court over the res, together with reasonable constructive notice to parties defendant, but, unlike judgments strictly in rem, they are binding only upon the parties joined in the action, and thus notified, and have no effect upon the rights or liabilities of strangers."

One case in our Reports bearing a pretty close analogy to the present one is that of *Wilcox v. Morrison*, 9 Lea (77 Tenn.) 700. In that case it appeared that Wilcox had executed a trust deed in the state of Virginia conveying real and personal property in that state, and also including therein a judgment which he had in Hawkins county, Tenn., on one Netherland. After litigation had progressed for considerable time in Virginia, Wilcox came to Tennessee and filed his bill against Netherland, a resident of Tennessee, who was the debtor in the judgment, and also certain of his creditors who resided in Virginia, and the trustee under the Virginia mortgage who likewise resided there. The bill charged that the debts had been practically settled in Virginia, and that the Tennessee judgment belonged to the complainant Wilcox. The trustee and one of the creditors, residents of Virginia, demurred because the trustee and effects were in Virginia, and the cause was being administered in that state. The demurrer was overruled. Here the court had control of the res, the judgment, by having before it the plaintiff in the judgment; and also the defendant, and proceeded to settle the rights of the parties

thereunder. It seems from the report of the case that the parties subsequently answered the bill, and so submitted themselves to the jurisdiction, but the overruling of the demurrer indicated the view the court had as to its right to settle the status of the parties with respect to the judgment, even against nonresidents.

The case of *Amparo Mining Co. v. Fidelity Trust Co.*, 74 N. J. Eq. 197, 71 Atl. 605, is nearer in point. There it appears that a bill was filed in the Chancery Court of New Jersey by the complainant corporation against the defendant corporation, the latter a resident of Pennsylvania, for the purpose of having declared the ownership of the complainant as against the defendant of certain treasury stock in the complainant company. It appears from the report of the case that some of the certificates were in Pennsylvania, but the complainant company, which had issued the shares, resided in New Jersey. The court held that, the res being thus situated in New Jersey, it had control thereof, and could settle the rights of the respective parties in respect thereto, although the defendant was a nonresident, and had notice only by publication and other substitutionary process directed by the court. It was held that the court, having control of the complainant whose treasury stock was in controversy, had control of the stock or res, since it could order the same into actual custody at any time. The court said:

"In the case at bar no receivership is prayed for, and no party having the custody of the res is brought in as a defendant in order to subject the res to the control of the court. The situation seems to be analogous to one where a complainant in New Jersey, holding the possession of chattels, files a bill in this court to obtain equitable relief against a defendant not resident in New Jersey in respect to such chattels. * * * The authorities which control this court indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it. (2) A course of judicial procedure, the object and result of which are to subject the res to the power of the state, directly by the judgment or decree which is entered as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res in accordance with the mandate of the judgment or decree. (3) A course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action."

Further the court said:

"The origin of the jurisdiction of our courts in actions quasi in rem is to be found in the power of the sovereign state to exercise control over all objects to which that power can be directly applied. The state must control all property within its territorial limits. Parties interested in that property and residing within the state, or voluntarily coming into the state in order to have their rights in respect of the property in question enforced or protected, have a right to be heard in the courts of the state, and the utmost that can be demanded on the part of nonresident defendants is that they shall be

fairly notified of the action so as to have an ample opportunity to appear and be heard therein. When these conditions exist, the rights of all parties interested in the res are determined by due process of law. * * * Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and, if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust—a trust in respect of a res situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its right in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the state of Pennsylvania in order to secure such surrender. * * * The last matter to be considered is whether it is necessary, where the res is personal property, to have the res actually placed within the custody of the court through the instrumentality of a receiver, in order to give to the action the quality of an action quasi in rem. I can find no warrant in reason, and none in the authorities, disregarding a few dicta, which makes the actual seizure of the res by an officer of the court essential to the status of the action as one quasi in rem. The fundamental essential, of course, must be that the personal property, which is the res, is so situated within the state that it may be seized; in other words, the res must be within the control of the state. * * * It is not the actual seizure of the res which is the essential element of an action quasi in rem, but the power to seize the res and to seize it in the action. If the res is within the jurisdiction of the court, it may be entirely unnecessary to take possession of it through a receiver in order to secure its presence when the decree of the court is to be enforced. * * * So long as the res is situate within the jurisdiction of the court, and the custodian of the res is made a party to the suit, the requirements of an action quasi in rem under consideration seems to me to be complied with. * * * I think it follows from the principles enunciated in a number of recent federal cases, and in the New Jersey cases above cited, that an action like the present one, brought by the complainant to establish a trust in shares of stock in a New Jersey corporation, is an action quasi in rem, provided the corporation the stock of which is in litigation is made a party to the suit, and is lawfully subjected to the jurisdiction of the court in which the suit is brought by service of process within the state or by voluntary appearance"—citing *Arndt v. Griggs*, 134 U. S. 318, 10 Sup. Ct. 557, 33 L. Ed. 918; *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; *Citizens' Savings & Trust Co. v. Ill. Central R. Co.*, 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703.

"All parties, whether resident in New Jersey or residing in other states, may be lawfully brought into the suit by serving process upon the New Jersey residents, and giving the reasonable notice provided by law to the defendants residing in other states. I discover no basis for the proposition that the whole fabric of the action quasi in rem falls to the ground unless the court of chancery, through a receiver, attempts in some way to take possession of the res and actually obtains such possession. The question

remains whether, when the custodian of the res, the New Jersey corporation, whose stock constitutes the res, comes into court as a party complainant, the case is essentially different from that which is presented where the custodian is made a party defendant. In each case the res is subjected to the power of the court, in the one case by the control over the res, which the court acquires when the custodian of the res is brought into court by service of process, and in the other by the voluntary action of complainant in coming into court and presenting to the court for adjudication his claims in respect of the res. No doubt, the court, at the instance of the defendant, may preserve the res to meet the decree of the court by an injunction or by a receiver."

This method of deciding rights has been often recognized by the Supreme Court of the United States. In *Goodman v. Niblack*, 102 U. S. 556, 563, 26 L. Ed. 229, the court said:

"This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and, as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed for by the complainant."

In *Bryan v. Kennett*, 113 U. S. 179, 195, 199, 5 Sup. Ct. 407, 28 L. Ed. 908, the Supreme Court recognized the right of the court to pass title to land within jurisdiction of the court as against minors, although the latter had been made defendants only by publication. So it has been held that the land of one made defendant by publication only may be subjected to condemnation proceedings for the benefit of a public improvement. *Huling v. Kaw Valley R. & Improvement Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045. It has also been held that a court having under its control a corporation for winding-up purposes may make an assessment on the stockholders pursuant to law for the payment of corporate debts, and that persons who are defendants only by publication will be bound by the assessment if they were, in fact, stockholders subject to the law under which the assessment was made, and that they would not be suffered in a collateral proceeding to question the propriety of the assessment itself, although such persons would be permitted to show in such collateral proceedings that they had transferred their stock and might litigate any matter bearing upon the extent or duration of their stockholding. *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518.

Under the foregoing authorities, and many others that might be cited, we are of the opinion that the defendants Young and wife are properly before the court under the publication ordered and made, and that they will be bound by whatever decree may be finally made in the cause.

It is proper to say that we do not consider important the attachment that was issued

and served on the supposed interest of Mrs. Young in the policy, inasmuch as the complainant asserted no debt against Young and wife, nor any right by which they could subject such interest to sale. The jurisdiction of the court over the res depends on other principles which have been fully stated. The publication, however, made under the attachment, served the useful purpose of not only notifying Young and wife of the existence of the suit, and of their duty to appear and defend, but also that the controversy was over a policy of insurance in the defendant company, stating the number of that policy. Thus on reading the notice they will be sufficiently informed of the necessity of appearing and defending any rights that they may wish to assert.

The result is that the decree of the Court of Civil Appeals is affirmed and the cause is remanded to the chancery court for further proceedings.

FANCHER, J. (dissenting). I cannot give assent to the proposition that the Texas defendant can be brought before the court by publication in this case. The insurance company is a nonresident corporation. It is before the court by service of process upon its agent in this state by virtue of a statute on the subject. The nonresident defendant has such right in the policy of insurance, or in the subject of litigation that it cannot be taken away from her unless the court can gain jurisdiction over her person.

The principle is well settled by all the courts in this country that no effective personal judgment can be rendered in one state against a nonresident defendant who is not personally served with process and does not appear. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 586; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *St. Clare v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372. All the authorities upon the subject of substituted process against a nonresident defendant recognize the right to affect his property, and in this manner bring him before the court, but only to the extent of his property situated within the jurisdiction of the court. The right to summon a party from his distant place of abode and compel him to submit to an adjudication of matters in another state lies only in the right to seize and affect his property located in the state. The law goes no further than this, and this far only upon the presumption that it is supposed a party will look after his property, and, when that is seized by the law, he is bound to take notice.

The case of *Selig v. Hamilton*, 234 U. S. 658, 34 Sup. Ct. 926, 58 L. Ed. 1523, discussed in the opinion of the majority, does not violate the principle above stated. That was a case affecting the right of a stockholder in a corporation and subjecting him to assessment for payment of debts and arose under

the Minnesota statute upon that subject. The corporation was properly before the court, and, of course, all matters affecting the corporation as such, and its property, consequently its stockholders, to the extent of their stock, could be adjudicated. It was held that the statute provided reasonable regulations for enforcing liability assumed by those who became stockholders under the laws of Minnesota. The assessment as to the amount thereof against the stockholders, including the propriety and necessity for same, might be made effective against nonresident stockholders, as well as those who were resident, after proper notice by publication or otherwise, as directed by the court. And in fixing the amount of such pro rata liability of stockholders the court would consider the expenses of the receivership, the amount of corporate assets available, the parties liable as stockholders, the nature and extent of such liabilities, considering the probable solvency or insolvency of the stockholders, and expenses in levying the rate upon all the parties. It was expressly held that in determining these matters the judgment of the court was not in the nature of a personal judgment, but the stockholders were deemed to be represented by the corporation itself, which was before the court. This upon the principle of the obligation assumed by virtue of the relationship of the stockholders to it. However, in order to give the stockholder the right to make any personal defense, this course of procedure did not preclude him from showing he was not a stockholder, or not a holder of as many shares as was alleged, or that he had a claim against the corporation, or any other defense personal to himself. In bringing the corporation before the court, the stockholders were necessarily before the court, inasmuch as the several shares owned by the stockholders compose the corporate body. The right to bring the stockholder before the court in the first instance, however, is upon the logical basis that, being a mere shareholder in the corporation, he was presumed to be represented by the general corporate body, and he was before the court upon the same principle that a nonresident may be brought before the court in any other action to the extent that he has property subject to seizure within the jurisdiction of the court.

The New Jersey case of *Amparo Mining Company v. Fidelity Trust Co.*, 74 N. J. Eq. 197, 71 Atl. 605, cited in the majority opinion, likewise falls within the same rule. The court had the corporation before it, the stock of which was owned in part by the nonresident corporation sought to be brought before the court as a defendant. It was held that the stock of the corporation before the court could be ordered before it at any time. Manifestly this was true, since the stock is but a share in the concern itself which was before the court. Having the corporation before the court, it had the several shares with-

in its control. These shares had been issued in the state of New Jersey, and the principal corporation was a resident of that state, and was before the court of the state of its residence.

I do not consider the case of *Wilcox v. Morrison*, 9 Lea, 700, as authority here. It seems clearly distinguishable to my mind. The judgment in Tennessee was against a resident of Tennessee. Wilcox, the judgment creditor, had transferred this judgment to a trustee in Virginia. Afterward Wilcox sought in equity to assert his rights to this Tennessee judgment on the ground that the Virginia debts had been settled, and it was held he could bring before the court the non-resident trustee to whom the judgment had been assigned. This was correct upon the principle that the nonresident trustee would have notice of matters concerning this judgment just as he would be presumed to look after property in Tennessee. His rights under the judgment could only be asserted here, and he was forced to take notice that the court of equity, having power to control this judgment, was asserting this power. It was very much as if he were a party to the judgment sought to be affected, because that judgment had been assigned to him by the plaintiff.

I do not regard the matters affecting this Texas defendant in the present case as coming within that large class of cases which are not strictly actions in rem, but are often spoken of as actions quasi in rem. These actions quasi in rem only seek to subject certain property of the owner to the discharge of the claim asserted, such as attachment cases, actions for the enforcement of mortgages and other liens, and all other proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff. They differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected so that citation to him is required, and the judgment therein is only conclusive between the parties.

The state has power over property within its limits owned by nonresidents, and it is by virtue of this ownership that tribunals can inquire into the nonresident's obligations to its citizens. The inquiry in such case can only proceed so far as may be necessary for the disposition of the property. If the nonresident possesses no property within the state, there is nothing upon which its tribunals can act. *Pennoyer v. Neff*; *Freeman v. Alderson*, supra.

Now in the present case, as I view it, the Texas defendant has no property within this state. She is not a stockholder of the insurance corporation. She has no such interest in the affairs of the corporation as that she will be presumed to take notice of anything respecting the court's action as to the liability of the insurance company.

It is said that the res is before the court in this case. To my mind, no res is here. The claim is not the res. The action is entirely personal. Suit upon the subject-matter of this litigation might be brought in any state so far as the insurance company is concerned, where it might be served with process through its proper agents. The Texas defendant might bring her suit involving her rights in any court in any state having such jurisdiction. Furthermore, the property of the insurance company is not before the court, nor involved in the suit. Then upon what principle must she take notice of a suit against the corporation here in Tennessee? The policy of insurance is like a note. It is not property. It is only the evidence of the obligation. The obligation itself is like a thing in the air which may fly anywhere. The suit is to change or declare a liability of the insurance company personal in its nature. Can it be that a non-resident having an interest in that contract must take notice of the proceeding and appear because the insurance company is before the court? Suppose this action had been brought in any other of the many states where the insurance company, no doubt, does business and has agents; will Mrs. Young, the nonresident having an interest in the obligation of insurance, be forced to take cognizance and appear, upon mere constructive notice? We think not.

It was suggested in argument that under modern insurance the policy holder has a right to share in certain surplus arising from the earnings on money paid in by the policy holder as premiums in excess of the amount necessary to carry the actual risk. If this be so, it is still a personal relationship arising from the contract of insurance, the main feature of which is the insurance, not as an investment or shareholder in the company, but to indemnify the holder against the loss. But, if the policy holder, under modern insurance, has certain rights in the earnings of the company, this suit is not to change or affect the status of policy holders in general upon the principle that they hold a position analogous to stockholders. In point of fact, such policy holders do not stand in such relationship that a suit against the company will authorize the court to deal with them upon the grounds held in *Amparo Mining Company v. Fidelity Trust Co.* and *Selig v. Hamilton*, supra, that, having the corporation before the court, the shares therein are subject to its orders. This is not a suit to change the relationship of the shareholders to the corporation. It is a suit entirely of a personal nature and involving the rights under one policy alone.

The publication has its office, but it does not give actual notice. The party sought to be brought before the court in reality is before the court by the publication, not alone, but in conjunction with the assertion by the

court of control over the property or res within its jurisdiction.

Webster defined "due process of law" in his argument in the Dartmouth College Case as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Within that fundamental right, how can it be said that a court proceeds to hear and give trial when no actual personal notice is given, and when no property of the defendant is affected within the control of the court, which will afford presumptive notice?

The whole proposition reduces to the question of notice. I am unable to see how notice can be had as here attempted, within the rules governing the action of courts exercising power only within a given jurisdiction, within which the defendant does not come. I therefore respectfully dissent from the opinion of the majority on this question, believing the chancellor was correct sustaining the demurrer of the insurance company.

BUCHANAN, J. (dissenting). "Jurisdiction has been well defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law and to carry his sentence into execution." *Swift & Co. v. Warehouse Co.*, 128 Tenn. (1 Thomp.) 82-100, 158 S. W. 480; Cyc. vol. 11, p. 660. The primary question in the present case is whether such power was in the chancery court of Davidson county, in respect of the right of Mrs. Young, which it was the purpose of the bill to have the court adjudicate by its decree. His honor the chancellor held that, under the facts disclosed by the bill, no such jurisdiction or power existed in his court, and, in my opinion, that holding was correct. The right sought to be affected by the decree was one which existed wholly under contracts referred to in the bill. The first of these was a contract between complainant and the insurance company; the second a contract of assignment between complainant and his mother by which complainant made an assignment, absolute on its face, of all his rights under the insurance contract to his mother. The mother died, and, by operation of law, all her rights under the absolute assignment were cast upon her distributees; Mrs. Young being one of this class. The bill was filed for the purpose of reforming the contract between complainant and his mother in such manner as to wholly defeat the right of Mrs. Young and the other distributees, under the assignment and descent cast, as above stated.

Now the right of Mrs. Young, under the foregoing contracts, is wholly incorporeal in character. It is a right in property of the same character. Her right is one which inheres in her person. It is attached to no tangible property, and it is capable of being brought into judgment only by personal serv-

ice of process upon her, affording notice to her that her right is in question, and opportunity to defend the same. It is not pretended that such service of process was had upon her. She was beyond the jurisdiction of the court when the bill was filed, and when the court sustained the demurrer to its jurisdiction. She was at the times aforesaid a resident of the state of Texas. If the case were different in its facts, as, for instance, if the bill had sought to subject, under the decree of the court, a right to real property within the local jurisdiction of the court, or a right to tangible personal property located within the jurisdiction of the court, or other character of property so situated that the court assuming the jurisdiction would be in a position to protect the rights of parties, the court might well have assumed jurisdiction. In such classes of cases the court can lay its hand upon the property, and thereby draw into its jurisdiction the rights of parties attached to the particular property over which the court has assumed jurisdiction. But no such case is presented here. The property right of Mrs. Young is wholly intangible, and is attached to no property which by any proceeding in this cause has or can be brought within the local jurisdiction of the court. Her property right sought to be reached by the decree is inseparable from her person, except by her voluntary surrender of it with or without consideration, her death, or the judgment or decree of a court of competent jurisdiction founded on her voluntary appearance or process personally served upon her.

"The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit * * * is a mere nullity, and incapable of binding such persons or property in any other tribunal.'" *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

As I see this suit, it was not a proceeding in rem, nor even one quasi in rem, but was purely a personal action involving only personal and intangible property rights where the jurisdiction of the subject-matter of the suit could only be acquired by personal service of process upon the parties in interest. In *Pennoyer v. Neff*, supra, it was said:

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

On the grounds above stated, and those advanced in the dissenting opinion of Mr. Jus-

tice FANCHER, in which I concur, I respectfully dissent from the opinion of the majority of the court in this cause.

COHN v. LUNN.

(Supreme Court of Tennessee. Feb. 1, 1916.)

1. BILLS AND NOTES \S 106, 375—VALIDITY—ILLEGAL TRANSACTIONS.

A note executed in violation of a penal statute is absolutely void not only between the parties, but even as against an innocent holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 219, 225-232, 971-981; Dec. Dig. \S 106, 375.]

2. BILLS AND NOTES \S 107—RECITAL OF CONSIDERATION—NOTE FOR PATENT RIGHT.

Where a party sold defendant a quantity of patented articles and granted him an exclusive right to sell such articles, and such others as he might order, in certain territory, and in consideration of the articles purchased, and the exclusive right to sell, defendant executed his note for \$495, the note was not invalidated by noncompliance with Acts 1897, c. 77, \S 1, making it unlawful to take or receive any note for the sale of a patent right or any interest therein unless it shall clearly appear upon the face of the note that it is given in the purchase of a patent right or interest therein, as a license to sell patented articles conveys no interest in the patent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 227; Dec. Dig. \S 107.]

3. BILLS AND NOTES \S 107—PENAL STATUTES—CONSTRUCTION.

Acts 1897, c. 77, requiring notes given for the sale of a patent right or interest therein to show on their face that they are so given, and making a violation thereof a felony, is a penal act, and must be strictly construed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 227; Dec. Dig. \S 107.]

Certiorari to Court of Civil Appeals.

Action by Sam Cohn against J. N. Lunn. A judgment for defendant was affirmed by the Court of Civil Appeals, and plaintiff brings certiorari. Reversed, and judgment entered for plaintiff.

Nathan Cohn, of Nashville, for plaintiff.
Jno. T. Allen, of Nashville, for defendant.

NEIL, C. J. On November 9, 1911, one Notman sold to defendant 333 "fuel savers," patented articles. At the same time, as "territorial agent" of his company, the owner of the patent, he arranged to let defendant have an exclusive right to sell these articles and such others as he might order, in the state of Tennessee, a writing being delivered at the time, duly signed by the owner of the patent, and delivered to defendant. In consideration of the articles purchased and the exclusive right to sell in Tennessee, defendant executed to Notman his note for \$495, due at a future date. This note was within a day or two thereafter sold by Notman to the plaintiff, the latter purchasing for a valuable consideration and without notice of any infirmity in the instrument.

The note not being paid at maturity, plain-

tiff sued defendant before a justice of the peace. After judgment before that officer the case was taken by appeal to the circuit court of Davidson county, and judgment was there rendered in favor of defendant. On appeal to the Court of Civil Appeals that judgment was affirmed. The case was then brought here under the writ of certiorari.

It is insisted in support of the judgment that the note was absolutely void, because executed in violation of chapter 77 of the Acts of 1897 of this state.

Section 1 of this act reads:

"Hereafter it shall be unlawful for any person, either in his own behalf or in a representative capacity to take or receive for the sale of a patent right or any interest therein, a note or other written security given for such right or any interest therein unless it shall clearly appear upon the face of the note or other security that the same is given in the purchase of a patent right or an interest therein."

Section 2 makes the violation of section 1 a felony punishable by imprisonment in the penitentiary for not less than one nor more than five years.

[1] It is insisted that, inasmuch as the note in question was executed in violation of a penal statute, it was absolutely void, not only between the parties, but even as against an innocent holder.

It is clear that a note given in violation of a penal statute would be void as between the parties. *Webb v. Tarver and Wife*, 2 Tenn. Chan. App. 366; *Pinney v. First National Bank of Concordia*, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 381, and note.

In *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918, it was held that a note given for a gaming consideration was void in the hands even of an innocent holder; but in the later case of *Bank v. Chapman*, 122 Tenn. 415, 423, 424, 123 S. W. 641, it was said that *Snoddy v. Bank* was based on an express statute, making the contract void in direct terms.

[2] But it is unnecessary to go into this phase of the case. The real question to be determined is whether the facts show that Notman or his company assigned to defendant a patent right or any interest therein. It is clear that what operated as a consideration for the note consisted only of the 333 fuel savers, and an exclusive license to sell in Tennessee. License to sell patented articles does not convey any interest in the patent. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923.

In that case, after referring to the fact that under the federal laws the grant to the patentee, his heirs and assigns, is of the exclusive right to make, use, and vend the invention, etc., it is said:

"The monopoly thus granted is one entire thing, and cannot be divided into parts except as authorized by those laws. The patentee, or his assigns, may, by instruments in writing, assign, grant and convey, either: (1) the whole patent, comprising the exclusive right to make,

use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. * * * Any assignment or transfer short of one of these, is a mere license, giving the licensee no title to the patent, and no right to sue at law in his own name for an infringement."

Among other matters in that case, the court considered an instrument by which the owner of the patent granted to another "the sole and exclusive right and license to manufacture and sell fountain pen-holders containing the said patent improvement throughout the United States." The court said that this did not include the right to use such pen-holders, at least if manufactured by third persons, and was therefore a mere license, and not an assignment of any title.

In another part of the opinion the court said the grant of an exclusive right under the patent within a certain district which did not include the right to make and use and the right to sell was not the grant of a title in the whole patent right within the district, and was therefore only a license.

"Such, for instance," said the court, "is a grant of the full and exclusive right to make and vend within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. * * * So is a grant of the exclusive right to make and use, but not to sell, patented machines within a certain district. * * * So is an instrument granting the sole right and privilege of manufacturing and selling patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others."

[3] Our act of 1897 above referred to forbids the taking of a note "for the sale of a patent right or any interest therein," unless it shall appear upon the face of the note that it was given "in the purchase of a patent right or an interest therein." The language quoted must be construed in its technical sense, which we have found does not include a license to sell patented articles. We say it must be construed strictly because it is a penal act. For the purposes of the present case it must be construed as if one were before us under an indictment charging him with a violation of this statute.

We are fully aware of the fact that the evil sought to be remedied by the Legislature was the practice of frauds by wandering vendors of patents and interests in patents. It may be also that the purpose was to reach instances wherein merely the sale of territory was made under such a license as we have before us in the present case. If so, the language is not sufficient to cover it, and we cannot stretch the statute to reach the particular case. In the state of Arkansas the evil has been remedied by an act which, in direct terms, makes the note void in the hands of an innocent holder, and this was held constitutional in *John Woods & Sons v.*

Carl, 203 U. S. 358, 27 Sup. Ct. 99, 51 L. Ed. 219. Whether the Arkansas statute would cover a state of facts such as we have before us we do not consider, but only refer to the provision making void the negotiable instrument in the hands of every one. There is a somewhat similar case arising under a Kansas statute. *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137. The latter act however, does not provide that the note shall be void in the hands of an innocent holder.

On the grounds stated, we are of the opinion that the judgment of the Court of Civil Appeals was erroneous, and must therefore be reversed, and a judgment will be entered here in favor of the plaintiff for the amount of the note and interest, and for the costs, and a reasonable attorney's fee provided for in the face of the note.

LOUISVILLE & N. R. CO. v. McKAY & MORGAN.

(Supreme Court of Tennessee. Jan. 29, 1916.)

1. CARRIERS §83 — CARRIAGE OF GOODS — BILL OF LADING — DELIVERY.

A carrier is only authorized to deliver goods upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril, and renders it liable to the holder of the genuine bill.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 308-315; Dec. Dig. §83.]

2. CARRIERS §71—CARRIAGE OF GOODS—RELIEF—SURPRISE AND IMPOSITION.

Complainant railroad, which delivered a carload of beans to defendant upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the defendant, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which another party is induced to act is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 240-242, 247, 256, 257, 363, 561; Dec. Dig. §71.]

3. CARRIERS §71—CARRIAGE OF GOODS—RELIEF—LOSS BETWEEN INNOCENT PARTIES.

Complainant in such case might recover on the principle that, where one of two innocent parties must suffer, that one by whose act the loss was occasioned must bear it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 240-242, 247, 256, 257, 363, 561; Dec. Dig. §71.]

4. PRINCIPAL AND AGENT §146—LIABILITY OF AGENT OF UNDISCLOSED PRINCIPAL.

Agent innocently presenting a false bill of lading made by his principal, receiving goods from complainant carrier, and remitting proceeds to his principal, without disclosing his agency to the complainant, held personally liable for the goods received.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 521-527; Dec. Dig. §146.]

5. CARRIERS §71 — DELIVERY OF GOODS — FRAUD—ACTION.

Where a carrier through mistake or fraud has been induced to deliver goods to the wrong

person, it may maintain an action against such person for damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 240-242, 247, 256, 257, 363, 561; Dec. Dig. § 71.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Bill by the Louisville & Nashville Railroad Company against McKay & Morgan. Decree for complainant, and defendants appeal. Affirmed.

Hume & Cornelius, of Nashville, for appellants. F. M. Bass and Keeble & Seay, all of Nashville, for appellees.

GREEN, J. This bill was filed by the Louisville & Nashville Railroad Company to recover from the defendants the value of a car of beans delivered by the complainant to defendants on the faith of a bill of lading which afterwards turned out to be a forgery. From a decree in favor of complainant, defendants have appealed to this court.

The defendants were merchandise brokers in Nashville, correspondents of the firm of Botsford & Barrett, commission merchants of Detroit. The defendants ordered a car of beans from Botsford & Barrett, and the latter procured a shipment of such car to be made by the Farmers' Grain & Hay Company of Applegate, Mich. The shipment was made by the Farmers' Grain & Hay Company to their own order at Nashville, Tenn., with directions to notify McKay & Morgan.

The usual order notify bill of lading was issued to the Farmers' Grain & Hay Company by the agent of the Pere Marquette Railroad Company at Applegate, Mich., and the shipper attached this bill of lading to a draft made upon Botsford & Barrett at Detroit. This draft was forwarded through the shipper's local bank to a bank in Detroit and presented to Botsford & Barrett, but it was not paid. After being held in Detroit for some time, the draft was returned to the shipper at Applegate, Mich., together with the original bill of lading thereto attached.

Meanwhile the car of beans had been forwarded to Nashville. Botsford & Barrett made up a spurious bill of lading which was attached to a draft on McKay & Morgan and sent on to Nashville for collection. McKay & Morgan refused to pay the draft because it had not been authorized by them. Some telegraphic correspondence was had between the parties in Nashville and the parties in Detroit, and the Nashville bank was directed to release the bill of lading to McKay & Morgan without payment of the draft.

McKay & Morgan took this forged bill of lading to the Louisville & Nashville Railroad Company in Nashville, and upon presentation thereof received the car of beans. They sold the beans to their customers in Nashville and remitted the proceeds to Botsford & Barrett at Detroit.

McKay & Morgan acted innocently in the matter, believing that their bill of lading was

genuine. It likewise appears that the Louisville & Nashville Railroad Company thought the bill of lading was genuine, and there is no question but that the railroad company and the defendants both acted in perfect good faith.

As stated above, the draft to which the genuine bill of lading was attached being finally returned to the Farmers' Grain & Hay Company at Applegate, Mich., that company then undertook to trace the car which had been shipped to Nashville. Upon investigation the facts stated above as to the delivery of the car were ascertained by the shipper at Applegate.

The shipper then brought suit against the Louisville & Nashville Railroad Company in the federal court at Detroit for the value of the contents of the car, and obtained judgment against the railroad company, which the latter paid, taking an assignment of the claim of the shipper to the beans. The suit in Detroit was really settled by the complainant railroad company without any particular fight; it considering that resistance was useless. The complainant, however, notified defendants of the claim made against it by the shipper and invited defendants to undertake a settlement of the matter.

Upon the foregoing state of facts the chancellor held that the complainant was entitled to relief, and we think his conclusion was correct.

[1] In so far as the shipper's claim was concerned, the complainant railroad company had no defense. The company was only authorized to deliver this car upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding was at the peril of the company. *Bank v. Railroad*, 128 Tenn. 530, 161 S. W. 1144; *Railroad v. Fidelity & Guaranty Co.*, 125 Tenn. 674, 148 S. W. 671, and cases cited.

We think no question can be made upon the propriety of the action of complainant in settling the suit of the shipper without contest. Obviously no valid defense could have been interposed to this suit. *Bigham v. Madison*, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267; *Callis v. Cogbill*, 9 Lea, 138.

[2] The right of complainant to recover against the defendants in this case may be rested upon well-settled principles of equity jurisprudence.

If a party innocently misrepresents a material fact by mistake upon which another party is induced to act, it is as conclusive a ground for relief in equity as a willful and false assertion; for in either case it operates as a surprise and imposition on the other party. In such case the party must answer for his misrepresentations, even though innocently made. *Phillips v. Hollister*, 42 Tenn. (2 Cold.) 269; *Bankhead v. Alloway*, 46 Tenn. (6 Cold.) 56, 75; *Lewis v. McLemore*, 18 Tenn. (10 Yerg.) 206.

It cannot be doubted that the defendants would be liable in this case if they had inten-

tionally procured this consignment upon the forged bill of lading, and, under the authorities above cited, it makes no difference that they acted innocently in the matter.

[3] The suit of complainant is likewise maintainable on the principle that, where one of two innocent parties must suffer, he by whose act the loss was occasioned must bear it. This rule is of frequent application in controversies with reference to unauthorized deliveries by carriers. *Bank v. Railroad*, 128 Tenn. 530, 161 S. W. 1144, and cases cited.

[4] Defendants did not divulge the fact that they were acting as agents for others when they procured this car of beans from the carrier, and must therefore be held as principals in the transaction. Although they were mere selling agents for Botsford & Barrett and turned over the entire contents of the car to certain Nashville merchants, they did not disclose their principals in their dealings with the carrier, and must be held personally liable. *Siler v. Perkins*, 126 Tenn. 380, 149 S. W. 1060, 47 L. R. A. (N. S.) 232, and authorities cited.

Quite an able argument is made in behalf of defendants founded on the cases of *Fargason v. Ball*, 128 Tenn. 137, 159 S. W. 221, 50 L. R. A. (N. S.) 51, and *Roach v. Turk*, 9 Heisk. 708, 24 Am. Rep. 360.

In these cases it was held that cotton factors at Memphis who received cotton from ostensible owners and sold the cotton and turned the proceeds over to such ostensible owners could not be held as for a conversion by parties in other states who really owned or had mortgage liens on the cotton.

In *Fargason v. Ball*, supra, it is recognized that the rule announced in these cases is in conflict with considerable authority, but the court found it necessary to follow *Roach v. Turk*, supra, because of the peculiar geographical location of some of our cities, and the fact that the bulk of their business is transacted in other states. The cotton business at Memphis particularly has attained great proportions and has been conducted on the faith of the law as stated in *Roach v. Turk*, supra, and the court was unwilling to adopt a different rule at this late date.

In neither of the cotton factor cases, however, did the factor take any active part in procuring the merchandise from the owner's agent. There was no misrepresentation by the factor, albeit innocently made. Possession was not obtained upon the faith of any forged document presented by the factor, and this case is therefore readily distinguishable from *Fargason v. Ball*, and *Roach v. Turk*, on its facts.

We do not think it desirable to extend the doctrine of *Roach v. Turk*, and *Fargason v. Ball*, to cover cases involving such circumstances as are here presented.

[5] The general rule is that, where a carrier has through mistake or fraud been induced to deliver goods to the wrong person, he may

maintain action against such person for damages. *Sword v. Young*, 89 Tenn. 128, 14 S. W. 481, 604; *Walker v. L. & N. R. R. Co.*, 111 Ala. 233, 20 South. 358; 6 Cyc. 476.

We think it best to adhere to the general rule in the case before us, and the decree of the chancellor is accordingly affirmed.

JOHNSON CITY v. TENNESSEE EASTERN ELECTRIC CO.

(Supreme Court of Tennessee. Jan. 10, 1916.)

1. EQUITY — 219 — DEMURRER.

Defenses not appearing on the face of complainant's bill cannot be taken advantage of by defendant on its demurrer.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 496, 498-500; Dec. Dig. — 219.]

2. STATUTES — 30 — ENACTMENT — VETO BY EXECUTIVE — EFFECT OF "ADJOURNMENT."

Const. art. 3, § 18, provides in part that if the Governor shall fail to return any bill with his objections within 5 days (Sundays excepted) after presentment to him, it shall become a law without his signature, unless the General Assembly, by adjournment, prevents its return, in which case it shall not become a law. *Held*, that "adjournment," as used, means final adjournment of both houses, though as the word is generally used it may be intended to signify either a temporary or a final adjournment, so that a bill which was held by the Governor for 33 days before its return vetoed, for 30 days of which both houses of the General Assembly were adjourned temporarily pursuant to joint resolution, became a law, as it might have been returned during adjournment within 5 days with veto to an agent of the House of Representatives, in which the bill originated, such as the clerk.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 32; Dec. Dig. — 30.]

3. STATUTES — 32 — ENACTMENT — VETO BY EXECUTIVE — RETURN OF BILL.

A return of a bill by the Governor, with his objections thereto in writing, made to the committee on enrolled bills of the house of origin or to any member thereof, is a good return of the bill and objections within Const. art. 3, § 18, providing that the Governor's failure to return the bill with objections within 5 days, Sundays excepted, after presentment to him, causes it to become a law without his signature, unless adjournment of the General Assembly prevents such return.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 35; Dec. Dig. — 32.]

4. STATUTES — 30 — ENACTMENT — RETURN BY GOVERNOR — STATUTE — "ADJOURNMENT."

Shannon's Code, §§ 227-230, touching the procedure in regard to bills after enrollment, does not amount to a construction of Const. art. 3, § 18, providing that failure of the Governor to return a bill within 5 days after presentment to him, shall cause it to become a law without his signature, unless return is prevented by adjournment, in conflict with the construction in the section of "adjournment" as meaning "final adjournment."

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 32; Dec. Dig. — 30.]

Appeal from Chancery Court, Washington County; Hal H. Haynes, Chancellor.

Suit by the City of Johnson City against the Tennessee Eastern Electric Company. From a decree that complainant was entitled

to the writ of mandamus sought by its supplemental bill, defendant appeals. Affirmed.

Thad A. Cox, of Johnson City, for appellant. Geo. C. Sells, of Johnson City, for appellee. Frank M. Thompson, Atty. Gen., for the State.

BUCHANAN, J. The original bill was filed herein by the city of Johnson City, claiming certain rights under House Bill No. 19 of the General Assembly of 1915, and predicated said rights upon the enactment of said bill into law, according to the requirements of the Constitution. The Tennessee Eastern Electric Company demurred, the chancellor overruled the demurrer and decreed that House Bill No. 19 was a law, and that complainant was entitled to the writ of mandamus sought by its supplemental bill. The Electric Company appealed and has assigned errors in this court.

[1] We need not discuss the second and third assignments of error. They are predicated on the existence of certain defenses which do not appear on the face of complainant's bill, and which defendant cannot have advantage of by demurrer. The only matter available to defendant under its demurrer was its assault on the validity of House Bill No. 19. A copy of that bill is as follows:

"House Bill No. 19.

"(Mr. Barnes). An act to authorize the president and secretary of the state board of education to certify expenses for lighting the State Normal at Johnson City, and to provide for the payment of such expenses.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee that the president and secretary of the state board of education be and they hereby are authorized and directed to certify to the comptroller of the treasury the necessary expenses for lighting the State Normal School at Johnson City from the final passage of this act, provided that payment for current shall not exceed five cents per kilowatt hour.

"Sec. 2. Be it further enacted, that the comptroller of the treasury shall disburse the moneys for the expenses so certified in the manner prescribed by law for the disbursement of money to charitable institutions.

"Sec. 3. Be it further enacted that this act take effect from and after its passage, the public welfare requiring it.

"Passed March 30th, 1915.

"Speaker of the House of Representatives.
"William P. Cooper,
"Albert E. Hill,

"Speaker of the Senate."

Appearing under the above is the notation:

"This bill vetoed by the Governor, and veto sustained by the House of Representatives."

The following is a copy of a message from the Governor addressed to the Speaker of the House of Representatives setting out the objections of the Governor to House Bill No. 19:

"To the Speaker of the House of Representatives. I am returning House Bill No. 19 without my approval, for the reason that the contract made and entered into by and between Johnson City and the state board of education expressly provided that free lights and water would be furnished the school in the event the

same was located at that place. Therefore the furnishing of lights free to this school was a part of the consideration agreed to be paid by Johnson City, for the location of the same.

"Tom C. Rye, Governor.

"May 4, 1915."

House Bill No. 19 originated in the House and passed the House and Senate in all respects as required by the provisions of section 18 of article 2. It was then signed by the respective speakers in open session, and the fact of such signing noted on the journal. The date of its passage in the House was March 30, 1915. It was then presented to the Governor, and this occurred on April 1, 1915. The bill remained in the hands of the Governor continuously from the last above date to May 4, 1915, on which day his excellency returned the bill to the house in which it originated with his objections to it in writing set out supra. The House failed again to pass the bill, notwithstanding the objections of the executive.

On April 3, 1915, both houses of the General Assembly, by joint resolution adjourned, not sine die, but to meet again on May 3, 1915, on which latter date that body again assembled pursuant to adjournment.

[2, 3] From the foregoing it is apparent that excluding the day the Governor received the bill and including the day it was returned with his objections to the house in which it originated, this bill was continuously in his hands for the space of 33 days. Under the facts which are not in dispute the controversy between the parties is narrowed to a single question. What is meant by "adjournment" in section 18, art. 3, of our Constitution?

At this point two rival contentions arise. First, appellant insists that, under section 18, article 3, of our Constitution of 1870, the return of a bill with his objections thereto in writing, which is required to be made by the Governor, if he refuse to sign it, must be made to the house in which the bill originated, at a time when there is present in that house a quorum of its members competent to a reconsideration of the bill or other transaction of legislative business. Second, appellee insists that such return may be made to some officer, agent, or employé of the house chargeable, within the meaning of the Constitution, with the duty of placing before the house, for its reconsideration, the returned bill, and the objections of the Governor thereto, whether a quorum of the membership of the house be present or not at the time the bill with the objections of the Governor be placed in the hands of the officer, agent, or employé of the house.

Section 18 of article 3 is as follows:

"Every bill which may pass both houses of the General Assembly, shall before it becomes a law, be presented to the Governor for his signature. If he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it with his objections thereto, in writing, to the house in which it originated; and said house shall cause said

objections to be entered at large upon its journal, and proceed to reconsider the bill. If after such reconsideration a majority of all the members elected to that house shall agree to pass the bill notwithstanding the objections of the executive, it shall be sent, with said objections, to the other house, by which it shall be likewise reconsidered. If approved by a majority of the whole number elected to that house, it shall become a law. The votes of both houses shall be determined by yeas and nays, and the names of all the members voting for or against the bill shall be entered upon the journals of their respective houses. If the Governor shall fail to return any bill, with his objections within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly, by its adjournment, prevents its return, in which case it shall not become a law. Every joint resolution or order (except on questions of adjournment), shall likewise be presented to the Governor for his signature, and before it shall take effect shall receive his signature; and on being disapproved by him shall, in like manner, be returned with his objections; and the same, before it shall take effect, shall be repassed by a majority of all the members elected to both houses, in the manner and according to the rules prescribed in case of a bill."

It is manifest from a reading of the foregoing section that if the insistence of the appellant be the true postulate from which we should proceed, that is to say, if the return must be made to the house when a quorum of its membership is present, then the meaning of the phrase in the above section, "unless the General Assembly by its adjournment prevents its return" is that any adjournment which would result in the absence of a quorum would be such an adjournment as would prevent the return of the bill, and therefore it would result that the Governor could not return a bill during adjournment if the house in which it originated had adjourned for midday luncheon, or had adjourned at night until the following morning, or had adjourned for any longer period of time, or had finally adjourned.

If we should adopt the above conclusion it would necessarily result in a holding that the time during which the house in which the bill originated was temporarily adjourned could not be counted against the time limiting the Governor's right or power to return the bill with his objections to 5 days from the time it was presented to him, and therefore in order that the Governor might at times be advised of the amount of time within which the power was still in him to so act in respect of any particular bill, it would be necessary that he be informed of the length of each adjournment, and that he add the space of each to the 5 days' time referred to above. We think such a construction would result in many evils and abuses, and that it is not the one intended by the framers of section 18 of article 3.

The sound insistence is the one made by appellee. "Adjournment," as used in the phrase above quoted from the Constitution, means final adjournment. The framers of the Constitution must have known that each

house of the General Assembly which would meet after the adoption of the Constitution of 1870 would have a committee on enrolled bills. Such a committee is necessary to the orderly administration of legislative business. Such a committee existed in each house of the General Assembly of Tennessee prior to the adoption of the Constitution of 1870, and has existed since the adoption of that Constitution. Soon after the adoption of the Constitution of 1870, in fact at the session of the General Assembly of the year 1871, legislation was passed, which now appears as sections 227 to 230, inclusive, of Shannon's Code. These sections are as follows:

"Sec. 227. Every bill, joint resolution, or order, except on questions of adjournment, shall, after the same has been passed, enrolled, and signed by the speakers of both houses of the General Assembly, be presented by the committee on enrolled bills of that house wherein such bill, joint resolution, or order originated, to the Governor for his signature; and said committee shall report that they have presented the bill, joint resolution, or order to the Governor for his signature, and the date of such presentation, which report shall be entered on the journal of that house to which such committee belongs: Provided, that no bill, joint resolution, or order shall be presented to the Governor as aforesaid until the time for moving a reconsideration shall have expired, unless expressly ordered by that house wherein such bill, joint resolution, or order originated: And provided further, that the speaker of the Senate shall first sign all bills and joint resolutions originating in the Senate, and the speaker of the House of Representatives shall first sign all bills and joint resolutions originating in the House of Representatives.

"Sec. 228. If the Governor shall fail to return any bill, joint resolution, or order, with his objections, within five days (Sundays excepted) after it shall have been presented to him, it shall be the duty of the committee on enrolled bills of that house wherein such bill, joint resolution, or order originated to cause said bill, joint resolution, or order forthwith to be re-enrolled; and the same shall thereupon be signed by the respective speakers of each house, who shall annex and sign the following certificate:

"This bill (joint resolution or order) having been presented to the Governor for his signature on the _____ day of _____, and the Governor having failed to return it within the time prescribed by law, the same is hereby declared to have become a law (or, in case of a joint resolution or order, the same is hereby declared to have taken effect). This _____ day of _____, 18—.

"_____,
"Speaker of the House of Representatives.

"_____,
"Speaker of the Senate."

"Sec. 229. If the Governor approve the bill, joint resolution, or order, he shall write upon the same, to the left of and below the signature of the speaker of the two houses, the fact and date of his approval, as follows: 'Approved _____, 18—,' and shall sign the same as follows: '_____, Governor.'

"Sec. 230. When any bill, joint resolution, or order shall have been returned duly signed by the Governor, or shall have been passed over his veto, or shall otherwise become a law, the committee on enrolled bills of that house wherein such bill, joint resolution, or order originated, shall forthwith file the same in the office of the Secretary of State, and shall report the fact and date of such filing, which report shall be entered upon the journal."

Beyond question a return made by the Governor of a bill with his objections thereto in writing to the committee on enrolled bills of the house of origin, or to any member thereof, would be a good return of the bill and objections within the meaning of the Constitution. The committee, or any member of it *virtute officii*, would be under the duty of placing before the house where the bill originated, when a quorum was present therein, the bill with the objections of the Governor thereto, to the end that the bill might be reconsidered by that house, and if passed by it, and passed by the other house, notwithstanding the objections of the executive, it might be dealt with by the committee as provided by section 230 of Shannon's Code. Furthermore, we think such a return might properly be made within the meaning of the Constitution to the clerk of the house in which the bill originated. He would be chargeable by reason of his office or employment with the duty of informing the house, when a quorum was present, of the fact that the Governor had returned the bill with his objections thereto. The house in which a bill originates is a component part of the General Assembly. The General Assembly is one of the three distinct departments of government, under our Constitution. See article 2, § 1.

The house in which a bill originates is a parliamentary body, and must, so far as the manual possession of its journals, bills and enrolled bills, resolutions and the like, is concerned be represented by agents. It has custody of such things through its agents, and although a house in which a bill originated might be in open session with a quorum present, it could only gain knowledge of the fact that the bill was returned by the Governor, with his objections, through the manual act of some agent for the house, or member acting in that capacity. In other words, if a bill should be returned by the Governor, with his objections, to the house in which it originated, while the house was in open session, with a quorum present, and ready to reconsider the bill, the messenger from the Governor, or the Governor himself, if he should return the bill in person, would doubtless deliver manual possession of the bill to the clerk of the house, to the speaker of the house, or to some member of the committee on enrolled bills, and by means of the individual agency so selected, the house would gain intelligence of the fact that the bill had been returned, and of the substance and meaning of the objections of the Governor returned with the bill. These considerations demonstrate that it could not have been the intent of the framers of section 18 of article 3 that the return of the bill, with the objections of the Governor, could only be made while the house in which the bill originated was in open meeting with a quorum present. Nothing could be accomplished by a return of this character which would not be equally

well accomplished in any one of the other modes above indicated. The intent of the framers of the Constitution was that the Governor should have 5 days' time within which to consider the bill and to determine whether he would approve and sign the bill, or refuse to sign it, and return it with his objections to the house in which it originated. If the framers of the Constitution had intended that the Governor should have a longer time within which to perform those duties, that intent would no doubt have been made to appear in plain terms.

Only one contingency can save a bill from becoming a law, where the Governor fails to return it, with his objections, to the house where it originated, within the time limited; "the same shall become a law without his signature, unless the General Assembly, by its adjournment, prevents its return, in which case it shall not become a law." Such is the unmistakable mandate of the Constitution. House Bill No. 19 was not returned during the time limited within which power was vested in the Governor to return it with his objections; its return was not prevented by final adjournment of the Assembly; therefore the bill became a law at the expiration of the time limited, and its subsequent return by the Governor to the House, and any action on it taken by the House must be regarded as nullities. When the bill became a law it was the duty of the committee on enrolled bills to deal with it as required by the provisions of sections 228 and 230, Shannon's Code.

In support of the conclusions above reached it may be noted that section 18 of article 3 will not bear the construction that the adjournment of the house in which the bill originates, is sufficient to prevent the return of a bill with the objections of the Governor. To work that result both houses must adjourn; the "General Assembly" must adjourn; there must be an end of the session during which the bill originated. A session of the General Assembly is an entirety within the meaning of our Constitution. If it be a regular session its beginning is fixed by the Constitution, section 8, article 2; and the session terminates when both Houses composing it shall have adjourned *sine die*. If the General Assembly be convened into session by a proclamation of the Governor, as it may be under section 9 of article 3, its session begins at the time fixed in the call, and ends with its adjournment *sine die*. There is no warrant in the Constitution for the idea that a session of the General Assembly ends with each temporary adjournment by the joint action of both houses composing it, nor for the idea that a new session begins with each subsequent resumption of activity. The session is continuous, although parliamentary and legislative activity, which must be accomplished by human agencies, necessarily cannot be continuous. If the intent of the fram-

ers of the Constitution had been that a mere temporary adjournment of the house in which a bill originated could prevent its return by the Governor within the time limited, no reason can be imagined for their failure to express the idea in plain terms. The words "General Assembly" should have been omitted if such was the intent, and the words, "the house in which the bill originated," should have been substituted in lieu.

In the second edition of the American and English Encyclopedia of Law, volume 28, p. 551, the substance of the text is that where there is a constitutional provision that in case of failure of an executive to act upon a bill presented to him within a specified time it shall become a law, it is usually modified by the provision that in case of an adjournment of the Legislature before the expiration of the time limited the bill shall not become a law, and that such provisions in a Constitution mean a final adjournment, and cases are cited in notes 11 and 12 to sustain the above text.

A learned author on statutory construction has the following text on the same subject:

"Many Constitutions provide that an act shall become a law without the Governor's signature if he retain it for a certain number of days after it is presented to him for approval [citing *McNeil v. Commonwealth*, 12 Bush. (Ky.) 727], unless the adjournment of the Legislature shall prevent him from returning it within that time, and in that case that it shall not become a law. The adjournment intended by this provision is a final adjournment, not adjournments from time to time." Lewis' *Sutherland, Statutory Construction* (2d Ed.) vol. 1, § 62.

To sustain his text the author cites *Miller v. Hurford*, 11 Neb. 377, 9 N. W. 477, and *State v. Michel*, 52 La. Ann. 936, 27 South. 365, 49 L. R. A. 218, 78 Am. St. Rep. 364.

The doctrine announced by the text-books above cited seems to have had its origin, so far as the American courts are concerned, in the Opinion of the Justices reported in 3 Mass. 567. This opinion was rendered in 1791, and appears to be the leading case of the line supporting the doctrine as laid down in the above text-books. The holding was followed in the opinions of the Justices on the Soldiers Voting Bill rendered in 1864 by the New Hampshire Supreme Court; see 45 N. H. 607. Next in order of date is *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432, decided in 1870; next is *Corwin v. Comptroller*, 6 S. C. 390, decided in 1875; next is *Miller v. Hurford*, 11 Neb. 378, 9 N. W. 477, decided in 1881; next is *Hequem-bourg v. City of Dunkirk*, decided by the Supreme Court of New York in 1888 and reported in 49 Hun, 550, 2 N. Y. Supp. 447.

Each of the foregoing cases supports the text above quoted from the text-books, and also of course supports the view which we take in the present case of the meaning of section 18 of article 3 of our Constitution. In each of the cases above referred to, the constitutional provision construed by the court was in substance the same as the pro-

vision construed by us in the present case. It is insisted for appellant, however, that there is a conflict of authority in the American courts. The conflict is very slight, if it may be said to exist. The first opposing case relied on is *People v. Hatch*, 33 Ill. 135. The text of the Illinois Constitution construed by the court in that case was substantially the same as our own with one very material exception; for after the words, "unless the General Assembly shall by their adjournment prevent its return," the section construed in the Illinois Constitution concluded as follows:

"In which case the said bill shall be returned at the first day of the meeting of the General Assembly, after the expiration of the said ten days." Const. Ill. 1848, art. 4, § 21.

This last-quoted clause is not in our Constitution. If it were we could very well reach the same conclusion at which the Illinois court arrived (without, however, adopting all of its reasoning), for it is manifest that the last-quoted clause unerringly indicated the intent of the Illinois Constitution to be that the return of the bill should only be made to the house in open meeting. There was a clearly implied grant to the Governor of such additional time in which to make the return as might elapse between the expiration of the 10 days expressly granted and the first day of the meeting of the General Assembly thereafter. The intent of the Illinois Constitution clearly was that a temporary adjournment of the house should relieve the Governor of the duty of making the return during such adjournment; while under our Constitution no such intent can be discerned, but a contrary one, as we think, clearly appears. Some of the reasoning of the Illinois court is in conflict with the views we entertain, and with those entertained by the other courts above cited. But it is manifest that the conclusion reached by the Illinois court must be rested upon the peculiar provision of its Constitution above set out. The next case relied on by appellant is *State v. South Norwalk*, 77 Conn. 257, 58 Atl. 759. That case was decided in 1904, and while it construed a section of the Connecticut Constitution similar in substance to our section 18 of article 3, and held that a mere temporary adjournment of the Legislature would, within the intent of the Connecticut Constitution, prevent the return of a bill by the Governor with his objections to the house in which it originated; yet when examined the decision seems to be rested on a practical construction of the Constitution of Connecticut made by the Legislature and chief executives of the state and acted upon by these two departments of the government from the year 1819 down to the time of the decision of the case in 1904. Thus it appears that this practical construction of the Connecticut Constitution by two departments of the state government had continued for a period of 85 years, as the opinion recites,

"since the creation of the office of executive secretary in 1819 the invariable practice in returning a bill has been to return it by his hand for delivery in open house to the proper officer." Now the Constitution construed in that case was adopted in 1818, so that the construction which was sustained by the opinion had been placed upon the Constitution practically during the entire period of its existence. The opinion, though rendered long after the establishment of a unanimous current of authority contrary to some of the reasoning contained in the opinion, fails to notice any of the cases holding the opposing view. With the exception of such support as appellant's position may have in the reasoning of the two cases last-above mentioned, we have been unable to find any support for it in any of the adjudicated cases which we have examined. There is, however, to be found, at section 64, volume 1, Lewis' Sutherland, Statutory Construction, a text apparently supporting appellant's view, but to sustain this text the author cites *People v. Hatch*, 33 Ill. 135, which we have discussed supra.

[4] Appellant insists, however, that sections 227 to 230 of Shannon's Code, compiled from chapter 139 of the Acts of 1871 and already set out in this opinion, amount to a construction of section 18 of article 3 of our Constitution in conflict with the view which we have expressed. Appellant insists that:

"This legislation clearly contemplates that the five days mentioned in said section 18 were legislative days and not calendar days, and that the bill when vetoed should be returned to the house in which it originated, while the same was sitting, and not while it was in recess, or when the Assembly had adjourned, even though temporarily."

Now under our Constitution it is provided that:

"The Senate and House of Representatives, when assembled, shall each * * * sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each House shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members."

See section 11, article 2. Note in the foregoing quotation from the insistence of appellant the word "sitting," in describing the condition in which it insists the house shall be when the return of a bill is made.

In view of the foregoing quotation from the Constitution, article 2, section 11, we take it that the word "sitting," in appellant's insistence, means when the house is in legislative session, with a quorum present, because, if any other meaning should be given to the word "sitting," it is apparent that less than a quorum of the membership of the house

would have no power to reconsider a bill, if returned while less than a quorum was in the house, and an insistence that the Governor might make a return to less than a quorum of the house where a bill originated is tantamount to an insistence that the Governor might make a return to one member of the house. We are unable to see the force of the insistence that the legislation above referred to amounts to a practical construction of section 18, article 3, in conflict with the view which we have announced as the true construction of that section. The legislation referred to, as we think, merely outlines a course of conduct in no way in conflict with the plain terms of section 18, article 3. These sections were enacted to promote the orderly administration of the business of the legislative department of the government.

So far as we have judicial knowledge of any practical construction of section 18 of article 3 in this state, in respect of the return of bills when disapproved by the Governor, it has been that such return could be made to the clerk of the house in which the bill originated during a temporary adjournment of that house, or a joint temporary adjournment of both houses. As the word "adjournment" is generally used in this country it may be intended to signify either an adjournment temporary or final in character, and when used as it is in section 18 of article 3, resort must be had to the context to ascertain the true sense. As the word was used in England, at the time Sir William Blackstone wrote, it signified a continuance of the session from one day to another, and, said he:

"This is done by the authority of each house separately every day, and sometimes for a fortnight, or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is not the adjournment of the other. It hath also been usual when his Majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the King's pleasure so signified, and to adjourn accordingly. Otherwise besides the indecorum of a refusal, a prorogation would assuredly follow which would often be very inconvenient to both public and private business; for prorogation puts an end to the session, and then such bills as are only begun and not perfected must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement." *Bla. Comm.* vol. 1, § 186.

The distinction between adjournment and prorogation apparent in the above excerpt was made in the opinions of the Justices in 3 Mass. 567.

In our opinion the decree of the chancellor was correct, and the same is affirmed, at appellant's cost.

I. J. COOPER RUBBER CO. v. JOHNSON
et al.

(Supreme Court of Tennessee. Feb. 5, 1916.)

1. CORPORATIONS \S 642—FOREIGN CORPORATIONS—“DOING BUSINESS”—“FACTOR”—“COMMISSION MERCHANT.”

A foreign corporation, which consigned tires for sale to a company handling automobile accessories in the state, was not “doing business” within the state to render necessary compliance with the foreign corporation act as a condition precedent to its right to recover of the sureties on the bond of the consignee, since the business of a “factor” or “commission merchant,” synonymous terms, meaning one whose business is to receive and sell goods for commission, is not the conduct of an agency or business for the consignor of the goods sold where the factor picks customers at his own risk and the consignor does not exclusively own the proceeds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2520-2527; Dec. Dig. \S 642.]

For other definitions, see Words and Phrases, First and Second Series, Commission Merchant; Doing Business; Factor.]

2. CORPORATIONS \S 642—FOREIGN CORPORATIONS—DOING BUSINESS.

The requirement of a contract between a foreign rubber company and a local company selling tires for the rubber company on commission that the local company should keep the goods insured in the name of the rubber company did not constitute the local company a business agency of the rubber company so to render the latter subject to laws relating to doing business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2520-2527; Dec. Dig. \S 642.]

3. CORPORATIONS \S 642—FOREIGN CORPORATIONS—“DOING BUSINESS.”

The provision of the contract for the sale on commission of automobile tires consigned to an automobile accessories company in the state by a foreign rubber company that the former should make adjustments necessary under the selling guaranty out of the latter's stock in its hands did not render the rubber company subject to laws relating to engaging in business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2520-2527; Dec. Dig. \S 642.]

4. PRINCIPAL AND SURETY \S 104—RELEASE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

Where a company received tires for sale on consignment from a rubber company, the contract providing that monthly remittances of the proceeds of sales should be made in cash, the fact that the company was permitted to fall behind in its payments, and the rubber company accepted a note for a month's sales payable in 30 days, did not release the surety on the consignee's bond, except as to the payment covered by the note, since, if a surety is liable for different payments, an extension of time as to one or more will not affect his liability for others.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 186-190, 193-195, 197-200; Dec. Dig. \S 104.]

5. PRINCIPAL AND SURETY \S 104—RELEASE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

Where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety as to it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 186-190, 193-195, 197-200; Dec. Dig. \S 104.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Suit by the I. J. Cooper Rubber Company against J. T. Johnson and another. Decree for defendants, and plaintiff appeals. Reversed, with decree in the Supreme Court.

F. M. Bass and E. J. Walsh, both of Nashville, for appellant. Clarence T. Boyd, of Nashville, for appellees.

WILLIAMS, J. This suit was instituted by the Cooper Rubber Company, an Ohio corporation, to recover of Johnson and Tinsley, as sureties on a bond executed by the Standard Vulcanizing & Tire Company (called the tire company in this opinion), as principal.

The tire company was engaged in handling automobile accessories in Nashville, and entered into a contract with the rubber company by the terms of which the latter agreed to consign to the former tires, etc., for a designated period. On account of its lack of financial ability or standing, the tire company was required to execute a bond to save harmless the rubber company in respect of a breach of the contract by the tire company.

[1] The first and main defense of the sureties is that the complainant rubber company had not complied with our foreign corporation acts, and was doing business in this state through the agency of the tire company; therefore that it may not maintain the suit because of the failure to so comply. This defense was sustained by the chancellor.

The contract between the two companies is in character one of consignment of merchandise for sale, unless one or more of its provisions later to be set out, relied on by appellee as so doing, mark it as one governing the parties as principal and agent—the tire company as agent through which the rubber company did business in this state.

A contract quite similar as to the main provisions was involved in the case of Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167, writ denied 212 U. S. 577, 29 Sup. Ct. 686, 53 L. Ed. 658, in the Court of Appeals of the Eighth Circuit. In reply to the same defense that is here interposed—that the plaintiff rubber company had never qualified to do business in the state of Colorado, and that it could not therefore maintain suit in that state—the court said:

“It [the foreign corporation] agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing, and sell-

ing the goods, and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. * * * The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the goods in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that state, and the contracts between these litigants are valid and enforceable."

Among other cases cited on the point in the opinion just quoted from are *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714, and *Gunn v. White Sewing Machine Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223, and cited for disapproval is the contrary ruling in *Com. v. Parlin*, 118 Ky. 168, 80 S. W. 791. See, also, the later cases of *Hessig-Ellis Drug Co. v. Sly*, 83 Kan. 60, 109 Pac. 770, Ann. Cas. 1912A, 551; *Stein Double Cushion Tire Co. v. Wm. Fulton Co.* (Tex. Civ. App.) 159 S. W. 1013; *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 115 N. W. 844, 18 L. R. A. (N. S.) 135, and note; and note to *Harrell v. Peters Cartridge Co.*, 44 L. R. A. (N. S.) 1094.

In *Allen v. Tyson-Jones Buggy Co.*, supra, in speaking of such a foreign corporation's status to maintain suit, it was said:

"The business which it transacted, as shown by the allegations, was to enter into a contract with the commission merchants to sell its buggies and phaetons on commission. * * * The selling of the buggies and phaetons, which was to be done by the commission merchants, was not a business done or carried on by the corporation. It was the business of the commission merchants themselves."

The terms "factor" and "commission merchants" are said to be nearly or quite synonymous; the former expression being more common in the language of the law, and the latter in the language of commerce. A "factor" is one whose business it is to receive and sell goods for a commission, being intrusted with the possession of the goods to be sold, and usually selling in his own name. 1 *Mechem on Agency*, §§ 74, 2497, et seq.

While in one sense a factor or commission merchant is the agent of the consigning dealer or manufacturer, he does not conduct an agency or business for the latter at the place of business of the former, where the sales of the consigned merchandise are made to customers chosen by the local dealer, at his own risk, and the proceeds of the sale do not become the exclusive property of the consigning company. A business so conducted is truly said to be that of the factor or commission merchant.

[2] A provision of the contract pointed to by appellee sureties as showing a doing of business in the state is one which makes it the duty of the tire company to insure the goods in its hands, as follows:

"Third. It is mutually agreed that the second party shall at all times cause the said merchandise in its possession to be, to the satisfaction

of the first party, insured against fire in the name of the first party, to an amount not less than 80 per cent. of the value of said merchandise. It is further understood that the policies covering such insurance shall be made payable to, and deposited with, the first party, and that the cost of this insurance shall be borne by the second party."

The incorporation of similar clauses in contracts of consignment is not unusual, and it has been held that it does not have the effect claimed by appellee, to constitute the local dealer a business agency of the foreign corporation; the latter therefore to be treated as doing business in the state. *Wasey v. Whitcomb*, 167 Mich. 53, 132 N. W. 572; *Three States Buggy, etc., Co. v. Com.*, 32 Ky. Law Rep. 385, 105 S. W. 971; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

The power to insure the goods placed in his hands is one of the ordinary powers of a factor or of one selling on commission, impossible by contract or usage on the factor as such. 1 *Mechem on Agency* (2d Ed.) § 2521; 12 Am. & Eng. Enc. L. (2d Ed.) 656; *Wasey v. Whitcomb*, supra. Manifestly the provision had relation to and was in furtherance of the duty to care for, and in certain circumstances to return, the goods. The cost of the insurance was to be paid by the local dealer, not by the rubber company through it.

[3] It is next said that the following contract provision works the result contended for:

"Eleventh. The second party agrees to, in behalf of the first party, make all adjustments with reference to sale of merchandise covered by this contract that may be necessary under the guaranty under which said merchandise was sold, in accordance with written instructions given the second party by the first party from time to time; said adjustments to be made out of stock of tires, casings, and tubes belonging to the first party, and in possession of the second party, when necessary."

These adjustments, we understand, are those required to be made to satisfy the ultimate consumer in respect of and under the guaranty of the quality of the merchandise. The guaranty aided the local dealer in selling the goods and this provision but enabled the latter to keep faith with his customer. Anything so done may be treated as an incident of the local dealer's business. We fail to see how it brought the rubber company within the purview of the statute as the possessor of goods within this state for the purpose of barter or sale, or constituted the tire company an agency for that purpose.

[4, 5] Another and distinct defense of appellees, sustained by the chancellor, was: That the rubber company had agreed with the tire company on a material change in the contract without their consent, with the result that as guarantors, or sureties on the bond, they were released from liability. It is insisted that, while the contract provided that monthly remittances should be made in cash, the tire company was permitted to fall

behind in its payments, and that the rubber company accepted a note for one month's sales from the tire company, payable in 80 days, thus extending the time and operating a release of the sureties. This defense cannot be sustained.

"If a surety is liable for different payments, such as installments of rent, an extension of time as to one or more will not affect the liability of the surety for others." 32 Cyc. 196.

When successive payments are to be made, at fixed periods, if the creditor gives time as to one of such payments he will release the surety as to it, but not with regard to subsequent payments. The receipt of the note could have no greater effect than a payment of the money, especially when received as here as cash, and the surety is not sought to be held liable thereon. *Klein v. Long*, 27 App. Div. 158, 50 N. Y. Supp. 419; *Cohn v. Spitzer*, 145 App. Div. 104, 129 N. Y. Supp. 104; *Shepard Land Co. v. Bantigan*, 36 R. I. 25, 87 Atl. 531; 2 White & Tudor's Fed. Cas. (8th Ed.) 590.

We are of opinion that the several defenses urged by the appellee are not maintainable, and that the chancellor erred in not decreeing in favor of the rubber company.

Reversed, with decree here.

GERMAN-AMERICAN MONOGRAM MFRS. v. JOHNSON.

(Supreme Court of Tennessee. Feb. 5, 1916.)

1. SALES §116—BREACH OF CONTRACT—REMEDY OF BUYER—RESCISSION.

Where plaintiff, selling goods to defendant, represented that defendant was to handle the goods exclusively in his city, without which inducement the contract would not have been made, defendant's subsequent sale of the same goods to another dealer in that city was a breach of a material part of the contract, so that, regardless of whether there was fraud, the buyer was entitled to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 290; Dec. Dig. §116.]

2. FRAUD §9—REPRESENTATIONS—EXPRESSION OF INTENTION.

A representation amounting to a mere expression of intention, though false, is not a fraud at law; but a representation amounting to an engagement binds the party making it to make it good.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. §9.]

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

3. SALES §116—BREACH—EFFECT.

A buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to the essence of the contract and renders the seller incapable of performance, or of performance as intended.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 290; Dec. Dig. §116.]

4. APPEAL AND ERROR §1068 — HARMLESS ERROR—INSTRUCTIONS.

In an action for the price of goods sold, where the verdict was manifestly reached on the ground that the buyer had a right to rescind, the charge of the trial court on the defense of set-off or recoupment, as to which no

damages were shown upon which the verdict might have been reached, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. §1068.]

5. SALES §365—BREACH OF CONTRACT—REMEDY OF BUYER—VERDICT—SUFFICIENCY.

In such action, where the verdict for defendant on the ground of his right to rescind was correct, whether the jury attributed that right to the ground of fraud or to the defense that there was a breach of a material part of the engagement was immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1077; Dec. Dig. §365.]

Certiorari to Court of Civil Appeals.

Action by the German-American Monogram Manufacturers against E. B. Johnson. From a judgment of the Court of Civil Appeals reversing a judgment for defendant, he brings certiorari. Reversed, and judgment of trial court affirmed.

Knight & Beasley and Alvin McCarn, all of Nashville, for plaintiff. Jas. T. Miller, of Nashville, for defendant.

FANCHER, J. The suit is to recover for the price of certain monogram designs sold the defendant upon the express representation that the defendant should have the exclusive sale of these goods in the city of Nashville. The fact that Johnson was to handle the goods exclusively was a material element in the contract, and without which the contract would not have been made. The company breached this provision by selling the same goods to another dealer in the city of Nashville. Defenses were interposed by defendant that the account is not a just claim; that it is fraudulent and void; that it is without due consideration; and that defendant is not liable for said account, as plaintiff hath in its warrant alleged. The jury returned a verdict in favor of the defendant.

Upon appeal to the Court of Civil Appeals, the case was reversed upon the ground that the trial court erred in submitting to the jury the right of Johnson to a set-off or recoupment; that court holding that Johnson had failed to prove his damages for the breach.

[1-3] The main ground which has heretofore been urged in the Court of Civil Appeals and in the petition for certiorari in this court is that the representation made to Johnson, upon which he was induced to purchase the goods in question, that he should have the exclusive sale of the goods, and the violation of that agreement, was a gross fraud practiced on defendant which should entitle him to a rescission.

It is urged by the plaintiff that the agreement not to sell to another dealer did not relate to an existing fact, but only to future sales, and is therefore no ground for avoiding the contract. As authority for this proposition, plaintiff cites *Landreth v. Schevenel*,

102 Tenn. 486, 52 S. W. 148, and other authorities in accord therewith.

In *Landreth v. Schevenel*, supra, it was held that misrepresentations in order to be fraudulent must be of facts at the time or previously existing, and not mere promises for the future, and therefore it was held that rescission for fraud in procuring the settlement and compromise of the claims of a wholesale merchant against a retail merchant could not be predicated on the latter's failure to keep his promise to continue the business he was then conducting.

This is not exclusively a case where a defendant seeks to avoid payment on the ground of fraud because he has been induced to enter into the agreement by a promise for the future, but it is more proper to consider it upon another phase, namely, that plaintiff failed to carry out the undertaking or contract as agreed upon in a material part thereof, and for this reason the defendant refused to perform the contract on his part and offered to rescind.

There is a distinction between a representation which amounts to a mere expression of intention, which though false, is not a fraud at law, and a representation which amounts to an engagement. If the representation amounts to an engagement, the party making it is bound to make it good. *Kerr on Fraud and Mistake*, p. 89.

As a general statement of the law upon this subject, a buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to its essence and renders the defaulting party incapable of performance or makes it impossible for the defaulting party to carry it out as intended. 35 Cyc. 135.

On the subject of discharge by breach of contract, Elliott, in his work on Contracts, says:

"The breach may occur in any one of three ways; the party may renounce his liability under the contract, or he may by his own act make it impossible for him to fulfill his liabilities under the contract, or he may totally or partially fail to perform his promise. The first two forms of breach may take place while the contract is still executory and before performance can be legally demanded. The third form of breach can only take place at or during the time of performance. The effect of a breach of a contract by one party is to excuse performance by the other, and generally, but not always, to discharge the contract." Elliott on Contracts, § 2025.

In section 2026, this author says:

"On breach of a contract the party not in default generally has the right to elect whether to terminate the contract or not, and he may exercise this right where such election does not increase the damages resulting from the breach."

A case in point is as follows: In a suit to recover on the price of an advertising novelty, the contract under consideration stipulated as a part of the consideration of the purchase that the plaintiffs for a period of four months from the date of delivery would sell none of them in the city of Buffalo except to

the defendant. Within 30 days from delivery of the property, the plaintiffs violated the agreement by selling the pictures to another party, and the defendant thereupon notified the plaintiffs that he rescinded the agreement and held the pictures subject to order. It was held that an executory agreement which is entire may, upon a substantial breach by one of the parties, be rescinded for that reason by the other when it can be done in toto and the parties put in statu quo. The contract was considered executory, and a part of the consideration of the purchase was the plaintiffs' stipulation that they would not, within such term, give opportunity to any other person in the city of Buffalo, by sale to him, to come in competition with the defendant in the use of the advertising novelty; that plaintiffs disabled themselves from performance on their part, of the contract, in a respect which may have been deemed material to the beneficial purpose of the purchase; and when plaintiffs did, by such sale to another, deny to the defendant the benefit of that provision, he was at liberty to treat such sale as a substantial breach of the contract, prejudicial to him, and on that ground to rescind it, if he was then able to fully restore to the plaintiffs what he had received from them. *Koerner v. Henn*, 8 App. Div. 602, 40 N. Y. Supp. 1021.

In another case a wholesale dealer, the plaintiff in the action, sold to the defendant, a hardware dealer, 12 dozen razors under a contract containing a stipulation that the plaintiff would insert an advertisement in an Atlantic City newspaper, which advertisement should contain the name of the defendant as the selling agent of the razors for that town in the hardware trade, and that all inquiries to the plaintiff should be referred to the defendant. In an action to recover the price of the razors, the defendant offered evidence to show that the plaintiff had during the period covering the contract with defendant sold such razors at a less price than was permitted defendant in his contract with plaintiff. It was held that the provision amounted to a contract that the defendant should be the exclusive agent for the plaintiff and an offer of this testimony should have been allowed. *Silberstein v. Guttridge*, 80 N. J. Law, 117, 77 Atl. 702.

We are of opinion that the verdict of the jury can well be sustained upon the ground that the representation made by the agent of plaintiff that the defendant should have the exclusive sale of the goods sold to him in the city of Nashville was a part of the engagement entered into between the parties, and that, regardless of whether there was fraud, it was such material part of the contract as that the future breach thereof would entitle the defendant to a rescission.

It appears that, as soon as the defendant ascertained the fact that plaintiff had sold the same goods to another dealer in the city,

he promptly offered to rescind and immediately shipped the goods back to plaintiff, except a small amount which he had sold. For the portion sold he paid the plaintiff.

[4, 5] We do not attribute the verdict of the jury to the defense of set-off or recoupment, because no damages were proven upon which the verdict could have been reached, and therefore the charge of the trial judge on that question was not prejudicial. The verdict manifestly was reached upon the ground that there was a right to rescind, and whether the jury attributed that right to the question of fraud, or to the defense that there was a breach of a material part of the engagement, is immaterial. The correct result was reached.

The writ of certiorari is granted. The judgment of the Court of Civil Appeals is reversed, and judgment of the trial court affirmed.

TILLMAN v. LEWISBURG & N. R. CO.

(Supreme Court of Tennessee. Feb. 1, 1916.)

1. STIPULATIONS \S 14—CONDEMNATION PROCEEDINGS—AGREEMENT—EFFECT.

Where, in condemnation proceedings, by agreement the right was reserved to a co-owner to claim in a future suit incidental damages to another tract of land, her case in such subsequent suit must be viewed as if her claim to damages were being urged in the condemnation proceeding.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. \S 24-37; Dec. Dig. \S 14.]

2. EMINENT DOMAIN \S 96—RIGHT TO DAMAGES—SEPARATE TITLES.

Where a wife owned a tract of land, and, together with her husband as tenant by the entirety, owned a tract across a public turnpike which was used with her individually owned tract, she could not, upon condemnation by a railroad of a right of way through the tract owned by her and her husband by the entirety, recover damages to the tract individually owned by her.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 245-249; Dec. Dig. \S 96.]

Certiorari to Court of Civil Appeals.

Action by Martha S. Tillman, by next friend, against the Lewisburg & Northern Railroad Company. To review a judgment sustaining a demurrer to the declaration, plaintiff seeks certiorari. Writ denied.

J. M. Anderson and Lewis Tillman, both of Nashville, for plaintiff. F. M. Bass, Jno. B. Keeble, and Ed. T. Seay, all of Nashville, for defendant.

WILLIAMS, J. In this cause a demurrer to the declaration was sustained by the circuit judge, and the Court of Civil Appeals on appeal affirmed the ruling.

In the declaration it was averred that in March, 1896, plaintiff and her husband became the owners as tenants by the entirety of a tract of 105 acres; that in June, 1887, plaintiff became the owner, to her sole and separate use, of a tract of 25 acres lying opposite the 105-acre tract and separated

from it only by a public turnpike; that the plaintiff's residence is located on the smaller tract; that the two tracts were and had been continuously used and operated together, or as one farm; and that the residence, barn, and servants' houses situated on the one are supplied with water by means of a reservoir located on the other tract.

It was further averred that the railway company had instituted a proceeding to condemn a strip through the larger tract as a right of way, and that for the value of that strip and for incidental damages to the remainder of that 105-acre tract plaintiff and her husband, tenants by the entirety, had received payment; but that, under the terms of an agreement in that proceeding, the right was reserved to plaintiff to claim in a future suit incidental damages to the smaller tract, so individually owned by plaintiff. The present action was thereupon brought for this purpose.

The demurrer set forth two grounds: (1) That plaintiff's land was not shown to be a part of the tract, a portion of which was taken for the right of way; and (2) that the title to land as to which damages are now claimed was in plaintiff, and the title to the 105-acre tract subjected to the easement was vested in her and her husband, and that, the ownership being thus variant, the claim of damages could not be supported.

In our opinion a decision on the last point will be determinative of the question of liability, and we shall not discuss the first.

[1] As we consider, the case of plaintiff must be viewed as if her claim to damages to the smaller tract were being urged in the condemnation proceeding that affected the larger tract. The damages of the character claimed can only be such as are incident to the taking of a part of the latter tract for a railway right of way.

[2] The authorities are surprisingly few that deal with the question of an allowance of incidental damages to the owner of an adjoining tract where the title-holding of the same is not identical with that of the lands affected by the actual condemnation-taking, both of which tracts are claimed to be actually used as one.

In *Indiana, etc., R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402, it was held, where a strip of land was condemned wholly within a quarter section owned by a person in fee, that the owner might also recover for injury to his interest as a tenant in common of a remainder estate in an adjoining quarter section. On a second appeal of the case, the interference with the operation of the two sections as one farm was urged as a ground of relief (*Conness v. Indiana, etc., R. Co.*, 193 Ill. 404, 62 N. E. 221), and it was further held that the jury could not take into consideration the fact that the right of way would divide the two sections so as to render dif-

difficult of access to the owners of the quarter held in fee to wells and buildings, located on the quarter in which his interest was one as tenant in common in remainder. It was said that the jury must not take into account the fact that the right of way divided the two interests, but must consider each as if they were standing alone, or "as if the other of the two interests belonged to an entire stranger." Yet a judgment for some damage to the untouched quarter section was allowed to stand, but that appears to have been based on a provision of the Constitution of Illinois, and this particular ruling makes the case an inapplicable precedent in this state.

In *Chicago, etc., R. Co. v. Dresel*, 110 Ill. 89, it appeared:

Dresel was in the possession of lots 2 to 15, inclusive, cultivated by him as a whole as a flower garden. Lots 2 to 9 were held under a lease. Lots 10 to 15 were owned by him in fee. The strip sought to be condemned was off of the leased lots, and it was attempted to be subjected as part of a leasehold interest. His residence and barn were upon lots 14 and 15.

Instructions of the trial judge to the jury were approved which went on the theory that if the lots had a special capacity, as an entirety, for the purpose of flower gardening, and were so used, Dresel could recover for depreciation of the value of the whole for the residue of the lease term. The court said:

"Appellant proposed to take a portion of the lots held by the lease. If by so doing the market value of the whole tract was lessened during the two years which appellee had the right to hold and use the same, to that extent he was damaged, and while no part of the lots he owned in fee was taken, still, by the taking, as his property held in fee and by lease was damaged, he, in justice, ought to be entitled to recover so far as the market value of his property was depreciated."

See, also, in the same connection, *Smith County v. Labore*, 37 Kan. 480, 15 Pac. 577.

Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234, dealt with a claim of damages incident to the laying out of a public highway. Glendenning owned an 80-acre tract lying immediately north of the highway, and he and his wife as tenants by entirety owned a 20-acre tract lying directly south of the road. It was sought to show the market value of the 20 acres, considered in connection with, because used along with, the 80-acre tract, as at the time farmed. The trial court excluded the offered testimony, saying:

"It is settled that, in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm. * * * This principle cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose."

In *Potts v. Railroad Co.*, 119 Pa. 278, 13 Atl. 291, 4 Am. St. Rep. 646, the land condemned was the individual property of Potts,

while the second tract was the property of Potts and another as tenants in common. Held that, notwithstanding a claim of a common use, the assessment of damages should be confined to the lot a portion of which was taken for the railroad's use; "the fee was held and owned by different persons; neither of them could be considered as appurtenant to, or part and parcel of, the other."

Where a leasehold estate was condemned, a claim for damages by the lessee in respect of property owned by him individually, separated from the condemned property by an alley, but used by him in connection with that property in the conduct of his business, was denied. *U. S. v. Inlots*, Fed. Cas. No. 15,441a.

The case of *Leavenworth, etc., R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16, relied on by appellee railway company, went off on a question of pleading without the court reaching the particular question of substantive law now under consideration. The case of *Smith County v. Labore*, supra, was cited, but its ruling on the immediate question was not disapproved.

We think the better rule is that announced in the *Indiana* and *Pennsylvania* cases.

In the case at bar we think it quite manifest that plaintiff's claim cannot be supported on principle. The two tracts are held by different titles vested in different persons. Separate condemnation proceedings would be required to condemn a right of way over them, and separate suits would have to be brought for damages by the distinct owners against an appropriator for injuries done the tracts. When we look upon a condemnation as a compulsory sale, made for the parties by the law (*Southern R. Co. v. Jennings*, 130 Tenn. 450, 171 S. W. 82), the law thus would bring the railway in confrontation with two distinct ownerships.

Assume that the plaintiff, Mrs. Tillman, were the owner, as tenant in common, of a one-tenth undivided interest in the larger tract. May it be held that a condemnation affecting that small interest would support the claim here urged for damages done to the entire tract solely owned by her? If so, other such tenants in common owning contiguous tracts individually could do so in like manner, and it is conceivable that if the right of way were taken out of a small boundary so owned in common, surrounded by large tracts severally owned by the tenants in common, enormous damages could be collected from the condemnor under the rule contended for by the appellant.

Let the attitude of the case be reversed, by supposing that plaintiff's individually owned tract had been specially benefited by the construction of the railway over the adjoining tract, but that the balance of the larger tract was incidentally damaged. Would it be either fair or sound to hold that this incidental damage should be offset by

the benefits accruing to the smaller tract? Would it not be an abundant reply that mutuality of parties or ownership was lacking to justify such a set-off? We think so.

We think the case has been properly disposed of. Writ of certiorari denied.

NEIL, C. J., being incompetent, took no part in the decision of this case.

WALMSLEY et al. v. FRANKLIN COUNTY et al.

(Supreme Court of Tennessee. Feb. 5, 1916.)

1. STATUTES \S 123—TITLES—PLURALITY OF SUBJECTS—VALIDITY.

Const. art. 2, \S 17, provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. Pub. Acts 1913, c. 26, was entitled "a general enabling act authorizing counties through their quarterly courts to issue bonds for highway purposes to provide for a retiring indebtedness thus created at or before maturity, and to provide for the expenditures of the fund derived from the bond issue." Section 16 of that chapter was amended by Pub. Acts 1915, c. 23, to read that nothing in the act shall be construed to repeal or modify any private or special act authorizing any county or municipality through its county court to issue bonds for the purpose of building roads. Pub. Acts 1913, c. 26, \S 3, provides for the issuance of bonds when necessary to secure federal co-operation on the roads. Section 6 makes it the duty of the county trustees to collect and account for taxes, and to take advantage of all laws to force the collection of the tax levied to retire the bonds. Section 12 provides that, if all the roads provided for in the enactment are finished, and there is a surplus, it shall be expended as the road commissioners direct. *Held*, that the act did not violate the constitutional provision requiring but one subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 176-183; Dec. Dig. \S 123.]

2. STATUTES \S 123—SUBJECTS—PLURALITY OF SUBJECTS.

All the provisions of such act being intended to further its general subject, the improvement of county roads, the act did not violate the constitutional provision requiring that the subject of the act be stated in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 176-183; Dec. Dig. \S 123.]

3. COUNTIES \S 52—POWERS OF COUNTY BOARD—REGULAR SESSIONS.

Under Pub. Acts 1913, c. 26, \S 1, providing for the improvement of county roads, and Pub. Acts 1915, c. 23, the 1913 act requiring the issuance of bonds by the county courts in quarterly session assembled, the county courts may issue bonds at a specially called meeting under Shannon's Code, \S 5997, providing that the chairman or judge of the county court shall have power to convene the quarterly courts in special session.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 63-65; Dec. Dig. \S 52.]

4. COUNTIES \S 54—HIGHWAY BONDS—TIME OF REDEMPTION.

Under Pub. Acts 1913, c. 26, \S 1, providing that highway bonds shall mature at such time as determined by the county court, not exceeding 40 years from the date of issuance, redeemable at the option of the county at such times as fixed by the court, a resolution of the county court fixing the time and maturity of the bonds

in 40 years, was valid, since it fixed a definite date of maturity.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 71, 72; Dec. Dig. \S 54.]

5. COUNTIES \S 180—HIGHWAY BONDS—NOTICE—STATUTORY REQUIREMENTS.

The provision of Pub. Acts 1913, c. 26, \S 2, requiring that the orders and resolutions of the county courts directing issuance of highway bonds shall be preceded by at least 30 days by the adoption of a resolution setting forth the roads to be built or improved, and published as a notice to the voters, is mandatory, and compliance may be enforced before the adoption and issuance of the bonds, but, where no objection is made until after the issuance of the bonds, the bonds are not invalid for failure to comply therewith.

[Ed. Note.—For other cases, see Counties, Dec. Dig. \S 180.]

Appeal from Chancery Court, Franklin County; Foss H. Mercer, Chancellor.

Action by H. A. Walmsley and others against Franklin County and others. From an order sustaining a demurrer to and dismissing the bill, the complainants appeal. Affirmed.

T. L. Stewart and T. A. Embrey, both of Winchester, for appellants. Floyd Estill, Arthur Crownover, Geo. E. Banks, and Jesse Templeton, all of Winchester, and J. J. Lynch, of Chattanooga, for appellees.

BUCHANAN, J. The bill was filed to enjoin the issuance of bonds by the county in the sum of \$350,000 for highway purposes. Defendants demurred to the bill, the chancellor sustained the demurrer and dismissed the bill, and complainants appealed.

The grounds for relief made in the bill are twofold: First, that the act under authority of which the county proposed to issue the bonds was unconstitutional and void; second, that if the act be valid the defendants have not proceeded in accord with its provisions in certain respects in the bill set out. The act in question is chapter 26 of the first extra session of the General Assembly of the year 1913. See page 477, Public Acts 1913. This act was amended by chapter 23, Acts of 1915. See Public Acts 1915, p. 67. The substance of the amendment is as follows:

"But nothing in this act shall be construed to repeal or modify any private or special act authorizing any county or municipality in this state through its county court, or other authority, to issue bonds for the purpose of building roads in such said counties or municipalities."

[1] The first point made upon the constitutionality of the act is that it violates that part of section 17, art. 2, of the state Constitution, which provides:

"No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

We think the general object or purpose disclosed by the body of the act is expressed in the title, and that purpose is to enable counties in this state to issue bonds for highway purposes. Undoubtedly, when the scheme

of the act is examined, a number of agencies and instrumentalities are apparent, but it is clear that each and all of these are employed in the body of the act to advance the general purpose of the act. It has been held that:

"When a statute has but one general object or purpose, the subject is single, however multitudinous may be the means or instrumentalities provided for effecting that purpose."

See *Railroad v. Byrne*, 119 Tenn. (11 Cates) 299, 104 S. W. 460; *State v. Brown*, 103 Tenn. (19 Pick.) 449, 53 S. W. 727; *Morrell v. Fickle*, 71 Tenn. (3 Lea) 79; *Scott v. Hamby*, 114 Tenn. (6 Cates) 364, 84 S. W. 622; *Cannon v. Mathes*, 55 Tenn. (8 Helsk.) 504; *Frazier v. Railroad Co.*, 88 Tenn. (4 Pick.) 157, 12 S. W. 537; *Scott v. Marley*, 124 Tenn. (16 Cates) 398, 137 S. W. 492; *Todtenhausen v. Knox Co. et al.* (Tenn.) 177 S. W. 487.

[2] Appellants insist that section 3 of the act in question expresses a purpose not within the purview of the title of the act. We are unable to assent to this view. Section 3 provides:

"If the federal government should at any time propose to supply the service of a federal engineer, and, in addition appropriate a specified sum of money for the construction or improvement of highways in any county in this state, the quarterly court of such county is hereby authorized to appropriate for the purpose a sum not exceeding double that contributed by the federal government; and if there be not funds in the treasury sufficient to meet this appropriation, then, without submission to a vote of the people, the quarterly [county] court of such county is authorized to issue bonds for the amount required to make good the appropriation: Provided, such bond issue shall not in the aggregate exceed 3% of the taxable values of such county, which may be either in a single order or successive orders, as the court may determine."

That section does not introduce into the body of the act a new subject. Its object is to enable counties in this state to issue bonds for highway purposes in cases where the federal government shall become active in the manner indicated. The activity of the federal government and the activity of the quarterly county court in conjunction with such aid as may be received from the federal government are mere agencies or instrumentalities within the scheme of the act to forward its general purpose, of enabling counties in this state, through their quarterly county courts, to issue bonds for highway purposes. This view is supported by the fact that whether the county issues bonds under sections 1 and 2 of the act, or under section 3 of the act, the same agency in either case acts for the county. That agency is the quarterly county court, and, whether bonds be issued under section 3 or sections 1 and 2, the product of the agency provided under each of these sections is the same. The product is county bonds, and county bonds issued for highway purposes.

Appellants next insist that the last clause of section 6 of the act introduces into its

body a separate and distinct subject not germane to the general purpose of the act. This insistence, we think, has no merit. The last clause of section 6 makes it the duty of the county trustee to take advantage of all laws on the statute books to force the collection of the tax which section 6 provides shall be levied for the purpose of taking care of the interest on bonds issued under the act, and for the purpose of creating a sinking fund for the retirement of the bonds at maturity. The remaining provisions in the last clause of section 6 all relate to the general purpose expressed in the body of the act.

It is next insisted for appellants that section 12 introduces into the body of the act a subject not germane to its general purpose. This section provides, in substance, that after all the roads named in the resolution have been graded and macadamized for their full length, if a surplus of the fund for which the bonds have been sold remains on hand, it shall be expended on such other road or roads not set forth in the resolutions as, in the judgment of the road commissioners, will serve the greatest number of people anywhere within the county. This is an application of the proceeds of the bonds to highway purposes, and germane to the general purpose of the act, certainly not incongruous therewith, and permissible under the following of our cases: *Cannon v. Mathes*, 55 Tenn. (8 Helsk.) 504; *Luehrman v. Taxing District*, 70 Tenn. (2 Lea) 426; *Morrell v. Fickle*, 71 Tenn. (3 Lea) 79; *Frazier v. Railroad*, 88 Tenn. (4 Pick.) 156, 12 S. W. 537; *Cole Manufacturing Co. v. Falls*, 90 Tenn. (6 Pick.) 469, 16 S. W. 1045; *State v. Yardley*, 95 Tenn. (11 Pick.) 554, 32 S. W. 481, 34 L. R. A. 656; *Peterson v. State*, 104 Tenn. (20 Pick.) 131, 56 S. W. 834; *Condon v. Maloney*, 103 Tenn. (24 Pick.) 99, 65 S. W. 871; *Furnace Co. v. Railroad Co.*, 113 Tenn. (5 Cates) 697, 67 S. W. 1016; *Scott v. Marley*, 124 Tenn. (16 Cates) 398, 137 S. W. 492.

In our opinion, there is no merit in any of the questions made upon the constitutionality of the act.

[3] Under the second ground of relief on which the bill is predicated the point is made that by the first section of the act authority to issue bonds was conferred on the county courts of the various counties in the state when in quarterly session assembled; a quorum being present and a majority thereof voting in the affirmative. This authority, appellant insists, could only be exercised when the body above named was in regular session; whereas, the resolution of the county court to issue the bonds in the present case was passed at a special or called meeting of the county court in quarterly session assembled.

In response to this objection it is to be noted that the act does not in terms require the authority to be exercised at a regular meeting of the county court in quarterly

session. Section 5997, Shannon's Code, provides:

"The chairman or judge of the county courts of this state shall have power to convene the quarterly courts in special session when, in his opinion, the public necessities require it, or upon the application to him, in writing, of any five justices, members of said court, so to do."

The transcript shows that the judge of the county court of Franklin county made the call, as required by the terms of the section above named, and it appears that the notice of the call required by section 5998 of Shannon's Code was published in accord with the requirements of that section. We think, under a proper construction of the act in question, that the power conferred could be legally exercised at a called or special quarterly session of the county court.

[4] The next insistence for appellants is that the bonds authorized to be issued under the act—

"are to be redeemable at the option of the said county, and that it is mandatory on the county, under the provisions of said act, to fix a time for the redemption of the said bonds, and failure to so fix a time is vital and renders the resolution and election void."

The above-quoted insistence is based on the following language of section 1 of the act, where, referring to the bonds, it is said:

"They shall mature at such time as the court may determine, not exceeding forty years from date of issuance, and be redeemable at option of the county at such time or times as the court may fix."

The resolution which was passed authorizing the issuance of the bonds, after fixing the amount of the issue and the denomination of each bond, and the rate of interest which each was to bear, provided further, "And to mature in forty years from date of issuance," from which it appears to us that the county court, acting for the county, deemed it best not to fix an earlier date than 40 years for the redemption of the bonds. The court, for the county, exercised the discretion and judgment which the act expressly committed to them, and therefore there is no merit in the above contention.

[5] It is next said for appellants:

"The last paragraph of section 2 of the said act provides that the orders and resolutions of the county court directing the issuance of bonds under this act 'shall be preceded by at least thirty days by the adoption of the resolution setting forth the roads to be built or improved.' This resolution was incorporated in the same resolution directing the issuance of bonds and calling the election."

Appellants insist that the failure of the county court to adopt the resolution required by the last clause of section 2 of the act is a clear limitation upon the power of the county court to make a bond issue, and therefore that the same is void. We think the requirement of the last clause of section 2 is mandatory, and that the county court could have been required by mandamus to proceed in accordance with the mandatory requirement of that clause, but, as shown by appellants' insistence above quoted, the resolution required by the last clause of section 2 was published for the length of time required, and was incorporated in the resolution of the quarterly county court directing the issuance of the bonds, subject to the result of the election. The manifest purpose of the last clause of section 2 was: First, to give notice to the members of the county court of "the roads to be built or improved, naming the starting and ending points, the general course, and approximate number of miles thereof"; second, to give the same notice to the people of the county interested in the proposed action.

While it is our opinion that the last clause of section 2 imposed a mandatory duty upon the county court to comply therewith for the purposes above set out, yet, construing the act as a whole, we do not think it was the purpose of the General Assembly that the bonds issued should be invalid, where, as in this case, the resolution for issuance of the bonds was voted for by a majority of the members of the quarterly county court, and the required majority of voters at the election voted in favor of issuance of the bonds. The act does not provide that a failure to give the notice shall invalidate the bonds; moreover, the last clause of section 2 of the act was a mere matter of grace extended by the General Assembly to the classes of persons for whose benefit it was inserted. The Legislature had the power to grant the authority in question without making the validity of the action of the county court dependent on an election by the voters of the county, or the giving of such notice. No constitutional right of the voters or of the members of the county court was invaded by failure to give the notice.

We have disposed, in detail, of each of the contentions made by appellant. We think there is no merit in any of them; wherefore the decree of the court below is affirmed at appellants' cost.

SHIVE v. JANES et al.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. ADVERSE POSSESSION ⇨100—OCCUPATION TO CLAIMED BOUNDARIES.

Appellant's father, C. S., while in possession of five parcels containing 200 acres, which had been patented to appellant's grandfather, G. S., secured a patent to another parcel of land of about 200 acres lying between and surrounding the five parcels he already owned. Appellant's father executed a deed granting to appellant a parcel supposed to contain 200 acres, but the calls did not close. The deed to appellant closed with the expression, "excluding two hundred acres, same patented to G. S., this patented to C. S." Held that, in view of the fact that the boundary was set off and appellant went into possession, occupying one of the parcels patented to his grandfather, the clause of exclusion must be deemed to have been inserted by mistake for the conveyance showing an intent to make some sort of a grant, it will be governed by the acts of the parties.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. ⇨100.]

2. ADVERSE POSSESSION ⇨114—EVIDENCE—SUFFICIENCY.

Evidence held to show that appellant had possessory title to a parcel of land which he occupied, though the deed under which he claimed was of no effect, except as a parol gift; the description being wholly insufficient.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ⇨114.]

Appeal from Circuit Court, Metcalfe County.

Action by Fannie Janes and others against C. R. Shive. From the judgment, defendant appeals. Reversed, with directions.

J. W. Compton and M. O. Scott, both of Edmonton, for appellant. J. W. Kinnaid and J. R. Beauchamp, both of Edmonton, for appellees.

CLARKE, J. January 4, 1913, appellees filed this action in the Metcalfe circuit court to sell the land of which they allege Charles Shive died seised and possessed, consisting of two tracts, one containing 110 acres, and the other 637 acres, and asking that the proceeds of said sale be distributed among the plaintiffs and defendants, as the only heirs of said Charles Shive, according to their interests therein. Joe Shive, one of the parties to this suit, asserted claim to the 110-acre tract, which claim was allowed, and that tract is not involved in this litigation.

Appellant, C. R. Shive, on August 20, 1913, filed answer alleging that the said decedent had conveyed to him by deed in 1891 200 acres included in the 637-acre tract, copying into his answer as a description of said 200 acres the calls given for same in the deed to him. These calls do not close, and are not sufficient to describe any boundary of land.

On August 21, 1914, appellant filed an amended answer in which he said he had just discovered the description of his land in his original answer and deed was incorrect, and he then gave a description as being the

correct description of the land conveyed to him by said deed from his father, which included probably more than 400 acres.

On March 16, 1915, appellant filed a rejoinder in which he gave another description of the land claimed by him to have been conveyed by the deed from his father, which description was estimated to contain considerably more than 200 acres, and appellant alleged in this rejoinder that the description given therein was the true and correct description of the land conveyed to him by his father in 1891, at which time he took possession under said deed to the boundary lines therein described, and that he had been in adverse possession of said boundary since the date of said deed, which was more than 20 years. He asked that his deed be reformed so as to include this boundary described in the rejoinder, and that he be adjudged to be the owner of said boundary by reason of the adverse possession of same in the event his deed was not reformed. The allegations of all of his pleadings were traversed by pleadings filed by appellees. In the deed from his father, Charles Shive, to appellant, after giving the nine calls which purported to completely describe the boundary of 200 acres of land attempted to be conveyed to him by said deed, there is this sentence:

"Excluding two hundred acres, same patented to George Shive, this patented to Charles Shive in the year 1851."

In 1851 there had been issued to Charles Shive a patent for a tract of land, stated to contain two hundred acres, but which, in fact, embraced a boundary of more than 400 acres, and included within said boundary five tracts of land aggregating about 200 acres, which many years before had been patented in five separate patents to George Shive, the father of Charles Shive. At the time Charles Shive had this patent issued to him in 1851 he was the owner and in possession of the five tracts formerly patented to his father, George Shive, and the patent to him in 1851 for the 200 acres described a tract of land which included these five George Shive patents, aggregating about 200 acres, and at the end of the description of the land in said 200-acre patent is this sentence, "Excluding two hundred acre patent to George Shive," from which it is apparent that this patent to Charles Shive was a blanket patent taken out by him for the purpose of acquiring the title to about 200 acres of land lying between and surrounding the five tracts he already owned.

If the deed Charles Shive made to appellant in 1891 had contained a complete description of the land patented to him in 1851, it would be apparent that his purpose in making that deed was to convey to appellant the land the title to which he acquired under said patent, not including the George Shive tracts of about 200 acres; but, as stated before, the deed to appellant only contained a small

part of the calls necessary to describe the land covered by the patent of 1851, and not enough calls to describe or identify any tract of land.

The lower court, evidently believing that this was his purpose, adjudged that appellant took under his deed the land patented to his father in 1851, excluding the five tracts known as the George Shive patents, which awards to appellant title to some land he does not claim, and denies to him title to the land upon which he has resided continuously for about 20 years. The judgment held appellant's claim to possessory title to be without merit.

Joe Shive, Jim Jones, Mathew Gabbart, Lora Garman, E. A. Firkins, and Polly Garman, testifying for appellant, stated that during the past 15 years, at different times and places, the decedent, Charles Shive, had shown or described to each of them as the division line between the land he still owned, and that he had deeded to appellant the line that appellant is now claiming as said division line, and several of these witnesses testified that during all this time appellant had resided upon, occupied, and claimed as his own the land up to said division line and to the lines as now claimed by him. No witness testifies that Charles Shive ever at any time after he made the deed to appellant asserted any claim or questioned appellant's title or possession to the land he is now claiming.

[1] While the deed to appellant does not sufficiently describe any land to identify it, still it is evident that his father did attempt to convey to him some land. At the time appellant's father made this deed to him appellant was living in the house with his father, which is located upon one of the George Shive patents, and to which appellant makes no claim. In a short time after the deed was executed, appellant moved out of his father's house and into a house upon another of the George Shive tracts, included in the boundary he now claims. That was more than 20 years ago, and there is absolutely nothing in the record contradicting appellant's claim that during all the time since in which he has lived in that house he has occupied the land as now claimed by him adversely to the claims of all others. That he did so occupy it, and to the lines now claimed, is supported by the testimony of several witnesses, and that his father recognized his claim to that part of the land is substantiated by the testimony of the six witnesses named above. In view of this testimony, it is impossible for us to believe that the lower court's decision correctly decided this case. There is no evidence to support his decision,

and it can rest upon but one thing, and that is the following sentence in the deed to appellant:

"Excluding two hundred acres, same patented to George Shive, this patented to Charles Shive in the year 1851."

As said before, if in connection with this sentence the deed to appellant had contained a complete description of the land patented by Charles Shive in 1851, we would have been convinced that it was the intention of the parties by the deed to convey to appellant the land acquired by the grantor under the patent of 1851; but the deed did not contain all or even half of the description in the patent. It contained only nine calls, and these nine calls correctly described a part of two sides of the boundary of land claimed by appellant, and none of these calls touch any of the land that is not claimed by him. This would seem to indicate to us that in the preparation of that deed it was the intention of the parties not to convey to appellant thereby all the land acquired by Charles Shive under the patent of 1851, and this construction is in harmony with all the facts in this case, except the one clause in the deed above quoted.

If the lower court's construction is correct and was the intention of the parties at the time, appellant all these years has been living upon and in possession of one of George Shive's tracts of land which was excluded from the deed. It seems more reasonable to us that the sentence, "Excluding two hundred acres, same patented to George Shive, this patented to Charles Shive in the year 1851," was included in the deed through a mutual mistake than to believe that a greater part of the calls of the 1851 patent were left out of the deed by mistake, and that appellant all these years lived upon the land not conveyed to him, especially in view of the testimony of the six witnesses that Charles Shive at various times throughout the 20 years since the deed was made has recognized the division line between him and appellant agreeable to appellant's claim.

[2] Even if we disregard the deed because it did not sufficiently describe any tract of land, and hold it had no effect except as evidence of a parol gift or conveyance, the testimony in this case for appellant was ample to sustain a possessory title to the land claimed. *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453, 9 Ky. Law Rep. 205; *Medlock v. Suter*, 80 Ky. 101; *Tippenhauer v. Tippenhauer*, 158 Ky. 639, 166 S. W. 225; *Robinson v. Huffman*, 113 S. W. 458.

Wherefore the judgment is reversed, with directions to adjudge appellant the owner of the land claimed by him, and for proceedings consistent herewith.

KENTUCKY TRACTION & TERMINAL CO. v. WRIGHT.

(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. STREET RAILROADS ⇨112—ACTIONS FOR INJURIES TO ANIMALS—PRESUMPTIONS AND BURDEN OF PROOF.

Under the statute the killing of stock grazing on a turnpike by an electric railway car was *prima facie* negligent, and it devolved upon the railroad company to excuse itself by showing that the accident could not have been avoided by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 227, 228; Dec. Dig. ⇨112.]

2. STREET RAILROADS ⇨117—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

When it is satisfactorily shown by uncontradicted and unimpeached testimony that the killing of stock on a turnpike by an electric railway car could not have been avoided by the exercise of ordinary care, the statutory presumption of negligence is overcome and the case is properly taken from the jury; but if the witnesses are impeached or contradicted by other witnesses, or by physical facts and circumstances, the presumption of negligence is not necessarily overcome, and the case should go to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. ⇨117.]

3. STREET RAILROADS ⇨117—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the value of live stock killed by an electric railway car while grazing on a turnpike, evidence *held* to make a question for the jury as to whether the accident could have been avoided by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. ⇨117.]

4. STREET RAILROADS ⇨118—ACTIONS FOR INJURIES TO ANIMALS—INSTRUCTIONS.

In an action for the value of live stock killed by an electric railway car on a turnpike, the jury were told to find for plaintiff, unless they believed that defendant's employes used all the means at their command, having due regard for the safety of passengers and the crew, and the property of the company to stop or slacken the speed of the car after the motorman discovered, or by ordinary care, could have discovered the animals in a position of peril. *Held* erroneous, as prescribing no degree of care respecting the use of means at the command of the company's employes, and imposing upon them the absolute duty to use all means at their command consistent with the safety of the car and the persons thereon to avoid the injury, whereas the law merely imposes on them the duty to use ordinary care under such circumstances.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 258-269; Dec. Dig. ⇨118.]

5. STREET RAILROADS ⇨118—ACTIONS FOR INJURIES TO ANIMALS—INSTRUCTIONS.

In an action for the value of stock killed by an electric railway car where the motorman was the only employe of defendant in a position to act, an instruction as to the duty of using ordinary care to avoid the injury should have been confined to him alone.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 258-269; Dec. Dig. ⇨118.]

Appeal from Circuit Court, Bourbon County.

Action by C. J. Wright against the Kentucky Traction & Terminal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Stoll & Bush, R. C. Stoll, and Wallace Muir, all of Lexington, for appellant. Denis Dundon, of Paris, for appellee.

CLAY, C. In this action to recover damages to stock alleged to have been killed by the negligence of the defendant, plaintiff, C. J. Wright, recovered of the defendant, Kentucky Traction & Terminal Company, a verdict and judgment for \$600. The defendant appeals.

[1-3] Briefly stated, the facts are as follows: The stock, consisting of two horses and two mules, were struck and killed by an interurban car at 8:05 p. m., April 14, 1913. The accident occurred about a mile and a half from Paris on the pike leading from Lexington to Paris. Defendant's track at that point is on the right side of the turnpike and between the metal and fence of the adjacent landowner. The fence is about 5 feet from the track, and the stock were grazing between the track and the fence. The motorman says that it was dark and he discovered the stock only about 300 feet away and could not have discovered it any sooner. As soon as he saw the stock he shut off the current and applied the brakes, but was unable to stop the car, which was running about 30 or 35 miles an hour. After discovering the stock he did all he could to avoid the injury. He stated, however, that just as soon as he applied the brakes and shut off the current he struck the stock. After that he ran a few feet, when the car was derailed. The conductor and a passenger, who were in the same compartment with the motorman, corroborate the statements of the motorman. The evidence for plaintiff is to the effect that there was an unobstructed view of the track for a distance of about 1300 feet, and that at nighttime a motorman, with the aid of an electric headlight could see much further than 300 feet. A passenger on the car stated that he was standing in the aisle and did not notice any checking in the speed of the car until the stock was struck. Plaintiff's evidence also shows that after the stock was struck the car ran on the track for a distance of 90 feet, and after being derailed for a distance of about 150 feet.

The statute makes the killing of stock *prima facie* negligent. It then devolves on the company to excuse itself by showing that the accident could not have been avoided by the exercise of ordinary care. When this is satisfactorily shown by uncontradicted and unimpeached testimony, the statutory presumption of negligence is overcome and it is proper to take the case from the jury. However, if the witnesses are impeached, or are contradicted by other witnesses, or by

physical facts and circumstances, the presumption of negligence is not necessarily overcome, but the case should go to the jury. *Byrd v. Central Kentucky Traction Company*, 136 Ky. 766, 125 S. W. 174; *C. & O. Ry. Co. v. Grigsby*, 131 Ky. 363, 115 S. W. 237; *C. N. O. & T. P. Ry. Co. v. Lowry*, 122 S. W. 128. Here the stock were not at a considerable distance from the track, and therefore out of the motorman's range of vision. Between the track and the fence there was a distance of only 5 feet. The stock were in this space, and therefore not only in dangerous proximity to the track, but within the natural range of the motorman's vision. The motorman himself says that he observed the stock when only about 300 feet away. He immediately applied the brakes and shut off the current. Notwithstanding this statement, he admits that as soon as this was done he struck the stock. Even if it conceded, therefore, that he could not have discovered the stock when further away than 300 feet, yet he does not satisfactorily account for the delay in applying the brakes and shutting off the current. Not only so, but the defendant's witnesses are contradicted as to the distance the car ran after striking the stock, and by another witness who was standing in the aisle and who says that he did not notice any checking of the car until the stock were struck. There was also proof to the effect that the stock could have been seen for a distance greater than 300 feet. In view of the admissions of the motorman and of the contradictions of the defendant's witnesses, we conclude that the case was properly submitted to the jury.

[4, 5] The court gave the following instruction:

"First. The jury are instructed to find for the plaintiff, unless they believe from the evidence that the defendant's employes, in charge of the car on the occasion complained of, used all the means at their command, having due regard for the safety of the passengers on the car, the crew in charge of it, and the property of defendant, to stop or to slacken the speed of the car after the motorman discovered, or by the exercise of ordinary care could have discovered, the plaintiff's horse or horses in a position of peril, and, if they so believe, they ought to find for the defendant."

It will be observed that the instruction makes the defendant liable, unless the defendant's employes in charge of the car "used all the means at their command," etc., "to stop or to slacken the speed of the car," etc. The law does not impose upon the defendant's employes the absolute duty to use all the means at their command, consistent with the safety of the car and the persons thereon, to avoid the injury, nor does it impose upon them the duty to exercise the highest degree of care for that purpose. It merely imposes on them the duty to use ordinary care, with the means at their command, consistent with the safety of the car and the persons thereon. The instruction in question prescribes no de-

gree of care. It erroneously leaves that question to the determination of the jury. *Lexington Railway Company v. Woodward*, 106 S. W. 853, 32 Ky. Law Rep. 653; *Blue Grass Traction Company v. Ingles*, 140 Ky. 488, 131 S. W. 278. We also conclude that as the motorman was the only person in a position to act, the duty of using ordinary care with the means at his command should be confined to him alone.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

BARRETT et al. v. VREELAND et al.

(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. NUISANCE \Leftrightarrow 75—INJUNCTION SUIT—JOINER OF PLAINTIFFS.

Under Civ. Code Prac. § 22, providing that all persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, unless otherwise provided, property owners whose houses were injured and rendered uncomfortable to inhabit by the operation of a quarry and rock crusher in the vicinity could join in suit for an injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. \Leftrightarrow 75.]

2. NUISANCE \Leftrightarrow 72—PUBLIC NUISANCE—INJUNCTION.

Property owners, the physical structure of whose homes was injured by the shock from blasting in a quarry, which also threw stones upon the properties, and who were disturbed at night by the noise of machinery at the quarry, could enjoin the operation of the quarry in such manner, since a public nuisance will be restrained at the suit of a private person suffering a special and particular injury distinct from that suffered by him in common with the public at large, though an individual, suffering no injury different from other members of the public, cannot prosecute an individual suit to abate the nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. \Leftrightarrow 72.]

3. NUISANCE \Leftrightarrow 75—CHARACTER OF DISTURBANCES—SUFFICIENCY OF EVIDENCE.

In a suit to enjoin the operation of a quarry and rock crusher, evidence held to justify the chancellor's finding that the facts in regard to the disturbances produced in plaintiffs' properties were as testified to by them and their witnesses.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. \Leftrightarrow 75.]

4. NUISANCE \Leftrightarrow 75—INJUNCTION.

Equity will interfere more readily to enjoin a nuisance interfering with the enjoyment of property uninjured physically than it will to restrain physical injury to the property itself, since in the former case damages are less readily ascertainable.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. \Leftrightarrow 75.]

5. NUISANCE \Leftrightarrow 75—PUBLIC NUISANCE—INJUNCTION.

To enjoin a public nuisance causing them a particular individual injury, property owners did not need to first establish their right to injunctive relief by a proceeding at law.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. \Leftrightarrow 75.]

6. NUISANCE —26—PUBLIC NUISANCE—INJUNCTION—DEFENSES.

Operators of a quarry and stone crusher, constituting a nuisance, could not defend the suit of injured property owners for an injunction on the ground that some of the plaintiffs moved to the nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 64-66; Dec. Dig. —26.]

7. NUISANCE —75—PUBLIC NUISANCE—INJUNCTION—LACHES.

Where property owners, injured by the operation of a quarry and stone crusher, sued to restrain its operation by heavy blasts and running the crusher day and night within a few years from the beginning of such mode of operation, which was not the only possible way to conduct the business, the suit was not barred by laches, although the quarry owners had installed \$2,500 worth of removable machinery.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. —75.]

8. NUISANCE —75—PUBLIC NUISANCE—INJUNCTION—SUFFICIENCY OF EVIDENCE.

In an injunction suit by property owners to restrain the operation of a quarry and rock crusher, evidence held insufficient to show injuries resulting from the operation of the rock crusher to justify injunctive relief as to it.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. —75.]

Appeal from Circuit Court, Franklin County.

Suit by Graham Vreeland and others against Guy Barrett and another. From so much of the judgment as granted relief to plaintiffs, defendants appeal, and from so much as refused requested relief, plaintiffs appeal. Affirmed.

T. L. Edelen and J. H. Hazeltigg, both of Frankfort, for appellants. Frank Chinn and Brown & Nuckols, all of Frankfort, for appellees.

THOMAS, J. The appellees (eight in number) are each residents of the city of Frankfort, being the owners, respectively, of the houses in which they each reside with their families, and their property is located, some on Wapping street, some on Watson Court, and that of others on Wilkinson street in said city. The residences of the appellees Christine B. South and Frank Chinn have no intervening residences or buildings between them and the Kentucky river, which runs immediately west of their lots. The residences of the other appellees are farther away from the river and, for the most part, to the east of it, but, as is claimed in the petition, their residences are located sufficiently near to the property of appellants as to be affected by its operation, as is complained of in this suit. Immediately west of this property and across the Kentucky river the appellants maintain, and have maintained, a rock quarry, which they have operated more or less constantly since the year 1906, they having acquired the land upon which the quarry is located in the year 1900. Claiming that for several years past, the appellants had operated this quarry in such a way as

to invade the peaceful, quiet, and comfortable enjoyment of the right of appellees to occupy their property as a residence by each of them, they, on December 20, 1913, filed their joint petition in equity in the Franklin circuit court against the appellants, Guy Barrett and A. G. Barrett, doing business under the name of Devil's Hollow Stone Company, seeking to enjoin them from so operating their quarry as to interfere with the appellees' rights, before mentioned, and claiming that the operation of it in the manner stated was and had been a nuisance, which was sought to be abated by the injunctive process prayed for in the petition. The objectionable acts in the operation of the quarry sought to be enjoined can best be stated in the language adopted in the petition, which is as follows:

"In operating this quarry the defendants have continuously for more than five years last past, blasted the rocks from the river cliff, over a space about 150 feet from the bottom of the quarry to the top of it, with heavy charges of dynamite, powder, and other such explosives, which have thrown rocks entirely across the river and upon the property of plaintiffs, thereby endangering their lives on divers different occasions, and have repeatedly shaken the houses of plaintiffs upon their foundations, like an earthquake would do; have knocked the plastering from their walls, and put their families in fear of their lives. During all of said time defendants have also operated a rock crusher, with steam, at the same point, crushing the hard stones thrown out of the hillside by said blasts, and thereby filled the air with dust, soot, and smoke, which is blown into the homes of plaintiffs, the dust, soot, and smoke so thick and penetrating as to injure the furniture of their homes, and otherwise render their homes uncomfortable, and the noise from the peculiar machinery of the rock crusher, which is run day and night, at times is so great as to drown out and prevent ordinary conversation in the homes of several of plaintiffs, and prevent sleep at night."

The answer consists of a general denial, and in another paragraph an effort is made to rely upon a prescriptive right to so manage and use the quarry, as it is claimed that the quarry had been operated at the same place since about the year 1852; and it is further urged in defense that appellants, since they began its operation, have expended considerable sums of money in equipping it to its present capacity, and that appellees stood by without protest and acquiesced in this expenditure; and, for these reasons, they should be denied the relief sought. It is also insisted in the answer that some of the appellees have acquired their property since the commencement of the operation of the quarry by appellants, and that, so far as these are concerned, they are not entitled to any relief upon the insisted doctrine that they "have moved to the nuisance," if one exists. With the exception of the latter contention as to such defendants, the reply is a denial of the allegations of the answer. After very extensive preparation and a submission of the cause, the court adjudged, in

substance, that appellants be perpetually enjoined from discharging, or permitting to be discharged, such blasts of dynamite or other explosives in the operation of the quarry as would jar the houses of the plaintiffs, or any of them—

“to such an extent as would interfere with the comfortable or reasonable enjoyment of their homes, or houses; or to cause said houses, or any of them, to vibrate or shake; or to cause the plastering or tiling, or other coverings of the walls or ceiling, in any of said houses to crack or fall or be in any way damaged; or cause other injury to any of said houses; or cause rocks or dirt or other debris to be thrown on the property of plaintiffs, or any of them.”

The appellants were further enjoined from—

“making, or permitting to be made, at night any noise by the machinery at the quarry, or in the operation thereof, which would disturb or interfere with the peace and quiet of the homes of plaintiffs, or any of them, or with the rest or sleep of the plaintiffs, or any of them, or their families, or any of them.”

The court declined to enjoin the appellants from the operation of the rock crusher. From so much of the judgment as granted relief to appellees, the appellants appeal; and from the refusal of the court to restrain in any manner the operation of the rock crusher, the appellees prosecute a cross-appeal.

[1] The first ruling of the court brought in question by a special demurrer to the petition and by a motion to require plaintiffs to elect, is the right of appellees to jointly prosecute this suit. That they may do so under the facts disclosed by their pleading, there can be no doubt. Sustaining the right, the author of the excellent work of Wood on Nuisances (2d Ed.) page 1160, says:

“Where several persons are injured by a common nuisance, although varying in degree but having a common effect, they may join in a bill for an injunction, but there can be no recovery of damages.”

Section 22 of our Civil Code of Practice is:

“All persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, unless it is otherwise provided in this Code.”

Mr. Newman in his work on Pleading and Practice, § 153, in commenting on this section of the Code, supra, says:

“So, also, different persons owning separate tenements affected by a nuisance may unite as plaintiffs to restrain by injunction its continuance.”

This rule of practice has also been upheld by this court in the following cases: Louisville Coffin Co. v. Warren, 78 Ky. 400; Seigfried v. Hays, 81 Ky. 377, 50 Am. Rep. 167; Palestine Building Association v. Minor, 86 S. W. 695, 27 Ky. Law Rep. 781; Beckham v. Brown, 40 S. W. 684, 19 Ky. Law Rep. 519. Many other authorities might be cited, but the rule permitting the right of persons similarly circumstanced and affected by the acts complained of to unite in one petition for relief is so universally settled as to render

further consideration of the question unnecessary.

[2] That this character of action may be maintained where the facts justify it is equally as well settled as the question just disposed of. The right to the remedy by the individual citizen is recognized by Mr. Pomeroy in his work on Equity Jurisprudence in section 1849, wherein he says:

“A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large.”

And the same author again says, in section 1350:

“It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. * * * The equitable jurisdiction is therefore based upon the motion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits.”

The same right to such relief is found in all standard works on equity jurisprudence or equitable relief. And in Cyc. vol. 29, p. 1191, the doctrine is thus stated:

“The question in all cases is whether the annoyance produced is such as to materially interfere with the ordinary comfort of home existence. It is not, of course, necessary that the annoyance and discomfort should be so great as to actually drive the person complaining thereof from his dwelling; but if the alleged injury be a plain interference with the ordinary comforts and enjoyments, there is a nuisance, no matter how slight the damage, provided the inconvenience be actual and not fanciful.”

Many cases and authorities almost innumerable could be cited from other jurisdictions, but which we think is unnecessary. The maxim, “Sic utere tuo ut alienum non laedas,” is an ancient, as well as a just, rule, and is patterned after the one which is elsewhere more comprehensively stated, “And as ye would that men should do to you, do ye also to them likewise.” The right to this remedy, under the pleadings and proof here, has, on numerous occasions, been upheld by this court, and, indeed, so far as we can learn, has never been denied by it. Louisville Coffin Co. v. Warren, 78 Ky. 400; Seigfried v. Hays, 81 Ky. 377, 50 Am. Rep. 167; Palestine Building Association v. Minor, 86 S. W. 695, 27 Ky. Law Rep. 781; Phillips v. Elizabethtown B. & C. Factory, 15 Ky. Law Rep. 574; Alexander v. Tebeau, 132 Ky. 487, 116 S. W. 356, 18 Ann. Cas. 1092; Louisville Home Telephone Co. v. City of Louisville, 180 Ky. 611, 113 S. W. 855; Peacock v. Spitzelberger, 29 S. W. 877, 16 Ky. Law Rep. 803; Green v. Asher, 11 S. W. 238, 10 Ky. Law Rep. 1006; and many other cases which might be cited.

[3] The testimony taken and heard upon the trial showed substantially the following facts: The nearest house of any of the appellees to the quarry is 780 feet, the Kentucky river intervening. The quarry in which the blasting is done has a perpendicular facial surface of some 200 or more feet long and something like 150 feet high, and faces

practically squarely towards the appellees' property. For some years before the filing of the suit very heavy explosions of dynamite would frequently be made at the quarry, and on some occasions flying rock would light upon some of the houses of the appellees, but not upon all of them, and other and larger rocks would, upon occasions, fall in the yards to the premises of some of the appellees. That these blasts would be exceedingly loud and produce great concussion in the atmosphere, causing the houses of appellants to shake and the windows to rattle; and upon more occasions than one, in some of the houses, within a short while after these explosions, the plastering on some of the walls would fall, this being true with regard to the residence of appellee South, although the plastering was comparatively new. There is no testimony to show that any of the plastering thus affected was old or rotten, or that there existed any other cause for its falling except the excessive jars produced by these explosions. It was also shown by testimony, which is uncontradicted, that some kind of noise was permitted to be made at night, presumably by some of the machinery in use at the quarry, which noise invaded the premises of appellees and prevented the quiet and undisturbed enjoyment of their premises, which they claimed they had a right to enjoy unmolested. That this noise at night interfered with the sleep of the members of their families and rendered the habitation of the premises exceedingly annoying. There was also testimony to the effect that the rock crusher in the daytime produced similar disturbances, especially as to the premises of appellees South and Chinn. The facts just related were not only testified to by the appellees, but by many other witnesses not interested in the result of the suit. On the contrary, there were citizens, residing upon the same streets of Frankfort with appellee, who testified that they were not disturbed by these things to the extent to which appellees claimed to have been disturbed. Citizens residing in other parts of the city, but relatively as near to the quarry as appellees, gave similar testimony. None of the witnesses for appellants denied the casting of rocks upon the premises of some of the appellees, as was testified to by the latter, and none of such witnesses denied but that upon occasions the heavy explosions produced by the blasting occurred, but they stated that these explosions did not materially disturb them. Under this condition of the record, the chancellor was perfectly justified in finding the facts as to the disturbances produced, as is testified to by the appellees and their witnesses. So the question is, May such acts under the conditions presented by this record, by an appropriate proceeding, be enjoined?

At the beginning it may be stated that it is claimed that the acts proven show a public nuisance and the remedy should be by a

proceeding prosecuted by the appropriate agent of the public, instituted in the name of the commonwealth, or, if not, by an indictment, and not by a proceeding for an injunction by the individual claiming to be affected. This contention, of course, is upon the idea, and is insisted upon because of the rule, that if an individual suffers no injury different from the other members of the public, he cannot prosecute an individual suit to abate the nuisance, which rule is universally recognized and its soundness unquestioned. But all of the authors on the law who profess to write upon the subject acknowledge an exception, or rather give the right to an individual to sue in cases where he suffers a greater injury than other members of the public. This is to be seen in the words taken from Pomeroy, *supra*, and it is recognized in the opinion in the case of *Palestine Building Association v. Minor*, *supra*, in the following language:

"It is not denied that where private citizens suffer peculiar injury apart from that of the general public from nuisances, they may maintain their action in equity to abate it, although the public, through the Attorney General or commonwealth attorney, may also have the right to proceed in the name of the commonwealth to abate the nuisance."

And also in the opinion in the case of *Green v. Asher*, *supra*, wherein this court, through Judge Pryor, in upholding the right of the citizen to maintain the action, although the nuisance might in some respect be a public one, says:

"It is well settled that a public nuisance may become a private nuisance when special injury arises, and particularly when it is that character of nuisance that is continual, and affects the party complaining to a much greater extent than the public generally."

Many other cases from this court might be cited in substantiation of the point, but it is manifestly unnecessary. In the cases to which we have hereinbefore referred, the acts constituting the nuisance, as well as the character of the rights of the plaintiffs which were affected thereby, were different in each case. In many of them the atmosphere was polluted by noxious odors to such an extent as to render the occupancy of the premises of plaintiff greatly uncomfortable, although not to the extent of the impairment of health. In others there were noises and disturbances produced by the operation of ball parks or disorderly houses, whereby the peaceful and quiet enjoyment of plaintiff's premises was unduly disturbed; and in still others the air around about the plaintiff's premises would be polluted by the acts complained of in such a way as to render the comfortable habitation of the premises impossible, such as smoke and other deleterious fumes; and in still other cases the nuisance was produced by loud and disturbing noises such as are involved in this case. The case of *L. & N. R. R. Co. v. Sweeney*, 157 Ky. 620, 163 S. W. 739, was one brought for damages against the railroad company for a physical invasion

of plaintiff's premises by the blasting of rock through the use of dynamite, whereby some of it was cast on plaintiff's premises. This court upheld the right of plaintiff to maintain the action; and, where the acts complained of are of such a continuous nature as to produce a nuisance, we are unable to see wherein the injunctive remedy would not lie. It is not necessary to the maintenance of the action that there should be a physical invasion of the property of plaintiff through the objectionable acts of defendant. It is sufficient that there be an invasion of, or unlawful interference with, the right incident to plaintiff's property; and, where this right incident to his property is sought to be protected, the remedy by injunction will be much more readily granted than where the injury is to the physical property. The latter is a tangible thing and has a visible and physical existence, as well as a marketable value which is susceptible of determination and can be definitely fixed, or at least practically so, in dollars and cents. Whereas, it is entirely different with a right incident to the property. This doctrine is fully recognized by Mr. Wood in his work on Nuisance, *supra*, in section 782, wherein upon this subject he says:

"But where a right is injured, no just or adequate measure of damages can be arrived at. It may, or it may not be, of present special value; it may, or it may not be, of considerable prospective value; in either case a jury will seldom give more than nominal damages for its violation, which is utterly inadequate to protect the right."

[4] He then continues to say that in cases of injury to the property, courts of equity are more reluctant to grant relief because of the adequacy of the remedy at law, but where violations of, or injuries to, the rights incident to the property, this reluctance on the part of equity to interfere is moderated. In stating this rule, the learned author says:

"But in case of an injury to a right, that is a substantial right of property which, as has heretofore been explained, is an incident of real property belonging or annexed to it, either as a material incident or by grant or prescription, where the right is clear and the nuisance established, and injunction will always be granted to protect the right, as well as to prevent irreparable injury."

[5] It is insisted, however, by appellants that the right to the relief by injunction in favor of appellees should have first been established by a proceeding at law. In other words, that the existence of the nuisance, as well as the interference by it with the rights of the appellees, should be determined by a trial at law. This contention cannot be maintained. It is denied by all modern authority; and, whatever may have been the ancient rule when there existed a great rivalry between courts of equity and courts of law, it is sufficient to say that the rule contended for has no modern authority, text-writer, or judicial utterance in its favor when the facts are similar to those we have here. In the

work on Nuisance to which we have referred, in section 785 upon this subject, it is stated:

"It is not necessary that the right should first be established in law in all cases, as, if the right is clear and unquestioned and its violation is established or practically conceded, an injunction will be granted if the nature of the injury is such as would warrant an injunction after a verdict."

But it is a sufficient answer to this contention to say that in none of the cases emanating from this court has the doctrine contended for been applied, and wherever it is found to prevail there will also be found to exist the common-law rules of procedure governing the practice in equity and ordinary cases, and not within jurisdictions having the character of Code practice which prevails in this state.

[6] A reversal is urged because it is claimed that some of the appellees "moved to this nuisance," but this position likewise is untenable. In the work on Nuisance, previously referred to in section 802 upon this subject, it is stated:

"Neither will the fact that when he erected his house no houses were near, but that the plaintiff has come to his works, in any measure operate to protect him; for he should have taken the precaution to purchase enough of the surrounding property when he built his works to prevent the possibility of such results."

Moreover, in the instant case by far the larger per cent. of the appellees were the owners of and occupying their premises long before the appellants commenced the operation of the quarry, and all were such before the character of acts enjoined were commenced.

[7] It is likewise urged as a ground for reversal that the appellees are deprived of their remedy because of their laches. In other words, that by remaining quiet and by acquiescing, they are equitably estopped to make complaint; and, as a further right to insist upon this defense, it is claimed that appellants expended a considerable sum of money in the investment of and equipment of their plant. The facts are that the tract of land upon which the quarry is located consists of about 45 acres, which cost appellants \$2,600. They have spent for machinery something like \$2,000, or perhaps \$2,500. This machinery is from six to nine years old, and can be easily and readily moved to any other place to which appellants might see proper to carry it. The land, of course, is still there, and will remain there whatever may be the action of the court. Furthermore, the testimony in regard to the objectionable management of this quarry shows that the acts producing the nuisance complained of, and enjoined, does not grow out of the nature of the business, but grows out of the way and manner in which it is conducted, and that this particular way and manner has not been indulged in by appellants until the last few years preceding the filing of this suit. The conduct complained of is a thing which might, or might not, become a nuisance.

sance, dependent entirely upon the extensiveness of the blasting and the consequent noise and jarring resulting therefrom, and the molesting noise at night, and it is this manner of use which was sought to be and was enjoined. There is no such acquiescence of laches shown as to deprive the plaintiffs of the injunctive relief.

Lastly, it is earnestly insisted that this court's opinion in the case of Louisville Coffin Co. v. Warren, supra, effectually bars the right of plaintiffs to maintain this action. The facts of that case and those in the present case are essentially different. The factory, the operation of which was sought to be enjoined there, had been operated in the same manner as it was being operated when the suit was filed, for many years. The plaintiffs had stood by and seen improvements placed upon the property without protest, and with a full knowledge of the character of the intended operation, to the amount of \$15,000, or more. It is stated in the opinion:

"In this case the buildings had been erected, and a large expenditure made, amounting to \$15,000, or \$20,000. The business in which appellants are engaged is lawful. It is not shown that the health of the appellees or their families are affected by it, or that the atmosphere is rendered unpleasant, except from the smoke at certain periods, when the wind is blowing in the direction of appellees' houses."

Further on in the opinion, after recognizing that mere acquiescence in the existence of a nuisance for seven years, or more, will not prevent an individual from abating it, the opinion says:

"Where one stands by and permits the erection of buildings, as in this case, and their use for the purposes for which they were constructed for seven years, it becomes very persuasive evidence that the injury complained of is such as is incidental to like improvements and common to the entire population on the square."

And still further on in the opinion it is stated:

"We think, in a case like this, where the property has been used for the same purposes for a number of years, and expenditures made that, if rendered valueless, must result in the financial ruin of the owners, the application for an injunction must be sustained by strong and convincing testimony; in other words, a plain case of nuisance, and with it irreparable injury, must be established."

The differences between the two cases are, that the injunction granted herein does not render the appellants' property valueless, nor does it result in financial ruin to them. The continuous jarring and injury to plaintiffs' houses render their occupancy unpleasant as well as, according to the testimony, unhealthful, and their annoyance is not governed by the shifting changes of the wind. Furthermore, it is shown in this case that the application for the injunction is sustained by strong and convincing testimony, and the nuisance, together with the irreparable injury, is indisputably established; especially so as to at least three of the

appellees. Every citizen has a right to the free and unmolested enjoyment of the occupancy of his home, and included in this is the right to freedom from the consequences of any subtle influence being set in motion which interferes with this right, be it visible or invisible, and, as the proof in this case shows, in addition to the casting of rocks upon the premises of some of the appellees, such forcible vibrations in the air were produced by the explosions as to cause the shaking and jarring of their premises, their rights incident to the enjoyment of the property were seriously and irreparably interfered with. The judgment in so far as it granted the appellees relief was proper. If, as appellees contend, they are not guilty of producing the noise at night complained of, then the injunction granted below upon this cause of complaint cannot affect them; for they cannot be in contempt for continuing to not do the thing that is enjoined.

[8] Upon the cross-appeal but little need be said. We have seen in the course of this opinion that the nuisance must be thoroughly established by convincing proof. The injuries resulting from the operation of the rock crusher are not established by the character of testimony that we think the law requires in order to obtain the relief sought, and it, therefore, results that the denying of the relief to the appellants upon this ground was also proper.

It, therefore, results that the judgment appealed from should be, and is, affirmed, and that the part of it called in question by the cross-appeal should also be, and is, affirmed, all of which is so ordered.

HUMBLE & McLENDON v. WYATT.

(Court of Appeals of Kentucky. Feb. 18, 1916.)

1. SALES \S 168½ — SATISFACTION OF BUYER — GOOD FAITH.

Where plaintiff contracted to manufacture and deliver railroad ties, with a provision that, if the buyer's inspection was not satisfactory to it, or if the ties were not satisfactory to the buyer on inspection, the contract should be void, the buyer was the sole arbiter of his own satisfaction, so long as he acted in good faith.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 403-408; Dec. Dig. \S 168½.]

2. SALES \S 377 — ACTION FOR BREACH OF CONTRACT — SUFFICIENCY OF PETITION.

In an action for damages for breach of a contract under which plaintiff manufactured and sold railroad ties, providing that, if the ties were not satisfactory to the buyer on inspection, the contract should be void, a petition not alleging that the buyer, in notifying the seller that the ties were not satisfactory, acted fraudulently or in bad faith, was bad on demurrer; the allegation that he acted arbitrarily and ought to have been satisfied being insufficient.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1092; Dec. Dig. \S 377.]

Appeal from Circuit Court, Whitley County.

Action by Humble & McLendon against W. B. Wyatt. Judgment for defendant dismissing the petition, and plaintiffs appeal. Affirmed.

John Jennings, Jr., of Jellico, Tenn., and Tye, Siler & Gatliff, of Williamsburg, for appellants. Smith & Early, of Williamsburg, for appellee.

CLAY, O. Plaintiffs, L. H. Humble and D. R. McLendon, partners doing business under the firm name of Humble & McLendon, brought this suit against defendant, W. B. Wyatt, to recover damages for his breach of a contract of purchase of a certain quantity of railroad ties. A demurrer was sustained to the petition, and the petition dismissed. Plaintiffs appeal.

It appears from the petition that plaintiffs and defendant entered into a contract by which defendant purchased from plaintiffs not less than 30,000 and not more than 50,000 white and chestnut oak cross-ties at certain prices, varying according to the dimensions of the ties. Plaintiffs were to manufacture and deliver the ties for shipment. Defendant was to inspect the ties. Besides other provisions, which it is not necessary to enumerate, the contract contains the following:

"* * * And in case the inspection is not satisfactory to first party at any time or the ties not satisfactory to second party this contract is to be null and void."

The petition charges, in substance, that after the delivery of a certain number of the ties and their acceptance by the defendant the defendant notified plaintiffs that the ties were not satisfactory. It further alleges that the ties were of the same quality as those previously accepted, were well manufactured, and complied in every respect with the specifications contained in the contract, and were such as ought to have satisfied a reasonable man. The petition contains the further allegations that the defendant acted arbitrarily in refusing the ties.

[1, 2] The weight of authority is to the effect that the parties must stand to their contract as they have made it, and, if the one party has agreed to do something that shall be satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction, at least so long as he acts in good faith, and his dissatisfaction is real, and not feigned or a mere subterfuge. It is further held that the application of this principle is not now limited to transactions involving personal taste and preference. In such cases the question for determination is not whether the one complaining ought to be satisfied, but whether, in declaring his dissatisfaction, he acted in good faith. *Campbell Printing Press Co. v. Thorp* (C. C.) 38 Fed. 414, 1 L. R. A. 645; *White v. Randall*, 153 Mass. 394, 26 N. E. 1071; *Sax v. Detroit, etc., R. Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep.

572; *Frery v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Adams Radiator & Boiler Works v. Schnader*, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 893; *Barrett v. Raleigh, &c., Coke Co.*, 51 W. Va. 416, 41 S. E. 220, 90 Am. St. Rep. 802; *Ellis v. Mortimer*, 1 Bos. & Pul. (N. R.) 257; *Taylor v. Brewer*, 1 M. & S. 290; *Barnes v. Rawson*, 111 Iowa, 426, 82 N. W. 947; *Daniels v. Decatur County*, 99 Iowa, 440, 68 N. W. 718; *Tyler v. Ames*, 6 Lans. (N. Y.) 280; *Spring v. Ansonia Clock Co.*, 24 Hun (N. Y.) 175; *Hart v. Hart*, 22 Barb. (N. Y.) 606; *Rossiter v. Cooper*, 23 Vt. 522; *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851, 18 L. R. A. (N. S.) 741, 130 Am. St. Rep. 382; *Livesley v. Johnston*, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Kligger Press Co. v. J. V. Reed & Co.*, 133 Ky. 350, 117 S. W. 950, 134 Am. St. Rep. 450; *Dick v. James Clark, Jr., Electric Co.*, 161 Ky. 622, 171 S. W. 198; *Elliott on Contracts*, § 1605.

Whether or not this doctrine will be applied in every instance to so simple and standard an article as a railroad cross-tie we deem it unnecessary to determine. It is sufficient to say that, in our opinion, it is peculiarly applicable to the facts of this case. Under the contract in question the ties were to be manufactured by plaintiffs and inspected by the defendant. The contract expressly provides that it is to be null and void if at any time the inspection is not satisfactory to plaintiffs or the ties not satisfactory to defendant. It is evident that plaintiffs, on the one hand, were unwilling to risk the inspection to the defendant or any one else, while the defendant, on the other, was unwilling to leave the question of his satisfaction with the ties to anybody but himself. In view, therefore, of the two provisions inserted for their mutual protection, we conclude that it was the intention of the parties to make each the sole judge of his own satisfaction. It follows that unless the defendant, in declaring his dissatisfaction, acted fraudulently or in bad faith, plaintiffs are not entitled to recover. The petition does not allege that the defendant acted fraudulently or in bad faith. The allegation that he acted arbitrarily and ought to have been satisfied is not sufficient.

We therefore conclude that the demurrer to the petition was properly sustained.

Judgment affirmed.

JUSTICE et al. v. PETERS et al.

(Court of Appeals of Kentucky. Feb. 18, 1916.)

1. VENDOR AND PURCHASER ⇨239 — BONA FIDE PURCHASERS—VALIDITY OF PRIOR CONVEYANCE.

A deed, to be effectual against a subsequent purchaser for a valuable consideration, must have been delivered to and accepted by the grantee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 563-600; Dec. Dig. ⇨239.]

2. DEEDS \Leftrightarrow 56—"DELIVERY"—MODE OF.

Delivery of a deed may be actual or constructive, but in either case there must be an intent on the part of the grantor to transfer title, coupled with some act by which he parts with power and control over the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. \Leftrightarrow 56.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

3. DEEDS \Leftrightarrow 194—ACCEPTANCE—PRESUMPTION.

When a parent makes a voluntary deed for the benefit of his infant child, the law presumes an acceptance by the infant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. \Leftrightarrow 194.]

4. DEEDS \Leftrightarrow 194—DELIVERY—ACCEPTANCE.

If one executes a deed to an infant and causes it to be recorded, delivery and acceptance is presumed; but the mere execution by a parent of a deed does not raise a presumption of delivery and acceptance, where the parent retains it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. \Leftrightarrow 194.]

5. DEEDS \Leftrightarrow 208—DELIVERY—ACTIONS—EVIDENCE.

Evidence held insufficient to show a delivery of a deed by a father to his infant sons, or acceptance by them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. \Leftrightarrow 208.]

Appeal from Circuit Court, Pike County.

Action by James A. Justice and another against William Peters and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. S. Cline, of Pikeville, for appellants. Staton & Pinson, of Pikeville, for appellees.

HURT, J. In 1890 John Thacker conveyed a tract of land in Pike county to E. P. Justice, and thereafter, on January 20, 1894, Matilda Thacker conveyed to E. P. Justice a tract of land adjoining the first-named tract. E. P. Justice, with his family, resided on the first-named tract, and in 1898 E. P. Justice and his wife, Nancy, executed a deed of conveyance for the two tracts of land to their two infant sons, James A. Justice and T. F. Justice, the first of whom was then 8 or 9 years of age and the latter 14 and 15 years of age. The proof does not very satisfactorily show what were the contents of this deed. It was never recorded, and in the year 1909 was destroyed. T. F. Justice and James A. Justice resided with their parents until after becoming 21 years of age, when they each married and went away to live to himself; T. F. Justice on the lands of his uncle near by the lands where E. P. Justice continued to live, and James A. Justice upon lands several miles away. Some time shortly after 1898 the wife of E. P. Justice, who was living at the time the deed is alleged to have been made to their sons, died, and E. P. Justice, shortly thereafter, married again. He continued in possession of the lands, and exercising authority over them as he had always done previous to the making of the deed to

his sons, and in 1909 he sold and conveyed the portion of the land upon which his dwelling house and improvements stood, and containing about 30 acres of the land, to William Peters and his wife, Nancy J. Peters. He executed and delivered a deed to Peters and wife for the 30 acres of land for a consideration of \$750, which they paid to him at the time of the execution and delivery of the deed. This sum seems to have been the full value of the land. Within a short time after he sold and conveyed the 30 acres of land to Peters and wife, they moved into the house upon the land, and E. P. Justice moved away therefrom, and thereafter purchased another tract of land upon Jonacan creek, at a distance of 3 or 4 miles from his former place, and for the price of \$400, and caused this land to be conveyed to his son, T. F. Justice. In January, 1912, the sons, James A. and T. F. Justice, filed this suit against Peters and wife and E. P. Justice, in which they alleged that E. P. Justice had sold and conveyed the land to them in 1898, and had delivered the possession of it to them, and that he had thereafter, in 1909, sold and conveyed the land to Peters and wife, who they alleged had actual knowledge of the fact that the land had been previously conveyed to them, and that they were the joint owners of the land and that the claim of Peters and wife was casting a cloud upon their title, and prayed the court to adjudge that they were the owners of the land, and that Peters and wife be required to release to them all of their claims thereto, and that the deed executed by E. P. Justice and wife to Peters be canceled.

Peters and wife filed an answer, in which they traversed the allegations of the petition and pleaded further that they were the owners of the land, and were the bona fide purchasers of it for a valuable consideration, and without notice of any claim of ownership by James A. and T. F. Justice, and, further, that the appellants had, by their acts and words, induced them to buy the land, which they would not have done with knowledge of their claim to ownership of it, and they were now estopped on that account to claim the lands. These affirmative allegations were, by agreement, controverted upon the record.

A great quantity of very conflicting testimony was offered by each party, and upon submission of the case the court adjudged that the conveyance from E. P. Justice and wife to their two sons, James A. and T. F. Justice, was voluntarily made, without consideration, and that the deed was never delivered to them, nor accepted by them, that Peters and wife were innocent purchasers for a valuable consideration and without notice of the existence of the deed from E. P. Justice to appellants, and dismissed the petition. The appellants, James A. Justice and T. F. Justice, excepted to the judgment of

the court and have now brought the case by appeal to this court.

The proof shows that the appellees, Peters and wife, were in possession of the land at the time the suit was brought, and the only cause of action which the appellants had was a suit to cancel the deed, as it further developed in the evidence that, although the appellants claimed in their petition that they were the owners of the land in fee, under the alleged deed by their father to them, when they came to testify, they claimed that their father, E. P. Justice, had reserved in the deed, which he executed to them, a life estate for himself.

They also claimed that the consideration for the deed, and which was expressed in it, was the affection which E. P. Justice had for his children, and that the appellants would pay to each of their two sisters \$50. Thus the claim of appellants was reduced from the ownership of the entire interests in the lands and the holders of the possession to a claim of ownership to a remainder interest in the land, after the expiration of the life estate of E. P. Justice, without any present possession.

[1-5] The proof showed that the deed from E. P. Justice to appellants was burned by E. P. Justice, or by his direction, upon the day that he executed and delivered the deed to appellees Peters and wife. The first question presented by the record for determination was whether the deed from E. P. Justice to appellants was ever delivered to them, and, if delivered, did appellees have notice of the execution and delivery of the deed before or at the time of their acceptance of the conveyance to them and the payment of the purchase price?

A deed, to be effectual against a subsequent purchaser for a valuable consideration, must have been delivered to the grantee, or to some one for him, and accepted by the grantee. *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078, 12 Ky. Law Rep. 222; *Bell v. Farmers' Bank*, 11 Bush, 34, 21 Am. Rep. 205; *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868, 15 Ky. Law Rep. 101; *Bunnell v. Bunnell*, 111 Ky. 556, 64 S. W. 420, 65 S. W. 607, 23 Ky. Law Rep. 800, 1101; *Collins v. Collins*, 92 S. W. 577, 29 Ky. Law Rep. 51; *Koger v. Koger*, 92 S. W. 961, 29 Ky. Law Rep. 235; *Hughes v. Easten*, 4 J. J. Marsh. 572, 20 Am. Dec. 230. Unless a delivery of the deed is made, the title never passes to the individual named as the grantee in the deed, and an acceptance must take place to make it effectual, because an estate cannot be thrust upon one without his consent. In 8 R. C. L. 974, it is stated:

"That there is no foundation for any rule that will sustain an undelivered deed, and no room for a presumption when the facts show there was no delivery; the question whether a deed was perfected by delivery being one which a court of equity regards precisely in the same light as a court of law would."

The delivery may be actual, or it may be a constructive delivery; but, in either

state of case, the intent of the grantor to transfer the title to the grantee is essential and necessary to constitute a delivery. This intention to transfer the title must, however, be accompanied with some act of the grantor, by which he parts with power and control over the deed for the benefit of the grantee, for intention alone will not constitute a delivery. Where a parent makes a voluntary deed for the benefit of his infant child, the law presumes an acceptance by the infant, if it is beneficial to the infant; but, before the deed is effectual, there must be some act by the grantor evidencing his parting with control over the deed for the benefit of the infant, accompanied with the intention to transfer the title to the infant by the deed. Although the parent is the natural guardian of the infant, the mere fact of having prepared a deed to the infant, and signing and acknowledging it, and then retaining the same in his possession, without any intention of ever parting with the control of the deed, has in no case ever been held to be a delivery of it, so as to pass the title from him to the infant, and from such acts the courts have never presumed a delivery, without evidence that it was the intention of the parent. 8 R. C. L. 1011. This court has held that if one executes a deed to an infant of tender years, and causes it to be recorded, a delivery and acceptance is then presumed, because these acts supply the place of the old forms of livery of seisin under the common law. If a deed is delivered to a third person for an infant, it is a valid delivery.

While there is some evidence in the case at bar going to prove that E. P. Justice delivered the deed to appellants, it always remained in his possession, and when appellants married and removed from his house the deed still remained there. They never caused it to be recorded, nor obtained possession of it. He declared to many witnesses, from time to time, that he only made the deed to please his wife; that he did not intend to deliver the deed to appellants at the time he made it, and never intended to do so. The appellants are proved to have had knowledge of his negotiations to sell the land to appellees, and made no objection to it; one of them declaring to appellees that he had no interest in the land, and his father could dispose of it as he chose, and the other declaring the same to a neighbor. One of them assisted his father in removing from the house, after appellees had begun to occupy it, and thereafter accepted from his father a conveyance for a tract of land, which was purchased with a portion of the money received from appellee for the land in controversy. The appellants have never paid their sister any of the sum which they claimed the deed required them to do. While there is some evidence which militates against the conclusions above set out, the weight of the evidence proves that the deed from E. P.

Justice to appellants was never delivered to nor accepted by them, and hence they did not own any interest in the land at any time. This was the conclusion arrived at by the chancellor below, who knew the parties and witnesses, and we see no reason to disturb his judgment.

Having arrived at this conclusion, it is unnecessary to discuss the other questions presented in the case, and the judgment is therefore affirmed.

FORESTAL v. NATIONAL SURETY CO. et al.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. MUNICIPAL CORPORATIONS ⇨189—POLICE OFFICERS—BONDS—ACTIONS—QUESTIONS FOR JURY.

In an action on the bond of a police officer, who shot the plaintiff and defended on the ground that he did so in self-defense, where the testimony was conflicting, the issue of self-defense was for the jury, whose determination thereon, unless flagrantly against the evidence, is conclusive.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 487, 523, 524; Dec. Dig. ⇨189.]

2. APPEAL AND ERROR ⇨1002—CONFLICTING EVIDENCE.

Where the only evidence is that of two witnesses, who flatly contradict each other, the verdict cannot be said to be flagrantly against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

3. WITNESSES ⇨400—IMPEACHMENT — EVIDENCE.

Evidence held insufficient to show contradiction by a party of his own witness, so as to render the evidence inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. ⇨400.]

4. EVIDENCE ⇨222—ADMISSION AGAINST INTEREST.

In an action on the bond of a police officer, who shot the plaintiff and claimed self-defense, testimony of a conversation with the officer after the shooting was admissible as an admission against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 788-800, 808-808; Dec. Dig. ⇨222.]

5. MUNICIPAL CORPORATIONS ⇨189—POLICE OFFICERS — BONDS — ACTIONS — SELF-DEFENSE.

Where plaintiff was shot by a police officer, who claimed self-defense, an instruction limiting the force which the officer might use in repelling the plaintiff's assault to what seemed to the officer to be necessary to repel it, was correct.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 487, 523, 524; Dec. Dig. ⇨189.]

6. MUNICIPAL CORPORATIONS ⇨189—POLICE OFFICERS—BONDS—ACTIONS.

In an action on the bond of a police officer, who shot plaintiff and defended on the ground of self-defense, where the plaintiff's evidence was that he did not attack the officer, and neither plaintiff nor defendant testified that plaintiff attacked the officer and then abandoned the attack before he was shot, it was not error

to refuse a requested instruction that although plaintiff assaulted the officer, if he had abandoned the assault when he was shot, the law was for him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 487, 523, 524; Dec. Dig. ⇨189.]

7. MUNICIPAL CORPORATIONS ⇨189—POLICE OFFICERS—BONDS—ACTIONS.

In an action on the bond of a police officer, who shot plaintiff, an instruction predicated the right to recover against the surety only on whether the officer was acting in his official capacity at the time, while technically error under the officer's testimony that he was acting as a policeman, was harmless, where the jury found for the officer, in which case the surety could not be liable, since its liability was conditional upon that of the officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 487, 523, 524; Dec. Dig. ⇨189.]

Appeal from Circuit Court, Caldwell County.

Action by Thomas Forestal against the National Surety Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Miller, Miller & Morse, of Princeton, for appellant. George G. Harralson and R. W. Lisanby, both of Princeton, for appellees.

MILLER, C. J. The appellant, Thomas Forestal, brought this action against the appellee Wm. Henry Malone and the National Surety Company, surety upon Malone's bond as a policeman of the city of Princeton, seeking to recover damages for an assault committed by Malone in shooting Forestal through his left thigh, breaking the large bone of his leg.

Malone traversed the petition; and, in the second paragraph of his answer, he admitted the shooting, but alleged it was done in self-defense, and after Forestal had assaulted him by throwing rocks at him, and had advanced upon him in the dark in a menacing and threatening manner; that he had in good faith, while believing he was in great and imminent danger, shot only in self-defense to repel the assault upon him by Forestal, and that he did no more than what seemed to him to be necessary in defending himself.

The surety company joined in the answer of Malone, but subsequently filed a separate answer, alleging that its joinder in Malone's answer was by mistake. In its separate answer, the surety company traversed the petition, and further alleged that if Malone shot and wounded Forestal, he was not doing so in his official capacity, but as an individual and in his necessary self-defense, having reasonable grounds to believe, and believing, that Forestal was then and there about to inflict great bodily injury upon him.

The trial resulted in a verdict for the defendants, and Forestal appeals.

The proof shows that Forestal had worked for a short time during the summer in South Dakota; that he then went to Chicago and

remained there about a week; that from Chicago he went to Ft. Wayne, Ind., and remained there a few days; that from Ft. Wayne he went to Centralia, Ill., where he remained one day, and thence to Evansville, Ind., where he remained a like period; that from Evansville he went to Louisville, where he remained two or three days, and thence to Princeton, where he arrived in September, on a passenger train that reached Princeton about 5 o'clock in the evening. During most of the travels above spoken of, Forestal "beat his way." At Evansville he fell in with John Ward, who accompanied him on his travels from that point to Princeton.

About 7 o'clock in the evening after Forestal and Ward had arrived at Princeton, they went to the yards of the Illinois Central Railroad Company and entered an empty box car, where they proposed to spend the night. After removing his shoes and coat, Forestal says he and Ward retired and went to sleep immediately, leaving the sliding door in the side of the car open about 2 inches. Later in the night, according to Forestal's story, he was awakened by some one knocking on the door, and a light flashing in his face. The man with the light was Malone. He told Forestal and Ward to get out of the car, and be quick about it.

Forestal says that when he and Ward started to get out of the car, Malone had stepped back about 10 or 12 feet from the car and across the main track; that when Ward left the car and went up to Malone, Malone kicked him in the pit of the stomach and told him to "beat it"—to get out and run, and that Ward immediately ran down the track.

From what he had seen pass between Malone and Ward, Forestal says he concluded that Malone also wanted him to leave, so he jumped out of the car and started to run, but before he got very far away, Malone shot him in the thigh, as above indicated. Forestal fell to the ground, and was shortly thereafter carried to the freight office, and thence to the hotel, where he remained for several weeks.

Forestal says that when Malone came up to where he was lying on the ground, after he was shot, Malone admitted he had shot Forestal, and said Forestal had been throwing rocks at him, exhibiting one of the rocks which he held in his hand.

According to Malone's version, when he approached the box car he saw a man standing in the car door, who jumped out of the car and ran up to Malone; that he shoved the man back, put his light in his pocket, and pulled his pistol, whereupon the man (Ward) ran away. Malone says that immediately after Ward ran away a rock brushed by his head and shoulder, and that Forestal then jumped from the car door towards Malone, and as he sprung down he was in a reaching position like he was going for a rock, whereupon Malone shot him. Malone says he fired the shot because he thought he

was in danger of great bodily harm, and for the purpose of repelling the assault which was being made upon him.

Malone admits he kicked Ward, or kicked at him, and shoved him back when Ward approached him, and he does not claim that Forestal threw the rock that struck him on the shoulder. Presumably, the rock was thrown by Ward. And it does not appear precisely where Forestal fell when he was shot—whether he was near the door of the car, as he would have been if Malone's story is true, or whether he was further down the track running away, as he states. Ward did not testify.

[1, 2] 1. In the first place, we are urged to reverse the judgment of the lower court upon the ground that the verdict was contrary to the evidence, which it is claimed shows, beyond a doubt, that Malone was not acting in self-defense at the time he shot the appellant. That, however, was a question for the jury, under the conflicting testimony. If Ward and Forestal were assaulting Malone, and he believed he was in great bodily danger, he had the right to protect himself from the assault, and the jury had the right to believe his story rather than the story of Forestal. It being the province of the jury to pass upon the disputed facts of a case, its verdict will not be disturbed, unless it is flagrantly against the evidence. Where there are only two witnesses to the fact in issue, each flatly contradicting the other, it can hardly be said that the verdict is flagrantly against the evidence.

[3] 2. It is next insisted that the trial court erred in permitting the defendants to contradict the statement of their witness Winternheimer, in a material portion of his testimony. Winternheimer had walked down to the place where Forestal lay after he was shot, and testified that Malone said, "Here is what they threw at me;" that he had a rock in his hand, and said, "One threw it at him, and started to run."

Malone was recalled for the purpose of contradicting Winternheimer's testimony to the effect, as shown by the avowal, that Malone had said he shot Forestal while he was running; but the court sustained the objection and did not permit Malone to contradict his own witness. But it is claimed that the court did permit Jennings and Throgmorton, other witnesses for the defendants, to contradict Winternheimer in this respect, and that in permitting this to be done, the trial court erred.

A careful reading of the testimony shows, however, that there was no contradiction of Winternheimer. The avowal as to what Malone would testify, erroneously states that Winternheimer testified that Malone had said he shot Forestal while he was running away. But Winternheimer's testimony only shows that one of the boys (which one is not stated) threw a rock at him and then ran;

and that nothing was said by Malone about having shot him.

This also appears from Jennings's testimony, which reads as follows:

"Q. I will get you to state whether Mr. Malone there in the presence of yourself and this plaintiff and Winternheimer, and possibly others, made the statement that one of them threw a rock at him and ran, and he shot at him; did he make that statement? (Objected to.)

"By the Court: Was it in the presence of the plaintiff? A. Yes, sir.

"By the Court: You may answer. (Plaintiff excepts.)

"Q. Did Mr. Malone make that statement? A. Yes, sir. Q. Did Mr. Malone make that statement? A. Yes, sir. Q. Did Mr. Malone state that he shot at the man that ran? A. Well, no, sir; he said, I think, the little fellow got out of the car and ran, and the other one threw a rock and jumped out of the car or something like that, and he shot at him. Q. Did Mr. Malone state that he shot the man that ran, in that conversation? A. No, sir."

Throgmorton corroborated Jennings, but added nothing new. The proof shows that Ward was a much smaller man than Forestal, and he is repeatedly referred to in the record as the "little man," or the "little fellow."

Upon a careful reading of the statement attributed to Malone, we see no error in the ruling of the trial court. According to Winternheimer, Malone did not say that Forestal threw the rock at him, or that he shot him while he was running; on the contrary, he is reported to have said that one of them threw it at him and started to run; and Jennings testified that Malone said "the little fellow" (Ward) got out of the car and ran, and that the other one (Forestal) jumped out of the car and threw a rock, and that he shot at him. Jennings further says that Malone did not say he shot the man that was running.

It will be seen, therefore, that no witness testified that Malone admitted having shot Forestal while he was running. There was no error in this ruling of the court.

[4] 3. In rebuttal, the plaintiff called four witnesses, Rucker, Phelps, Howard, and Lucy, who testified to a conversation with Malone some time after the shooting, which tended to contradict him as to the place where he was standing, and what he did at the door of the car when he told the boys to get out of it; and the court, in each instance, told the jury they could consider the testimony only for what bearing it might have upon the credibility of Malone as a witness, and for no other purpose.

It is claimed that this testimony of Rucker and the other witnesses was substantive testimony, and went to the merits of the case, and that it was error for the court to limit its application, as it did. But this testimony in no way directly related to the facts of the shooting; it merely related a subsequent conversation with Malone as to where he was standing, and at most contradicted his testimony upon that point. This testimony, show-

ing an admission against interest, was competent, and should not have been limited to credibility. *Lesser v. Jefferson Fire Ins. Co.*, 141 Ky. 670, 138 S. W. 551. The ruling was not, however, prejudicial under the facts of this case.

[5] 4. Finally, plaintiff complains that the court erred to his prejudice in instructing the jury, particularly in submitting the issue of self-defense. This was proper, since the issue was made by the pleadings, and there was proof to sustain the plea. Indeed, self-defense was Malone's only plea in justification of the shooting; it was his only defense.

It is further insisted, however, that instruction No. 1 improperly limited the force to be used in repelling the assault, by what seemed to Malone to be apparently necessary to repel said assault. It is insisted that instead of authorizing Malone to defend himself by using no more force than seemed reasonably necessary, to him, to repel said assault, it should have authorized him to use no more force than was reasonable or necessary to repel the assault. In other words, the instruction is criticized because it made Malone, and not the jury, the judge of what was necessary to repel the assault.

This, however, is the instruction authorized in cases of self-defense. The right of self-defense does not depend upon the real or the apparent danger as it appeared to the jury, but on the danger as it appeared to the accused at the time of the shooting. *Munday v. Commonwealth*, 81 Ky. 233; *Ayers v. Commonwealth*, 108 S. W. 320, 32 Ky. Law Rep. 1234.

[6] Plaintiff also offered instruction B, to the effect that although he assaulted Malone, still if plaintiff had abandoned the assault at the time he was shot, the law was for the plaintiff. The court, however, properly refused to give this instruction, for the reason that there was no evidence to support it. Forestal denied that he attacked Malone, and neither Forestal nor Malone testified that Forestal attacked Malone and then abandoned the attack before he was shot.

[7] Instruction No. 1 did not authorize the jury to find against the surety company in any state of case, and the third instruction predicated the plaintiff's right to recover against the surety company only in case Malone was acting in his official capacity as a policeman at the time he shot the plaintiff.

Technically, this was an error since Malone, the only witness upon the subject, testified that he was acting as a policeman when he shot Forestal. Under this proof the instruction should have placed Malone and his surety under the same liability; but since the jury found for Malone under a proper instruction, and the surety's liability was secondary and conditioned upon Malone's liability, the plaintiff was not prejudiced by the error.

Judgment affirmed.

KOOP v. HENRY BICKEL CO.

(Court of Appeals of Kentucky. Feb. 16, 1916.)

1. MUNICIPAL CORPORATIONS \S 450—STREET ASSESSMENTS — SQUARES — "PRINCIPAL STREETS."

In determining what constitutes a square for the purpose of assessing the cost of a street improvement upon one-half of its extent, the "principal streets" surrounding it are those which have been dedicated and accepted, and not those which are practical and convenient routes for travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. $\S\S$ 1073, 1074; Dec. Dig. \S 450.]

2. DEDICATION \S 35—ACCEPTANCE.

Where two streets had been dedicated for a number of years, and the city had constructed sewers along them and otherwise exercised control over them as streets, these facts were sufficient to show that the streets had been accepted by the city.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. $\S\S$ 68-71, 75, 76; Dec. Dig. \S 35.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Henry Bickel Company against Jane Koop. From a judgment for the plaintiff, the defendant appeals. Affirmed.

Fred Forcht and Benjamin F. Washer, both of Louisville, for appellant. Furlong, Woodbury & Furlong and Harrison & Harrison, all of Louisville, for appellee.

CLAY, C. This appeal involves the proper method of assessing the abutting and adjacent property for the improvement of Sycamore avenue, lying between Keats avenue and Jane street in the city of Louisville. South of Sycamore avenue there is a square extending to Frankfort avenue a distance of 612 feet. The property in that square was assessed for a distance of 306 feet from Sycamore avenue. North of Sycamore avenue it is claimed that there is a square bounded by Keats avenue and Keats avenue extended on the east, by Jane street and Jane street extended on the west, and by Letterle avenue on the north. The distance from Sycamore avenue to Letterle avenue is about 1,300 feet.

In ordering the improvement the general council took the position that there was no square north of Sycamore avenue, and provided that the property to the north should be assessed for only a distance of 306 feet.

The contractor, Henry Bickel Company, sued certain property owners to enforce his lien for the improvement. Certain defendants contested the correctness of the apportionment made by the city authorities, and insisted that a square bounded by principal streets existed north of Sycamore avenue, and that the assessment area should be extended for one-half the distance of that square, or about 650 feet. This contention was sustained by the chancellor, and judgment entered accordingly. Jane M. Koop,

whose assessment has been materially increased by the judgment, appeals.

A reversal is asked on the ground that there is no square bounded by principal streets lying between Sycamore avenue and Letterle avenue. The basis of this contention is that neither Keats avenue or Jane street is a principal street within the meaning of the statute.

It appears that Keats avenue is intercepted by a large apartment house, and immediately in its rear is a rock cliff and then a fall of 57 feet, and the extension of Keats avenue beyond this point is impracticable. A sewer has been constructed along this street. It also appears that Jane street is a public way of irregular width, being 20 feet wide at some places, and 40 feet wide at others. When the George Speed place was platted it lay on the western edge of that property, and was dedicated as a public way. The city has constructed a sewer in Jane street. Beginning with Sycamore and extending north towards Letterle, there is a drop of 28 feet in a distance of 250 feet. When you reach a point nearer Letterle, there is a drop of 24 feet in 175 feet. It has been used by vehicles as far as the Koop building. Beyond that to Letterle avenue travel by vehicle is impossible. Between the Koop property and Letterle avenue there is a foot bridge. In order to build a first-class street it will be necessary to make a fill of 200 feet or more, and to construct a culvert at the brook.

[1, 2] It is admitted that Letterle avenue is a principal street. The square extends from Sycamore avenue to Letterle avenue. The argument is, that this square is not bounded by principal streets because neither Keats avenue nor Jane street is at present a practicable route for travel. In our opinion, the test to be applied is not whether the side streets are impracticable or convenient routes for travel, for if that view were adopted the validity of street assessments would depend on the physical conditions prevailing rather than the actual existence of the streets themselves. In view of the uncertainty and confusion that would result from such a rule, we conclude that the only test to be applied is whether or not the streets have been dedicated and accepted. The evidence clearly shows that Jane street and Keats avenue have been dedicated for a number of years, and that the city has constructed sewers along them and otherwise exercised control over them as streets. These facts are sufficient to show acceptance. Unless this rule be adopted, the portion of the territory lying between Sycamore avenue and Letterle avenue would be exempted from taxation for street improvement when Letterle avenue is improved. Of course, if a new street, extending from Keats avenue to Jane street, should ever be constructed between Sycamore avenue and Letterle avenue, the general council or

the court may take such steps as are necessary to equalize the burden on the property thereby affected. Since the judgment accords with the views herein expressed, it follows that it is correct.

Judgment affirmed.

CENTRAL HOME TELEPHONE & TELEGRAPH CO. v. FIDELITY & COLUMBIA TRUST CO.

(Court of Appeals of Kentucky. Feb. 15, 1916.)

TELEGRAPHS AND TELEPHONES — 17 — DEED OF TRUST — FORECLOSURE AND SALE — PARTIES.

Under Civ. Code Prac. § 29, providing that in an action for the recovery of property, or for the subjection thereof to a demand of the plaintiff under a lien, any person claiming a right to or an interest in the property or its proceeds may, before payment to plaintiff, file his verified petition stating his claim and controverting that of the plaintiff, whereupon the court may order him to be made a defendant and his petition to be treated as an answer, appellant, petitioning in a proceeding by a trustee to subject a telephone company's plant to a mortgage lien, to present its claim to a prior lien upon the proceeds of the sale of such property while under the control of the court, should have been permitted to file its petition and litigate its claim against the proceeds.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 11; Dec. Dig. § 17.]

Appeal from Circuit Court, Logan County.

Action by the Fidelity & Columbia Trust Company, as trustee, against the Russellville Home Telephone Company and another. Judgment for plaintiff ordering a sale, with reservation of jurisdiction, pending which the Central Home Telephone & Telegraph Company offered to file a petition to be made a party thereto, and to have its petition taken as an answer and counterclaim against plaintiff, and as a cross-petition against defendant Russellville Home Telephone Company, from a refusal to allow which petitioner appeals. Reversed, and cause remanded.

Bruce & Bullitt and Helm Bruce, all of Louisville, for appellant. W. F. Browder and Browder & Browder, all of Russellville, and W. Pratt Dale, of Louisville, for appellees.

CLARKE, J. On December 15, 1906, the Russellville Home Telephone Company executed a mortgage to the Fidelity & Columbia Trust Company, as trustee, to secure the payment of \$40,000 of bonds issued and sold. April 21, 1907, said Russellville Company made a contract with the Central Home Telephone Company, a long-distance telephone company, for the transmission over its lines of long-distance messages originating with the Russellville Company, and for the use by the Russellville Company of the poles of the Central Home Telephone Company to support its wires. January 1, 1908, the Russellville Company defaulted in the payment of interest on its bonds, and no interest has been

paid since that time. On December 14, 1912, the Fidelity & Columbia Trust Company, as trustee for the bondholders under the mortgage, instituted suit in the Logan circuit court for a judgment against the Russellville Company for the \$40,000 of bond issued and sold, and to enforce the mortgage lien upon all of the property of said company.

Prior to the filing of this suit the Central Home Telephone & Telegraph Company had acquired the rights and obligations and stood in the place of the Central Home Telephone Company. This Central Home Telephone & Telegraph Company was a New Jersey corporation, and was made a party to said suit, but said company is not the same corporation as appellant, which is a Delaware corporation, although these two companies have the same name.

A motion was entered in this action for the appointment of a receiver by the plaintiff, but before said motion was heard an agreement was reached on December 28, 1912, between all the parties who were at that time parties to or interested in said suit by which agreement appellee Fidelity & Columbia Trust Company, as trustee for the bondholders, was to take charge of and operate said telephone plant, as had been provided in the mortgage it might do under such circumstances.

At the February, 1913, term of the Logan circuit court a judgment was rendered in this action giving the trustee a judgment against the Russellville Company for the full amount of the mortgage, and ordering a sale to satisfy said judgment of the property covered by the mortgage, which was all the property owned by the Russellville Company, which judgment at its conclusion made the following reservation of jurisdiction:

"The court reserves for future consideration and disposition all other questions involved in this action, including the question of the liability of the defendant the Central Home Telephone & Telegraph Company to make an accounting of all moneys received by it from its codefendant, the Russellville Home Telephone Company, as prayed for in the petition, and also including the question of the amount due, if anything, by the defendant Russellville Home Telephone Company to the sinking fund provided for in said mortgage, and all other questions not specifically disposed of by this judgment."

The order of sale was not enforced against said property until April 5, 1915, and from January 1, 1913, until said sale in April, 1915, the said trustee had control of and operated the Russellville Company's plant. Appellant up until this time had not been a party to this suit. On May 21, 1915, appellant offered to file in said action a petition to be made a party thereto, and sought to have said petition taken as an answer and counterclaim against the appellee Fidelity & Columbia Trust Company in said action, and as a cross-petition against the Russellville Home Telephone Company. The lower court

refused to permit appellant's petition to be made a party to be filed in said action, to which ruling appellant excepted and objected, and prayed this appeal.

The only question involved in this appeal is whether or not appellant by its petition showed its right to be made a party at that time to said action. Appellant's petition to be made a party alleged, in substance, that appellee trust company took possession of the Russellville Company's plant on January 1, 1913, and employed the New Jersey corporation of the same name as appellant to operate, manage, and keep in repair said Russellville Company's plant; that said New Jersey corporation performed this service for the trustee until April 1, 1913, when it assigned to appellant all claims it had for its services, and transferred to appellant the operation of said plant; that since said date the appellant has operated, managed, and kept in repair for the said trustee said plant; that the said trustee is indebted to it for the services so performed by appellant and its predecessor in operating and keeping in repair said telephone plant, and that it has never been paid and is entitled to have payment made to it for these services out of the proceeds of the sale of the Russellville Company's telephone plant; that there are no other funds out of which it can be paid; and that this claim is a superior lien upon said fund to the mortgage lien of said trustee. In addition to the claim for service performed since the trustee took charge of said plant, appellant is seeking pay for services rendered by one of its predecessors for the Russellville Company for a short time before the said company's plant was turned over to the trustee, and insisting that this claim is also a lien superior to the mortgage lien upon the fund derived from the sale of said plant.

That appellant's petition to be made a party to said suit presents claims against the Russellville Company and said trustee, for some of which at least it is entitled to recover, but has not received pay, is conceded by counsel for appellees, but that it is not entitled to sue for same in this proceeding, is the earnest contention of appellees. Appellees insist that appellant should have filed a new suit against the trustee in Jefferson county, where both appellant and the trustee are domiciled, and it doubtless would have the right so to do. But, if it performed the services as alleged for the trustee in possession and charged with the operation and maintenance of the plant covered by this mortgage, it seems to us that it certainly had a right to litigate in this action its right to pay for its services out of the fund arising from the sale of the property upon which it had performed these services, that fund being in court in this action, and all the parties having any interest therein being parties thereto.

Section 29 of the Civil Code provides:

"In an action or proceeding for the recovery of real or personal property, or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file, in the action, his verified petition, stating his claim and controverting that of the plaintiff; whereupon the court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer."

The action at bar is a proceeding by the plaintiff to subject the Russellville Company's plant to a mortgage lien, and appellant's petition is an attempt to present in that action its claim to a prior lien upon the proceeds of the sale of said property while said proceeds are still under the control of the court. Such a proceeding as appellant is attempting is expressly provided for in the foregoing section of the Code, and the trial court should have permitted it to file its petition and to litigate in this action its claim against the fund arising from the sale of the Russellville Home Telephone Company's property. Vanmeter v. Fidelity Trust & Safe Vault Co., 107 Ky. 111, 53 S. W. 10. We do not, of course, express any opinion as to the merit of any of the claims presented by appellant, but decide simply that it had a right to litigate its claims in this action at the time and in the way attempted.

Wherefore the judgment of the lower court rejecting the pleading tendered by appellant herein is reversed, and the cause remanded for proceedings consistent herewith.

WILLEY v. HOWELL

(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. WITNESSES ~~§~~ 52—COMPETENCY—COMMUNICATION BETWEEN HUSBAND AND WIFE—STATUTE—"COMMUNICATION."

Under Civ. Code Prac. § 606, providing that neither the husband nor the wife may testify concerning any communications between them during marriage, even after the relationship has terminated, the word "communication" is not confined to statements between husband and wife, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for it, would not have been known to the other party, yet in an action by a husband against his father-in-law for alienation of his wife's affections, the plaintiff's former wife, after her divorce, was competent to testify that, a short time before her separation from the plaintiff, she told her father of the nature of the trouble between them, that plaintiff had a loathesome venereal disease, and cruelly accused her of giving it to him, and that she intended to leave him, although the defendant had been allowed to testify as to what his daughter had told him in justification of the separation, and was also competent to testify whether she left plaintiff of her own accord or whether her father persuaded her to leave him, but was incompetent to testify whether plaintiff actually had such disease, or did make the accusation against her, or to describe the conditions in their home, or the actions and state-

ments of plaintiff to her while the marriage relation continued.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 128-136, 165, 415-417, 419, 424; Dec. Dig. ¶52.]

For other definitions, see Words and Phrases, First and Second Series, Communications.]

2. WITNESSES ¶52—COMPETENCY—COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

In such action and under such statute the plaintiff's former wife after her divorce was competent to testify as to what she heard plaintiff say to a certain third person, and as to a conversation she had overheard between defendant and such third person in the presence of the plaintiff, as it was not information obtained by her as a result of the marital relation between herself and the plaintiff.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 128-136, 165, 415-417, 419, 424; Dec. Dig. ¶52.]

3. WITNESSES ¶52—COMPETENCY—COMMUNICATIONS BETWEEN HUSBAND AND WIFE—STATUTE.

In such action, plaintiff's former wife after her divorce was competent to testify that she wrote a letter to her mother and when she wrote it, as that related only to a transaction of her own during marriage, but independent of it, and did not violate Civ. Code Prac. § 606, declaring that neither the husband nor wife may testify concerning any communication between them during marriage, even after the relation has terminated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 128-136, 165, 415-417, 419, 424; Dec. Dig. ¶52.]

4. WITNESSES ¶78—COMPETENCY—ALIENATION OF WIFE'S AFFECTIONS—EVIDENCE.

In an action against plaintiff's father-in-law for the alienation of his wife's affections, where the defendant, to qualify plaintiff's former wife as a witness, had to show that she had obtained a divorce, the refusal to permit defendant to read the judgment of her divorce from plaintiff was erroneous.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. ¶78.]

5. HUSBAND AND WIFE ¶333—ALIENATION OF AFFECTIONS—EVIDENCE.

In such action the exclusion of testimony as to a conversation witness had with plaintiff's former wife before the separation was erroneous.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ¶333.]

6. WITNESSES ¶58—COMPETENCY—STATUTE.

In such action, plaintiff's testimony as to statements made to him by his former wife while the marriage existed was expressly prohibited by Civ. Code Prac. § 606, relating to communications between husband and wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 159½-162, 164; Dec. Dig. ¶58.]

7. DIVORCE ¶172—JUDGMENT—RES JUDICATA—PARTIES.

The issues in an action against plaintiff's father-in-law for alienation of his wife's affections, growing out of the plaintiff's accusations against his wife before their separation, were not concluded by the judgment whereby the wife obtained a divorce from plaintiff, as the parties in the second action were different, although the evidence was much the same.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559-561; Dec. Dig. ¶172.]

Appeal from Circuit Court, Hickman County.

Action by E. W. Howell against M. B. Wil-

ley. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for a new trial.

Robbins & Robbins, of Mayfield, and Joe W. Bennett, of Clinton, for appellant. J. D. Via, of Clinton, and B. C. Seay, of Mayfield, for appellee.

CLARKE, J. This is the second appeal of this case. The opinion rendered by this court on the former appeal is reported in 159 Ky. 805, 169 S. W. 519, and is decisive of several of the questions presented here.

Upon the last trial the wife of appellee, Mrs. Bessie Howell, having procured a divorce from him subsequent to the former trial, was introduced as a witness for appellant, her father. That trial resulted in a verdict in favor of appellee for \$5,520 against appellant, who is prosecuting this appeal to reverse the judgment entered thereon. Numerous errors are assigned as grounds for a new trial, but error in the trial court's refusal to permit the divorced wife of appellee to testify about certain matters is the principal ground relied upon by counsel for appellant for a reversal of the judgment. The testimony thus rejected is presented to us in six avowals.

[1] 1. The first avowal contains a statement by Mrs. Bessie Howell of a conversation she had with her father a short time before her separation from appellee, in which she told her father, the appellant, of the existence and nature of the trouble between her and her husband; that he had a loathsome venereal disease and cruelly accused her of giving it to him, and of her purpose to leave him.

Under section 606 of the Civil Code neither the husband nor the wife may testify concerning any communication between them during marriage, even after the relationship is terminated. This court in *Commonwealth v. Sapp*, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, and other cases, has held that the word "communication" in this section should not be confined to statements between husband and wife, but should be construed to embrace all knowledge upon the part of one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party, and to that construction we adhere. Nevertheless the witness should have been permitted to tell whether or not she told her father of appellee's treatment of her, and, if so, when and what she told him. The fact that she imparted this information to her father and what she told him are not within the prohibition of the above section as construed, and it was highly prejudicial to appellant to deny him this evidence, as the very gist of the action against him was whether or not he acted reasonably and in good faith in what he said and did thereafter. She had a right,

when troubles arose between her and her husband, to apply to her father for advice and succor, and it was necessary that the jury in trying this case, in order to determine whether the father was acting wrongfully and maliciously, or in good faith and as he had a right to do, to know what actuated him. Therefore he had a right to present to the jury evidence of what his daughter had told him about her husband's treatment of her, so that the jury might know what was operating upon his mind in what he said or did, if anything, with reference to the separation of these people. Without knowing what had been told him by his daughter the jury would not know under what information he was acting, and could not determine whether he was acting rightfully or wrongfully.

It is true he was permitted to testify what his daughter had told him in justification of what he did and said in reference to the separation; but he was also entitled to have his testimony on that point corroborated by his daughter's testimony, if she was a competent witness for that purpose. The jury might have disbelieved him unsupported, and believed him when corroborated by his daughter. The daughter could, not, of course, testify to the jury whether or not, as a matter of fact, appellee did have this disease, or did make the accusation against her; and she did not attempt to do that. It was immaterial, so far as appellant's good faith was concerned, whether or not it was true that appellee had the loathsome disease, or had accused his wife of giving it to him. That his daughter had so told him, and he believed her statements, was sufficient to justify reasonable actions upon his part in her behalf. She would have told, if permitted, not what happened between her and her husband, but what happened between her and her father, and that was competent, while the other would not have been competent. She was a competent witness to testify what she actually told her father, a relevant circumstance not within the prohibition of section 606 of the Code, although she was not a competent witness to testify what actually happened between her and her husband, a circumstance within said prohibition. The distinction, though narrow, is we believe sound.

For the same reason she should have been allowed to testify under the sixth avowal whether or not she left appellee of her own accord, and whether or not her father persuaded or coerced her to leave him; but she ought not to have been permitted to testify to that part of said avowal which described the conditions in her home, or the actions and statements of appellee to her while the marital relation existed.

[2] 2. In avowal No. 2 the testimony of this witness was offered to prove what she had heard appellee state to one Barney Kough. By avowal No. 3 appellant attempted to prove by this witness a conversation she had over-

heard between appellant and Barney Kough in the presence of appellee. Avowal No. 4 has reference to a conversation she overheard between appellant and appellee in reference to this trouble.

All this testimony was competent, and its rejection was prejudicial to appellant. None of it was information obtained by her as a result of the marital relation between herself and appellee. It was information obtained by her in hearing a conversation between others, just as any one else might have done, and is the same character of testimony that was held competent by this court in the case of *Hostetter v. Green*, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870.

[3] Avowal 5 contains the testimony this witness would have given, if permitted, of the fact that she wrote the letter to her mother, which upon the former appeal of this case was held to be competent evidence, and the time when she wrote it. This evidence was also competent, and its exclusion prejudicial to appellant. Testimony that she wrote the letter, and the time that she wrote it, related only to a transaction of her own during marriage, but entirely independent of it, and did not in any way violate provisions of section 606 of the Code, and without this testimony, to properly accredit the letter, its value as evidence on behalf of appellant was probably destroyed.

[4] 3. Appellant also complains that the trial court refused to permit him to read to the jury the judgment of divorce of this witness from appellee. In order to qualify this witness, it was necessary to show that she was no longer the wife of appellee, and the best evidence of that fact was the judgment of divorce, and for that purpose appellant was entitled to introduce said judgment, but for that purpose alone.

[5] The court also erred in refusing to permit Cephus Allen to testify to a conversation he had with Mrs. Howell before the separation, as is admitted by counsel for appellee in brief.

[6] And appellee, of course, should not be permitted on another trial of this case, as he was at the last trial, over appellant's objection, to testify to statements made to him by his former wife while the marriage existed, since it is expressly prohibited by section 606 of the Code.

[7] 4. Counsel for appellant argue that the issues here are concluded by the judgment in the divorce proceeding between Mrs. Howell and appellee; but that contention is not tenable. Appellant was not a party to that suit, and Mrs. Howell is not a party to this suit, and while the evidence supporting the one may be, as alleged, practically the same as that required to support the other, that fact does not render the judgment in that case a bar to the prosecution of this action. *Hostetter v. Green*, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870; *L. & L. & G. Ins.*

Co. v. Wright, 166 Ky. 159, 179 S. W. 49; 23 Cyc. 1238.

Numerous other errors were assigned as reasons for reversal, but we do not deem it necessary to consider them.

For the reasons indicated the judgment is reversed, and this cause is remanded for a new trial consistent herewith.

THOMAS, J., not sitting.

LARUE v. REDMON et al.

(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. STATUTES — ENACTMENT — TITLES — VALIDITY.

Ky. St. § 4482, as amended by Acts 1914, c. 64, entitled "An act to amend sections 4464, 4464a, 4480, 4482, article 10, Kentucky Statutes, Carroll's Edition, 1909, and repealing section 4464b thereof, and amending * * * article 10, of said Statutes, relating to schools, by adding thereto section 4500b," is a valid enactment under the Constitution, section 51 requiring that laws shall relate to but one subject, which shall be stated in the title, since the general purpose of the act was but one; all its subject-matter being germane to the subject stated in the title, and the amendment by reference only to section numbers being permissible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. § 122.]

2. CONSTITUTIONAL LAW — 92, 137 — SCHOOLS AND SCHOOL DISTRICTS — 101 — VESTED RIGHTS — OBLIGATION OF CONTRACTS.

Ky. St. § 4482, as amended by Acts 1914, c. 64, providing for an increase of the tax for operating expenses of common schools, is not invalid as violating federal Constitution and Const. Ky. § 19, on the ground that it impairs vested rights and the obligations of contracts in varying an assessment voted by the electors, since it is within the power of the Legislature, as the taxing body, to make any change in the taxes which it desires and for the further reason that the constitutional inhibition does not apply to contracts and bonds of quasi public corporations, of which the school district is one.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237, 364; Dec. Dig. § 92, 137; Schools and School Districts, Cent. Dig. §§ 236, 262; Dec. Dig. § 101.]

3. TAXATION — 37 — STATUTES — VALIDITY.

Ky. St. § 4482, as amended by Acts 1914, c. 64, providing for increase of the tax for operating expenses of schools, is not a violation of Const. § 2, as an exercise of absolute and arbitrary power over the lives, liberty, and property of citizens.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 64-66, 133; Dec. Dig. § 37.]

4. TAXATION — 26 — SCHOOL TAXES — NECESSITY OF POPULAR VOTE.

Under Const. § 184, providing that no sum shall be raised by taxation for education other than in graded common schools except on submission to the voters, taxes for common schools may be imposed by the Legislature without submission of the question to the legal voters.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 26.]

5. TAXATION — 26 — POWER OF LEGISLATURE — DELEGATION OF POWER — EFFECT.

That the Legislature in one instance delegated the determination of the amount of a

school tax to the voters did not affect its power subsequently to vary that tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 26.]

6. TAXATION — 28 — POWERS OF LEGISLATURE — DELEGATION.

It is the exclusive power of the Legislature to provide for taxation, and such power cannot be delegated in the absence of express constitutional authority for the delegation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60; Dec. Dig. § 28.]

Appeal from Circuit Court, Larue County.

Action by W. T. Larue against C. H. Redmon and others. From a judgment sustaining a demurrer to the petition and dismissing it on failure to further plead, the plaintiff appeals. Affirmed.

Williams & Handley, Charles Williams, O. M. Mather, and L. B. Handley, all of Hodgenville, for appellant. Geo. K. Holbert, of Elizabethtown, for appellees.

THOMAS, J. In 1905 there was established, under the provisions of section 4464 of the Kentucky Statutes, the Hodgenville graded common school district No. 32, which included the city of Hodgenville, together with some contiguous territory. The order calling the election as entered by the county court, provided for the collection of an ad valorem tax for the purpose of the contemplated graded school of 40 cents on the \$100 worth of property situated therein and the collection of no poll tax. By an act of the Legislature at its 1914 session, the school laws, with reference to graded schools, was amended, and a part of the amendment (being a proviso to section 4482 of the Kentucky Statutes) is as follows:

"Provided, that after July 1, 1914, any graded common school which has been regularly voted and organized, and which does not levy as much as fifty cents on each one hundred dollars' worth of taxable property, shall have the power, and their charters are hereby amended so as to empower them to levy any rate of tax for operating expenses, not to exceed fifty cents on each one hundred dollars' worth of taxable property, and one dollar and fifty cents poll tax, and that their boards of education be and the same are hereby authorized to exercise this power, when, in their judgment, the demands of the school make it expedient." Section as amended by Acts 1914, p. 162.

After the taking effect of this amendatory act, the trustees of Hodgenville graded common school district No. 32, by appropriate orders, levied an ad valorem and poll tax upon the property and each poll in the district in compliance with the amendment, which in the present case was an additional 10 cents ad valorem tax on each \$100 worth of taxable property, and in addition levied a poll tax of \$1.50 on each poll in the district.

Questioning the right of the trustees to do this, and assailing the validity of the amendment, the appellant, for himself and all other taxpayers in the district, filed this suit against the district and the trustees, and the

tax collector of the district, seeking to enjoin the collection of any of the taxes which had been levied pursuant to the amendatory act. The assault made upon this amendment is best stated in the language of the petition as follows:

"He says that the said pretended order and levy and the said act of the General Assembly are in violation of the rights of this plaintiff and the other white taxpayers in said district as guaranteed to them under the Constitution of the commonwealth of Kentucky, and the Constitution of the United States of America, and that the attempted increase of ten cents on each \$100 worth of taxable property, and the attempted levy of \$1 per capita tax on the male inhabitants of said district over the age of 21 years, are without warrant of law and are null and void."

Particularizing, it is insisted that the amendatory act is unconstitutional because the title thereof fails to comply with the requirements of section 51 of the Constitution, and because it violates the provisions of sections 2, 19, 157, and 184 of that instrument; otherwise, it seems to be conceded that both the statute and levy complained of are unobjectionable.

[1] The title of the act is as follows:

"An act to amend sections 4464, 4464a, 4480, 4482, article 10, Kentucky Statutes, Carroll's Edition, 1909, and repealing section 4464b thereof, and amending said article 10, of said Statutes, relating to schools, by adding thereto section 4500b."

The purposes of section 51 of the Constitution in requiring that an act of the Legislature shall relate to but one subject and it shall be stated in the title, is to place it so that the title of the act should not be a means of deception to either the members of the Legislature or the public at large, but that it should reasonably inform them of the contents of the act by a reference to the title; and it is the uniform rule wherever this constitutional provision prevails, that if the subject-matter of the act was germane to the subject stated in the title the requirements of the constitutional provision would be fully met. *Pennington v. Woolfolk*, 79 Ky. 13; *Ex parte City of Paducah*, 125 Ky. 514, 101 S. W. 898, 31 Ky. Law Rep. 170, and many other authorities which could be cited.

According to the opinions of the court *supra*, it is sufficient to amend an act by reference only to the sections of the Kentucky Statutes proposed to be amended, provided the amendatory matter was germane to the subject treated of in the section amended. Indeed, this statement of the rule so completely fulfills the requirement of the section of the Constitution being considered, as well as the purposes of such requirement, that we would unhesitatingly so determine if the question was one of first impression. All of the sections referred to in the title of the amendment here involved treat exclusively of graded common schools in this commonwealth, and the subject-matter of the proviso in the amendatory act is unquestionably germane to the general subject of graded

common schools. We therefore find no merit in this contention of appellant.

[2] It is attempted to be shown that the 1914 act in some mysterious and to us invisible manner violates the federal Constitution and section 19 of our Constitution, in that it impairs vested rights or impairs the obligations of a contract. Between what persons, and concerning what particular subject-matter this supposed contract exists whereby vested rights were created, is not by any means clear, nor is it clear as to when or how such supposed contract was entered into. Surmising, however, that this supposed contract in some manner grew out of the election in 1905, and assuming, for the purpose of argument only, that the voters at that election contracted with somebody to pay an ad valorem tax upon their property of 40 cents only on the \$100 worth thereof, and in the same manner obligated themselves to pay no poll tax, for graded schools in the district, the appellant's contention would still be untenable, because the supposed contract would be only an immunity, privilege, or gratuity entered into at the time by this mysterious somebody with the voter and taxpayer by this supposed contract to exempt him from being taxed for a purpose which the Constitution, not only permits but commands the Legislature by appropriate legislation to prescribe; this being "an efficient system of common schools throughout the state." Section 183, Constitution.

If it should be insisted that the immunity from the collection of the taxes sought to be enjoined was brought about by the incorporation of the graded school district created by the election, and thereby vesting in the taxpayer a right to it which cannot be impaired, a successful answer to this would be: First, that the statute of 1856 (being section 1987 of the Kentucky Statutes) and section 3 of the Constitution would permit at any subsequent time the repeal or amendment of the supposed contract granting the immunity. *Deposit Bank of Owensboro v. Daveiss County*, 102 Ky. 174, 30 S. W. 1030, 19 Ky. Law Rep. 248, 44 L. R. A. 825; *City of Newport v. Masonic Temple Association*, 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. Law Rep. 286; *Citizens' Saving Bank v. Owensboro*, 173 U. S. 644, 19 Sup. Ct. 571, 43 L. Ed. 840; *Central University of Kentucky v. Walters' Executors*, 122 Ky. 65, 90 S. W. 1066, 28 Ky. Law Rep. 1041. Second, a graded common school district is at least a quasi public corporation, and the constitutional inhibition against the impairment of contracts do not apply to rights obtained through the charters of such corporations. *Thompson on Corporations*, § 5382; *Covington v. Commonwealth*, 107 Ky. 680, 39 S. W. 836, 19 Ky. Law Rep. 105; *Durrett v. Davidson*, 122 Ky. 851, 93 S. W. 25, 29 Ky. Law Rep. 401, 8 L. R. A. (N. S.) 546; *Covington v. Commonwealth of Kentucky*, 173 U. S. 242, 19 Sup. Ct. 383, 43

L. Ed. 679. These same authorities also hold that there is no protection from a supposed saving virtue given to the taxpayer because of an election whereby he is supposed to have acquired the immunity.

[3] It is furthermore insisted that to permit the collection of this additional tax provided by the act of 1914, would violate section 2 of the Constitution, in that it would be exercising "absolute and arbitrary power over the lives, liberty, and property" of the citizens. Just how it is proposed to apply this section to the acts complained of in this case is beyond our power to grasp. The taxpayer, after the additional taxes shall have been collected, will still have his life and his liberty, and as to his property, it is always held under the very foundation principles of government, subject to the right of the sovereignty to tax it within constitutional limitations for public purposes. There is no more cherished public purpose for which taxes may be collected within such limitations than for the fostering of the common school system of the country; and it has on numerous occasions been determined by this court that a graded common school was a part of the general common school system of the state. *Fitzpatrick v. Board of Trustees of Mt. Sterling Pub. Graded Schools*, 87 Ky. 132, 7 S. W. 896, 10 Ky. Law Rep. 9; *Jeffries v. Board of Trustees, etc.*, 135 Ky. 488, 122 S. W. 813; *Riggs, etc., v. Stevens, County Judge, etc.*, 92 Ky. 393, 17 S. W. 1016, 13 Ky. Law Rep. 631; *Williamstown Graded School District v. Webb*, 89 Ky. 264, 12 S. W. 298, 11 Ky. Law Rep. 456. See, also, *Board Trustees, etc., Graded School District v. Tate*, 155 Ky. 296, 159 S. W. 777, and *Christopher v. Robinson, Sheriff, etc.*, 164 Ky. 262, 175 S. W. 387.

[4] These authorities also dispose of the contention that this additional tax cannot be imposed under section 184 of the Constitution, except by a vote of the people, because taxes for common schools under said section may be imposed without a submission of the question to the legal voters. *Fitzpatrick v. Board of Trustees of Mt. Sterling*, 87 Ky. 132, 7 S. W. 896, 10 Ky. Law Rep. 9; *Durrett v. Davidson, Sheriff, etc.*, 122 Ky. 851, 93 S. W. 25, 29 Ky. Law Rep. 401, 8 L. R. A. (N. S.) 546.

[5] From an examination of our Constitution and the opinions of this court, supra, together with others which could be cited, it will be found that the General Assembly of this commonwealth has the power to, and can without a submission of the question to the voters to be affected, create by due enactment, graded school districts and fix the rate of taxation therein to be collected in aid of such schools. However, out of deference to the particular taxpayer, the Legislature enacted section 4464 of the Kentucky Statutes and the ones following it, whereby

the taxpayers might have the privilege of voting upon the question of the establishment or nonestablishment of such school district, as well as the rate of the taxes to be collected therein for graded school purposes. It need not have done this, but because it did enact the sections referred to, granting the privilege to the citizen to vote upon the subject, does not impair its right to exercise the power which it possessed without such election. This is all it did in passing the act complained of in 1914.

[6] In conclusion, it may be stated that the power to tax lies at the very foundation of and is the essence of sovereignty. Without this power the ability to govern and to carry out the functions of government would become paralyzed. The right, therefore, to levy and collect such taxes as may be necessary to carry out the policies of the government in furtherance of enhancing the betterment of the conditions of its citizens, cannot be bartered away without positive and unerring authority to do so, and which must always be found in the fundamental law of the sovereignty, which, in this state, is the Constitution. There is no such authority found in that instrument whereby the immunity sought to be established in this case can be upheld.

It therefore results that the judgment of the court in sustaining the demurrer to the petition, and dismissing it on failure to further plead, is correct, and it is affirmed.

STARR PIANO CO. v. PETREY et al.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

CHattel Mortgages §150—RECORDATION—VALIDITY.

Ky. St. § 496, declares that no deed of trust or mortgage shall be valid against a purchaser for a valuable consideration, unless acknowledged or proved according to law and lodged for record. Section 501 declares that deeds may be admitted to record on acknowledgment before the proper clerk or notary public, or on proof of two subscribing witnesses, or proof of their death or absence. Section 511 provides that the clerk of each county shall record all instruments which shall be lodged for record, properly certified or proven, while section 519a declares that whenever a certificate admitting to record a deed executed by a married woman shows that such deed was admitted to record on proof of one of the subscribing witnesses, it shall be presumed that such subscribing witness proved the attestation of the other. A chattel mortgage executed by a woman was attested by witnesses, but the certificate of the clerk who admitted it to record did not show that it was proved by such witnesses. Held that, as a chattel mortgage is not valid against a purchaser without notice, and it does not constitute notice until recorded, the recordation of the instrument was unauthorized; proof of execution not having been made and so as against a subsequent mortgagee, the mortgage was unavailing.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 246-252; Dec. Dig. § 150.]

Appeal from Circuit Court, Whitley County. Action by the Starr Piano Company against Lucy Petrey and R. B. Sutton. From a judgment for defendant Sutton, plaintiff appeals. Affirmed.

W. L. Bruner, of London, for appellant. M. A. Gray, of Corbin for appellees.

CARROLL, J. Lucy Petrey, while living in Laurel county, Ky., and in March, 1911, purchased from the Starr Piano Company a piano, for which she executed her notes and also a mortgage on the piano to secure their payment, which mortgage was duly recorded in the county clerk's office of Laurel county. This mortgage was signed by Lucy Petrey "in the presence of Frank H. March and E. J. Ford." After this she moved to Whitley county, Ky., and gave to the appellee, R. B. Sutton, a mortgage on the same piano, which mortgage was duly acknowledged and recorded in the county clerk's office of Whitley county. Subsequently the piano company brought this suit in the Whitley circuit court against Lucy Petrey and Sutton to recover judgment on the note, and for the enforcement of its mortgage lien on the piano. Sutton as a party to this suit asserted his mortgage lien, claiming that it was superior to the lien of the piano company because its mortgage was not a recordable instrument, and, having no actual notice, he was not affected by the constructive notice that a duly recorded mortgage conveys.

It will be observed that the mortgage executed to the piano company was not acknowledged before an officer; the signature of Lucy Petrey being attested by two witnesses in the manner stated. And the certificate of the clerk of the Laurel county court reads:

"I, Ira J. Davidson, clerk of the county court in and for the county and state aforesaid, do certify that the foregoing mortgage from Lucy Petrey to the Starr Piano Company was this day produced to me in my said office, whereupon the same, together with the foregoing, and this my certificate, have been duly recorded in my office."

The only question in the case is: Was this mortgage, the recordation of which was certified to by the clerk in the manner stated, a recordable instrument on the showing made by the record? If it was, the mortgage lien of the piano company is superior to the lien of Sutton, and the judgment should be reversed. If it was not, the fact that it was recorded did not give Sutton constructive notice of its existence, and his lien should be held superior to that of the piano company.

The statutes controlling this question are sections 496, 501, 511, and 519a, reading as follows:

"Sec. 496. No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

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"Sec. 501. Deeds executed in this state, by married women, or other persons, may be admitted to record: (1) On the acknowledgment, before the proper clerk or notary public, by the party making the deed; (2) or by the proof of two subscribing witnesses, or the proof of one subscribing witness, who shall also prove the attestation of the other; (3) or by proof of two witnesses that the subscribing witnesses are both dead; and also like proof of signature of one of them and of the grantor; (4) or by like proof that both of the subscribing witnesses are out of the state, or that one is so absent and the other is dead; and also like proof of the signature of one of the witnesses and of the grantor; (5) or on the certificate of a clerk of a county court of this state, or notary public, that the same had been acknowledged or proved before him, as required by this section."

"Sec. 511. The clerk of each county court shall record all instruments of writing embraced in any section of this chapter, which shall be lodged for record, properly certified, or which shall be acknowledged or proved before him as required by law. He shall also record the certificates indorsed on the same, and shall certify the time when the instrument was lodged in his office for record. If acknowledged or proved before him, he shall also certify the time of doing the same, and by whom proved, and that the instrument and the certificates thereon have been duly recorded in his office."

"Sec. 519a. Wherever a certificate admitting to record a deed executed in this state, by a married woman or other person, shows that such deed was admitted to record on the proof of one of the subscribing witnesses thereto, it shall be presumed that such subscribing witness proved the attestation of the other subscribing witness as well as the execution thereof by the grantor; and a certified copy of any such deed which has been, or which may hereafter be, recorded in the proper clerk's office shall be prima facie evidence in all courts and tribunals of this state."

From these statutes it will be seen: (1) That a mortgage is not valid against a purchaser without notice and creditors until it shall have been acknowledged and proved according to law and lodged for record; (2) that a mortgage may be admitted to record on the proof of two subscribing witnesses or the proof of one subscribing witness who shall also prove the attestation of the other, or by proof of two witnesses that the subscribing witnesses are both dead, and also like proof of the signature of one of them and of the grantor, or by like proof that both of the subscribing witnesses are out of the state, or that one is so absent and the other dead, and also like proof of the signature of one of the witnesses and of the grantor; (3) that the clerk shall record all instruments authorized by the statute to be recorded, which shall be acknowledged or proved before him as required by law, and, if acknowledged or proved before him, he shall also certify the time of doing this thing and by whom proved; (4) that when a certificate shows that a deed was admitted to record on the proof of one of the subscribing witnesses thereto, it shall be presumed that this subscribing witness proved the attestation of the other subscribing witness.

It will be further noticed that a deed or mortgage does not furnish constructive notice until it shall have been acknowledged

or proved according to law, and when the instrument is not acknowledged by a duly authorized officer, but the signature of the grantor is attested by subscribing witnesses, it can only be admitted to record upon proof before the clerk in the manner required by section 501, which proof must be incorporated by the clerk in his certificate showing that the instrument has been recorded.

The certificate of the clerk showing the recording of the mortgage to the piano company does not show that the signature of Lucy Petrey was proven by the persons whose names are attached to the mortgage as attesting witnesses or by any other person, and in the absence of such proof as is required by section 501, the clerk had no authority to record the instrument. It was no more a recordable instrument than it would have been if the names of the attesting witnesses had not appeared on the instrument. The purpose of the statute was to make sure that the instrument lodged for record was in fact signed and acknowledged by the grantor. If the investment is accompanied by the certificate of a duly authorized officer, this certificate itself is sufficient evidence of the signing and acknowledgment to authorize the clerk to accept it without other or further evidence of the verity of the acknowledgment. But if it has not been so acknowledged and the signature of the grantor is attested by witnesses, then the statute requires proof of the authenticity of the signature in the manner provided in section 501. *Miller & Pulling v. Henshaw & Co.*, 4 Dana, 325; *Charleroi Timber & Cannel Coal Co. v. Licking Coal & Lumber Co.*, 116 S. W. 682; *Belcher v. Polly*, 106 S. W. 818, 32 Ky. Law Rep. 623.

The amount involved in this case is not sufficient to authorize an appeal as a matter of right, but in view of the novelty of the question, we grant an appeal and affirm the judgment of the lower court holding that the mortgage executed to the piano company was not recordable on the showing made by the record, and therefore Sutton, under his junior mortgage, had a superior lien on the property.

LOUISVILLE & N. R. CO. v. JENKINS.

(Court of Appeals of Kentucky. Feb. 16, 1916.)

1. RAILROADS — 360 — LIABILITY FOR INJURIES — FRIGHTENING ANIMALS.

Plaintiff was injured by reason of his mules becoming frightened at a passing train while on the right of way, but at a distance of six or eight feet from the track, and separated therefrom by a secure railing at a place where a coal mining company had a mine side track and coal tippie, and other appliances necessary for use in its business. It did not appear that there was any crossing at this point, that it was a regular stopping place for trains, or that any statute or rule of the company required signals of the approach of trains to be given at that point. *Held*, that the railway company owed plaintiff

no duty of giving signals of the train's approach or slackening its speed in approaching the place of the accident to avoid frightening his team.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1269-1262; Dec. Dig. — 369.]

2. RAILROADS — 360 — LIABILITY FOR INJURIES — FRIGHTENING ANIMALS.

A railway company was not liable for injuries sustained by plaintiff by reason of his mules becoming frightened at the noise of a passing train, or the escape of steam from the engine, unless the escape of steam was unnecessary, or the noise made by it unusual and greater than that ordinarily made by the escape of steam from passing trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. — 360.]

3. RAILROADS — 360 — LIABILITY FOR INJURIES — FRIGHTENING ANIMALS.

Train employees were charged with no duty to maintain a lookout at a place where there was no crossing, for mules near the track which might become frightened at the train, or to use ordinary care to discover their presence, or the peril of their driver, due to their fright.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259-1262; Dec. Dig. — 369.]

4. RAILROADS — 398 — ACTIONS FOR INJURIES — EVIDENCE.

In an action for injuries sustained by plaintiff by reason of his mules becoming frightened at a passing train or the steam escaping from the engine, evidence that the mules did not become frightened until the engine reached them and the train was in the act of passing them failed to show that those in charge of the train discovered their fright or plaintiff's peril in time to prevent his injuries, as it was too late to do anything to prevent the injuries when the fright of the mules or plaintiff's peril arose.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. — 398.]

5. RAILROADS — 360 — LIABILITY FOR INJURIES — FRIGHTENING ANIMALS.

That a train which frightened mules standing within a few feet of the track at a coal tippie where there was no crossing was an extra train, not running on a regular schedule, imposed on the company no duty of informing the driver of the mules of the time of the coming of the extra train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. — 360.]

6. RAILROADS — 398 — ACTIONS FOR INJURIES — EVIDENCE.

In an action for injuries sustained by plaintiff by reason of his team of mules becoming frightened at a passing train, evidence *held* to show that plaintiff was guilty of culpable negligence barring a recovery in failing to hitch the team at the place of the accident or remove it to a greater distance from the railroad track, instead of leaving it unattended and unhitched within a few feet of the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. — 398.]

7. NEGLIGENCE — 75 — CONTRIBUTORY NEGLIGENCE — RISKS IN SAVING PROPERTY — RAILROADS — FRIGHTENING ANIMALS.

Where the danger which menaced plaintiff's mules and wagon when the mules became frightened at a passing train was due to no negligence of the railroad company's employees, but to plaintiff's negligence in leaving the mules unattended and unhitched near the track, he could not recover for injuries sustained in attempting to save the mules and wagon from injury, since a person attempting to rescue another from per-

it can recover for injuries sustained in attempting the rescue only where the peril was caused by the negligence of the person sought to be made liable, and the same rule applies where only property is in danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 103; Dec. Dig. § 75.]

Appeal from Circuit Court, Hopkins County.

Action by S. D. Jenkins against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Laffoon & Waddill, of Madisonville, and Benjamin D. Warfield, of Louisville, for appellant. Gordon, Gordon & Cox and Virgil Y. Moore, all of Madisonville, for appellee.

SETTLE, J. This is an appeal from a judgment of the Hopkins circuit court, upon a verdict awarding appellee \$1,000 damages for personal injuries resulting, as alleged, by the servants of the appellant so negligently operating a train as to frighten his mules, attached to a wagon, and cause them to run against or over him. The accident happened near Madisonville, at a place called Reinecke, where the Reinecke Coal Mining Company, which is engaged in mining coal, has a mine side track, coal tipples, and other appliances necessary for use in its business, in part situated on appellant's right of way.

It appears from the allegations of the petition and evidence that on the day of the accident appellee drove to the Reinecke Mine in a wagon drawn by a pair of mules to deliver a load of mine props, purchase coal, and haul it to his home six miles distant. After unloading the props appellee was delayed in getting his wagon loaded with coal by reason of there being four or five other wagons to be loaded before his. While thus delayed he left his wagon and mules where they were separated from the track by a railing, which at that point ran some distance parallel with the track. Leaving the mules unhitched, appellee walked a distance of about 50 feet to where some men were standing and began a conversation with them. While thus engaged a pay train owned by appellant and being operated by its servants passed the station without stopping. The mules, becoming frightened by the passing train, attempted to run away, upon seeing which appellee ran to them, seized them by their bridles, and attempted to hold them. In making this attempt he was thrown by one of the mules against the railing standing between them and the track and to the ground, and while upon the ground the wagon ran over him, thereby causing the injuries received by him.

It was alleged in the petition:

"That the defendant so negligently ran, managed, and operated one of its engines and cars over and upon said railroad, approaching and passing said place, without signal or warning of its approach, and at an unusual and rapid rate of speed, that the sight of said train and the

noises produced by the same frightened the team drawing the plaintiff's wagon, and caused them to become unmanageable and to run away * * *; that said train was running westward and at an unusual time, and that its approach was unexpected by plaintiff, and that the same was being negligently run, and operated at a grossly excessive, unusual and unnecessary rate of speed, and that the defendant negligently and unlawfully failed to give any warning of the approach of said train to said place by bell, whistle or otherwise; that defendant's agents and servants in charge of and operating said engine and train saw and knew or in the exercise of ordinary care would have seen and known of the perilous position of plaintiff in time to have avoided injuring him or frightening his team by the use of ordinary care, but failed to use such care to avoid injuring plaintiff, and that, as the direct and proximate result of the said negligence of said defendant, and its agents and servants, the plaintiff received and suffered the injury of which he complains. The plaintiff states that he did not see nor know of the approach of said engine and train, and in the exercise of ordinary care could not have seen same nor known thereof in time to have avoided or prevented the injury."

The above allegations were followed by others that the court, upon appellant's motion, struck from the petition; the stricken allegations being to the effect that the Reinecke mine was a place continually used by men and teams in loading and hauling coal, in close and dangerous proximity to the railroad tracks and on appellant's right of way, and had been so used for more than 15 years, and by more than 200 employees of the Reinecke Mining Company, with the consent and acquiescence of appellant, by reason of which the latter knew that the safety of persons and property required and demanded that its servants, in operating its trains at and approaching the Reinecke mines, should keep a diligent lookout for persons on or near its tracks and give proper signals and warning of the approach of its engines and trains.

The answer of appellant contained a traverse and plea of contributory negligence, and the latter plea was controverted by reply, thus completing the issues.

[1] It will be observed that it is not alleged that there was a crossing at the Reinecke coal mines, or that it is a regular stopping place for appellant's trains, or that appellee's wagon and mules were on appellant's track or otherwise so situated as that they could have been struck by a passing train. On the contrary, while on the appellant's right of way they were at a distance of six or eight feet from its track and separated therefrom by the secure railing. In view of this situation, we see no force in appellee's contention that appellant owed to him the duty of giving signals of the coming of its train or of slackening its speed in approaching the place of the accident. If the speed of trains is to be reduced at such places, to prevent the frightening of teams that may be at all times during the day expected to be found standing thereat contiguous to the main track, it would seriously interfere with the needs and demands of the traveling public and of com-

nerce as well. Especially would this be true, as to fast through passenger and mail trains and fast through freight trains, which make no stops at such places, as such trains must be operated at high speed in order to maintain their schedules and make connection at their terminals.

We have repeatedly held that the failure of those in charge of a train to moderate its speed under the circumstances appearing in this case is not negligence as to one situated as was appellee. *L. & N. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293; *L. & N. R. Co. v. Dalton*, 102 Ky. 290, 43 S. W. 431, 19 Ky. Law Rep. 1318; *Dolfinger v. Fishback*, 12 Bush, 474. Nor did appellant owe to teams and the owners thereof situated as was appellee the duty of giving signals of the approach of the train. It was not alleged in the petition that Reinecke was a place at which appellant was required, either by statute or its rules, to give signals of the approach of its trains. As previously remarked, there was no crossing at or near the place of the accident. Appellee was not approaching a crossing, nor was his team near enough to appellant's track to be in any danger of injury by contact with the train. If, under such circumstances as are here presented, appellee was entitled to signals and to a slackening of the speed of the train, they should be given for the benefit of every plowman in the fields alongside the railroad and every person driving a team along roads paralleled by a railroad, although not at or near a public crossing.

In *L. & N. R. Co. v. Redmon's Adm'r*, supra, we said, quoting with approval from *Shackleford's Adm'r v. L. & N. R. Co.*, 84 Ky. 43:

"Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence, but this is required for the safety of passengers, trainmen, and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the tracks elsewhere. The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the outbuildings, or vice versa; and to require the companies in all such cases to signal the approach of their trains and to presume and guard against the presence of persons upon the track would not only be unreasonable, but detrimental to public travel." In *Davis' Adm'r v. C. & O. Ry. Co.*, 116 Ky. 144 [75 S. W. 275, 25 Ky. Law Rep. 342], still another case very much like the one at bar, the petition alleged that plaintiff's intestate was killed 'at or near the public crossing.' In the opinion we find the following statement of the law: 'From the averments the court concludes that the intestate had the right to use the private crossing, but under the rule that a pleading must be construed most strongly against the pleader the averment that she was killed "at or near the crossing" is equivalent to the averment that she was not killed on it, but near the crossing; hence she was a trespasser. This being true, under the well-settled rule of this court, those in charge of the train owed her no duty except to use reasonable care to save her after discovering her per-

il. As she was not on a crossing when killed, it cannot be claimed that, as to the intestate, it was negligence to fail to give signals on the approach to either the private or public crossing.' *L. & N. R. Co. v. Vittitoe's Adm'r* [41 S. W. 269] 19 Ky. Law Rep. 612. We do not think it was made to appear in this case that appellant's trainmen failed to give the customary signals in approaching the streets and public crossings in New Haven; but, if they had not done so, it was not negligence as to the deceased, who, as repeatedly stated, was not at the time of the accident on a street or the public crossing of the town, but a trespasser on appellant's right of way and within its inclosure."

In *L. & N. R. Co. v. Vittitoe's Adm'r*, supra, it is said:

"The evidence for the plaintiff in this case does not show whether or not any bell was rung at the road crossing mentioned, and some of the witnesses who were in the field some distance from that point say they did not hear the whistle sounded. The law imposes a duty to blow the whistle or ring the bell on approaching a crossing, not to give trespassers notice, but to give notice to the public, who have a right to enjoy the use of the crossing. If the boy was not on the crossing, the failure of the company to blow the whistle or ring the bell would not make them guilty of negligence as to the boy." *C. N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, 132 Ky. 445, 115 S. W. 699; *L. & N. R. Co. v. Cummins' Adm'r*, 111 Ky. 333, 63 S. W. 594, 23 Ky. Law Rep. 681; *Parkerson's Adm'r v. L. & N. R. Co.*, 80 S. W. 468, 25 Ky. Law Rep. 2260; *L. & N. R. Co. v. Molloy's Adm'r*, 122 Ky. 219, 91 S. W. 685, 28 Ky. Law Rep. 1113; *Newport News, etc., Co. v. Deuser*, 97 Ky. 92, 29 S. W. 973, 17 Ky. Law Rep. 113.

If the failure of those in charge of a train to give the signals required of it by law in approaching a crossing or public place is not negligence as to one occupying the track where he has no right to be, how can it be said with any show of reason that such failure is negligence as to one who is not, or whose team is not, on the track or near enough thereto to come in contact with the train? All that has been said with reference to the failure of appellant to give signals of the approach of its train to Reinecke, if there was such failure, applies with equal force to its failure to slacken the speed of its train in approaching and passing that place. It is true that much of appellee's evidence tended to show that the speed of the train was 30 or 40 miles an hour, but appellant's servants in charge of the train testified that it did not exceed 12 or 15 miles an hour. Appellee and several of his witnesses also testified that, if the train sounded its whistle or rang its bell in approaching and passing Reinecke, such signals were not heard by them. Upon the other hand, those in charge of the train testified that the whistle was sounded at the crossing half a mile east of Reinecke, and again at the private crossing 200 yards east thereof. The engineer and fireman testified that the engine bell was ringing in approaching and passing Reinecke, and two employes of the Reinecke Coal Mining Company corroborated their statements as to the blowing of the whistle. In view, however, of the proof as to the noise made by the coal tippie when the train

passed, it is not surprising that appellee and his witnesses failed to hear both the whistle and bell.

Tested by the authorities, *supra*, the averments of the petition as to the unusual speed of the train and its failure to give the signals did not state a cause of action; therefore the trial court erred in overruling appellant's motion to strike them out.

[2] It is, however, insisted for appellee that the averments of the petition and amendment as to the mules being frightened by the sight and noise of the train, and that their fright and his consequent peril was seen by appellant's servants in charge of the train, or could, by the use of ordinary care, have been discovered by them in time to have prevented his injuries, did state a cause of action, which received support from some of the evidence introduced in his behalf, conducing to prove that the noise of steam which appellant's servants in charge of the engine permitted to escape therefrom as it passed the mules was the main cause of their becoming frightened; but this evidence stops short of showing that the escape of the steam was unnecessary, or that the noise made by it was unusual; that is, greater than is ordinarily made by the escape of steam from passing trains. The allegation of the petition that the fright of the mules was caused by the sight and noise of the train is not sufficient in the absence of the additional allegation that such noise was unusual and unnecessary; and the petition wholly fails to allege the escape of the steam or that the escape thereof was unnecessary or the noise unusual, both of which allegations were necessary to make good the cause of action attempted to be stated. We have more than once held that a railroad company is liable for injuries to a traveler on the highway whose horse or horses are frightened by a train if, after discovering the fright and danger, the railroad company's servants do not use ordinary care for his safety. *L. & N. R. Co. v. Harrod's Adm'r*, 155 Ky. 155, 159 S. W. 685, 47 L. R. A. (N. S.) 918; *L. & N. R. Co. v. Allen*, 153 Ky. 252, 154 S. W. 1095; *L. & N. R. Co. v. McCandless*, 123 Ky. 121, 93 S. W. 1041, 29 Ky. Law Rep. 563; *L. & N. R. Co. v. Street's Adm'r*, 139 Ky. 186, 129 S. W. 570, 139 Am. St. Rep. 471. It was, however, also distinctly held in *L. & N. R. Co. v. Harrod's Adm'r*, *supra*, that those in charge of a train are not required to keep a lookout for teams on adjacent highways.

In *L. & N. R. Co. v. Smith*, 107 Ky. 178, 53 S. W. 269, 21 Ky. Law Rep. 857, we also held that a railroad company does not owe to travelers upon an adjacent parallel highway the duty of discovering that they have become imperiled by having their horses frightened by the sounding of the whistle and ringing of the bell, but only reasonable diligence to prevent injury after discovering such peril. In the opinion it is in part said:

"* * * But there is no rule of law that would require employes in charge of an engine to discover the condition of a team or persons on a highway running parallel with the railroad. *Lamb v. Old Colony Railroad Co.*, 140 Mass. 79, 2 N. E. 832, 54 Am. Rep. 449. While it is not their duty to discover such things, yet, if the employes do see the apparent danger, it then becomes the duty of such employes to use (ordinary) care to avert the injury. As to persons not on the railroad the obligation to observe care begins when the danger is discovered."

[3, 4] The evidence of appellee fails to show that appellant's servants in charge of the train discovered the fright of appellee's mules or his peril in time to have prevented his injuries. They were not charged with any duty to maintain a lookout for the presence of the mules near the track, or to use ordinary care to discover their presence or appellee's peril; therefore the recovery was unauthorized in the absence of any evidence whatever tending to show that after the discovery of the fright of the mules and appellee's peril they could have done anything to prevent the injuries sustained by the latter. According to the uncontradicted testimony of the engineer and fireman, the mules did not become frightened until the engine had reached them and the train was in the act of passing them; and, if this was true, neither the fright of the mules nor the peril of appellee arose or existed until it was too late for anything to be done by the trainmen to prevent the injuries he sustained. Moreover, if, as some of the witnesses of appellee testified, the fright of the mules was caused by the escape of steam as the engine reached or passed them, no precaution that might have been taken by the trainmen could have prevented what followed. Even if appellee had alleged that the fright of the mules was caused by the escape of steam from the engine, as he and some of his witnesses testified, there being no evidence that its escape was otherwise than necessary or customary in the operation of the engine, or that the noise thereof was unnecessary and unusual, no negligence in this particular can be said to have been shown.

[5] Appellee's case is not strengthened by the fact that the train which frightened his mules was an extra train; that is, a train not running on regular schedule. In *Blankenship's Adm'r v. N. & W. Ry. Co.*, 147 Ky. 260, 143 S. W. 995, we held that the railroad company did not even owe to its own employe, a trackwalker, who was run over and killed by an extra train, of the approach of which he was unadvised, the duty of notifying him through the section foreman or otherwise of the coming of such extra train; and, if a railroad company does not owe to one of its employes whose work requires him to be on the track the duty of informing him of the time of the coming of an extra train, by what process of reasoning can it be said to owe such duty to a person whose team is not on the track, though close enough

thereto to be subjected to possible fright by the passing train?

The case of *C., N. O. & T. P. Ry. Co., etc., v. Winningham's Adm'r*, 156 Ky. 434, 161 S. W. 506, relied on by counsel for appellee, is not authority in point. In that case it was held that, where a coal company, by authority of the railroad company, was engaged in constructing, according to specifications furnished by the latter, a tipple across its track at an elevation of 30 feet above same, and the duties of the coal company's employes, in doing the work of construction, required them to remain in close proximity to the railroad track and much of the time to cross it and be upon it, and such work had continued for ten days, in such state of case the railroad company was charged with notice of the presence of the coal company's workmen at that point and of their use of its track, and hence owed them the duty of giving warning of the approach of trains, and was liable in damages for the death of one of the employes at the tipple caused by its failure to give such warning.

It will readily be seen that the facts appearing in the case *supra* are wholly unlike those of the instant case. In that case the railroad company, by authorizing the coal company to construct the tipple across and over its track, and because of its knowledge that the work of construction would necessarily compel the employes of the former to frequently cross and be upon the track and thereby expose themselves to the danger of being run over by passing trains, voluntarily assumed and imposed upon itself the duty to take such reasonable and customary precautions in running its trains by the tipple as would protect the workmen thereat from being run over by them; that is, that in running its trains by the tipple it would use ordinary care to give the usual signals of their approach, the failure to do which caused the death of *Winningham*. In the instant case, however, no such duty was imposed by law or assumed by the appellant. The coal company had no such connection with it as could have created such a duty upon appellant's part. *Reinecke* was not a place at which appellant's trains were accustomed to stop. The coal company's tipple was not across or above its track, and there was nothing in the relations between it and the coal company that required the use of its track by the employes of the latter, its customers, or others. The only duty it owed to the appellee was to exercise ordinary care to prevent his injuries after discovering his peril, and there was no evidence tending to show that it discovered the fright of the mules or appellee's peril in time to do anything to prevent his injuries. This being the only one of the several grounds attempted to be alleged in the petition, as amended, that can be said to even inferentially state a cause of action, and there be-

ing no evidence to support it, the trial court should have granted the peremptory instruction directing a verdict for appellant, as requested by it after the introduction of appellee's evidence and again at the conclusion of all the evidence.

[8] We are further of opinion that appellee's contributory negligence furnished another equally potent reason for the granting of the peremptory instruction. According to his own testimony, after he drove and placed his team in line behind four or five other wagons that by reason of their earlier arrival at the tipple took precedence of his in being loaded with coal, he left his mules attached to the wagon, unhitched and unattended, and walked away from them a distance the length of three wagons, or about 50 feet, to where some men were standing near the tipple, which was then in operation and making a great noise. He immediately entered into a conversation with these men, which was continued until some one announced that the train was coming. What followed can best be told in appellee's own words, appearing in the bill of evidence:

"A. * * * When somebody said, 'Yonder comes the train,' and I started to run for the team, and by the time I got hold of them the train was there. Q. Why did you run to your team? A. I run to them to take care of them. Q. What was the first knowledge you had of the approach of the train? A. Some one said, 'Yonder is the train.' * * * Q. When you got hold of your team, tell the jury what happened to you. A. I got hold of the team, and the train split by. Some way or other the lead mule got her harness in here and put me across that railing right across my spine here, and that is all I know about it. Q. The mule got you between the railing something like that (indicating)? A. Yes, sir; a four or two by six. Q. Was your back against that railing? A. Kind of my side. * * * Q. What effect did the surging of the mule have upon you when you were in that position? A. As soon as the team turned me loose I walked about ten steps and sank down. Q. How long were you in the position between the mule and the rail? A. Two or three minutes; the mule ran against me. Q. What caused the mule to turn away from that position? A. It was the steam I suppose."

It does not appear from the evidence that the fright thus given the mules resulted in any injury to them or the wagon, and we think it patent from appellee's own testimony that, if he had been at the heads of the mules when the train passed they would not have been seriously frightened; nor is it probable that the injuries sustained by him would have been received. Moreover, it is alleged in the amended petition:

"That said team was composed of ordinarily gentle and well-disposed animals, and, if hitched at the place of the accident or properly secured, or removed to a greater distance from the railroad track, said team would not have been frightened, and would not and could not have caused any injury to the plaintiff."

It is true this allegation was preceded by another, argumentative in character, to the effect that, if the train had been run at a more moderate speed and had given the usual signals of its approach, appellee might

or could have known of its coming in time to have removed his team to such a distance as would have prevented them from becoming frightened. But this could not have been true; for, if the train was running at the high rate of speed claimed by appellee, and it had sounded its whistle at the private crossing 200 yards east of Reinecke, as he further claimed it should have done, it would have been physically impossible for him, after hearing the whistle, to have gotten his team any considerable distance from where he left it before the arrival of the train at Reinecke. The argument contained in the allegation in question is therefore illogical, and its only effect is to give emphasis to the admission in the succeeding allegation that:

"If hitched at the place of the accident or properly secured or removed to a greater distance from the railroad track, said team would not have been frightened, and would not and could not have caused any injury to the plaintiff."

This admission necessarily suggests the inquiry: If hitching the team at the place of the accident or its removal to a greater distance from the railroad track would have prevented it from becoming frightened and appellee from being injured, why did he not, before leaving the team, in anticipation of the probable coming of a train, hitch it at the place of the accident or remove it to a greater distance from the railroad track? As he did not take these precautions, which, if taken, admittedly would have prevented his injuries, the conclusion is inevitable that his failure to do so must be regarded as culpable negligence, sufficient of itself to bar the recovery of damages sought by him. The evidence shows no negligence whatever on the part of appellant. *L. & N. R. Co. et al. v. Benke's Adm'r*, 164 Ky. 798, 176 S. W. 212; *Hummer's Ex'r v. L. & N. R. Co.*, 128 Ky. 486, 108 S. W. 885, 32 Ky. Law Rep. 1315; *L. & N. R. Co. v. Franklin's Adm'r*, 165 Ky. 595, 177 S. W. 457.

[7] The negligence of appellee cannot be excused upon the ground that his injuries were received in attempting to save his mules and wagon from injury. Without considering whether there was any negligence in the method adopted by him of preventing injury to his property, it is sufficient to say that the danger which menaced the property was not caused by any negligence of the appellant's servants in charge of the train, but by his own negligence in leaving the mules unattended and unhitched where they would be subjected to fright from a passing train, or in failing to remove them to a place where the coming of a train would not reasonably have been expected to frighten them. As said in *Taylor Coal Co. v. Porter's Adm'r*, 164 Ky. 523, 175 S. W. 1014:

"It is well settled that a person who attempts to rescue one who has been put in peril by the negligence of another may maintain a cause of

action for injuries sustained in attempting his rescue. But this right of action rests entirely upon the ground that the peril to which the person was exposed was caused by the negligence of the person sought to be made liable. *Shearman & Redfield on Negligence*, vol. 1, § 85; *Lemay v. Springfield St. Ry. Co.*, 210 Mass. 63 [96 N. E. 79] 37 L. R. A. (N. S.) 43, and cases cited in note; *Norris v. Atlantic Coast Line Ry. Co.*, 152 N. C. 505 [67 S. E. 1017] 27 L. R. A. (N. S.) 1069."

Such being the rule applicable where human life is involved, a fortiori must it be applicable where only property is involved. From whatever viewpoint considered, the evidence was insufficient to authorize the submission of the case to the jury; hence the trial court should have peremptorily directed a verdict for the appellant.

Judgment reversed, and cause remanded for a new trial consistent with the opinion.

INDIAN CREEK COAL CO. v. WALCOTT.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. MASTER AND SERVANT—§281—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In a servant's personal injury action, evidence held to show that he was the foreman in charge of the gang of men who fired the shot of dynamite which resulted in the injury relieving the master from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.]

2. DAMAGES—§130 — PERSONAL INJURIES—MEASURE.

An award of \$10,000 damages for fractures to one arm is so flagrantly excessive as to furnish ground for reversal.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 857-867, 870; Dec. Dig. § 130.]

3. EVIDENCE—§880 — DEMONSTRATIVE EVIDENCE.

In a personal injury action X-ray photographs not properly accredited should not be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. § 880.]

Appeal from Circuit Court, McCreary County.

Action by Freedman J. Walcott against the Indian Creek Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tye-Siler & Gatliff, of Williamsburg, and O'Rear & Williams, of Frankfort, for appellant. Robert Harding and John W. Rawlings, both of Danville, and John M. Perkins, of Whitley City, for appellee.

CLARKE, J. On August 26, 1912, appellee, while working for appellant in its coal mine, was injured by a shot of dynamite or powder fired for the purpose of loosening the coal. His arm was broken in four places, and upon the trial of the suit filed to recover for these injuries he recovered a verdict and judgment for \$10,000.

Appellant is seeking a reversal of that judgment for the following reasons: (1) The

court erred in refusing it a peremptory instruction. (2) The damages are grossly excessive. (3) Admission of incompetent evidence for appellee.

[1] Appellant contends that appellee at the time of the accident was foreman of the gang of men that fired the shot from which the accident resulted, and that these men in that work and at the time were under the immediate direction and supervision of appellee, and that appellant is therefore not liable to appellee for the injuries so received.

It is appellee's contention that at the time of the accident these men were not working under him, but were under the direction and supervision of the bank boss, Ramsey, and that the company is liable to him for his injuries.

The men who fired this shot were engaged at the time in driving a new entry from the outside into the mine, and there were four men engaged in this work, Columbus King, Louis Strunk, Floyd Strunk, and Him Dietz.

Appellee was electrical engineer for the mine, and, in addition, for some time before this accident, at times had been acting as civil engineer for the mine as well. A short time before this accident, and while acting as civil engineer, he had made a survey of the old entry in the mine, and from that survey had located for the company under the direction of the general manager, J. C. Walker, this new entry which was being driven into the mine, and he had set the stakes showing where and in what direction this entry was to be made. The entry had been nearly completed, and a day or two before the accident, Mr. Walker, superintendent of the mine, told appellee that it had been reported to him by the bank boss that this new entry was not going to strike the place in the mine desired, and that he had better check up his work to see if he had not made a mistake. At the time of the accident appellee was engaged in checking up his survey for this entry, and was measuring the stakes he had set in the old entry. He admits that until a few days before the accident he was the superior and in charge of the two Strunk boys and Dietz, and was in charge of them in driving this new entry until the vein of coal was struck; but it is his contention that when the coal was struck these men automatically passed from his control to the control of the bank boss, Ramsey. He admits that as civil engineer he had surveyed, mapped, and staked this new entry, and started the men in the work of excavating the dirt and driving the entry, and erecting the necessary timbers to protect the opening. He does not even himself state that he had ever transferred or turned over this gang of men, or the work that they were doing, to the bank boss, Ramsey. He only states that so long as the work was outside work, he was in control of it; but when it became inside work it was under the control

of Ramsey, and he contends that because in driving the new entry the vein of coal had been reached and the coal was being saved for the company by the men doing the work; that that fact changed their work from outside work to inside work or mining, and that they thereby passed from his control to that of Ramsey. In this theory of his, he is not supported by any evidence whatever. While these men were saving the coal encountered in making this new entry, that clearly was merely incidental to the work they were engaged in, which was not mining, but was that of constructing a new entrance into the mine.

Appellee introduced the Strunk boys as witnesses for him, and they both testified that appellee employed them, directed them what to do, kept the time of this force of men, was there two or three times a day directing them in their work, and that at the time of the accident they were working under the immediate direction and supervision of appellee. Appellee admits that he employed these men, except King, and that he did keep their time and that he was in control of them in making this entry until they struck the coal vein, and he admits that at the time of the accident he was engaged in checking up his survey for this entry. Every bit of evidence introduced by appellee shows that these men who fired the shot were at the time engaged in driving the new entry; that he was in charge of the work of making this new entry; that these men were working by stakes set by him; that he kept the time and directed the work of these men. The only thing presented as indicating in any way that these men were not under his supervision at the time of the accident, is not evidence at all, but is simply his theory that because these men in driving the entry were saving the coal encountered, that they thereby passed from under his control to that of the bank boss.

In our judgment appellee's evidence not only did not show that these men were not under his control at the time of the accident, but as a matter of fact shows conclusively that he was their superior, and in charge of them at the time of the accident.

It results, therefore, that the court erred in overruling appellant's motion for a directed verdict in its favor, and, having reached this conclusion, it is unnecessary to discuss at length the other errors assigned; but in view of the fact that another trial may be had, we deem it necessary to state our conclusions without setting up the reasons therefor upon these other matters.

[2, 3] In our judgment the verdict in this case of \$10,000 damages for fractures to one arm was so flagrantly excessive as to furnish a ground for reversal; and the X-ray photographs not having been properly accredited, it was error to admit them as evidence (*Ligon v. Allen*, 157 Ky. 101, 162 S. W. 536, 51

L. B. A. [N. S.] 1213), and such an error as would necessitate a reversal if the verdict was not in accord with the weight of the evidence.

For the reasons indicated the judgment is reversed, and the case remanded for a new trial consistent herewith.

BOWMAN v. FAYETTE COUNTY et al.
(Court of Appeals of Kentucky. Feb. 16, 1916.)

1. COUNTIES \S 178—ELECTION—MAJORITY OF VOTES—CONSTITUTIONAL PROVISIONS.

Const. \S 157, provides that a county shall not become indebted to an amount exceeding in any year the revenue provided for that year without the assent of two-thirds of the voters thereof at an election for that purpose. Section 157a, adopted in 1909, authorizes counties to incur an indebtedness for public road purposes not in excess of 5 per cent. of the value of its taxable property, and to levy a tax of 20 cents on the \$100 of its assessed valuation, provided such additional indebtedness is submitted to the voters at a special election. Ky. St. \S 4307, provides for the holding of an election on some day named in the petition, not earlier than 60 days after the application therefor is filed with the judge of the fiscal court, and that every legal voter may vote at such election. *Held*, that an election at which an issue of county road bonds was authorized was not invalid because two-thirds of all the persons residing in the county legally qualified to vote thereat did not vote to issue such bonds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. $\S\S$ 269-278; Dec. Dig. \S 178.]

2. COUNTIES \S 178—BOND ELECTION—TIME FOR HOLDING.

Such election held on September 30, 1915, instead of on the day of the general election, did not invalidate the bond issue.

[Ed. Note.—For other cases, see Counties, Cent. Dig. $\S\S$ 269-273; Dec. Dig. \S 178.]

3. COUNTIES \S 178—BONDS—MATURITY.

Such voted bond issue was not invalid because the time for the maturity of the bonds was not fixed in the question submitted to the voters, except that they should not mature in less than 5 years nor after 30 years.

[Ed. Note.—For other cases, see Counties, Cent. Dig. $\S\S$ 269-273; Dec. Dig. \S 178.]

Appeal from Circuit Court, Fayette County.

Action by Andrew Bowman against Fayette County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Embry Allen, of Lexington, for appellant. Hogan Yancey and Geo. C. Webb, both of Lexington, for appellees.

HURT, J. This action was instituted in the Fayette circuit court by the appellant, who is a freeholder and taxpayer in Fayette county, and who sues for himself and all others of his class, against the appellees, the county judge and the members of the fiscal court of the county, for the purpose of having declared to be unauthorized the proposed action of the fiscal court in issuing and selling \$300,000 in value of the bonds of Fayette county for the purpose of building, constructing, and reconstructing the public roads and bridges of the county, and to re-

strain the fiscal court from the proposed action. The authority relied upon by the members of the fiscal court for its proposed action is an election which was held in the county on the 30th day of September, 1915, under the provisions of section 4307, Kentucky Statutes (Carroll) 1915. The record discloses the following facts, which are undisputed:

On the 31st day of July, 1915, 150 persons, each of whom was a legal voter and freeholder in the county, signed and presented to the county court a petition by which they requested the county court to order an election to be held at all of the polling places in the county upon the 30th day of September, 1915, for the purpose of taking the sense of the legal voters of the county on the proposal to create an indebtedness of the county in the sum of \$300,000 for the purpose of building, constructing, and reconstructing the public roads and bridges in the county, and to secure which the bonds of the county were to be issued and sold; the bonds to bear interest not in excess of 5 per cent. per annum, with coupons attached, which were to be payable semiannually, to be in denominations of not less than \$100 nor more than \$1,000, to be payable in not less than 5 years and not more than 30 years, to be redeemed in not less than 5 years nor more than 30 years, at the pleasure of the court, and to be sold at a sum not less than their par value and accrued interest. The petition was received by the county court and filed in the office of its clerk on the day of its presentation.

On the 9th day of August, 1915, the county court made and entered an order by which an election was ordered to be held in the county at the various polling places on the 30th day of September, 1915, upon the proposition to create the indebtedness and to issue and to sell the bonds in the amount and manner and with the conditions and for the purposes, in accordance with the requests of the petition. By the order of the county court the proposition and question ordered to be submitted to the voters at the election was:

"Shall the fiscal court of Fayette county issue bonds of the value of \$300,000 for the purpose of building, constructing, and reconstructing public roads and bridges in said county; said bonds to bear interest not to exceed 5 per cent. per annum, with coupons attached, payable semiannually, and to be in denominations of not less than \$100 nor more than \$1,000, to run not less than 5 years nor more than 30 years, and to be redeemed within that time, at the pleasure of the court, and to be sold at not less than par value and accrued interest?"

The sheriff was by the order directed to hold the election, and to advertise it and its date, as provided in section 4307, Ky. Statutes, supra, and the sheriff and clerk were directed to fully comply with the requirements of all the laws pertaining to such elections. The election was held on Septem-

ber 30, 1915, after having been advertised beforehand as required by law, and the proposition duly submitted as directed by the order of the court. No complaint is made of any irregularity or failure to comply with the law applying to such elections in its conduct, nor any irregularity as to the returns from it. The board of election commissioners for the county convened at the time and place provided by law, and canvassed the returns from the election, and certified the result, as provided by law. While at the time of holding the election there were 10,414 persons residing in the county who were qualified voters and legally entitled to vote at the election, only 3,653 of these persons participated in the election, of which number 2,483 voted in favor of creating the indebtedness and issuing the bonds, and 1,170 voted against the issue of the bonds.

Thereafter, pursuant to the election and its result, the fiscal court, on the 6th day of January, 1916, made an order directing that the bonds be issued and sold, and the proceeds paid to the county treasurer, to be used for no purposes except the building, construction, and reconstruction of the public roads and bridges in the county, but directed that the bonds be 300 in number, and each of the denomination of \$1,000 and that they be payable, both principal and interest, in not less than 5 years nor more than 20 years from the date of the order, at the discretion of the fiscal court, the interest to be paid, however, semiannually.

The appellees by their answer pleaded and set out in detail the calling of the election, the orders of the county court in reference thereto, the proceedings of the sheriff and other officers in reference to the election, the acts of the board of election commissioners, the return of the sheriff as to his acts in regard to the election, and filed copies of the orders of the county court, the advertisement of the election, and the proofs of the advertisement, and the orders of the fiscal court in reference to the election and the proposed issue of the bonds.

It was also alleged in the answer that the assessment made in the year 1914 of the taxable property of Fayette county for the year 1915 was in excess of the sum of \$42,000,000; that 5 per cent. of the value of taxable property in the county for the year 1915 was \$2,100,000; that 2 per cent. of the value of the taxable property in the county for 1915 was \$840,000; that during the year 1915 the county had a bonded indebtedness of \$225,000, which, added to the proposed indebtedness of \$300,000, would make a bonded indebtedness of \$525,000, which was all the indebtedness existing or created by the county during the year 1915, except the indebtedness for the current expenses of the year, which would not exceed \$225,000, and that the entire indebtedness, both that which was carried in bonds and for current expenses, and with the

addition of the proposed indebtedness, was less than 2 per cent. of the value of the taxable property in the county for that year; that a tax of 20 cents upon each \$100 of the taxable property of the county as assessed for taxation is more than sufficient to provide a fund for the payment of the interest upon the bonds, and to provide a sinking fund for the payment of the principal of the bonds within 20 years.

The appellant interposed a general demurrer to the answer, which the court overruled, and, failing to plead further, his petition was dismissed, and the court adjudged that the election was valid, the proposed issue of the bonds was authorized, and the bonds, when sold, were valid and binding obligations of the county.

The grounds relied upon for a reversal of the judgment are three, and as follows:

First. The election did not authorize the issue of the bonds, because two-thirds of all the persons residing in the county who were legally qualified to vote at said election did not vote in favor of issuing the bonds.

Second. The election was held on September 30, 1915, instead of on the day of the general election, and for that reason was invalid, and gave no authority to issue the bonds.

Third. The time for the maturity of the bonds was not fixed nor stated in the question submitted to the voters, except that they should not mature in less than 5 years nor after 30 years.

The grounds for reversal will be considered in their order.

[1] Section 157 of the Constitution provides that:

A county "shall not be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election * * * held for that purpose; and any indebtedness contracted in violation of this section shall be void."

Construing this provision of the Constitution, this court has, in a number of cases, held that it did not mean the assent of two-thirds of the voters of the county or municipality or taxing district, but it meant the assent of two-thirds of the voters who participated in the election by voting at it. The language of the constitutional provision is such that it is not susceptible of any other construction. *Montgomery County Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738; *Tipton v. Shelbyville*, 139 Ky. 541, 107 S. W. 810, 32 Ky. Law Rep. 1123; *Render v. Louisville*, 142 Ky. 409, 184 S. W. 458, 32 L. R. A. (N. S.) 530; *Board of Education, etc., v. City of Winchester*, 120 Ky. 594, 87 S. W. 768, 27 Ky. Law Rep. 994; *Fowler v. City of Oakdale*, 158 Ky. 606, 166 S. W. 195. If the election in controversy was governed by section 157, supra, as it would seem to be contended, the objection would be unavailing,

as more than two-thirds of the persons who voted at the election gave their assent to the creation of the indebtedness proposed by the issuance of the bonds, by voting in favor of so doing.

Section 157a of the Constitution, which was adopted by the people in 1909, and which authorizes the counties to incur an indebtedness for public road purposes in any sum not in excess of 5 per cent. of the value of the taxable property in the county, and, when indebtedness on that account is incurred, in accordance with the constitutional provision supra, to levy a tax of 20 cents on the \$100 of the assessed valuation of the property, in addition to the rate prescribed by section 157, supra, uses the following language in conferring the authority upon the county to incur the indebtedness:

"Provided, said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law."

The manner provided by the legislative authority to carry into effect the provisions of section 157a, supra, is section 4307, Ky. St. (Carroll) 1915, and the requirements of this section seem to have been literally followed by the people and officials of Fayette county in obtaining the authority to incur the proposed indebtedness, and to issue and sell the bonds sought to be enjoined. Section 4307, supra, provides for the holding of an election "on some day named in said petition not earlier than sixty days after said application is lodged with the judge of said court." It further provides that at said election every legal voter of the county shall be authorized to vote. It will be observed that neither the constitutional provision nor the statute adopted to carry into effect its provisions requires more than a majority of those voting at the election to give their assent in order to authorize the indebtedness to be incurred.

[2, 3] The exact questions embraced in the two remaining grounds for reversal have been recently passed upon by this court, and decided adversely to the contention of appellant. *Walsh v. Asher*, 163 Ky. 379, 173 S. W. 808; *Albright v. Ballard*, 164 Ky. 748, 176 S. W. 185.

It is therefore ordered that the judgment appealed from be affirmed.

BOWEN v. CHENOA-HIGNITE COAL CO.
(Court of Appeals of Kentucky. Feb. 18, 1916.)

1. CONTRACTS — 93—WRITTEN CONTRACTS — MODE OF MAKING.

If an offer is made by delivering a paper containing the terms of the proposed contract, and it is accepted, the acceptor is bound by its terms whether he reads the paper or not.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. —93.]

2. CONTRACTS — 35—WRITTEN CONTRACTS — SIGNATURE.

While ordinarily a written contract is not completed until signed by the parties, they may adopt a written instrument as their contract without signing it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 171-185; Dec. Dig. —35.]

3. CORPORATIONS — 456—CONTRACT — SUFFICIENCY OF MINUTES.

The board of directors of a coal mining company authorized the president to employ a mine superintendent or foreman upon terms stated. The president was required to submit to the board for its approval such contract as he might make. A copy of the minutes of the board, which was delivered to one whom the president engaged as mine superintendent, showed no acceptance on the part of the superintendent or report to or ratification by the board. Neither did such minutes show that any term of employment was agreed on. *Held*, that the written minutes were insufficient to constitute a written contract for employment for a given period.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1806; Dec. Dig. —456.]

4. FRAUDS, STATUTE OF — 113—CONTRACTS.

A parol contract for employment for a year or more is unenforceable under the statute of frauds (Ky. St. § 470, subsec. 7), and so, where a written contract is relied on, all of the material terms must be contained therein, and it cannot be supplemented by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 239-241; Dec. Dig. —113.]

5. MASTER AND SERVANT — 20—EMPLOYMENT — TERM OF EMPLOYMENT.

Where the term of employment was indefinite, it may be terminated by the master at any time.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 19; Dec. Dig. —20.]

6. CUSTOMS AND USAGES — 13—EMPLOYMENT — TERM OF EMPLOYMENT.

Where a contract of employment was wholly indefinite, it cannot be extended by custom that such employment should last for the term of a year.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 25, 26; Dec. Dig. —13.]

Appeal from Circuit Court, Bell County.

Action by M. S. Bowen against the Chenoa-Hignite Coal Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Patterson & Ingram, of Pineville, for appellant. William E. Cabell, of Middlesboro, for appellee.

SETTLE, J. The purpose of the appellant, M. S. Bowen, in bringing this action in the court below was to recover of the appellee, Chenoa-Hignite Coal Company, a corporation engaged in mining and selling coal, damages for the violation of an alleged contract whereby, as averred in the petition, it employed him to serve it as superintendent and foreman of its coal mine for the term of one year beginning October 1, 1914, "at a salary of \$150 per month, with residence and coal for his private use furnish-

ed free of cost, and with the privilege of buying his goods in the store at a discount of 15 per cent. off of store prices during his term of office." It was further alleged in the petition that, after rendering appellant three months' service as mine superintendent under the contract referred to, appellee was wrongfully discharged by it. The petition contains the admissions that appellant's discharge resulted from a reorganization of the appellee company and change in its officers, and that for and during the time he served appellee appellant was paid by it a salary of \$150 per month, furnished a residence and coal for his use, and allowed the 15 per cent. discount on all merchandise purchased at its store.

Appellee filed a general demurrer to the petition as amended, which the circuit court sustained. Though given leave to further amend, appellant refused to do so. Thereupon the court dismissed his petition, and from the judgment manifesting these rulings, he has appealed.

The writing relied on as evidencing the alleged contract in question was filed with and made a part of the petition. It is a copy of the entire minutes of a meeting of appellee's board of directors held September 12, 1914, and is in words and figures as follows:

"Minutes of a called meeting of the board of directors of the Chenoa-Hignite Coal Company held on Saturday, September 12, 1914, at 9:30 a. m., at the office of Wm. Ayres, in Pineville, Ky., pursuant to notice.

"Following were present at said meeting: W. H. Hollingsworth, F. G. Burnette, Wm. Ayres, P. T. Cairns, and J. R. Justice—the above being all of the directors, and also all of the stockholders. Said meeting was called to order by the president, F. G. Burnette.

"The affairs of the company having been discussed at some length, Mr. W. H. Hollingsworth resigned his position as general manager, to take effect October 1, 1914, which resignation, on vote of the board of directors, was accepted.

"On motion of J. R. Justice, duly seconded and carried by vote of the board, it was ordered that a superintendent and mine foreman of the company be appointed at a salary of \$150 per month, with residence and coal for his private use furnished free of costs, and with the privilege of buying his goods in the store at a discount of 15 per cent. off of store prices during his term of office. The president was authorized to negotiate with W. L. Stallsworth or other suitable or competent men who shall be satisfactory to the board of directors to serve as superintendent and mine foreman of the company's mining operations on the above terms of compensation, or less, if same can be agreed upon, and the superintendent and mine foreman so selected to enter upon his duties on October 1, 1914, or as soon thereafter as possible.

"On motion of Mr. Justice, duly seconded and carried, it was ordered that the superintendent and mine foreman shall have complete charge of the active mining operation and all the men employed in connection with same, including the mining of coal and loading same on board the railroad cars, and general supervision of the mines and all work connected therewith.

"It is also ordered that the president submit to the board for its approval any contract or agreement that he may negotiate with said Stallsworth or other person for services as superintendent and mine foreman as soon as the same can be practically done.

"On motion duly seconded and carried it was also ordered that the superintendent and mine foreman shall have the authority to employ and discharge all men engaged in mining operations under his direction, or in any other work about the mines, and fix their rate of pay, subject to the approval of the president in case of any raise in wages over the present rate, and also shall have authority to order in behalf of the company such necessary mine supplies or repairs as the current business may demand, but this authority shall not extend to the purchase of new machinery or rails or the making of any permanent improvements or incurring any considerable indebtedness without first obtaining the approval of the president or board of directors.

"The superintendent and mine foreman shall have all authority necessary to enable him to comply with the laws of the state, and, in addition to all reports required to be made by the superintendent to the officers of the state, he shall file with the secretary of this company duplicates of all such reports, and shall also make reports and file same with the secretary of this company from time to time of the operation of the mine and other property under his control.

"Upon motion of J. R. Justice and carried by the board it is also ordered that W. H. Hollingsworth be appointed engineer of the company at a salary of \$25 per month, and as such engineer he shall keep up the centers and prepare from time to time all maps required by the lease and the laws of the state of Kentucky and deliver them to the proper parties as required thereby.

"There being no further business to come before this meeting, the same was adjourned subject to the call of the president.

"F. G. Burnette, President.

"Attest: P. T. Cairns, Secretary."

Appearing on the back of the paper containing the above minutes are these words:

"Copy of Minutes of Board Meeting for M. S. Bowen."

[1-3] Allowing the foregoing paper to speak for itself, it means nothing more than its language clearly expresses, viz., authority to the president of the board of directors to employ a mine superintendent or mine foreman upon the terms therein stated, and defines the powers and duties to be exercised and performed by the latter under the employment, when made, but is indefinite—indeed silent—as to the time the employment would continue or end. It does not even name appellant as the person to be employed. It will further be observed that the paper contains a provision requiring that the president submit to the board for its approval such contract as he might make, under the authority therein conferred, with any person employed by him as superintendent and mine foreman; but it does not show that he ever reported the making of such a contract, or its approval by the board of directors.

"A contract may be formed by accepting a paper containing terms. If the offer is made by delivering to another a paper containing the terms of a proposed contract, and the paper is accepted, the acceptor is bound by its terms; and this is true, as a rule, whether he reads the paper or not." 9 Cyc. 260.

But the paper here relied on is not in the form of a contract proposed by appellee to appellant and submitted for the latter's ac-

ceptance. It merely shows authority to appellee's president to make a contract upon the terms mentioned therein, and requires him to report the contract when made to appellee's board of directors, and that it be approved by the board. The paper shows no making of a contract by the president upon the terms authorized, nor does it show the acceptance of such a contract by appellant, or that, following its acceptance by the latter, it was reported by the president to the board or approved by it. It is our conclusion that the paper in question was never accepted or delivered as evidence of a contract between the parties; therefore it cannot be treated as such.

"As a general rule, a written agreement cannot be said to be a completed contract until it is signed by all the parties to it. And this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed. Yet it is competent for the parties to adopt it as their contract without signing it, provided their intention to do so is clear." 9 Cyc. 299.

But the rule last stated cannot apply here; for the writing relied on by appellant as evidencing the contract was not addressed to him, nor did its provisions make it a form of contract proposed for his acceptance. On the contrary, its provisions contemplate that appellee's president should, under the authority conferred, make with appellant a contract that would comply with their requirements, in such form as that the board of directors might understandingly act upon and approve it. This, we concede, the president, in contracting with appellant, might have done, by merely presenting him a copy of the paper, and, upon his agreeing to the employment on the terms therein specified, obtaining his signature at some place thereon, under any such words as would have shown his acceptance of the paper as evidence of the contract between the parties. But this was not done. There is nothing in the contents of the paper nor in any writing indorsed thereon or executed in connection therewith that shows the acceptance of its terms by appellant, the board's approval of the contract as thus made following such acceptance, or even that the making of the so-called contract was ever reported to the board by the president.

Although it is, in substance, alleged in the amended petition that, after appellant had verbally contracted with appellee through its president for his services as mine superintendent and foreman, its president reported the parol contract back to its board of directors, which approved it and furnished appellant a copy of the original minutes authorizing his employment, as evidence of the contract, it is not perceived how these alleged facts sustain appellant's contention that the minutes authorizing his employment sufficiently evidence the contract, when they are utterly silent as to whether the authorized contract was ever made, and likewise

silent as to whether it was reported to or approved by appellee's board of directors. The minutes are free of ambiguities, and the allegations of the amended petition cannot change or enlarge their meaning, or supply what will be necessary to make them set out the contract in its entirety, in the absence of an allegation and proof of fraud or mistake in the minutes. A writing relied on as a contract must in all substantial particulars specifically set out the contract that it may thereby speak for itself. The writing here relied on, without parol evidence to aid it, falls short of establishing a contract at all. In addition to its failing to show appellant's alleged employment, the duration thereof, or any undertaking on his part to perform the services required by the alleged employment, it does not even show the compensation agreed to be paid him. It directs the president to make the best bargain possible under a certain limit, and, if he could secure the services of a mine superintendent and foreman at less than the compensation it did not permit him to exceed, it was his duty to do so. So appellant, instead of relying upon the writing to establish the contract, would have to show by parol evidence, not only that it was made as authorized by the writing, but also that it was approved by appellee's board of directors, none of which things is shown by the writing.

[4] By the allegations of his petition as amended appellant is attempting in this case to attach a verbal contract made by him with appellee's president, and which was not to be performed within a year, to a writing whereby appellee conferred upon that officer authority to make such a contract, under the claim that, as the contract the latter made with him was authorized by the writing and conforms to its requirements, it is to be treated as a part of the writing and in connection therewith, as constituting in its entirety the contract between the parties. Obviously the purpose of appellant in thus attempting to connect the verbal contract made with him by appellee's president with the writing authorizing the latter to make it was to avoid the inhibition as to agreements not to be performed within one year contained in section 470, Kentucky Statutes, known as the "statute of frauds," subsection 7 of which declares:

"No action shall be brought to charge any person * * * upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent. * * *"

In *Tracy v. Deshon*, 157 Ky. 226, 162 S. W. 1116, in construing and applying this statute, we said, quoting with approval from the opinion in *Fowler v. Lewis*, 3 A. K. Marsh, 413:

"Independent of any statute, an agreement which can be the subject of specific execution must be fair, full, and complete in all its parts; and, if any part of it was left undefined and incomplete by the parties in their negotiations, equity would not supply it, by amending the agreement and adding what the chancellor might deem reasonable and proper. For such supplement would then be the work of the court, and not the act of the parties; it would be making, instead of simply enforcing what was made. This rule was equally applicable to the contract, whether it was written or verbal. Since the adoption of the statute the contract must be in writing, and that writing must be complete in itself. It is not competent for the party claiming the benefit of such contract to show that part only was reduced to writing, and then to supply the residue by parol evidence. The evidence to establish one part of the contract must be of the same grade with that which proved the residue, and that, according to the statute, must be in writing, at least so far as it imposes any obligation on the party to be charged therewith."

In *Wright v. Weeks*, 25 N. Y. 153 (Court of Appeals), it was said:

"If a reference in a writing to a verbal agreement would let in that agreement, where the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing to sign a statement that they had contracted verbally respecting a given subject, and they would thus dispense with the statute."

In *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, will be found this statement of the law:

"At common law, if the contract was incomplete on its face, oral evidence was admissible to supply the defects, because the oral contract was good without the writing, and, the presumption that all the agreement was in the writing being negated on its face, no principle of law was violated in admitting the parol evidence. But under the statute of frauds, if the subject-matter of the contract is within the statute, and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects; for this were to do the very thing prohibited by the statute." *Thomas v. Charles*, 119 S. W. 752; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, 9 Ky. Law Rep. 449; *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138, 13 Ky. Law Rep. 33.

[5] The writing filed with the petition furnishes no evidence that appellee's president made with appellant the contract authorized by it, but, if it could be regarded as constituting the contract between the parties, its indefiniteness as to the duration of the contract or term of employment made it terminable at any time. In *L. & N. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467, we said:

"But, if it be conceded that there was a contract for regular employment, as alleged in the petition and amended petition, still the contract, as alleged and proved, being that 'said regular work would continue so long as this plaintiff did faithful and honest work for the defendant,' was a contract indefinite as to the time or term of employment or service, and was therefore subject to be terminated at any time at the discretion of either party to it. *L. & N. R. Co. v. Harvey*, 99 Ky. 157 [34 S. W. 1069, 17 Ky. Law Rep. 1368]. * * * The well-settled rule with reference to the character of hiring that

is set up in the petition and amended petition is that, when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied, in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. *Wood on Master and Servant* (2d Ed.) §§ 133, 136; *Am. & Eng. Ency. of Law*, vol. 14, pp. 776, 790." *East Line & R. R. Ry. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; *Victoria Limestone Co. v. Hinton*, 156 Ky. 674, 161 S. W. 1109.

[6] The doctrine announced in the cases supra disposes of a further contention made by counsel for appellant that the silence of the writing as to the duration of the employment can be supplied by the allegation of custom or usage of a year's hiring. It should be remarked here, however, that the existence of such custom, as alleged in the petition, is not sufficiently pleaded. But where, as in this case, the alleged contract, whether it be assumed that it is contained in the writing sued on or in the alleged verbal agreement subsequently made, is wholly indefinite as to the duration of the term of employment, custom or usage cannot have the effect to extend it beyond the will of either party to terminate it. *Kelly v. Peter & Burghard*, 130 Ky. 533, 113 S. W. 486; *Thomas v. Charles*, 119 S. W. 752.

If the alleged contract made by appellant with appellee was a parol contract—and such was its character if any was made—and was not, as claimed by appellant, to be performed within one year, it was clearly within the statute of frauds, and for that reason void. Moreover, its indefiniteness as to the time of duration of the employment made it terminable at the will of either of the parties. In either event appellee had the right to discharge appellant from its service, and in so doing it incurred no liability to the latter by reason thereof.

It is our conclusion that the circuit court did not err in sustaining the demurrer to the petition, as amended, and dismissing the action. Therefore the judgment is affirmed.

LEWIS v. REED'S EX'R et al.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. REFORMATION OF INSTRUMENTS — 16 — WILL—MISTAKE.

Strictly speaking, courts of equity have no power to reform a will, as that term is used with respect to other instruments, and it is only where the mistake in a will is apparent on its face, and the court is able to ascertain the means of correcting a mistake, that a court of equity will correct a mistake in a will.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 68; Dec. Dig. — 16.]

2. WILLS — 535—CONSTRUCTION.

An heir will not be excluded or disinherited, except by express words or necessary implication; and if the will is doubtful, that

construction favorable to the heir will be adopted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. ¶535.]

3. WILLS ¶439—CONSTRUCTION—INTENT OF TESTATOR.

In construing a will, the court should aim to give effect to the testator's intent, upholding, if possible, each item of the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ¶439.]

4. WILLS ¶471—CONSTRUCTION—INCONSISTENT PROVISIONS.

The courts will, if possible, harmonize provisions of a will, and only if inconsistent will the latter prevail over former provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. ¶471.]

5. WILLS ¶535—CONSTRUCTION—INTERESTS.

The sixth clause of a will recited that the residue of the testator's estate should be held by his executors in trust for the benefit of all his nieces and nephews hereinafter named, paying to each, who should survive the testator for 15 years, equal installments of the income, and that at the end of such period the property should be sold and divided among the nieces and nephews and their children. The clause further recited that it was the testator's intention that all his nieces and nephews and their children should take an equal portion of the estate. The enumeration of the nieces and nephews omitted the name of plaintiff's mother, a niece who died before the testator. Held that, notwithstanding the use of the expression "all," the enumeration of the nieces and nephews showed the intent on the part of the testator that only those enumerated should take; consequently plaintiff was not entitled to take on the theory that the name of her mother was omitted through mistake, the testator intending to put his nieces and nephews and their descendants on equal footing, such a conclusion being strengthened by the declaration, in a subsequent clause of the will, that no advancements should be charged against the interests of any of the beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. ¶535.]

Appeal from Circuit Court, Fayette County.

Action by Lizzie G. Lewis against Henry S. Reed's executor and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Robt. B. Franklin and Robt. C. Talbott, both of Lexington, for appellant. Falconer & Falconer, of Lexington, for appellees.

CLAY, C. Henry S. Reed, a resident of Fayette county, died in the year 1911, leaving a will, which was dated January 4, 1910, and duly probated by the Fayette county court. After authorizing his executor and trustee to sell and convey all of his property, and making certain specific bequests, which are not material to this controversy, the will is as follows:

"6th—All of the residue of my estate, real and personal, I desire my executor to hold in trust for the benefit of my nieces and nephews hereinafter named, paying to each of them that survive me for fifteen years after my death their equal portion of the income therefrom in semi-annual installments. At the end of said fifteen years all of my real and personal estate shall be sold by my executor and trustee and divided equally among my nephews and

nieces and their children. My intention is that all my nephews and nieces and their children shall take an equal portion of my estate. The nephews and nieces who take under this will are: Mrs. Mattie Simpson Dunlap, Houston, Texas; Mrs. Lilla H. Goggin, El Paso, Texas; Mary Simpson, Eagle Pass, Texas; Mrs. Catherine Bowman Banks, Columbus, Georgia; Joseph J. Reed, Knoxville, Tennessee; S. P. Simpson, Eagle Pass, Texas; William R. Bowman, Fayette County, Kentucky; Bush Bowman, Guthrie, Oklahoma; Andrew Bowman, Fayette County, Kentucky; John B. Bowman, McIntosh, New Mexico; Robt. Lee Bowman, Bellarie, Ohio; and Ellen Douglas Payne, Lexington, Kentucky.

"7th—No charge shall be made by my executor to any of the above named devisees for gifts or advancements made during my life.

"8th—I hereby appoint the Security Trust Company of Lexington, Kentucky, my executor and trust of this will."

Plaintiff, Lizzie G. Lewis, is the only daughter of Elizabeth Reed Lewis, who was a niece of testator, and who was dead when the will was written. The executor and trustee declined to recognize her as one of the devisees under the will. Claiming that the will shows on its face that the testator clearly intended that all of his nephews and nieces and their children should share equally under clause 6 of the will, and that, by mistake, she was not named as one of the devisees, plaintiff brought this action to have the will reformed and construed so as to give her an interest in the devised estate. From a judgment denying her the relief prayed for, she prosecutes this appeal.

[1-5] Strictly speaking, courts of equity have no power to reform a will, as that term is used with respect to other instruments. It is only where the mistake in the will is apparent on its face, and the court is able, by a due construction of its terms, to ascertain the means of correcting the mistake, that a court of equity will correct such mistake when called upon to construe the will or to determine the rights of the parties claiming under its provisions. *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1094, 26 L. R. A. 370; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64; 1 Story's Eq. Jur. 179; 2 Pomeroy's Eq. Jur. § 871; 1 Redf. on Wills (3d Ed.) 500; *Kerr on Fraud and Mistake* (Am. Ed. by Bump) 448; *Wilson v. Morley*, L. R. 5 Ch. Div. 776; *Mellish v. Mellish*, 4 Ves. 45; *Jackson v. Payne*, 2 Metc. 567; *Nutt v. Nutt*, 1 Freem. Ch. 128; *Hunt v. White*, 24 Tex. 643. It is conceded that this is the correct doctrine, but insisted that it is peculiarly applicable to the will in question. In brief, the argument is as follows:

The testator left no heirs, except his nieces and nephews. Plaintiff's mother being dead, plaintiff was an heir. An heir will not be excluded or disinherited, except by express words or necessary implication. In re *Reed's Estate*, 7 Pennewill (Del.) 76 Atl. 617; *Howard v. American Peace Society*, 49 Me.

288. Where the construction of a will is doubtful, a construction favorable to the heir will be adopted. In *re Long's Estate*, 228 Pa. 594, 77 Atl. 924; *Baker v. Baker*, 152 Ill. App. 620. In construing wills, the court should aim to ascertain the testator's intention, and should, if possible, adopt a construction that will uphold each item or clause thereof. *Patrick v. Patrick*, 135 Ky. 307, 122 S. W. 159. When, from the language of a will, there is no doubt as to the testator's intention, the provisions thereof may be broadened and supplied by the chancellor, in order to carry out such intention. *Peynado's Devisees v. Peynado's Executor*, 82 Ky. 5.

The will in question distinctly provides that at the end of 15 years all of the real and personal estate of the testator shall be sold by the executor and trustee, "and divided equally among my nephews and nieces and their children." Not only so, but the will further provides:

"My intention is that all my nephews and nieces and their children shall take an equal portion of my estate."

By using this language it is claimed the testator did not leave his intention to mere construction, but expressly declared his intention that all of his nephews and nieces and their children should share equally in the devised property. Having thus declared his intention, and then having proceeded to name the devisees, the will clearly shows on its face that in naming the devisees plaintiff was overlooked and her name omitted from the will by mistake.

While the argument is forcibly presented, it overlooks other provisions of the will with which the provisions relied on by plaintiff, when properly construed, are not inconsistent, and which show a clear intention on the part of the testator to limit the devise to those nieces and nephews specifically named. If the testator had desired that all of his nephews and nieces should take under the sixth clause of his will, there would have been no necessity whatever for naming them. Instead of so providing, he expressly limits the devise of the income for 15 years to his nephews and nieces "hereinafter named." When he comes to dispose of the corpus of the estate, he simply provides that it shall be divided equally "among my nephews and nieces and their children." While, in the next clause, he does say, "My intention is that all my nephews and nieces and their children shall take an equal portion of my estate," he does not stop there. He goes further, and says:

"The nephews and nieces who take under this will are: [Here follow their names.]"

His intention is further shown by the seventh clause of the will, which distinctly declares that:

"No charge shall be made by my executor to any of the above-named devisees for gifts or advancements made during my life."

The word "all" being used in connection with language showing a clear purpose on the part of the testator to devise the rest of his estate only to certain named devisees, we conclude that the testator meant only all of those who were named, and not all of his nieces and nephews, regardless of whether they were mentioned in the clause in question. We do not regard as controlling the fact that plaintiff's mother was dead when the will was written, and that the testator did not attempt to mention the children of any of his deceased nephews and nieces. His purpose was to have his estate kept intact for a period of 15 years and the income therefrom paid to the designated beneficiaries during that period. He did not intend that the corpus of his estate should be distributed until the expiration of that period. It was not improbable that during that time one or more of his nephews and nieces might die. Having in view this contingency, he made provision for their children.

Construed in the light of this circumstance, the will does not show an intention to make any distinction between the beneficiaries of the corpus of the estate and the beneficiaries of the income. In speaking of children he meant only the children of the devisees mentioned. Courts will always construe a will so as to harmonize its different provisions and give effect to each if possible. To this end they will not disturb the first provision further than is absolutely necessary to give effect to the second. It is only where the provisions are absolutely irreconcilable that the latter will be preferred and will prevail over the former. *Jacob v. Jacob*, 4 Bush, 115; *Hunt v. Johnson*, 10 B. Mon. 342; *Howard v. Howard's Ex'r*, 4 Bush, 497. The construction we have adopted does no violence to the will itself. It simply harmonizes the word "all" with the other provisions of the will, which clearly show that he intended to include as devisees only the nephews and nieces specifically named. Nor does this construction violate the rule that heirs should not be excluded, except by express words or necessary implication. By devising all the rest and residue of his estate to the nephews and nieces named in the will, the testator, by necessary implication, excluded all others. We therefore conclude that the will does not show on its face such a clear mistake on the part of the testator as would justify us in correcting the will so as to include plaintiff as one of the devisees.

Judgment affirmed.

McCRAV et al. v. CORN et al.
(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. DESCENT AND DISTRIBUTION §117 — ADVANCEMENT — STATUTE.

Under Ky. St. § 1407, providing that any real property given or devised by a parent to a descendant shall be charged to the descendant

in the division and distribution of the parent's undivided estate, and that he shall receive nothing more from the estate until the other descendants are made proportionally equal with him, a recited consideration in the conveyance sought to be charged as an advancement is not conclusive, nor is it essential that it should be averred or shown that it was made either by fraud or mistake.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 428; Dec. Dig. ¶ 117.]

2. DESCENT AND DISTRIBUTION ¶115—ADVANCEMENT—RECITED CONSIDERATION—BURDEN OF PROOF.

Under such provision, when the conveyance recites the consideration, and it is sought to charge the property conveyed as an advancement, the burden is on the person seeking to have it charged to show that it was, in fact, an advancement and not made for a valuable consideration.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 426; Dec. Dig. ¶ 115.]

3. DESCENT AND DISTRIBUTION ¶117—ADVANCEMENT—SUFFICIENCY OF EVIDENCE.

In an action under the advancement statute (Ky. St. § 1407) to charge property conveyed by plaintiff's mother to her brothers as an advancement, evidence *held* to show that the conveyance was not made for a valuable consideration, but was to be charged as an advancement.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 428; Dec. Dig. ¶ 117.]

4. DESCENT AND DISTRIBUTION ¶116—ACTION TO CHARGE ADVANCEMENT—EVIDENCE.

In such action evidence that the mother had stated before the deed was made that she intended to convey the land to defendants in consideration of their labor and services was competent.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 427; Dec. Dig. ¶ 116; Evidence, Cent. Dig. §§ 1059, 1066, 1138.]

5. DESCENT AND DISTRIBUTION ¶95 — ACTION TO CHARGE ADVANCEMENT—RENT.

In such case the defendants were not charged with the reasonable rent of the land conveyed to them by their mother in 1903 until her death in 1913, and with the rent of the other land owned by the mother and used by defendants before the land conveyed to them had been purchased by her, where defendants were continually improving the land by their labor and skill as farmers so as to increase the value of the other land from the proceeds of which the plaintiff had received her third share.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 391-393; Dec. Dig. ¶ 95.]

6. DESCENT AND DISTRIBUTION ¶95 — ADVANCEMENT—RENT.

Rents may be charged as an advancement, so that a child who has the use of land may be charged with the value of such use as an advancement.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 391-393; Dec. Dig. ¶ 95.]

7. DESCENT AND DISTRIBUTION ¶110—ADVANCEMENT—ATTORNEY'S FEE.

In a suit under the advancement statute to charge plaintiff's brothers with land conveyed to them by their mother as an advancement, where it appeared that the mother left practically no estate to settle, the attorneys for plaintiff were not entitled to a fee payable out of the estate on the ground that the suit was brought for the settlement of the mother's estate, though they might be entitled to a nominal attorney's fee

for bringing a suit to have the land sold and the proceeds divided.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 423-425, 430-432; Dec. Dig. ¶ 110.]

8. APPEAL AND ERROR ¶1171 — HARMLESS ERROR.

In such case the disallowance of the fee to which the attorneys were entitled was not of sufficient moment to justify a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. ¶ 1171.]

Appeal from Circuit Court, Mercer County.

Action by Mattie Corn and another against Joseph McCray and another. Judgment for plaintiffs, and defendants appeal, and plaintiff named prosecutes a cross-appeal. Affirmed on the original and the cross appeal.

E. H. Gaitther, R. L. Black, and J. F. Vandersdall, all of Harrodsburg, for appellants. C. B. Rankin and R. W. Keenan, both of Harrodsburg, for appellee.

CARROLL, J. Isaac McCray died in 1894, leaving a will that devised his property to his widow, Catherine McCray. He left surviving him three children, the appellants, J. W. and Isaac McCray, and the appellee, Mattie McCray, who married Corn. At the time of the death of Isaac McCray Mattie was about 24 years old, J. W. about 21, and Isaac 19. All of these children lived with their mother until March, 1903, when Mattie married and left home, and after her marriage the two boys, neither of whom had married, and the mother lived together until her death in 1913.

Isaac McCray at his death left a farm containing about 153 acres, and about \$900 in money and personal property after the payment of his debts. This farm was sold by the widow in September, 1900, for \$4,590. In May, 1896, she purchased a small tract of land for \$386, and in 1897 sold it to Samuel Corn for \$750. In February, 1897, she purchased another tract of land for \$1,900, and sold this in February, 1900, for \$2,786. In October, 1900, she bought a body of land containing 207 acres for \$9,348, one-third of which was paid in cash, and for the balance two notes were executed, which were paid on or before November, 1902. In November, 1903, for the recited consideration of \$4,568, she conveyed 101 acres of this 207-acre tract to her two sons, retaining the remainder, which she died the owner of.

After the death of the mother, and in February, 1914, Mattie Corn brought this suit against her brothers for the purpose of settling the estate of her mother, who died intestate leaving very little, if any, personal estate, and owing no debts except perhaps a few trifling ones, and to charge her brothers with advancements amounting to about \$17,000. It was averred that the 101-acre tract of land conveyed to them by their mother was an advancement to them, and that after

the death of her husband she had given to them property as well as rents and profits amounting to several thousand dollars.

For answer to this suit the brothers, after denying the averments of the petition, set up that they had paid the consideration recited in the deed from their mother in improvements put on land owned by her and in services rendered to her, including expenses incurred for her benefit, an aggregated sum amounting to much more than the recited consideration in the deed. They further set up a claim against their mother's estate for an amount composed of various items of service and attention after 1903 aggregating a sum equal to the value of the 107 acres owned by their mother at her death.

After the pleadings had been made up, the case was referred to the master commissioner of the court to ascertain and report the amount of advancements made to the children by their mother and the amount of rent with which the boys were chargeable. The commissioner's report showed that Mattie had never received anything from the estate of her mother or father except some personalty worth not less than \$50 nor more than \$150; and we might here add that the evidence shows that \$75 would be a fair valuation of everything that she received from both. The report further showed that the two boys, in addition to the 101 acres conveyed to them by their mother, had accumulated a considerable estate.

The court, upon exceptions to the report of the commissioner, adjudged that Mattie was entitled to \$1,500 more out of the estate left by her mother than her brothers, or, in other words, charged them jointly with \$1,500 as advancements. The 107 acres, the title to which was in the mother when she died, was ordered to be sold, and the proceeds equally divided between the three children, except that out of the proceeds Mattie was to get \$1,500 more than her two brothers jointly. It may here be observed that the 107 acres was sold under the judgment of the court for \$100 an acre. To so much of the judgment as gave Mattie \$1,500 out of the shares of her brothers the brothers prosecute this appeal, and she prosecutes a cross-appeal, complaining that the court should have allowed her an attorney's fee of at least \$300, and charged the brothers with several thousand dollars as advancements in place of \$1,500.

The evidence shows that the mother and the three children were industrious, saving, thrifty people. Mattie and her mother stayed at home and worked and saved about the house until her marriage in March, 1903, at which time she was about 33 years old, and the boys worked and saved about the farm. Of course, a large part of the money made while they all lived together was the result of the labor and good business qualities of the boys, but Mattie did her part by faithful service at home. Her father had given her an old organ, and when she left home in

March, 1903, upon her marriage with Corn, she took with her, or rather there was sent to her, about \$50 worth of odds and ends gathered about the place, and nothing was given to her afterwards. At this time it will be noticed that her mother had the title to 207 acres of land, the purchase price of which, amounting to \$9,348, had been paid in full, and that six months after she left her mother, for the recited consideration of \$4,568 paid in labor and service, deeded to the boys 101 acres of this land. It might therefore be said that, while Mattie for her services got \$50 from her mother, the boys for their services got land valued in the deed at \$4,568. In attempting to explain this discrimination against Mattie, the argument is made for the boys that this land was not given to them as an advancement, but for a valuable consideration paid by them in services to their mother in labor and improvements and the like. And the principal question in this case is: Was this 101 acres an advancement to them, or did they, in fact, pay the valuable consideration recited in the deed?

[1, 2] It is provided in section 1407 of the Kentucky Statutes that:

"Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undivided estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undivided. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement."

Counsel for appellants concede that, if the 101 acres deeded to the boys by their mother was an advancement within the meaning of this statute, they should be charged with the value of the property at the time the deed was made. But they insist that this conveyance was made for a valuable consideration, or, in other words, for the consideration expressed in the deed, and therefore the advancement statute has no application to this transaction. It is further urged that, as the recital in the deed setting out the consideration was not attacked in the petition on the ground of fraud or mistake, this recital is conclusive evidence of the fact that the consideration was in truth the sum named.

We do not think, however, that it is necessary in cases like this that the petition should charge that the recited consideration was inserted in the deed by either fraud or mistake. The statute provides that any property given by a parent to a child shall be charged as an advancement, and, no matter what the recited consideration in the conveyance sought to be charged as an ad-

vancement may be, this recital is not conclusive; nor is it essential that it should be averred or shown that it was made either by fraud or mistake, but, when the instrument recites the consideration, and it is sought to charge the property conveyed as an advancement, the burden of proof is on the person asking that it be charged as an advancement to show that it was, in fact, an advancement, and not made for a valuable consideration.

The principle announced in *Anheiler v. De-long*, 164 Ky. 694, 178 S. W. 195, is, we think, controlling here. In that case the effort was made to show that a deed which recited a valuable consideration was, in truth, a conveyance in consideration of marriage, and the point was made that, as there was no averment in the petition of fraud or mistake in the terms or conditions of the deed, the recited consideration was conclusive. But we said:

"But this rule has no application to a case like this, as the rights of the parties to the restoration of the property are determined by the provisions of the Code, and, if it appears that the property sought to be recovered was received by the other party 'directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof,' the party so receiving the property must restore it. The recitations of the deed are not controlling, although, if the deed should recite a consideration of value, the burden of showing the true consideration would, of course, be upon the party seeking the restoration.

"The only question to be determined in this class of cases is: Was the property received, directly or indirectly, from or through the other, during marriage, and in consideration or by reason thereof, and this is necessarily a question of fact to be determined as any other question of fact. If the deed recites a valuable consideration or other consideration than one arising directly or indirectly out of the marriage relation, it may be shown that the recited consideration was not, in fact, the real or true consideration, and that there was no valuable consideration or other consideration than the one arising out of the marriage relation."

In addition to this, it has been written in several cases that:

The parent "cannot, by a mere declaration of his intention, either make that an advancement which is not such by law, or exempt one of his children from liability to account, for money or property he has given to him, with which the statute makes him chargeable." *Clarke v. Clarke*, 17 B. Mon. 698; *Cleaver v. Kirk's Heirs*, 3 Metc. 270; *Shawhan v. Shawhan's Adm'r.*, 10 Bush, 600.

Now, if the appellant cannot by verbal declaration prevent that from being an advancement which the statute provides shall be one, we think it necessarily follows that he cannot do it by a written declaration or by a writing of any kind. So that, whatever the intention of the parent may be in giving property to his children, and whether this intention is manifested by words or in writing, the statute, and not the intention however expressed, will control. As said in *Clarke v. Clarke*, supra:

"The object of the statute seems to be to produce perfect equality in distributing the estate

of a decedent not disposed of by will among the persons entitled thereto. This object might be in a great degree frustrated by allowing the intention of the giver to intervene, and have the effect of avoiding the express and imperative requisitions of the statute."

And this construction of the statute has been consistently adhered to.

The case of *Gordon's Heirs v. Gordon*, 1 Metc. 285, is also conclusive of the question that the recital in a deed by a parent to his child that the land was conveyed for a valuable consideration, stating it, does not prevent the other heirs from showing that it was, in fact, an advancement. To the same effect is *Crafton v. Inge*, 124 Ky. 89, 98 S. W. 325, 30 Ky. Law Rep. 313.

[3, 4] The question therefore recurs: Was this conveyance made for a valuable consideration, or was it a gift in the meaning of the statute, to be charged as an advancement? And, Mrs. Corn having the burden of proof on this issue, does the evidence show that it was, in fact, a gift?

It seems to be conceded that no money consideration was paid by the boys for this land, but there is evidence that Mrs. McCray said at the time, and before the deed was made, that she intended to convey the boys this land in consideration of the labor and services they had rendered to her. And this evidence was competent. *Hill v. Hill*, 122 Ky. 681, 92 S. W. 924, 29 Ky. Law Rep. 201. And it is not to be disputed that these boys did render much and valuable service in the care of the estate left by their father and in the accumulation of the increase in its extent as well as its value. They were capable business men, good farmers, and to their energy, industry, and skill there may be attributed the acquisition of a large part of the estate owned by their mother at the time this conveyance was made in 1903. But, while this is so, it should not be forgotten that during the years that their efforts were largely contributing to the building up of this estate Mattie was also, in her narrow environment and according to her strength and opportunity, working as faithfully and saving as economically as her brothers. For their labor and skill their mother gave them land worth easily \$4,568, if not more, and to Mattie, for her years of attention and labor, she gave personal property not exceeding in value \$50.

It should also be kept in mind that the boys at all times from the death of their father had the use and control of the farm and its increase and profits. They started with the land left by him when he died, and, using this land as a base of operations, they were enabled out of the increase and profits from it, as well as from other land purchased with the profits made on this, to increase the value of the estate of their mother, and at the same time build up their own estate.

It may be true that the services of these boys during the ten years between the death

of their father and the conveyance of this land to them was worth the recited consideration in the deed. But under the circumstances of this case this is not the way the transaction should be looked at. During these years they were working for themselves as well as their mother. They derived and had reasonable expectation of deriving much larger benefits from their labor and services than their mother did, and it might be said that the increase in the estate and the ability to buy this 207 acres of land was the result of the combined efforts of the capital of the mother and the labor of the boys. We are therefore of the opinion that they should be charged with the value of this land as an advancement at the time the conveyance was made.

Counsel in their brief say that this land at the time it was deeded to the boys was worth \$75 an acre, but the record does not show that it was worth this much. But that it was worth fully the amount recited in the consideration is, we think, very clearly established; and so the lower court correctly adjudged that Mattie should have one-third of this amount.

[5] It is further urged in her behalf that the boys should be charged with the reasonable rent of the 106 acres retained by their mother from 1903 until the death of their mother in 1913, and also with the rent of the other land owned by her and used by them before this 207 acres was purchased. But under the circumstances of the case we do not find ourselves able to agree with this view. It is true the evidence shows very clearly that the boys not only had the use of this 106 acres from 1903 until the death of their mother, but also the use of all the land owned by her from the time her husband died. But, while this is so, they were continually improving and building this land up, and by their labor and skill as farmers increasing its value, and Mrs. Corn reaped, in a substantial way, the benefit of this increase in value, because she got one-third of the proceeds realized from the sale of the 106 acres, and the 207 acres of which it was a part was paid for out of the proceeds of the other land and the income and profits thereof which had been largely created by the efforts of the boys.

[6] We do not, however, wish to be understood as holding that rents cannot be charged as an advancement; for it has often been written by this court that a child who has the use of land may be charged with the value of this use as an advancement. Thus in the case of *Wakefield v. Gilliland's Adm'r*, 18 S. W. 769, 13 Ky. Law Rep. 845, Judge Pryor, speaking for the court, said:

"We think it well settled in this state in *Shawhan v. Shawhan*, 10 Bush, 600, and in other cases, that the value of the use and occupation of land by one child under no contract of renting, although holders at the will and pleasure of the father, must be accounted for by the child as an advancement in the settlement and distribution of the father's estate, and also settled that, if there is a consideration to be paid for the use that is merely nominal and inadequate to such an extent as to show injustice and inequality in the distribution, the chancellor will disregard such a consideration, and require the child receiving the use of the property to account for its reasonable value."

Other cases holding that rents may be charged as advancements are *Ford v. Thompson*, 1 Metc. 580; *Hamilton v. Moore*, 70 S. W. 402, 24 Ky. Law Rep. 982; *Garrott v. Rives*, 80 S. W. 519, 26 Ky. Law Rep. 10; *Bowles v. Winchester*, 13 Bush, 1.

The boys asserted, as stated, a large counterclaim for services and attention given to their mother during the last few years of her life, which was, they say, quite a charge on them; but we do not find any merit in this claim. She had labored many years continuously and faithfully for them, and it was no less than their duty to take care of her when age and infirmities made her a burden in place of a benefit to them.

[7, 8] The court refused to allow the attorneys for Mattie the attorney fee, or any part of it, which they claimed on the ground that they were entitled to an attorney fee to be paid out of the estate, as the suit was brought for a settlement of the estate of Mrs. McCray. In one sense the suit was brought to settle her estate, but in a larger sense it was brought for the purpose of charging the boys with advancements received from her. Mrs. McCray really had no estate to settle. She left neither personal estate of substantial value nor debts. All that she had was the 106 acres of land. There was at no time any question made as to Mattie's right to one-third of this land or of its proceeds. The entire contest grew out of the effort to charge the boys with advancements, and, although the attorneys of Mattie might be entitled to a nominal attorney fee for bringing a suit to have the land sold and the proceeds divided, we do not under the circumstances of this case think the disallowance of the fee to which they were entitled for this service of sufficient moment to justify a reversal of the case. *Wakefield v. Gilliland*, 18 S. W. 768, 13 Ky. Law Rep. 845.

We have carefully considered this entire record, and have reached the conclusion that the judgment appealed from is, under all the facts and circumstances, equitable and just, and it is affirmed on the original and cross appeal.

HOME LAUNDRY CO. et al. v. CITY OF LOUISVILLE et al.

(Court of Appeals of Kentucky. Feb. 16, 1916.)

1. MUNICIPAL CORPORATIONS \S 665—STREETS—WHAT CONSTITUTES "STREET."

A "street" is a public way through a city, town, or village, and ordinarily is a public way for footmen, persons upon horseback and in vehicles, and for the travel of vehicles necessary to be used in transporting commodities of traffic and whatever may be used by the public for their pleasure or necessities, and ordinarily contemplates a carriageway and a footway, but a public way is nevertheless a street, though its use is confined to travel by pedestrians only.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1441; Dec. Dig. \S 665.]

For other definitions, see Words and Phrases, First and Second Series, Street.]

2. MUNICIPAL CORPORATIONS \S 703—STREETS—AUTHORITY OF CITY'S GOVERNING BODY.

The governing bodies of cities and towns are generally invested with authority to regulate and control the use of streets, and may designate a portion of the street for the use of footmen and a portion for the use of vehicles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1509-1513; Dec. Dig. \S 703.]

3. DEDICATION \S 55—IMPOSING CONDITIONS—STREETS.

The dedicators of a public way may impose any condition as to its use which they may desire, and may limit a street to the use of pedestrians.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 98, 99, 101, 102; Dec. Dig. \S 55.]

4. MUNICIPAL CORPORATIONS \S 703—STREETS—REGULATION.

It is within the authority of a city, if beneficial to the public, to control by reasonable regulations the use which may be made of certain streets, as by limiting the weight of loads to be hauled over them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1509-1513; Dec. Dig. \S 703.]

5. MUNICIPAL CORPORATIONS \S 669—STREETS—RIGHTS OF ABUTTING OWNERS.

In addition to the rights which as a member of the community an abutting owner has in a street, he has rights to the use of the street which are peculiar to himself, including that of ingress and egress to and from his property over and from the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1445; Dec. Dig. \S 669.]

6. MUNICIPAL CORPORATIONS \S 669—STREETS—RIGHTS OF ABUTTING OWNERS.

An abutting property owner may make any reasonable use of a street which will not interfere with the enjoyment of the use of it by the public, his rights growing less as the public needs increase, and what may be deemed a reasonable use depending much on the local situation and on public usage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1445; Dec. Dig. \S 669.]

7. DEDICATION \S 57—PURPOSES OF DEDICATION—STREETS.

A strip of land 16 feet wide in the rear of a courthouse lot dedicated by the city, as a private owner, and by other private owners of land in the block as a street, was not dedicated or

accepted as a street in the ordinary use of that term in view of Act March 24, 1851 (Laws 1850-51, c. 892), denying to the general council of the city the right to accept the dedication of a street less than 60 feet in width.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 100; Dec. Dig. \S 57.]

8. DEDICATION \S 36—ACCEPTANCE—CONFORMITY TO OFFER.

The acceptance of a dedication in violation of the conditions of the grant is a nullity if objection is seasonably made.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 72; Dec. Dig. \S 36.]

9. DEDICATION \S 58—DEDICATION FOR SPECIFIC PURPOSE—USE.

If a dedication is made for a specific, limited, and defined purpose, the subject of the dedication cannot be used for another purpose, if those having rights under the dedication make seasonable objection to its misuser.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 100; Dec. Dig. \S 58.]

10. MUNICIPAL CORPORATIONS \S 648—STREETS—ESTABLISHMENT BY PRESCRIPTION.

A municipality or the public may acquire a right to the use of a street by adverse user.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1421, 1422; Dec. Dig. \S 648.]

11. MUNICIPAL CORPORATIONS \S 658—STREETS—TITLE AND RIGHT OF MUNICIPALITY.

A municipality in its governmental capacity holds streets as a trustee for the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1430; Dec. Dig. \S 658.]

12. MUNICIPAL CORPORATIONS \S 648—STREETS—ESTABLISHMENT BY PRESCRIPTION.

When a municipality through its officers and agents takes and holds land for a street adversely to the rights of the owner in fee for the statutory period, accompanied by a use of it by the public in the manner necessary to create an easement by prescription in the street, the title to its use as a street becomes fully vested in the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1421, 1422; Dec. Dig. \S 648.]

13. ADVERSE POSSESSION \S 8—STREETS—EXTINGUISHMENT OF EASEMENT BY ADVERSE POSSESSION.

An individual may by adverse possession for the statutory period of lands dedicated for a public use acquire title to them, but, under the express provisions of Ky. St. 1915, \S 2546, possession of streets, alleys, and public easements is not deemed adverse until the city authorities are notified in writing that such possession will be adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 14, 27, 43-57; Dec. Dig. \S 8.]

14. MUNICIPAL CORPORATIONS \S 669—STREETS—RIGHTS OF ABUTTING OWNERS—LOSS BY PRESCRIPTION.

The peculiar rights of an abutting property owner to the use of a street for ingress and egress to and from his property with teams and vehicles is a private right of his own not shared by the public, and the municipality does not hold such right as a trustee for him, and hence he may lose it by adverse user under circumstances justifying the enforcement of that doctrine.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1445; Dec. Dig. \S 669.]

15. MUNICIPAL CORPORATIONS — §669 — STREETS—RIGHTS OF ABUTTING OWNERS—LOSS BY PRESCRIPTION.

In 1851 the general council of a city adopted a resolution authorizing the mayor to give eight feet of the city's land in the rear of the courthouse lot for public use, provided the owners of property on the north side of such strip would dedicate eight feet for public use, and provided the street was only to be used by pedestrians, and not for wagons, carts, or drays. The city, as a private owner of property, and the other abutting property owners thereupon executed a deed dedicating such strip as a street denominated "Court place," with no provision that it was to be used by pedestrians only. There was no formal acceptance by ordinance of the general council, but the city, as a governmental entity, took charge and control of such place, and improved it at the cost of the abutting owners, including the city, by paving it as sidewalks are paved. Thereafter for many years its use was limited to pedestrians, and neither the public nor abutting property owners used it as a carriageway. *Held* that, assuming that such place was dedicated as an ordinary street over which abutting property owners had the right to haul with vehicles to and from their property, it was so constructed as to constitute notice to the public and every one that its use was limited to pedestrians, and the abutting owners' rights of egress and ingress with vehicles was barred by the expiration of 15 years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1445; Dec. Dig. § 669.]

16. MUNICIPAL CORPORATIONS — §669 — STREETS—RIGHTS OF ABUTTING OWNERS—ESTOPPEL.

The physical characteristics of such street and the manner of its construction and use having been notice to each successive abutting property owner of the use to which it was limited, one designing to acquire property upon it could not have been misled as to the uses which he could make of it, and was estopped to complain that he was not permitted to use it for vehicles.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1445; Dec. Dig. § 669.]

17. DEDICATION — §31—ACCEPTANCE—NECESSITY.

A dedication is an offer, and must be accepted before it is complete.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.]

18. DEDICATION — §36—ACCEPTANCE—CONFORMITY TO OFFER.

A dedicatior has the right to require the acceptance to be made according to the terms of his offer, or not at all, but may waive any conditions of the offer, and, if the dedication is accepted without some of the conditions imposed, and the dedicators assent to it and waive the conditions, they cannot thereafter complain, especially after the acceptor has expended money and labor upon it in fitting it for its purpose.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 72; Dec. Dig. § 36.]

19. MUNICIPAL CORPORATIONS — §708 — STREETS—ADVERSE USE.

Where a narrow strip in the rear of a courthouse was paved as sidewalks are usually paved, and not in the manner of streets for the passage of vehicles, and for a great many years used as a way for pedestrians only, the use of it as a carriageway by municipal officers by the occasional driving of a vehicle along it by city employes during a portion of one year did not create it a carriageway; as the city held the street as trustee of the public, and its acts could

not destroy the rights of the public to preserve and use the street for its benefit as a place free from the obstruction of vehicle traffic.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.]

20. MUNICIPAL CORPORATIONS — §708 — STREETS—USE AS HIGHWAY—SIDEWALKS.

A city ordinance prohibited any one from driving on or over a sidewalk otherwise than in going to and from premises occupied or owned by the person making such use of the sidewalk, and then only at such times and in such manner as would not interrupt or inconvenience the traveling public. Another section of the ordinance provided that nothing therein should prohibit the necessary, temporary use of sidewalks while actually receiving or shipping goods or merchandise and for putting up coal, provided sufficient passway was left for pedestrians. *Held*, that these provisions should be construed together, and related to sidewalks upon streets used as streets are ordinarily used, and granted the privilege to drive across the sidewalk, and did not authorize an owner of property abutting upon a narrow street used only as a way for pedestrians and paved as sidewalks are paved to drive along it longitudinally for the purpose of delivering coal at its abutting premises.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Home Laundry Company and others against the City of Louisville and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

Dodd & Dodd, of Louisville, for appellants. Pendleton Beckley and Joseph M. Lee, both of Louisville, for appellees.

HURT, J. Within the square embraced by Market street upon the north, Jefferson street upon the south, Fifth street upon the east, and Sixth street upon the west, in the city of Louisville, is a short, narrow, public way known as Court place. Upon the south side of this square, and bordering upon Jefferson street, is situated the lot upon which stands the main building of the Jefferson county courthouse. To the east of the courthouse, which stands immediately upon Jefferson street, midway of the lot, and between it and Fifth street, there is a vacant area, which is inclosed by an iron fence resting upon a stone base. A similar area and similarly inclosed is situated upon the west side of the courthouse and between it and Sixth street. Immediately north of the main building of the courthouse, and extending from Fifth to Sixth streets is Court place. It is 16 feet in width. To the north of it, and abutting upon it, are the St. Nicholas Hotel, the buildings of the Home Laundry Company, the Baldwin Book Company, the annex to the courthouse, and the buildings of the Kentucky Title Company, which occupy the corner of Court place and Fifth street, as the St. Nicholas Hotel does the corner of Court place and Sixth street. The

main building of the courthouse is connected with the annex by a covered way which extends from one to the other over Court place at such a height as not to interfere with a passing wagon, cart, or automobile. From Sixth street to the Kentucky Title Building Court place is paved with a material which is called granitoid No. 2, the body of which is composed chiefly of cement, and to which is added a small amount of sand. This paving extends from the buildings upon the north edge of Court place to the stone base of the fence upon the south edge, from Sixth street on to the Kentucky Title Building; and from there to Fifth street a portion of the way is paved with the material mentioned, and the remainder of it with flagstones. From the courthouse to Fifth street, and on the south side of Court place and adjoining it, the county of Jefferson has had constructed upon the courthouse lot a driveway 10 feet in width and built of vitrified brick, for the purpose of hauling in coal for the use of the courthouse and removing ashes and filth therefrom. The driveway terminates at the rear of the courthouse, in an area which is paved with vitrified brick and sufficiently large to allow incoming teams with vehicles to be turned around so as to go out again to Fifth street. This driveway and paved area at the rear of the main building of the courthouse adjoins the paved surface of Court place, upon a level with it. Court place is paved as sidewalks are usually paved, and the driveway from the courthouse to Fifth street is constructed in the manner of streets for the passage of vehicles.

The appellant Home Laundry Company is a corporation, and its coappellants are the sole owners of all the stock of the corporation, and are the owners of the property abutting upon Court place upon the north side from a point 73 feet and 5 inches east of Sixth street along Court place to a point 130 feet east of Sixth street. This property extends to the north about 95 feet, where it connects with another lot owned by appellants, and which extends at right angles to the property on Court place to Sixth street, upon which it has a front of 20 feet. All of the real estate described is covered by one building, in which appellants conduct a laundry. The office is on the portion of the building which fronts upon Sixth street, but the machinery necessarily used in the business, including the boilers and engines, is located in the portion which fronts upon Court place. The appellants have no practical way by which to get the coal which is necessary to be used in propelling their machinery into the building wherein the machinery is located, except to bring it along Court place from Fifth street to the portion of their building which fronts upon Court place. The appellants purchased a portion of the property which fronts upon Court place in 1894, and

at the same time they obtained a conveyance to that portion of it which has its front upon Sixth street. Since that time they have acquired the other property which adjoins the first purchase and has its front upon Court place. The deeds by which the property upon Court place was conveyed to them called for it as one of the boundaries of the property, and they claim that they made the purchase because they understood that it was situated upon a street of the city, and they would not have otherwise acquired it. From 1894 up to the bringing of this suit the appellants secured the necessary coal for their plant by having it brought in carts in at the entrance to Court place, which is upon Sixth street, and along Court place to their building, where a door was opened, to which the rear end of the cart was turned, and through the door the coal was unloaded into the building. This was the method of the delivery of the coal to their building during fair weather, but, when the surface of Court place was wet from rain or snow, or when ice or snow covered it, the coal was unloaded at the entrance to Court place from Sixth street, and was brought from that point to their building, a distance of less than 100 feet, in wheelbarrows, along Court place. Coal was received for the operation of the plant twice each week, and it was shown by the proof that on some occasions the way was practically obstructed by the cart and animals attached for as much as 40 minutes.

The chairman of the board of public safety, having received a complaint from one of the judges of the court which had its sittings in the courthouse that the noise from automobiles and vehicles upon Court place was interfering with the conduct of the court set an officer at Court place, with directions to enforce the ordinance of the city which prohibited persons from placing or maintaining a vehicle of any kind upon or over any sidewalk, or to ride, lead, drive, or place any beast of burden or vehicle on or over any sidewalk, otherwise than in going to and from the premises occupied or owned by such person, etc. The officer refused to permit coal to be hauled in a cart along Court place to appellants' premises, when they filed this suit against the city of Louisville and the members of the board of public works and the board of public safety, and sought an injunction to restrain the appellees from interfering with them in hauling coal to their premises, and from interfering with other persons in going to and from their premises with vehicles.

After the taking of a great deal of proof by each side, the cause was submitted and tried, and resulted in a judgment denying appellants the relief sought and dismissing their petition. To this judgment they excepted, and appealed to this court.

The contention of appellants is that Court place was originally dedicated for a "street,"

in the general and ordinary accepted meaning of that term, and, being such a street, they, as a part of the general public, are entitled to use it as a street, and, as abutting property owners, have a right to ingress and egress from their property with teams, and to haul the fuel necessary for the conduct of their business, machinery, and other things necessary over the street to their place of business and the products of their business therefrom.

The contention of appellees is that the way was accepted as a street for the use of pedestrians only, and has been so used, and that, as abutting property owners, the appellants have no right to use it for the purpose of hauling thereon with teams for any purpose, or to pass over or upon it with vehicles of any kind, but may use it as the general public does, as a footway.

To determine the right of these diverse contentions it will be necessary to look into the history of Court place. It had its origin in a deed of dedication executed by the abutting property owners, of which the city, as a private owner of property, was one, and which seems to have been delivered not earlier than the 17th day of October, 1851. The deed was acknowledged by the mayor on the 7th day of October, 1851. The authority of the mayor for his action was a resolution of the general council dated on September 19, 1851, by which he was authorized to give eight feet of the city's property "for public use" in the rear of the courthouse lot, provided the owners of property on the north side of Court place would dedicate "for public use" eight feet, "and provided the said street is only to be used by foot passengers, and not for wagons, carts, or drays." By a resolution of the general council which was adopted on March 27, 1852, the mayor was authorized, by appropriate deed, to dedicate for public use "as a footway" so much land as should not exceed eight feet when the abutting property owners on the north side of Court place should dedicate to public use a strip of ground described in a plat, which we presume is now the eight feet comprising the north side of Court place. The deed, however, by which Court place was dedicated to public use did not contain any provision to the effect that it was to be used by pedestrians only, or as a footway, and was not to be used by wagons, carts, or drays. The deed, after describing Court place in terms which sufficiently indicates its location, used the following language:

"And to that end the parties aforesaid now hereby and by these presents dedicate for a street, which they denominate Court place, the land between Fifth and Sixth cross-streets, of the width of sixteen feet, having for its center the dividing line aforesaid."

No formal acceptance of Court place as a street or thoroughfare of the city was ever made by an ordinance of the general council, but previous to March 21, 1853, the city as a governmental entity, had taken charge

and control of Court place, and had caused it to be improved, at the cost of the abutting property owners, of which the city was one, as it is now. This appears from a resolution of the general council adopted on March 21, 1853, apportioning the costs of constructing Court place and designating the amounts to be paid the contractor by each of the abutting property owners. The proof shows that the construction at that time consisted of red brick, laid flat, in the manner of constructing sidewalks and footways at that time, and at and across the entrance from Fifth and Sixth streets to Court place a curbing several inches in height was constructed, which made it very impractical to get into Court place with a vehicle. The proof shows very satisfactorily that Court place was never thereafter used as a carriageway. The persons who occupied the abutting property obtained their fuel by causing it to be unloaded from the vehicles at the entrance at Fifth and Sixth streets, and transported it in wheelbarrows from the entrance to their respective places along Court place. The public did not consider it a carriageway, because it made no such use of it, and neither did the abutting property owners. In 1901 Court place was reconstructed in the manner it now is by an ordinance of the city which apportioned the costs among the abutting property owners. The curbing across its entrance at Fifth street is several inches in height, and the curbing across its entrance from Sixth street has by use or disintegration, or a design of the engineer of the city, been reduced to one and a half or two inches in height. The granitoid with which the surface of the street or way is covered is only one-half inch in thickness. There does not appear to have ever been any objection by any of the abutting property owners to the manner of the original construction of the way or to the uses to which the construction limited it, nor to the manner of the reconstruction in 1901, or to the uses to which it necessarily limited it.

[1-4] Passing over the question as to the authority of the mayor to join in the deed as the representative of the city for the dedication of a portion of the city's ground for a public way or street, without a reservation in the deed limiting its use to persons upon foot, as directed by the ordinance, and whether or not such deed, on account of that omission, was valid, and which is not necessary to be decided, the deed of dedication did not actually contain any such limitation as to its use, and is not ambiguous in its terms, and specifically dedicates the ground for a street. While it is apparent that the city, speaking through its legislative council, never intended the creation of a street upon Court place other than one limited to pedestrian travel, the terms of the deed executed and delivered would seem to confer upon the general public such rights to its use and

to the abutting property owners such rights to its use as may ordinarily be made of a street. The question then arises: What is a "street," and what uses may ordinarily be made of a street? A "street" is a public way through a city, town, or village. 28 Cyc. 832. Ordinarily a street is a public way for the travel of footmen, and for the travel of persons upon horseback and in vehicles, and for the travel of vehicles, which are necessary to be used in transporting the commodities of traffic, and whatever may be used by the public for their pleasure or necessities. Ordinarily a street in a city or populous town contemplates a carriageway and a footway. The governing bodies of cities and towns are ordinarily and generally invested with authority to regulate and control the use of the streets, and may designate a portion of the street for the use of footmen and a portion for the use of vehicles. *Georgetown v. Hambrick*, 127 Ky. 43, 104 S. W. 997, 31 Ky. Law Rep. 1276, 13 L. R. A. (N. S.) 1113, 128 Am. St. Rep. 333. A public way is, however, nevertheless a street, though its use is confined to travel by pedestrians only. *Atlanta & W. P. Ry. Co. v. Atlanta, B. & A. R. Co.*, 125 Ga. 529, 54 S. E. 736. The dedications of a public way may impose any conditions as to its use which they may desire, and there is no doubt that a street may, by its dedication, be limited to the use of pedestrians. *Trenton Water Power Co. v. Donnelly*, 77 N. J. Law, 659, 73 Atl. 597; *Poole v. Huskinson*, 11 M. & W. 827; *Hughes v. Bingham*, 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454. It is within the authority of a city, if beneficial to the public, to control by reasonable regulations the use which may be made of certain streets, as by limiting the weight of loads which may be hauled over them upon vehicles having tires beneath a prescribed width, and it has also been held that municipality may prohibit the moving of a load beyond a certain weight over a paved street. *People v. Wilson*, 16 N. Y. Supp. 583.¹

[5, 6] In addition to the rights which, as a member of the community, an abutting property owner has in the street, he has rights to the use of the street which are peculiar to himself, and one of these rights is ingress and egress to and from his property over and from the street. *Transylvania University v. City of Lexington*, 3 B. Mon. 25, 38 Am. Dec. 173; *Pickrell v. City of Carlisle*, 135 Ky. 134, 121 S. W. 1029, 24 L. R. A. (N. S.) 193; *Railroad Co. v. Combs*, 10 Bush, 389, 19 Am. Rep. 67; *Gargan, etc. v. Railroad Co.*, 89 Ky. 212, 12 S. W. 259, 11 Ky. Law Rep. 492, 6 L. R. A. 340; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497. The abutting property owner may make any reasonable use of the street which will not interfere with the enjoyment of the use of it by the public, and, as the public needs in-

crease, his rights may grow less. 37 Cyc. 207, 208. What may be deemed a reasonable use must depend much on the "local situation and much on public usage." *Van O'Linda v. Lothrop*, 21 Pick. (38 Mass.) 292, 32 Am. Dec. 261.

It is now insisted that, the dedication of Court place being for a specific and defined purpose, that of a street, and no limitations as to its use being imposed, it necessarily follows that it was in contemplation of the parties who made the dedication that it should be used in the ordinary way of using a street, that is, for a carriageway, as well as a footway, and that appellants being abutting property owners have a right of ingress and egress to and from their property with vehicles to haul coal to their property, and to haul away their products from it, and this right cannot be taken from them without compensation being made, and, further, that it cannot be lawfully used, except for the purposes for which it was dedicated, and the uses for which it was dedicated cannot be limited. It can be, however, properly said that, although a street is a public way, and a dedication of a way for a street, without other words, would ordinarily carry with it the inference that it was within the contemplation of the dedicators that it should be used for all the purposes for which a street is ordinarily used, and that the abutting property owners would have all the rights to its use which they ordinarily have in an ordinary street, but if the way dedicated is too narrow for the practical passage of vehicles, or its physical characteristics, location, and situation, as regards the public and the business of the public, is such that its use as a carriageway was highly improper or injurious to the use of it by the public, it could very well be doubted that it was reasonably in contemplation of the parties who made the dedication that it should be devoted to a carriageway, for which it was physically unfit, and such use was unreasonably injurious to the public and its use of it.

[7] The further fact that the act of the Legislature which became a law on March 24, 1851 (Laws 1850-51, c. 692), denied to the general council of the city the right to accept the dedication of a street which was less than 60 feet in width, would lead to the conclusion that Court place was neither dedicated nor accepted as a street, in the ordinary use of that term.

[8] It is true that an acceptance of a dedication in violation of the conditions of the grant is a nullity, if objection is seasonably made.

[9-12] It is also true that, if a dedication is made for a specific, limited, and defined purpose, the subject of the dedication cannot be used for another purpose, if those having rights under the dedication make seasonable objection to its misuser. It is, however, the law of this jurisdiction that a municipality or the public may require a right to the use

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 62 Hun, 612.

of a street by adverse user, and, having acquired the right to the use of the street, may lose it by the adverse user of another. The municipality, in its governmental capacity, holds the street in the nature of a trustee for the public, and the public may acquire an easement in a street through the action of the municipal authorities for the benefit of the public, or by adverse user by the public for the statutory period. When the municipality, through its officers and agents, takes and holds lands for a street, adversely to the rights of the owner in the fee, for the statutory period, accompanied by a use of it by the public in the manner necessary to create an easement by prescription in the street, the title to its use as a street becomes vested fully in the public. Some of the opinions of the court which go to support this doctrine are based upon the fiction that, after 15 years' continuous, visible, notorious, and adverse use under a claim of right by the public of a way as a street in a grant or highway, it is presumed that the use of the way had its origin in a grant, but the essential element necessary to create the title by prescription is the adverse use of the way as a street for the statutory period. *Porter v. City of Clinton*, 74 S. W. 234, 24 Ky. Law Rep. 2435; *Elliott v. Treadway*, 10 B. Mon. 22; *Smythe v. Cleary*, 11 Ky. Law Rep. 328; *Com. v. Logan*, 5 Litt. 286; *Frazer v. Hutchinson*, 10 Ky. Law Rep. 871; *Witt v. Hughes*, 66 S. W. 281, 23 Ky. Law Rep. 1836; *L. H. & St. L. Ry. Co. v. Com.*, 104 Ky. 35, 46 S. W. 207, 20 Ky. Law Rep. 371; *Gatewood v. Cooper*, 38 S. W. 690, 18 Ky. Law Rep. 869; *Wilkins v. Barnes*, 1 Ky. Law Rep. 328; *Wright v. Willis*, 63 S. W. 991, 23 Ky. Law Rep. 565; *K. C. Ry. Co. v. Paris*, 95 Ky. 627, 27 S. W. 84, 16 Ky. Law Rep. 170.

[13-16] Upon the other hand, an individual may by adverse possession for the statutory period of lands dedicated for a public use acquire title to them. *Hegan v. Pendennis Club*, 64 S. W. 464, 23 Ky. Law Rep. 861; *Terrill v. Bloomfield*, 21 S. W. 1041, 14 Ky. Law Rep. 614; *Bosworth v. Mount Sterling*, 13 S. W. 920, 12 Ky. Law Rep. 157; *Cornwall v. Louisville, etc., R. Co.*, 87 Ky. 72, 7 S. W. 553, 9 Ky. Law Rep. 924; *Dudley v. Frankfort*, 12 B. Mon. 610; *Rowan v. Portland*, 8 B. Mon. 232. The principle allowing the acquisition of easements in streets by adverse user of the public and the loss of such easements by the public by adverse possession of another of a street dedicated to the public use remains unchanged, except for the statute of 1873, which provided that the statute of limitations will not begin to run in favor of an individual against a town or city for the use or possession of a street until the party who relies or intends to rely upon adverse possession of it has given the authorities of the municipality notice of his intentions. Ky. Statutes 1915, § 2546. The peculiar rights of an abutting property owner to the use of a street for ingress and

egress to and from the property with teams and vehicles is a private right of his own, and one not shared by the public with him, and the municipality does not hold such right as a trustee for him. Hence it is a right which he may lose by an adverse user, under circumstances which justify the enforcement of that doctrine. Hence, when the municipality, in 1853, accepted the dedication of Court place for the public use, if it was designed by the dedicators as an ordinary street over which the abutting property owners had the right to haul with vehicles to and from their property, when it was accepted as a street for pedestrians only, and was so taken control of by the municipal authorities, and so constructed as to constitute notice to the public and to every one that its use was limited to pedestrians as a street in the nature of a sidewalk, and not for use of vehicles, the abutting property owners then had the right to enforce the conditions of the dedication, and to require its construction in such a way that it could be used as an ordinary street over which they could use vehicles. If they had the right of egress and ingress to their property with vehicles, then the action of the public, through the municipality, by so constructing the street as to limit its use to pedestrians only, was a direct and intentional violation of such right, and, being a private right peculiar to themselves, the right to assert such an easement in the way was barred after the period of 15 years had expired. The action of the municipality in constructing and holding the street as a walkway for pedestrians only and the use made of it by the public as such was open, visible, notorious, continuous, and necessarily adverse and hostile to the claim of an easement by the abutting property owner to drive teams and vehicles over it. The physical characteristics of the street and the manner of its construction and use has been notice to each successive abutting property owner of the use to which it has been limited since its acceptance until the present. It does not seem that any one designing to acquire property upon it could have been misled as to the uses which he could make of it, and with notice of the fact that it was limited to the use of pedestrians, he would be estopped to complain that he is not permitted to use it for vehicles.

[17, 18] A dedication is an offer, and must be accepted before it is complete. The dedicator has the right to require the acceptance to be made according to the terms of his offer, or not at all, but it is well settled that he can waive any conditions of the offer. If the dedication is accepted without some of the conditions imposed, and the dedicators assent to it and waive the conditions, surely they cannot thereafter complain, especially after the acceptor of the dedication has expended money and labor upon it in fitting it for its purpose. *Forney v. Calhoun Co.*, 86 Ala. 463, 5 South. 750; *Port Huron v. Chad-*

wick, 52 Mich. 320, 17 N. W. 929. In the last-mentioned case supra it was held that, if the dedicator desires to avoid his gift for a failure to comply with the conditions or restrictions imposed upon the gift, he must act promptly. When the municipality accepted the dedication of Court place, which it did by causing it to be improved as a sidewalk, in the year 1853, the dedicators were still the abutting property owners, and it appears that they not only did not interpose any objections to its acceptance as a way limited to pedestrian travel only, but were assessed, and, we presume, paid the costs of the construction of the street as then constructed. If they contemplated, when making the dedication, to retain the right peculiar to an abutting property owner to use vehicles in hauling to and from their property over it, their acts clearly show that they assented to the acceptance of the street as a walking way, and not for use by vehicles. Having assented to such an acceptance, and having thereafter abided by it, if not equitably estopped from ever complaining of being deprived of the right to haul over the street with vehicles, such right as an abutting property owner was barred after 15 years. True, the right to haul with vehicles to and from his property by an abutting property owner is not lost by the mere failure to exercise the right, where the right is not denied to him, but where the exercise of his right is denied to him the statute applies. The appellants could not acquire the right to use vehicles upon the way by prescription, because since 1873 no prescriptive right in a public way can be acquired by an individual, unless he has given the governing authorities of the city notice of his intentions.

[19] The use of Court place as a carriage-way by the municipal officers by the occasional driving of a vehicle along it by an employé of the city during a portion of one year does not create it a carriage-way. The municipality holds the street as the trustee of the public, which is the cestui trustent, and its acts cannot destroy the right of the public to preserve and use the street for its benefit as a place free from obstruction of vehicle use.

[20] The ordinance of the city which regulates the use of the sidewalks of the city does not authorize any one, at any time, to drive a vehicle or loaded wagon or cart along a sidewalk longitudinally. In fact, they forbid such use of a sidewalk, and the provisions in the ordinance which prohibits one from driving on or over a sidewalk, otherwise than in going to and from the premises occupied or owned by such person, and then only at such times and in such manner as will not interrupt or inconvenience the traveling public, and the other section which provides that nothing in the ordinance shall prohibit the necessary temporary use of the

sidewalks, while actually receiving or shipping goods, wares, or merchandise, and for putting up coal, provided sufficient passway is left for pedestrians, should be construed together, and have relation to sidewalks upon streets which are used as streets are ordinarily used, and grants the privilege to drive across the sidewalk, and not along it longitudinally.

The appellants are not deprived of ingress and egress to or from their buildings, which front upon Court place, for any purpose, nor deprived of their right to get in their fuel, as the other occupants of the way have done for over 60 years, except in isolated instances. They are only prevented from using the way or street as a carriageway, and, considering the character of the street, the uses to which it has been put, the necessity for its preservation as it now is for the public benefit, its location and physical characteristics, such a restriction upon the use of the street does not appear to be unreasonable.

The judgment is therefore affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. HENRY.

(Court of Appeals of Kentucky. Feb. 15, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1099—SECOND APPEAL—LAW OF THE CASE.

Where, on the first appeal of a case, it was held that the evidence for the plaintiff was sufficient to take the case to the jury, and to sustain a verdict in his behalf, and the evidence on the second trial is fully as favorable to the plaintiff, the question of sufficiency of the evidence must be regarded as settled by the former opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. \Leftrightarrow 1099.]

2. APPEAL AND ERROR \Leftrightarrow 1096—SECOND APPEAL—LAW OF THE CASE.

On the second appeal of a case, if the pleadings, evidence, and rulings of the trial court are substantially the same as on the trial from which the first appeal was prosecuted, the first opinion is the law of the case, and it will be treated as controlling the second appeal, not only with respect to errors relied on for reversal on the first appeal and mentioned in the first opinion, but as to errors relied on but not noticed in the opinion, and also as to errors appearing in the first record that might have been relied on but were not brought to the attention of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353-4357; Dec. Dig. \Leftrightarrow 1096.]

3. TRIAL \Leftrightarrow 256—INSTRUCTIONS—REQUESTS.

An instruction in an action for personal injuries that the plaintiff might recover for time necessarily lost, for physical pain and mental suffering, and impairment of power to earn money, is not objectionable as failing to inform the jury that allowance for impairment of power to earn money should begin only after the allowance for lost time ended, in absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. \Leftrightarrow 256.]

4. APPEAL AND ERROR ⇐1068—HARMLESS ERROR—INSTRUCTIONS.

Such instruction, if erroneous, was cured by the plaintiff's act in entering a remittitur of the portion of the damages claimed in his petition for time lost.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ⇐1068.]

5. DAMAGES ⇐228—CURE OF ERROR—REMITTITUR.

It is good practice to remit in the trial court so much of the recovery in any case as may be fairly attributed to erroneous instructions.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. ⇐228.]

6. NEW TRIAL ⇐42—COMPETENCY—EXPRESSION OF OPINION.

Where a juror casually remarked in general conversation, before he was selected as juror, that he believed a person who was injured while working for a corporation ought to be paid, and that an injured man would be paid if he, the juror, had anything to do with the case, but it did not appear that those engaged in the conversation had this case in mind, or that the person who made the statement expected to be called as juror in the case, it was not misconduct of the juror sufficient to authorize the granting of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74-79; Dec. Dig. ⇐42.]

Appeal from Circuit Court, McCracken County.

Action by Toy Henry against the Nashville, Chattanooga & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Claude Waller, of Nashville, Tenn., and Wheeler & Hughes, of Paducah, for appellant. W. Mike Oliver, of Paducah, Samuel A. Anderson, of St. Paul, Minn., and Joseph R. Grogan, of Paducah, for appellee.

CARROLL, J. This is the second appeal of this case by the railway company. The former opinion may be found in 158 Ky. 88, 164 S. W. 310, and as the facts are very fully stated in that opinion, it is not necessary to repeat them here, especially as the evidence on the trial from which this appeal is prosecuted was substantially the same as the evidence on the trial from which the former appeal was taken.

The grounds relied on for reversal of the judgment, which was for \$12,600, are: That the verdict of the jury is not supported by sufficient evidence; that the court erred in the instructions, and in the admission of incompetent evidence; that the verdict is excessive, and that one of the jurors was guilty of misconduct.

[1] On the former appeal we held that the evidence for the plaintiff was sufficient to take the case to the jury and to sustain a verdict in his behalf, and in view of the fact that the evidence on this trial is if anything more favorable to the plaintiff than the evidence on the former trial, the question that the verdict of the jury was not support-

ed by sufficient evidence must be regarded as settled adversely to the contention of the railway company by the former opinion.

On the first appeal the instructions on the measure of damages and contributory negligence, given on the first trial, were held to be erroneous, and the court pointed out the proper instructions that should be given in place of the ones that were given. Some minor errors were also pointed out in other instructions, and it is now insisted by counsel for the appellant that the trial court in the instructions on the second trial did not follow the directions laid down in the former opinion; but we do not think this objection is well founded, except in one particular that will later be noticed.

Counsel for the railway company did not request any instruction, except one asking a directed verdict in its favor, and this the court properly refused, but exceptions were saved to the instructions given. *

[2] At this point it may be said, as a sufficient answer to some objections raised by counsel, that it has been frequently written by this court that on the second appeal of the case if the pleadings, evidence, and rulings of the trial court are substantially the same as on the trial from which the first appeal was prosecuted, the first opinion is the law of the case. And all questions which on the first appeal were brought to the attention of the court, or might have been brought to the attention of the court, are as conclusively settled, though not referred to in the opinion, as though they were specifically mentioned and considered. Although the first opinion may not notice errors relied on for reversal by the appellant, if these same alleged errors appear on the second appeal and are relied on for reversal, they will be treated as if they had been disposed of adversely to the contention of the appellant on the first appeal. In other words, the first opinion will be treated as controlling the second trial of the case not only with respect to errors relied on for reversal on the first appeal which are mentioned in the first opinion, but as to errors relied on but not noticed in the opinion, and so as to errors appearing in the first record that might have been relied on, but that were not brought to the attention of the court. *United States Fidelity & Guaranty Co. v. Blackley, Hurst & Co.*, 85 S. W. 196, 27 Ky. Law Rep. 392; *Dupoyster v. Ft. Jefferson Improvement Co.*, 121 Ky. 518, 89 S. W. 509, 28 Ky. Law Rep. 504; *Stringfield v. Louisville Ry. Co.*, 130 Ky. 468, 113 S. W. 513; *Stewart's Adm'r v. L. & N. R. Co.*, 136 Ky. 717, 125 S. W. 154; *Wall's Ex'r v. Dimmitt*, 141 Ky. 715, 133 S. W. 768.

[3, 4] The petition, in itemizing the damages to which plaintiff was entitled, sought a recovery of \$900 for lost time, and in instruction No. 3 the court told the jury that if they found for the plaintiff they should

find for him such sum in damages as would reasonably compensate him "for the reasonable value of any time necessarily lost, on account of said injury, not exceeding \$900, for physical pain and mental suffering, if any of either, on account of said injury, and for permanent injury to him, if any, on account of said injuries, diminishing his power to earn money, but in all not to exceed the amount claimed in the petition, to wit, \$50,000."

In *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278, the court said:

"But, when there is a claim for special damages based on time lost, and also a claim for partial or permanent injuries and as a consequence impairment of the power to earn money for any length of time or forever, as the case may be, the allowance for the impairment of the power to earn money whether it be temporary or permanent should begin when the allowance for lost time on account of total disability ends. * * * This rule as to beginning the allowance for the impairment of the power to earn money at the time that the allowance for loss of time ends, in order to prevent the assessment of double damages, when there is a claim for lost time as well as impairment, has been frequently recognized as correct by this court in different forms of expression, although the matter may not have been put in the language here employed."

It was further said in that case that if requested the court should add that the allowance, if any, for impairment of power to earn money should begin when the allowance, if any, for time lost ended; but we have never held it to be reversible error to fail to qualify the instruction in this way where a recovery was sought for lost time as well as permanent impairment, unless such a qualification was requested and refused. We have only said that the court, if requested so to do, should direct the jury that the allowance for the impairment of the power to earn money, if any, should begin when the allowance, if any, made for lost time ended. *Illinois Central R. R. Co. v. Mayes*, 142 Ky. 382, 134 S. W. 436.

But in this case, although counsel for defendant did not request the court to instruct the jury that the damages allowed for impairment should not begin until the time lost for which damages were allowed ended, the attorneys for the plaintiff, in order to remove any question that might be made that the jury may have allowed \$900 for lost time and also damages for impairment of power to earn money dating from the time of the injury, thereby giving double damages for a part of the time, moved the court to remit \$900 of the verdict, and this was done. In view of what has been said, it would not have been reversible error if this remitter had not been made, and of course the appellant has no ground of complaint that can be rested on this remittance.

[5] We might further add that it is good practice to remit in the trial court so much of the recovery in any case as may be fairly

attributed to erroneous instructions. *L. & N. v. Scott*, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206, Ann. Cas. 1912C, 547; *C. & O. v. Meyers*, 150 Ky. 841, 151 S. W. 19; *Cumberland Telephone & Telegraph Co. v. Sutton*, 156 Ky. 191, 160 S. W. 949; *C. & O. R. W. Co. v. Meyers*, 150 Ky. 841, 151 S. W. 19.

The instruction on the subject of contributory negligence is complained of, but this instruction, although not phrased like the one approved by this court in *C. & N. O. & T. P. Ry. v. Goode*, 163 Ky. 60, 173 S. W. 329, has been approved by the Supreme Court of the United States in *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

[6] We do not find that any incompetent evidence was admitted, nor do we think the alleged misconduct of the juror was sufficient to authorize the granting of a new trial. All that appears is that one of the jurors had said, in a general conversation some weeks before he was selected as a juror, that he believed a person who was hurt while working for a corporation ought to be paid, and if he had anything to do with it he would get paid for his injury. But it does not appear that any of the parties engaged in the conversation had in mind this case, or that it was anticipated at the time that the person who made this statement would ever be called as a juror in the case. Casual remarks made by men as to what they thought ought to be done or ought not to be done in certain classes of cases is not such misconduct as will authorize the granting of a new trial, when it does not appear that what they said had any reference to the case in which they sat as jurors.

Upon the whole case it appears that, with the exception of an error in the instruction as to lost time, the lower court tried the case according to the rules laid down in the first opinion.

Wherefore the judgment is affirmed.

CHESAPEAKE & O. RY. CO. v. SHAW.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. REMOVAL OF CAUSES — 3 — FEDERAL EMPLOYERS' LIABILITY ACT — STATUTE.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 6, 35 Stat. 86, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 [U. S. Comp. St. 1913, § 8662]), now known as section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1004 [U. S. Comp. St. 1913, § 1010]), providing that the jurisdiction of United States courts under the act shall be concurrent with that of state courts, and no cause arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States, where a railroad employé, suing in the state court under the act, was charged by the defendant, in its petition for removal to a federal court, with fraudulently alleging that he was engaged in interstate commerce when in-

jured, the case was not removed under the record so made to the federal court, and the state court could try the question of fraudulent allegation of jurisdictional facts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.]

2. COURTS §489—FEDERAL EMPLOYERS' LIABILITY ACT—STATE COURT—JURISDICTION.

Under a petition properly drawn under the federal Employers' Liability Act, the state court has jurisdiction to try the merits of the case, including the question as to whether plaintiff was injured in interstate commerce.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.]

3. MASTER AND SERVANT §276 — FEDERAL EMPLOYERS' LIABILITY ACT — ENGAGEMENT IN INTERSTATE COMMERCE.

Where plaintiff, suing for injuries under the federal Employers' Liability Act, fails to show that he was injured in interstate commerce, his case fails for proof, and a peremptory instruction for defendant is proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 273.]

4. COMMERCE §27 — FEDERAL EMPLOYERS' LIABILITY ACT — RAILROADS — "INTERSTATE COMMERCE."

A railroad baggagemaster, whose run was from Cincinnati, Ohio, to Maysville, Ky., and back, and who was injured at Maysville while assisting in side-tracking the train to permit the passage of another, pursuant to the usual custom regarding his train, was injured in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

5. MASTER AND SERVANT §286—INJURIES TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

In an action against a railroad under the federal Employers' Liability Act for injuries to its baggagemaster, question whether the road was negligent in leaving an open space between two ties for a switch rod to work in *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.]

6. MASTER AND SERVANT §284—INJURIES TO SERVANT—PLACE OF ACCIDENT—QUESTION FOR JURY.

In an action against a railroad under the federal Employers' Liability Act for injuries to its baggagemaster, whether the accident occurred at a switch or about 35 feet south therefrom *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1182; Dec. Dig. § 284.]

7. APPEAL AND ERROR §216 — RESERVATION OF GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.

A party may not complain of a failure of the court to give instructions, unless he offers an instruction upon the question.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. §§ 627-641.]

8. MASTER AND SERVANT §226 — ASSUMPTION OF RISK—SAFE PLACE TO WORK.

A servant does not assume the risk of accident and danger due to the master's failure to exercise ordinary care in furnishing him with a reasonably safe place to work, since assumption

of the risks of the employment by a servant must be considered with reference to the employer's primary duty to furnish reasonably safe surroundings.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.]

9. APPEAL AND ERROR §1064 — INSTRUCTIONS.

In an injured employe's action against a railroad, an instruction authorizing damages for lost time, and also impaired earning power, since the accident, without qualifying the last element of recovery by directing that any allowance for loss of earning power should begin when allowance for time lost ended, was not, when considered as a whole, prejudicial, as authorizing assessment of double damage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.]

10. APPEAL AND ERROR §216—RESERVATION OF GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.

A party, who fails to call the court's attention to an immaterial error in an instruction, and to request that it be remedied, will not be permitted to complain thereof on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. §§ 627-641.]

11. JURY §11 — FEDERAL EMPLOYERS' LIABILITY ACT—VERDICT BY NINE JURORS.

In a railroad employe's action under the federal Employers' Liability Act, nine or more jurors, under the state practice, can return a verdict.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19-24; Dec. Dig. § 11.]

12. COSTS §255—RECORD—INDEXING—RULE OF COURT.

Under rule 5 of the Supreme Court (154 S. W. viii), providing that a full index of the entire record, whether containing one volume or more, must be put at the beginning of the record, and that records not conforming to the rule will be condemned, and the clerk making out such record prohibited from collecting his full fees, a record of 206 pages, wholly without an index, will be condemned, and the clerk who made it out prohibited from collecting any fee therefor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 967; Dec. Dig. § 255.]

Appeal from Circuit Court, Mason County.

Action by John B. Shaw against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, of Maysville, for appellant. Allan D. Cole, of Maysville, for appellee.

MILLER, O. J. This is an appeal from a judgment awarding the appellee, John B. Shaw, \$10,000 damages for injuries sustained as the result of having been run over by one of appellant's trains in its yards at Maysville.

At the time of the accident Shaw was in the service of the appellant as baggagemaster on one of its passenger trains running between Cincinnati, Ohio, and Maysville, Ky., and known as the "Maysville Accommodation." This train left Cincinnati about 6 o'clock on Saturday evening, June 4, 1913,

and according to its schedule time it should have arrived at Maysville about 8 o'clock. It was, however, about five minutes late on this occasion. According to its custom, after stopping at the principal depot at Maysville and discharging such of its passengers as desired to alight there, the train would proceed about half a mile east, to what is known as the Market Street depot, where the remaining passengers would be discharged, and the train would then be backed to the yards immediately west of the principal depot, where the engine would be placed on a turntable and turned around preparatory to the trip back to Cincinnati on the next morning—the entire train remaining in the yards during the night.

In making this backward movement from the Market Street station, it was customary for Shaw to act as rear brakeman while the train was backed from Market street to the yards, and while it was doing the necessary switching in the yards. On the day of the accident, before the train left Cincinnati, orders were given its crew that after reaching Maysville the train was to take on another coach and then proceed eastwardly as an "extra," No. 73, to Russell, Ky., and return to Maysville the next morning, which was Sunday. The object of this extra trip was to bring down from Portsmouth to Maysville the Portsmouth baseball team and an excursion crowd, to be picked up at South Portsmouth, Ky., a station a few miles west of Russell, and between Russell and Maysville. On the night of the accident, when the "Maysville Accommodation" reached the Maysville depot, a part of the passengers and all of the baggage were unloaded, and the train then proceeded east to Market street, where the remaining passengers were unloaded. When this had been done, it was about 8 o'clock in the evening, and about five minutes later than the schedule time. The appellant's fast east-bound passenger train No. 6 was due at Maysville about 8 o'clock, and in order to permit this fast train to pass the "Maysville Accommodation" train was backed down to the yards; the appellee Shaw taking his position on the rear of the train, as usual.

The Maysville yard contains a "lead" track, which connects with the east-bound main track at a point west of the depot, and runs in a southwestwardly direction to a turntable, a distance of about 500 feet, and four switch tracks, which branch off westwardly from the "lead" track and run parallel with each other. Beginning with the one nearest the east-bound main track, these switch tracks are known as switch tracks No. 1, No. 2, No. 3, and No. 4, respectively. There is a switch stand located between the two main tracks, about opposite the point where the "lead" track begins. This switch stand is used to operate the switch connecting the "lead" track with the east-bound main track. There are also switches connecting the four

switch tracks with the "lead" track; each of these switches being operated by switch stands located at the point of intersection between the switch track and the "lead" track, and known as switch stands Nos. 1, 2, 3, and 4, respectively. These switch stands are all located on the south side of the "lead" track, in order that they may be seen by the engineer, for the purpose of receiving signals. There is also a "derail" switch, about half-way between the turntable and switch No. 4. This "derail" switch is used to operate both the "derail" and the connection between the "lead" track and the turntable.

After the train had backed from the East Market station to the depot, it moved backward on the "lead" track and onto switch track No. 1, for the purpose of letting the fast train pass, to get another coach that was on that track, and also to clear the "lead" track, so as to enable the dining car to be taken off the fast train and placed on track No. 2, as was customary. Shaw was standing on the rear of the train, controlling its backward movement by a bell cord connected with the engine. However, after the train had started in on switch track No. 1, Shaw ascertained there would not be sufficient room for his train upon that track, because of the presence of other cars there. Accordingly he stopped the train, jumped off the car, and gave Jones, the engineer, a signal to pull east out of switch No. 1, which was done. About the same time the conductor jumped off the train. Shaw then threw the switch connecting the "lead" track with switch track No. 1, so the train could pass on down the "lead" track; it being his evident purpose to run the train back on the "lead" track until the fast train had passed. After throwing switch No. 1, Shaw signaled the engineer to back the train down the "lead" track; Shaw walking or running ahead, evidently for the purpose of throwing switches Nos. 2, 3, and 4, and the "derail" switch, so as to keep the train on the "lead" track until it had cleared track No. 2. In obedience to the signal given by Shaw, the train began backing slowly, at the rate of about three miles an hour; Shaw running ahead of it, throwing switches 2, 3, and 4 as he passed them.

Up to this point there is no material conflict in the testimony of the several witnesses; but as to what happened after switch No. 4 was thrown the testimony is conflicting. According to Shaw's version, after throwing switch No. 4, and when he started to go directly across to the south side of the "lead" track for the purpose of reaching the "derail" switch, his feet were caught in a hole or opening between one of the ties and the rod which runs across the track and below the rails, connecting switch No. 4 with the switch stand, and while held in that position he was struck and knocked down by the train, which cut

off his right leg and the larger part of his left foot.

Shaw testified that the conductor told him to "hurry up" and throw the switches on the "lead" track without waiting for the signals to continue backing, which usually were given after each switch had been thrown, and that the engineer continued to back the train without waiting for the usual signals. The conductor contradicts Shaw in this respect; but the engineer testified that he continued to back the train until he lost sight of Shaw's lantern, and that he then stopped the train and told the conductor something must be wrong at Shaw's end of the train.

According to the company's version of the accident, Shaw was struck and run over at a point about 37 feet west of switch No. 4, while either walking or running beside the track, and trying to cross over the track, that he was not struck at switch No. 4, and that his injury was not and could not have been the result of his foot catching between the switch rod and the tie, as he claimed.

The action was brought under the federal Employers' Liability Act. The petition as amended alleged, in substance, that appellant was negligent (1) in operating its train that ran over Shaw; (2) in failing to have lights in the yard; and (3) that switch No. 4 and the tracks in that immediate vicinity were in such a defective and dangerous condition that Shaw was not furnished a reasonably safe place to work. The answer contained a traverse of the allegations of the petition, and affirmatively relied upon the defenses of contributory negligence and assumed risk upon the part of Shaw.

Upon the trial the circuit court held that there was no negligence shown in the operation of the train—the proof being that the brakeman and conductor were elsewhere at the time of the accident, in the performance of the duties required of them, that the train was being operated under signals given by Shaw, and that the engineer stopped the train the moment he lost sight of Shaw's signal lantern. The circuit court also refused to submit to the jury the question as to whether the appellant was negligent in failing to have lights in its yards, presumably upon the theory that this condition had existed for several months, and was fully known to appellee, who assumed that risk.

We are led to assume that the reasons above given influenced the court, as therein indicated, since the only issue of negligence upon the part of the company which was submitted to the jury was whether Shaw was injured at switch No. 4, and, if so, whether the company negligently failed to keep the switch rod connecting the switch stand of switch No. 4 with the "lead" track, and the ties and ground between said switch stand and the south rail of the "lead" track, in a reasonably safe condition.

[1] 1. The action was brought under the federal Employers' Liability Act; the peti-

tion charging that both the appellant and the appellee were engaged in interstate commerce. Appellant filed its petition for a removal of the case from the state court into the United States District Court, charging, after setting out the requisite diversity of citizenship, that the allegations as to the interstate nature of appellee's employment were untrue, that they were known by Shaw to be untrue, and that they were made for the sole purpose of fraudulently preventing the appellant from removing the case to the federal court.

A demurrer to the petition for a removal was sustained, and appellant contends that the record shows a fraudulent attempt by Shaw to oust the federal court of its jurisdiction, and that its petition for a removal should have prevailed, notwithstanding the amendment of 1910 to the federal Employers' Liability Act provides that the jurisdiction of the federal courts shall be concurrent with that of the state courts in such cases, and that no case arising under the federal Employers' Liability Act, which is brought in a state court of competent jurisdiction, shall be removed to any court of the United States. 36 Stat. at L. 291, c. 143, U. S. Comp. Stat. Supp. 1911, pp. 1324, 1325.

As a question of practice, appellant insists that under the record thus made, the case stood removed into the federal court, and that it remained for that court to try the question of fraudulent allegation of jurisdictional facts, and remand the case to the state court in case appellant failed to sustain the charge, and that the state court was without authority or jurisdiction to try that question or to further proceed with the trial of the case.

We do not so understand the practice. Section 6 of the amendment of 1910 to the federal Employers' Liability Act, now known as section 28 of the Judicial Code of March 3, 1911, provides in part as follows:

"Jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

In order to bring an action under the federal Employers' Liability Act, the petition must allege, among other things, that the plaintiff was engaged in interstate commerce at the time he was injured; and, according to appellant's contention, if the plaintiff fraudulently makes that essential allegation in his petition, the defendant has the right to remove the case to the federal court upon the ground of diverse citizenship, and the state court cannot pass upon the question raised by the petition for a removal. If this be the correct practice, every case may be removed to the federal court, notwithstanding the provision of section 28, supra, and the federal court alone would have the right to determine that question. The effect of such a rule would be to give the federal

courts exclusive jurisdiction of the merits in every case of this character, although such jurisdiction is expressly made concurrent with that of the state courts, and the defendant, by the express terms of the statute, is prohibited from removing the case into the federal court.

[2, 3] Under a petition properly drawn under the federal Employers' Liability Act, the state court has jurisdiction to try the merits of the case, including the question as to whether the plaintiff was injured while engaged in interstate commerce; and under our practice, as announced in the late cases of *I. C. Ry. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375, and *C. & T. P. Ry. Co. v. Tucker*, 168 Ky. 149, 181 S. W. 940, if the plaintiff fails to show that he was injured while engaged in interstate commerce, his case falls for proof, and a peremptory instruction to find for the defendant, is proper. In *I. C. Ry. Co. v. Coley*, 121 Ky. 396, 89 S. W. 237, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 374, in speaking of an alleged fraudulent misjoinder of parties, this court said:

"When the petition discloses a cause of action which is not within the jurisdiction of the federal court, the case may not be removed to the federal court for that court to try a case over which it has no jurisdiction, or to pass on the jurisdiction of the state court over the case. It cannot be maintained that the Circuit Court of the United States is only to determine in cases of this sort whether the joinder is fraudulent, and made without reasonable expectation on the part of the plaintiff to prove the facts alleged, and that it is the exclusive forum to determine this question; for in not a few cases the state court would hold upon the evidence that the plaintiff had made out his case against both the defendants, while in the federal court, upon the same evidence, it would be held that the plaintiff had failed to make out his case, and that therefore the joinder was fraudulent. The result would be that the state court would be prevented from proceeding in a case admittedly within its jurisdiction, by reason of the fact that the federal court was of opinion that there was no merit in the case. It was not contemplated by the act of Congress that the Circuit Court of the United States should be given supervisory power over the state courts on the merits of joint controversies of this character."

Again, in *I. C. Ry. Co. v. Houchins*, 121 Ky. 531, 89 S. W. 532, 28 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 377, 122 Am. St. Rep. 205, in speaking on the same subject, this court said:

"Such a rule would deprive the litigant of his right to try his case under the laws of the state, and would compel him to get into the merits of his case before a tribunal without jurisdiction to sit in it. If the state court makes a mistake, an appeal may be taken to this court; and if the railroad company feels aggrieved by the decision of this court, it may in every case prosecute an appeal to the Supreme Court of the United States on the question. So it is not without remedy, and there is no possibility of its rights not being properly protected."

See, also, *Clinger v. C. & O. Ry. Co.*, 128 Ky. 736, 109 S. W. 315, 83 Ky. Law Rep. 86, 15 L. R. A. (N. S.) 998; *Ward v. Pullman Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343; *Golden v. N. P. R. R. Co.*,

39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1159, 18 Ann. Cas. 886.

The averments of the petition conclusively show the case is brought under the federal act; that plaintiff is seeking to recover on a case arising under that act. In *Stafford v. Norfolk & Western R. Co.* (D. C.) 202 Fed. 605, it was held that where the plaintiff claimed that his action was within the federal Employers' Liability Act, and based his right to recover solely upon it, the case was one arising under that act, even though it was conceded that plaintiff's intestate was not employed in interstate commerce, and that plaintiff ultimately would not be able to recover under the act. And in *Strauser v. Chicago, B. & Q. R. Co.* (D. C.) 193 Fed. 298, it was held that by the amendment of 1910 Congress plainly showed its intention that no case should be removed from the state court upon any ground, provided it arose under the federal Employers' Liability Act. See, also, *Lee v. Toledo, St. L. & W. R. Co.* (D. C.) 193 Fed. 685; *Kelly v. C. & O. R. Co.* (D. C.) 201 Fed. 602; *Rice v. Boston & M. R. Co.* (D. C.) 203 Fed. 580.

In *Hulac v. Chicago & N. W. R. Co.* (D. C.) 194 Fed. 747, the court said:

"It is a well-recognized fact in judicial history that plaintiffs, in actions brought by employees against railway companies for damages resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and of appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and federal courts has also been well understood. Congress has recognized, by the Employers' Liability Act, as well as by the Safety Appliance Acts, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the Employers' Liability Act was the granting of additional rights to the servant, and the removal of existing defenses by the master in actions by injured employees against railway companies. One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated. The amendatory act of Congress gives concurrent jurisdiction to the courts of the United States with the courts of the states, and increases the number of districts in which the plaintiff may sue in the United States courts, and while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground."

To the same effect, see *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *C. & N. O. & T. P. Ry. Co. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *Orehore v. O. & M. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144.

So the rule of procedure must be treated as settled that the state court, having juris-

diction of the case as stated, is not bound to surrender its jurisdiction on a petition for removal, until a case has been made which, on its face, shows that the petitioner has a right to the transfer of the case to the federal court, and that the state court is at liberty to determine for itself whether, on the face of the record, a removal has been affected. If the state court should decide erroneously against the removal, and proceed with the cause, its ruling on that question can be reviewed, after final judgment, by the United States Supreme Court. There was no error, therefore, in the state court proceeding with the trial; and under the state practice as above pointed out, if Shaw had failed to show he was engaged in interstate commerce at the time of his injury, appellant's motion for a directed verdict would have prevailed.

[4] 2. But, as we read the evidence, Shaw was clearly engaged in interstate commerce at the time of his injury. We think that is apparent from a mere statement of the facts. The "Maysville Accommodation" train, which Shaw was assisting in operating at the time of his injury, had run from Cincinnati, Ohio, to Maysville, Ky.; and, under special orders, after it had completed its usual trip from Cincinnati to Maysville, it was, according to appellant's contention, to make a special trip from Maysville, Ky., to Russell, Ky., and not merely extend its usual trip from Cincinnati, Ohio, to Russell, Ky., and return. Clearly, if Shaw was injured on the journey from Cincinnati to Maysville, he was engaged in interstate commerce; and, if the trip from Cincinnati, Ohio, to Russell, Ky., be treated as a continuous trip, he was likewise engaged in interstate commerce. But, as contended by the appellant, if the trip from Maysville to Russell and return is to be treated as a special movement, and not a mere continuation of the usual trip from Cincinnati to Maysville, appellant was not engaged in interstate commerce at the time he was injured.

Under our view of the proof, however, we do not think it necessary to take into consideration the nature of the proposed trip from Maysville to Russell and return, since we think it clear from the evidence that appellant's initial trip from Cincinnati, Ohio, to Maysville, Ky., had not been completed at the time Shaw was injured, since it was a part of that trip to place the train upon the "lead" track. The fact that the accommodation train was placed upon the "lead" track for the purpose of permitting the fast train to pass, and not for the purpose of remaining there until the next morning, as it usually did, cannot change the controlling fact that it was a part of Shaw's duty to assist in placing his train upon the "lead" track, out of the way of trains passing upon the main track. Furthermore, the proof shows that the special order to go to Russell also directed the conductor of the accommodation train

to take an extra coach out of the Maysville yard for his excursion train, and that it was necessary for the accommodation train to back into the yard for the purpose of getting that coach. The initial trip from Cincinnati, Ohio, to Maysville, Ky., was not completed, under the usual method of handling the train, until the train had been put on the "lead" track, and out of the way of the fast train. They had not begun to make up the train for the Russell excursion, at the time appellee was injured.

In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 161, 33 Sup. Ct. 653, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, the court said:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight, and the duty which the decedent was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was the terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up out-going trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. *McNeill v. Southern R. Co.*, 202 U. S. 543 [28 Sup. Ct. 722, 50 L. Ed. 1142]; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 21 [25 Sup. Ct. 158, 49 L. Ed. 363]."

See, also, *L. & N. R. R. Co. v. Walker's Adm'x*, 162 Ky. 213, 172 S. W. 517, and *C. & O. Ry. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

We conclude, therefore, that at the time Shaw was hurt he was engaged in operating the interstate train from Cincinnati, Ohio, to Maysville, Ky., and was not engaged in operating "Extra 78," which was to be thereafter made up and run from Maysville to Russell and return, even if that train should be treated as distinct and separate from the interstate accommodation train.

[5] 3. But it is contended that no negligence was shown upon the part of appellant, and that its motion for a directed verdict should have prevailed. As the court, by its instruction, limited the scope of appellant's negligence to the single question of the condition of switch No. 4, appellant's complaint here must be confined to that question.

Briefly stated, the situation was this: The ties were 8 or 10 inches thick, and were ballasted with cinders; but between the two ties, where the iron switch rod ran from the switch stand across the "lead" track to the switch track, it was necessary that there should be left unballasted a space of about 5 inches extending down from the top of the ties, in order that the switch rod could work easily, and be free from interference by the cinders and dirt below. According to Shaw's version, there was no ballast at all between the two ties which carried the switch rod,

thus leaving an unballasted space of a depth equal to the thickness of the ties—8 or 10 inches—or about 5 inches deeper than was necessary for the proper management of the switch rod. Shaw says, when he started to cross the track, his foot was caught in between the tie and the switch rod, his foot going down about 8 inches and in such a way as to prevent him from extricating it before the train was upon him; and it is contended that if the track had been ballasted to a depth of only 5 inches between the ties which carried the switch rod, it would have been reasonably safe, and there would also have remained abundant space for the working of the switch rod.

One can readily understand that a hole between the rod and the tie 10 inches deep might be much more dangerous than a hole only 5 inches deep. In case the hole was 10 inches deep, it is evident that one's foot could easily get caught under the switch rod, while in case the ballast was brought up to the switch rod, thus leaving a hole only 5 inches deep, it would be more difficult to get the foot entangled under the rod. The fact that the switch was of standard make and pattern did not relieve the company from the duty of making the hole no deeper than was necessary. We conclude, therefore, that there was sufficient evidence of the unsafe condition of the roadbed at switch No. 4 to authorize the submission of the question of the company's negligence to the jury.

[8] 4. Appellant further insists that the verdict is flagrantly against the evidence, in that it shows that the accident did not occur at switch No. 4, as claimed by Shaw, but that it occurred about 35 feet south of switch No. 4, thereby indicating that Shaw was not injured by reason of his foot getting caught in the switch, as he claims, but from his own negligence in crossing the track in front of the train.

Brashears, the section foreman, testified that he visited the scene of the accident the next morning, and found evidence of blood and small pieces of flesh and clothing upon the rail about 30 feet south of switch No. 4; and King, the conductor, who was the first person to get to Shaw after the accident, says he found Shaw near the track, about 40 feet south of switch No. 4. Rockwell, the trainmaster, corroborates King, the conductor. Dr. Taylor, who attended Shaw, testified that either on the night of the accident, or the next day, Shaw said they were switching the train out of the way of another train; that they were in a hurry; that he was running along in front of the train, parallel with the track, to get to the switch and throw it, when he stumbled and fell on his hands and knees, and the steps of the coach hit him and switched his feet around under the train.

On the other hand, the appellee insists that he was hurt at the switch by getting his feet caught, as heretofore indicated, and in this he is corroborated by his son, James Shaw,

who testified that he found his father, immediately after the accident, lying a few feet from the switch. It is true that the son, James Shaw, at first testified that his father was lying nearer to the place where King says he found him; but upon re-examination James Shaw corrected that statement, by saying that he found his father nearer to the switch.

Under this contradictory proof, it was for the jury to pass upon the issue.

[7, 8] 5. Appellant further insists that the trial court erred in declining to submit to the jury its defense of assumed risk upon the part of the plaintiff. Upon that subject, appellant offered instruction O, which reads as follows:

"The court instructs you that the plaintiff cannot complain of or recover for any failure upon the part of the defendant to have lights in its switchyard. The plaintiff assumed the risk from such condition of the yard."

Under the rule in this jurisdiction, which does not permit a party to complain of a failure of the court to give instructions unless he offers an instruction upon the question, it might fairly be said that the appellant cannot now complain that the court failed to give an instruction upon assumed risk with reference to the condition of switch No. 4, which was the only question of negligence submitted to the jury.

An instruction, however, upon assumed risk, had no proper place in this case, because a servant does not assume the risk of accident and danger due to the failure of the master to exercise ordinary care in furnishing him with a reasonably safe place to do his work. A servant's assumption of the risks of his employment must be considered with reference to the employer's primary duty to furnish reasonably safe surroundings. *Broadway Coal Mining Co. v. Southard*, 144 Ky. 453, 139 S. W. 747. A servant does not assume risks that follow from the negligent acts of the master. *Geary v. McCreary*, 147 Ky. 254, 143 S. W. 1004; *Kentucky Refining Co. v. Schutz*, 148 Ky. 535, 147 S. W. 391; *O., N. O. & T. P. Ry. Co. v. Callahan*, 148 Ky. 682, 147 S. W. 398; *East Tenn. Telephone Co. v. Jeffries*, 153 Ky. 133, 154 S. W. 1112. The rule was stated in *Fluehart Collieries Co. v. Elam*, 151 Ky. 50, 151 S. W. 35, as follows:

"In accepting employment the appellee assumed the risk of such accidents and resulting injury as might happen to him in the ordinary and customary course of his employment, but he did not assume any risk from accident or injury caused by the failure of the coal company to exercise ordinary care to furnish him a reasonably safe place in which to work. The risk that the servant assumes does not embrace or include risks that are brought about by the failure of the master to perform his duty."

The negligent act of the company in failing to furnish the appellee a reasonably safe place to work being the basis of its liability, the court properly declined to submit to the jury the question of appellee's assumption of the risk attending that negligence.

[9, 10] 6. It is further objected that instruc-

tion No. 5, defining the measure of damages, erroneously permitted the assessment of double damages, because it not only authorized a finding of damages for time lost by Shaw, but also for the impairment of his power to earn money "since the accident," without qualifying this last element of recovery by directing that any allowance for the loss of power to earn money should begin when the time lost had ended. The instruction, however, is not as broad as the criticism would indicate. After directing the jury, in case it should find for the plaintiff, to find for his loss of time and for pain and suffering, if any, they were authorized to find "such further sum as you may believe from the evidence will reasonably compensate him for the impairment, if any, of his power to earn money."

It is true the instruction did not qualify this last element of recovery by expressly confining it to appellee's power to earn money in the future, yet we believe that is the meaning of the instruction when read as a whole, and that it could not have prejudiced appellant's rights. Furthermore, if the appellant had desired to have a more specific instruction, it should have asked the court to make it so; and, having failed to call the court's attention to the immaterial error, it will not now be permitted to complain. *Bluegrass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278; *McClintic Marshall Const. Co. v. Eckman*, 153 Ky. 708, 156 S. W. 382; *I. C. R. R. Co. v. Williams*, 163 Ky. 835, 174 S. W. 741; *N., C. & St. L. Ry. Co. v. Henry*, 168 Ky. 458, 182 S. W. 651.

[11] 7. Finally, we are asked to reconsider the former rulings of this court in which it was held not to be error for the trial court to instruct the jury, under the state practice, that nine or more of the jury could return a verdict. It is argued that in trials in the state court of cases brought under the federal Employers' Liability Act there must be a unanimous verdict, as required by the federal Constitution, and that Congress was without power to confer jurisdiction upon the state court to thus try a cause of action created by a federal statute; it not being a "court of competent jurisdiction," as defined by the federal act, because it permits the finding of a verdict by nine jurors. This question was considered and decided adversely to the contention of appellant in *C. & O. Ry. Co. v. Kelly's Adm'r*, 161 Ky. 655, 171 S. W. 185, in *L. & N. R. R. Co. v. Johnson's Adm'r*, 161 Ky. 824, 171 S. W. 847, and in *L. & N. R. R. Co. v. Stewart's Adm'r*, 163 Ky. 827, 174 S. W. 744. Upon a reconsideration of the question, we see no reason for departing from these decisions.

[12] 8. Rule 5 of this court (154 S. W. viii) reads in part as follows:

"(4) A full index of the entire record, whether it contains one volume or more, must be put at the beginning of the record. * * *

"(8) Records not conforming to this rule will be condemned and the clerk making out such record will be prohibited from collecting his full fees therefor; and the clerk of this court will, in taxing costs, tax only so much thereof as the court allows."

As this record of 206 pages is wholly without an index, it is condemned, and the clerk who made the record will be prohibited from collecting any fee therefor.

Judgment affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. BANKS.

(Court of Appeals of Kentucky. Feb. 18, 1916.)

1. DAMAGES ⇐132 — PERSONAL INJURIES — LOSS OF HANDS.

Damages of \$16,500 for the loss of both hands, awarded a stout, healthy young man earning from \$75 to \$85 a month at the time of his injury, were not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. ⇐132.]

2. APPEAL AND ERROR ⇐1096 — FORMER APPEAL—RES ADJUDICATA.

Matters brought to the attention of the court on former appeal, but for which judgment was not reversed, they being unnoticed in the opinion, must be considered on second appeal as *res adjudicata* and as having been decided adversely to the appellant on former appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1177, 4353-4357; Dec. Dig. ⇐1096.]

3. TRIAL ⇐256 — INSTRUCTION — REQUESTS.

In a personal injury case, where defendant did not request that the jury be directed that the allowance made plaintiff for impairment of his earning power should begin at the point of time where the allowance for loss of time ended, the giving of an instruction, permitting plaintiff to recover for diminished earning power without directing assessment to begin at the point where recovery for loss of time ended, was not prejudicial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. ⇐256.]

4. APPEAL AND ERROR ⇐1068 — HARMLESS ERROR—REMISSION OF DAMAGES.

Error in an instruction in a personal injury case as to the allowance to plaintiff for impairment of earning power in that it permitted the jury to award damages for such impairment during the initial period of the disability when damages for loss of time could likewise be awarded was cured by the remission of the entire sum which plaintiff could have possibly been awarded under the instruction for loss of time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ⇐1068.]

Appeal from Circuit Court, McCracken County.

Action by George Banks against the Nashville, Chattanooga & St. Louis Railway Company. From a judgment for plaintiff for \$16,500, defendant appeals. Affirmed.

Wheeler & Hughes, of Paducah, and Claude Waller, of Nashville, Tenn., for appellant. W. Mike Oliver, of Paducah, Samuel A. Anderson, of St. Paul, Minn., and Jos. R. Grogan, of Paducah, for appellee.

HURT, J. This is the second appeal to this court from a judgment of the McCracken circuit court, in favor of the appellee against the appellant. Upon the first trial of the case the appellee recovered a judgment against appellant for the sum of \$20,000. Upon appeal to this court the judgment was reversed and the case remanded for another trial. The opinion upon the former appeal may be found in 156 Ky. 609, 161 S. W. 554. The facts of the case are set out in the former opinion, and it will be unnecessary to more particularly state them.

Upon the second trial of the case in the circuit court the jury returned a verdict in favor of the appellee for the sum of \$16,500 in damages. The appellant's motion and grounds for a new trial being overruled, it has again appealed, and it now insists that the judgment ought to be reversed for the following reasons: First. The verdict is excessive. Second. The verdict is not sustained by sufficient evidence and is contrary to law. Third. The court erred to the prejudice of the appellant in giving instructions 1, 2, 3, 4, 5, and 6. Fourth. The court erred to the prejudice of appellant in admitting incompetent evidence. Fifth. The court was in error in proceeding with the trial of the case while a suit by the appellee against the appellant on account of the same matters in controversy in this suit, was pending in the federal court at Memphis, Tenn.

[1] The evidence upon the last trial is substantially the same as that given upon the first trial. The evidence shows that the appellee was a stout, healthy young man, and at the time earning from \$75 to \$85 per month, and the negligence of which he complained resulted in the loss of both his hands. One was taken off at the wrist, and the other arm was removed just below the elbow. These injuries necessarily incapacitate the appellee from doing any kind of labor or pursuing with profit any kind of employment, and rendered him unable to even take his meals. His injuries are necessarily permanent, and from the effects of which there can be no relief during life. This statement of the facts necessarily removed, without further comment, any objection to the verdict of the jury upon the ground that it was excessive or appeared to have been caused by any passion or prejudice on the part of the jury.

[2] As to the second and fifth grounds for reversal relied upon, they were relied upon upon the first appeal of this case, and while they were not adverted to in the opinion rendered, they were brought to the attention of the court upon that appeal. The judgment was not reversed on account of the alleged errors embraced in the second and fifth grounds for reversal mentioned, but were presented to the court upon the appeal, and must now be considered as *res adjudicata*, and as hav-

ing been decided adversely to the appellant upon the former appeal. The rule long since established in this court is, that where the first opinion does not contain any notice of errors relied on for reversal by the appellant, if these same errors appear upon the second appeal and are relied on for reversal they will be considered as having been decided adversely to the contention of the appellant upon the first appeal. *Dupoyster v. Ft. Jefferson Improvement Co.*, 121 Ky. 518, 89 S. W. 509, 28 Ky. Law Rep. 504; *Springfield v. Louisville Railway Co.*, 130 Ky. 468, 113 S. W. 513; *Wall's Ex'r v. Dimmitt*, 141 Ky. 715, 133 S. W. 768; *Stewart's Adm'r v. L. & N. R. Co.*, 136 Ky. 717, 125 S. W. 154; *Illinois Life Insurance Co. v. Wortham*, 119 S. W. 802; *U. S. Fidelity & Guaranty Co. v. Blackley, Hurst & Co.*, 85 S. W. 196, 27 Ky. Law Rep. 392; *Langhorn, Johnson & Co. v. Wiley*, 91 S. W. 255, 28 Ky. Law Rep. 1186; *Id.*, 115 S. W. 759.

We find no error on account of the admission of incompetent evidence upon the trial, and no error of such character is insisted upon by appellant or pointed out to the court.

Instructions 1 and 2, given by the court upon the last trial, are the same as instructions 1 and 2 given by the court upon the first trial, and are expressly approved in the opinion upon the former appeal.

[3] Instruction No. 3 given upon the last trial is the same instruction as that given upon the first trial, except upon the last trial it was modified as directed by this court in its former opinion, and while in one respect it does not use the same language as was directed by the former opinion in this case, it is substantially the same in meaning, and no prejudice could have resulted to appellant on account of it. The contention is now made that the instruction permitted the appellee to recover special damages on account of the time necessarily lost by him on account of his injuries, and that the instruction permitting him to recover on account of the injuries diminishing his power to earn money did not direct the jury to assess his recovery on account of the diminution of his power to earn money to begin at the point where his recovery for his loss of time ended. This court has held that in a case where special damages are sought for loss of time, and also damages for partial or permanent injury, which is, as the consequence, the impairment of the power to earn money for any length of time, the court, if requested, should direct the jury that any allowance made to the complainant for the impairment of his power to earn money should begin at the point of time where the allowance is made him for loss of time on account of the disability ends. *Illinois Central Ry. Co. v. Mayes*, 142 Ky. 382, 134 S. W. 436; *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278; *C. & O. Ry. Co. & Shaw*, 168

Ky. 537, 182 S. W. 653. In the case at bar the appellant made no request of the court that it should direct the jury that the allowance made appellee for the impairment of his power to earn money should begin at the point where the allowance made to him, if any, for loss of time ended, and for that reason the giving of the instruction, as the court below gave it, was not prejudicial.

[4] The amount of special damages for loss of time on account of his injuries was laid by the appellee at the sum of \$600 and if the jury found any sum for him on that account, it could not have been, under the instructions of the court, in excess of the sum of \$600; and while appellant's motion for a new trial was pending before the trial court, the appellee filed a remitter of the sum of \$600 from the amount of the verdict found for him, and the court thereupon rendered judgment in his favor for \$15,900, instead of \$16,500, in accordance with the verdict of the jury. So, if the instruction, in the form, in which it was given, if erroneous as to the items of damages, it was cured by the remission of the entire sum which appellant could be possibly awarded under the instruction for loss of time.

Instruction No. 4 defining contributory negligence and the duty of the jury in regard thereto, if it was of the opinion that the appellee was guilty of negligence, which contributed to the cause of his injuries, substantially embraced the law upon that subject. While this instruction is not in the same language of the one approved by this court (C., N. O. & T. P. Ry. Co. v. Goode, 163 Ky. 60, 173 S. W. 329), it is the same instruction which was given by the court in the case of Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, after being modified in accordance with the opinion of the Supreme Court of the United States in the case supra, and the case at bar is one prosecuted under the provisions of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]).

It is insisted that the court below was in error because it failed to define the duties of the appellee in regard to the care which he should take of himself in the execution of his duties as a brakeman, but we are of the opinion that instructions 5 and 6 given by the court were in substantial compliance with the law of the case, as defined by this court upon the former appeal. Instruction 5 is in the exact language as directed by the former opinion in this case.

There being no error found to the prejudice of the substantial rights of the appellant, it is therefore ordered that the judgment appealed from be affirmed.

RAY v. WOODRUFF.

(Court of Appeals of Kentucky. Feb. 17, 1916.)

1. COUNTIES ⇐162—FISCAL COURTS—JURISDICTION.

The fiscal court of a county, while a court of record, is one of limited jurisdiction, and can only make appropriations authorized by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 221, 222; Dec. Dig. ⇐162.]

2. COUNTIES ⇐196—FISCAL COURTS—APPROPRIATION.

If the fiscal court pays a claim of an officer or other person without authority, or appropriates money without authority, such sum may be recovered in a suit against the person or officer receiving it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. ⇐196.]

3. COUNTIES ⇐77—SERVICES—COMPENSATION.

Under the direct provisions of Ky. St. § 1749, officers of the county are forbidden to receive greater fees than allowed by law, or any fee when none has been fixed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 104; Dec. Dig. ⇐77.]

4. EVIDENCE ⇐450—PAROL EVIDENCE—OFFICIAL PROCEEDINGS.

Ky. St. § 4051a, declares that each county clerk shall certify to the county assessor a statement of all liens for money due shown by conveyances in his office, and that for his services the clerk shall be paid a reasonable compensation by the fiscal court of the county. An order of the fiscal court making payment to the county clerk recited that the payments were for "extra clerk and note clerk." Held that, while the order should have explained the purpose of the appropriation, yet, as the statute authorized such appropriation, parol evidence might be received to show that the payments were made for the services contemplated by the statute; such evidence not contradicting the order, but merely explaining it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. ⇐450.]

5. COUNTIES ⇐75—FISCAL COURT—ORDERS.

While Ky. St. § 1540, declares that the cost of all elections held in any county shall be allowed by the fiscal court, a payment to the county clerk for incidentals as shown by the record of the fiscal court may be recovered, though it was for expenses of an election; the order conveying no idea of the purpose for which the appropriation was made.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. ⇐75.]

6. COUNTIES ⇐74—COUNTY CLERKS—EXPENSES.

Though the county clerk furnished the board of supervisors stamps to mail notices to taxpayers, the fiscal court cannot allow the claim; there being no authority in law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 104-113; Dec. Dig. ⇐74.]

7. COUNTIES ⇐74—COUNTY CLERKS—COMPENSATION.

As Ky. St. § 1835, declares that the county clerk shall act as clerk of the fiscal court and receive compensation, an award of \$200 per year to the county clerk, where he and his deputy performed some of the services as clerk of the fiscal court, will be upheld, notwithstanding an

auditor of the accounts of the fiscal court performed most of such services.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 104-113; Dec. Dig. ¶74.]

8. COUNTIES ¶75—COUNTY CLERK—COMPENSATION—ALLOWANCE—COLLATERAL ATTACK.

As the fiscal court has jurisdiction to allow the county clerk compensation for acting as clerk of such court, an order allowing compensation cannot be attacked in a collateral proceeding, whereby it was sought to recover from the clerk such sums so paid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. ¶75.]

9. COUNTIES ¶75—COUNTY CLERK—ACTIONS.

Petition averring that an appropriation made by the fiscal court to the county clerk for work and expenses incidental to collecting taxes was unauthorized, and that the clerk had no right to receive or retain the money, states a good cause of action, notwithstanding it failed to aver that the clerk had not paid such sum into the state treasury as required by Ky. St. § 1761; for, while an officer is presumed to do his duty, had that been done, it is safe to assume that the clerk would have made such defense.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. ¶75.]

10. COUNTIES ¶74—COUNTY CLERK—COMPENSATION FOR DEPUTY.

As Ky. St. § 331e, subsec. 2, making the county clerk clerk of the juvenile session of the county court, and authorizing the appointment of a deputy, authorizes the appointment of only one deputy, the fiscal court is without authority to allow compensation for another deputy, where such deputy is necessary.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 104-113; Dec. Dig. ¶74.]

11. COUNTIES ¶75—COUNTY CLERKS—ACTIONS.

Ky. St. § 1761, declares that county clerks shall on the 1st day of each month send to the auditor of public accounts a statement showing the amount of money received for the previous month as fees or compensation, and shall with such statement send to the auditor the amount received. Sections 1762 and 1763 make provision for the number of deputies and their salaries; while section 1764 declares that the salary of such officer and the expenses of his office shall be paid monthly by the treasurer of the state upon the warrant of the auditor, made payable to the officer. The section also limits the amount that may be paid for salaries and expenses to 75 per cent. of the amount paid in. The county clerk received sums illegally appropriated by the fiscal court and transmitted them to the state treasurer. *Held* that, while ordinarily the payment of moneys by an officer to his superior discharges him, where it was received under color of law, such rule does not apply as to 75 per cent. of the moneys paid over by the county clerk; for, as such sums are used in payment of his salary and the expenses of his office, the result is the same as if they had never been paid in.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. ¶75.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by W. F. Woodruff against P. S. Ray. From a judgment in part for plaintiff, defendant appeals, and plaintiff cross-appeals. Affirmed in part, and in part reversed on both appeals.

W. A. Perry, of Louisville, for appellant. Burwell K. Marshall, of Louisville, for appellee.

CARROLL, J. This is a suit by W. F. Woodruff, for himself and other taxpayers of Jefferson county, to recover from the appellant Ray, county clerk of Jefferson county, \$1,415.35 alleged to have been wrongfully paid him as county clerk by the fiscal court of the county. The items constituting this total sum are made up of: (1) \$490 paid in February, March, April, May, and June, 1910, for "extra clerk and note clerk"; (2) \$19.15 for incidentals; (3) \$123 for postage stamps furnished the county board of tax supervisors; (4) \$400 for attending meetings and keeping a record of the proceedings of the fiscal court for two years at \$200 per year; (5) \$333.20 for work and expenses incidental to the collection of delinquent taxes growing out of the increase in valuation made by the state board of equalization on property in the county for the year 1910; (6) \$50 paid for a deputy assigned to the juvenile court.

After the case had been prepared for hearing, there was a judgment against Ray for \$123 on account of stamps furnished the board of tax supervisors; for \$400 allowed him for attending meetings of and keeping a record of the proceedings of the fiscal court; and for \$333.20 paid him for work and expenses incidental to the collection of the delinquent taxes. The recovery of \$490 for "extra clerk and note clerk" for February, March, April, May, and June, 1910, for \$19.15 for "incidentals," and \$50 paid for a deputy assigned to the juvenile court was denied, and the petition as to these items dismissed. From the judgment against him, Ray prosecuted this appeal, and from the judgment refusing to charge Ray with the items mentioned, Woodruff appeals.

[1-3] There is no difficulty about the law of this case. It has been settled by repeated decisions of this court that the fiscal court is a court of record as well as a court of limited jurisdiction, and can only appropriate money for purposes that it is authorized by law to make appropriations for. It has further been settled time and again that, if the fiscal court pays the claim of an officer or other person without authority of law, or appropriates money without authority, the amount so paid may be recovered in a suit against the person or officer receiving it. *Jefferson County v. Young*, 120 Ky. 456, 86 S. W. 985, 27 Ky. Law Rep. 849; *Fleming County Fiscal Court v. Howe*, County Judge, 121 Ky. 478, 89 S. W. 225, 28 Ky. Law Rep. 458; *Mitchell v. Henry County*, 124 Ky. 833, 100 S. W. 220; *McDonald v. Franklin County Court*, 125 Ky. 205, 100 S. W. 861, 30 Ky. Law Rep. 1245; *Fiscal Court v. Pfanz*, 127 Ky. 8, 104 S. W. 1002, 31 Ky. Law Rep. 1242; *Jefferson County v. Peter*, 127 Ky.

453, 105 S. W. 887; *Frizzell v. Holmes*, 131 Ky. 373, 115 S. W. 246; *Thomas v. O'Brien*, 138 Ky. 770, 129 S. W. 103; *Hollis v. Weisinger*, County Judge, 142 Ky. 129, 134 S. W. 176; *Elliott v. Com.*, 144 Ky. 335, 138 S. W. 300; *Flowers v. Logan County*, 148 Ky. 822, 147 S. W. 918; *Woodruff v. Shea*, 152 Ky. 657, 153 S. W. 1005; *Hickman County v. Jackson*, 153 Ky. 551, 156 S. W. 391. Many other cases in addition to these might be cited, but the ones referred to are more than sufficient to illustrate the uniform ruling of this court upon every phase of these questions that has come up.

It is also provided in section 1749 of the Statutes that:

"No officer shall demand or receive for his services any other or greater fee than is allowed by law, or any fee for services rendered when the law has not fixed on a compensation therefor; nor any fee for services not actually rendered."

Illustrative cases under this statute are *Wortham v. Grayson County Court*, 13 Bush, 53; *Morgantown Bank v. Johnson*, 108 Ky. 507, 56 S. W. 825, 22 Ky. Law Rep. 210; *Owen County v. Walker*, 141 Ky. 516, 133 S. W. 236; *Elliott v. Com.*, 144 Ky. 335, 138 S. W. 300.

The law of the case being thus so well settled, we will now take up the items for which a recovery against Ray was sought, and, treating each of them separately, determine the correctness of the ruling of the lower court.

[4] The first item is \$490 paid by the fiscal court to Ray in February, March, April, May, and June, 1910, or \$100 a month for four of the months, and \$90 for the other one, on account of "extra clerk and note clerk." These amounts were paid to Ray by the fiscal court as compensation for work done by his office under section 4051a of the Statutes. This section provides, in substance, that each county clerk shall certify to the county assessor a statement of all liens for money due shown by conveyances in his office, and further provides that:

"For his services in making such statements, the clerk shall be paid a reasonable compensation by the fiscal court of the respective county."

It is therefore clear that there was direct statutory authority for the payment of this sum to the county clerk, if it was paid for services rendered under this section of the Statutes.

It appears that the order book of the fiscal court shows that these payments were made for "note clerk and extra clerk," and counsel for Woodruff insist that, if the allowance was for services rendered under section 4051a, the order making the allowance should state specifically that it was for services performed under this statute, and that, inasmuch as the order does not show this, it was inadmissible for Ray to prove by the clerk of the fiscal court what this allowance was for. The order book of the fiscal court should have shown specifically what this allowance was made for.

The words "extra clerk and note clerk," nothing else being added, do not explain fully or indeed at all what service was performed by this note clerk or this extra clerk; but the evidence shows beyond question that this service was rendered under section 4051a, and, in view of the fact that the entry on the records of the fiscal court fails to show what the charge was for or what service the extra clerk or the note clerk performed, we think that, as the appropriation was authorized, it was competent to supply this omission by the evidence of the clerk of the fiscal court. This evidence does not contradict the record. It merely explains an ambiguity in it. It does not take the place of the record or supply by parol the record, but merely makes plain what was intended by the brief record or minute made. *Kozee v. Com.*, 139 Ky. 66, 129 S. W. 327.

In *Grayson County v. Rogers*, 122 S. W. 866, the court very properly held that the fiscal court must speak by its records, and that its records cannot be contradicted by parol evidence or an entire omission made in the record be supplied by parol evidence. To the same effect is *Owen County v. Walker*, 141 Ky. 516, 133 S. W. 236. And in *Flowers v. Logan*, 148 Ky. 822, 147 S. W. 918, it was said that, where money is appropriated, the order making the appropriation must specify not only the amount thereof, but the purpose for which it is to be used.

The order of the fiscal court here in question did specify the amount appropriated and the purpose for which it was appropriated, and it had power to appropriate money for clerks. The only defect is that it did not set out as fully as it should have done the purpose of the appropriation; and this specific purpose we think it was competent, under the facts stated, to supply by parol evidence. If, for example, the fiscal court, without specifying the road, should make an appropriation for roadwork which it was authorized to make, we think it might be shown by parol evidence on what road the appropriation was used. And so in this case we think it was competent to show that the service performed by this note clerk or extra clerk was in the performance of duties authorized by the statute; and so the judgment of the lower court upon this item was correct.

[6] The next item allowed by the fiscal court is \$19.15 for "incidentals" as shown by the records of the fiscal court. It is shown, but not with clearness or certainty, by evidence for Ray, that this charge was for expenses incurred in delivering ballots, cards of instructions to voters, ink, and stencils for use at the regular election held in the county in 1910. Section 1540 of the Statutes provides that the cost of all elections held in any county shall be allowed by the fiscal court of the county. And, when the clerk presents to the fiscal court an itemized account showing the expense he has incurred in an election, it is proper that an allowance to

him should be made by the fiscal court for the expense actually incurred. And it may be conceded that this \$19.15 was expended by Ray in the manner stated by him in connection with the election. But the record made by the fiscal court is too loose and indefinite to authorize the appropriation of this sum. The word "incidentals" does not convey any idea whatever of the purpose for which this appropriation was made, and the court has no jurisdiction to appropriate money for "incidentals." It would be the same as if the word "incidentals" had been omitted, and the records merely showed an appropriation of \$19.15 without any explanation of the purpose of the appropriation; and under the rule laid down in *Flowers v. Logan*, supra, as well as in other cases, this would not be sufficient to authorize the payment of the money so appropriated. We therefore think the lower court erred in failing to charge Ray with this sum. Upon satisfactory proof of the expenditure of this sum by Ray in connection with the election the fiscal court may yet allow to him this amount.

[6] The next item is \$123 for postage stamps furnished the county board of tax supervisors. The records of the fiscal court show that this appropriation was made to compensate Ray for postage stamps furnished by him to the board of tax supervisors in Jefferson county in the years 1911 and 1912. It appears that it has been for many years the practice of the board of tax supervisors of Jefferson county to write a great many letters to taxpayers in reference to their assessment list or respecting their failure to return any assessment, and in correspondence of this nature the board of tax supervisors secured from Ray as county clerk the stamps. This seems to be a meritorious claim, but we do not find any statutory authority for its allowance, and therefore approve the ruling of the lower court requiring Ray to refund this appropriation.

[7] The next item is the appropriation of \$400 for clerical assistance to the fiscal court for two years at the rate of \$200 per year. It appears that the fiscal court by an order made on June 7, 1910, allowed the county clerk \$200 per annum for attending the meetings of the court and taking the minutes of its business, and that the appropriation of this \$400 was to compensate Ray for his services from June 7, 1910, to June 7, 1912. It is provided in section 1835 of the Statutes that:

"The clerk of the county court of each county shall, by virtue of his office, be clerk of the fiscal court. He shall attend its sessions and keep a full and complete record of all its proceedings, with a proper index. For his services the fiscal court shall annually make him a reasonable allowance, to be paid out of the county levy."

And it is conceded by counsel for Woodruff that, if Ray, or one of his deputies, had attended the meetings of the fiscal court and kept the minutes, he would have been entitled

to the compensation by the fiscal court. So that, as stated by counsel, it becomes merely a question of fact as to whether Ray did or did not perform the services for which this compensation was allowed.

It seems that on June 7, 1910, the fiscal court, as a part of the order allowing the clerk \$200 a year, provided that:

"Commencing June 1, 1910, \$350 per month be allowed an auditor for keeping the accounts of the fiscal court, the accounts of the contractors on roadwork, and auditing all claims, etc., against the county."

Under this order one John H. Shea was employed as auditor, and continued as such until August, 1912; and it appears to be the contention of counsel for Woodruff that under this employment, which was held to be unauthorized in *Woodruff v. Shea*, 152 Ky. 657, 153 S. W. 1005, Shea acted as clerk of the fiscal court and performed all the services that the statute provided should be rendered by the county clerk, and for this reason the services of the county clerk were not needed, and he did not render any service during the time charged for.

Upon the question as to whether Ray performed any service there is a sharp issue. Gertrude O'Hara, who was a clerk in Ray's office, testified that after each meeting of the fiscal court she spent two or three days each week writing up the minutes of the court and making copies of different reports for magistrates; that, although a deputy in the office of Ray, she did this work under the immediate direction of Shea, who, it appears, kept the minutes of the meetings of the fiscal court, which were written up after each adjournment by her. The order appointing Shea does not show that it was a part of his duties to record all of the proceedings of the fiscal court as required by law, and, as this duty was imposed on the county clerk, and appears to have been at least partially performed by him, we think the allowance of \$200 a year was reasonable for the service rendered by his deputy, Miss O'Hara, and therefore the court erred in charging Ray with this item.

[8] But, aside from this, the fiscal court had statutory authority to appropriate the money for the purpose named, and, as the appropriation was within its power, and the order clearly shows the object of the appropriation, the discretion of the court in making it cannot be questioned in this collateral proceeding. Where the fiscal court acts within its discretion and within its authority, and the order making the appropriation shows that it was one authorized by law, its acts, like those of any other court, are conclusive, unless assailed in a direct proceeding. The fiscal court is a court of record, and, when it makes an authorized appropriation specifying the purpose, although the appropriation may seem too large, the person receiving it cannot, in a proceeding against him, be required to refund it. The remedy, if any,

to prevent the expenditure of the money under the appropriation, lies in a suit against the fiscal court to restrain it from issuing an order for the payment of the appropriation.

[9] The next item involved is an appropriation of \$333.20 allowed to Ray for work and expenses incidental to the collection of delinquent taxes. The averments of the petition in respect to this matter are as follows:

"That, contrary to the statute in such cases made and provided, the fiscal court of Jefferson county allowed and paid to the defendant, Presley S. Ray on the 10th day of May, 1911, \$533.20, which they allowed and paid to him as compensation for additional work and expenses incidental to the collection of the increased state taxes for the year 1910 on the basis of the increased 12 per cent. valuation.

"Plaintiff states that there is no warrant of law for the payment of the said \$333.20 paid as aforesaid to the defendant, and that the fiscal court of Jefferson county was without authority of law to pay said sum to the defendant, and that the defendant had no right to receive same, and holds the said money of the county contrary to law and is indebted to the county in the said sum of \$333.20 which was wrongfully allowed and paid to him by the fiscal court of Jefferson county."

To this paragraph a demurrer was filed and overruled, and, Ray declining to answer, judgment went against him for \$333.20. In asking a reversal on this item counsel for Ray insist that the paragraph quoted did not state a cause of action, because it is not shown in the petition that he failed to pay this money over to the auditor of public accounts, as required by section 1761 of the Statutes. It is further said that an officer is presumed to have done his duty, and, if he did perform his duty and pay this money into the state treasury as required by statute before suit was brought, he could not be required to refund the claim, although the appropriation may not have been authorized by law. We think the paragraph stated a good cause of action, as there does not appear to be any statute authorizing the fiscal court to appropriate money for the service for which this appropriation was made, and so it was incumbent upon Ray, if he desired to avoid the return of this money, to set up the reasons why he should not be required to refund it. It is further fair to assume that this money was not turned into the state treasury under section 1761, or else Ray would have made this defense as he did in other paragraphs of his answer respecting other claims. So that the judgment against him on account of this item is correct.

[10] The next and last appropriation assailed is an allowance of \$50. For the month of July, 1912, the fiscal court appropriated \$50 for the purpose of paying the compensation of an extra clerk assigned by Ray to the juvenile court. The law on this subject is contained in subsection 2 of section 331e of the Statutes, reading:

"The clerk of the county court of each county shall, by virtue of his office, be clerk of the juvenile session of the county court, and he may designate a deputy to act for him. He shall

attend all sessions of said court and shall keep the books provided for in this section, and a full and complete record of all its proceedings, with a proper index. For his services the fiscal court shall annually make him a reasonable allowance, to be paid out of the county levy."

It will be noticed that this statute authorizes the clerk to designate a deputy to act as clerk of the juvenile court, and it seems that the fiscal court appropriated \$100 a month for the payment of one deputy for this court. But, it appearing that the business of this court required the services of two deputies, this extra deputy was assigned to the court, and it is the compensation of \$50 appropriated for his services that is drawn in question.

The business of the court may have increased to such an extent as to render necessary the employment and compensation of two deputies, but, as the statute contemplates that only one deputy shall be assigned to this work, the fiscal court was without authority to appropriate money for the payment of two deputies; and the fact that two deputies were necessary cannot be allowed to evade the effect of this statute. It was said in *Woodruff v. Shea*, 152 Ky. 657, 153 S. W. 1005, and is very pertinent here:

"It is undoubtedly true that the business of the county could be conducted with more system and with perhaps greater accuracy if the accounts were regularly audited and properly kept by an experienced accountant such as appellee is known to be. But the desirability and necessity for the creation of such an office are matters which must be addressed to the legislative department of the government, and, until it acts and authorizes the appointment, the court is without power to make it. If it should be held that the court has power, in what it conceives to be the proper discharge of its duties and the safeguarding of the public interest, to appoint one auditor and one clerk, it is likewise in its discretion to appoint several, and the safeguard which is thrown around the people in the expenditure of the moneys collected would be entirely removed, and we would have substituted for the mandatory provision of the statute the discretionary power of the fiscal court, which would be, of course, as varied as courts are numerous, a condition which must at once be recognized as unsafe as the argument that such right now exists in the court is unsound."

We are therefore of the opinion that the lower court erred in refusing to require Ray to refund this \$50 appropriation.

[11] It is provided in section 1761 of the Statutes that county clerks in certain counties, including Jefferson, shall—

"on the first day of each month, severally, send to the auditor of public accounts a statement, subscribed and sworn to by each of them, showing the amount of money received or collected by or for each of them the preceding month, as fees or compensation for official duties, and shall, with such statement, send to the auditor the amount so collected or received."

This section, as well as sections 1762 and 1763, make provision for the number of deputies that may be appointed and their salaries; and section 1764 provides that:

"The salary of each officer, his deputies and expenses of office, shall be paid monthly by the treasurer of the state upon the warrant of the auditor, made payable to the officer."

This section further limits the amount that may be paid for salaries and expenses to 75 per cent. of the amount paid in.

For defense to this suit Ray set up in his answer, and it is conceded to be true, that in accordance with this statute he paid to the state auditor the \$490 appropriated by the fiscal court for "extra clerk and note clerk," the \$19.15 for "incidentals," the \$400 for attending meetings and keeping a record of the proceedings of the fiscal court, and the \$50 appropriated for the extra deputy in the juvenile court. On these facts the argument is made that, as this suit to require Ray to return this money was not brought until after he had paid it to the state auditor to go into the state treasury, he cannot be required to refund it. It is further said that this money was paid to him under at least color of authority, and, believing in good faith that it was a part of the compensation to which he was entitled, it was turned over by him to the state auditor to be placed in the state treasury, and that in cases like this the officer can only be required to refund the money when it is in his custody or possession when the suit to refund is brought, or when demand is made on him to refund or notice is given to him not to pay it over to the state. In other words, the contention is this: The statute required Ray as clerk to pay over to the state auditor for the benefit of the state treasury each month all fees and compensation received by him during the preceding month in payment for official duties, and that after he has so paid this money in compliance with the statute, without notice that he would be called on to refund it, he cannot, in a suit like this, be required to refund it, although he might have been so required if the payment to the auditor was made after he had notice that his right to the compensation would be called in question.

In *Mechem on Public Officers*, § 694, it is said:

"Where money illegally collected by color of law still remains in the hands of the collector, it may be recovered from him by the party paying it, but, if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears that he acted under an authority which was void."

And this text is supported by *Crutchfield v. Wood*, 16 Ala. 702; *State v. Oden*, 101 Tenn. 669, 49 S. W. 750; *First National Bank v. Christian County*, 106 S. W. 881, 32 Ky.

Law Rep. 634; *Dotson v. Fitzpatrick*, 66 S. W. 403, 23 Ky. *Law Rep.* 2042.

But the principle announced in these authorities has little effect on the questions arising in this case, because, under section 1764 of the Statutes, 75 per cent. of the money paid by Ray to the state auditor was at once returned to Ray by the state auditor for the purpose of defraying the salaries and expenses of his office. So that, when this suit was brought, 75 per cent. of the money sought to be recovered was in the possession of Ray.

The rule laid down in *Mechem* and the authorities cited applies to a state of case in which the officer has parted finally with the funds sought to be recovered. For example, if it were sought to recover from Ray money that he had paid to the state auditor or into the state treasury, no part of which was to be returned to him, he could not be required to refund it in an action like this, if, under the direction of the statute, he had parted with the fund before notice that he would be called on to refund it. It can easily be seen that in such a state of case it would be unjust to the officer to require him to refund money which, under the direction of the statute, he had paid without notice that his collection of it was unlawful.

But in the case we have the situation is exactly the same as if 75 per cent. of this money had not been paid to the auditor and was yet in the possession of Ray. To avoid any confusion it should further be said that this principle affects only the item of \$19.15 for "incidentals" and that of \$50 for juvenile court clerk, as these are the only items that should be charged against Ray among those paid to the state auditor by him, and he should be required to refund only 75 per cent. of these two items.

The result of our conclusions is that Ray should be required to refund 75 per cent. of \$19.15 appropriated for "incidentals," and 75 per cent. of \$50 paid for his deputy assigned to the juvenile court, and the whole of \$123 appropriated for postage stamps for the board of tax supervisors, and \$333.20 for work and expenses incurred in the collection of delinquent taxes, and that as to the other items sought to be recovered the petition should be dismissed.

Wherefore the judgment on the original as well as cross appeal is reversed in part, and affirmed in part. Each party will pay one-half the cost of the appeal.

BULLARD et al. v. NORTON et al.
(No. 2434.)

(Supreme Court of Texas. Feb. 10, 1916.)

1. MECHANICS' LIENS §315—CONTRACTOR'S BOND—CONSTRUCTION—SUBCONTRACTOR AS BENEFICIARY—LIEN—FAILURE TO GIVE NOTICE.

Where the bond of a contractor for the building of a church provided that the bond was made for the use and benefit of all persons who might become entitled to liens under the contract and might be sued upon by them as if executed to them, and the condition of the bond was that the contractor should duly and promptly pay all indebtedness that might be incurred by him in carrying out the contract and should complete the same free of all mechanics' liens, and there was a provision of the contract that a percentage of the contract price should be held by the owners for the purpose of securing faithful performance and to be applied to the liquidation of damages under the contract, and that a release from liens or any rights of liens should be furnished by bond, a subcontractor furnishing and installing plumbing, who failed to give the statutory notice to the builders, whereby he failed to fix a lien against the property, held entitled to recover against the sureties on the bond, since under the language of such bond a person having a right to have a lien became a beneficiary with the legal right to depend on the bond to secure the payment of his debt, whether he actually fixed the lien or not.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658; Dec. Dig. § 315.]

2. PRINCIPAL AND SURETY §101—CONTRACTOR'S BOND—CHANGE OF CONTRACT—DISCHARGE OF SURETY.

Where the contract secured by such bond was changed by the parties by the church paying to the contractor on his importunity the 20 per cent. which was to be retained for 30 days for the faithful completion of the work, such subcontractor could not recover against the sureties, though he was within the protection of such bond as a beneficiary, since sureties are bound only by the precise terms of the contract whose performance they secure and any material alteration in the terms thereof, whether injurious or favorable to them, discharges the sureties.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 169-180; Dec. Dig. § 101.]

3. PRINCIPAL AND SURETY §129—CONTRACTOR'S BOND—CHANGE OF CONTRACT—LACHES.

That such sureties did not make any inquiries concerning the manner in which the contract was being carried out, and required no statement showing how accounts stood between the principals, was immaterial, since they had the right to rely upon the fact that the contract would be carried out in good faith, and were not obligated to exercise vigilance.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 366-372; Dec. Dig. § 129.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by E. L. Norton against E. S. Boze, as principal contractor, George P. Bullard, W. A. Crow, R. C. Johnston, J. W. Harrison, and J. L. Gammon, as sureties on the contractor's bond, and the First Baptist Church at Abilene, Tex., as builder. Judgment for plaintiff against all the defendants, with

judgment over in favor of the church against Boze and the sureties. The sureties alone appealed to the Court of Civil Appeals for the Second District, where the judgment was affirmed, and the sureties bring error. Judgment of the Court of Civil Appeals and of the trial court reversed as to the sureties.

Sayles & Sayles, of Abilene, and J. L. Gammon and G. C. Groce, both of Waxahachie, for plaintiffs in error. Ben L. Cox and Kirby & Davidson, all of Abilene, for defendants in error.

YANTIS, J. E. S. Boze was the original contractor for the construction of the First Baptist Church at Abilene, Tex., with whose trustees the contract was made. E. L. Norton, defendant in error herein, was a subcontractor under Boze, whose contract with the latter obligated him to furnish all labor and material in the installation of the heating and plumbing in such building according to the plans and specifications thereof, and for which Boze agreed to pay him the sum of \$2,500. Norton fully performed his contract, which was with Boze alone, and properly installed the heating and plumbing in said church building about December 1, 1910. Norton claimed that Boze, the contractor, failed and refused to pay him a balance of \$900 under said contract. He filed this suit in the district court of Taylor county to recover said \$900. He joined as defendants the sureties on said contractor's bond, Geo. P. Bullard, W. A. Crow, R. C. Johnston, J. W. Harrison, and J. L. Gammon, plaintiffs in error herein, against whom he also prayed for judgment. He alleged in said suit that he had a materialman's lien and mechanic's lien upon the church building and the land upon which it is situated, and prayed for foreclosure of his said lien.

The subcontractor, Norton, alleged that the said sureties for Boze, the original contractor, executed with Boze, and delivered to the defendant church their bond to secure the faithful performance of the contract which had been made between the church and Boze; that said bond contained a provision that it was made for the use and benefit of all persons who may become entitled to liens under said contract between Boze and the church, according to the provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person.

Trial was had before the court without a jury, and a judgment was rendered in favor of Norton, defendant in error, who was plaintiff in the court below, against all of the other defendants for the sum of \$900, with interest thereon from January 3, 1911, at the rate of 6 per cent. per annum, together with all costs of suit. The judgment further provided that in addition to said amount the plaintiff, Norton, should recover from the

defendants Boze and his bondsmen, Bullard, Crow, Johnston, Harrison, and Gammon, the additional sum of \$150 as attorney's fees. The contract provided for attorney's fees if incurred in enforcing the collection of indebtedness due by said Boze. The judgment of the court further provided that the First Baptist Church of Abilene, Tex., recover over and against the defendants Boze and his sureties, the plaintiffs in error, the sum of \$900, together with interest thereon at 6 per cent. per annum from January 3, 1911, and all costs of suit. The court further rendered judgment foreclosing in favor of plaintiff, Norton, the materialman's lien and mechanic's lien upon the premises of said church.

The plaintiffs in error Geo. P. Bullard, W. A. Crow, R. C. Johnston, J. W. Harrison, and J. L. Gammon, appealed from said judgment to the honorable Court of Civil Appeals for the Second District, where the judgment of the district court was affirmed without written opinion. The defendants Boze and First Baptist Church of Abilene did not appeal from the judgment of the district court. The plaintiffs in error presented their petition for writ of error, which was by this court granted on May 10, 1912.

[1] The main questions for decision arise out of the provisions of the contractor's bond and the alleged breach of the contract itself between Boze, the contractor, and the First Baptist Church, of Abilene, Tex.

The bond was given to secure the faithful performance of the contract between Boze and the church. The plaintiffs in error were sureties for Boze on said bond. It is as follows:

"Know all men by these presents: That I, E. S. Boze, and the following signers, of the city of Waxahachie, county of Ellis, state of Texas, are held and firmly bound unto trustees of First Baptist Church of Abilene, county and state, as well as to all persons who may become entitled to liens under the contract hereinbefore mentioned in the sum of ten thousand six hundred eighty-seven and ⁵⁰/₁₀₀ dollars, lawful money of the United States of America, to be paid to the said trustees of the First Baptist Church of Abilene, and to said parties who may be entitled to liens, their executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, one and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

"Sealed with our seal; dated this 20th day of October, 1909.

"The condition of this obligation is such that if the above bounden E. S. Boze, his executors, administrators or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in above-mentioned contract, entered into by and between the said E. S. Boze, of Waxahachie, Texas, and the said trustees of the First Baptist Church of Abilene, dated on the 20th day of October, 1909, for the construction of the work or works on the lot mentioned in the foregoing contract, and shall and duly and promptly pay and discharge all indebtedness that may be incurred by the said contractor in carrying out the said contract, and complete the same free of all mechanic's liens and shall truly keep and perform the covenants, conditions and agreements in said contract and in

the within instrument contained, on his part to be kept and performed, at the time and in the manner and form therein specified, as well as all costs, including attorney's fees, in enforcing the payment and collection of any and all indebtedness incurred by said E. S. Boze, in carrying out the said contract, then the above obligation shall be void; else to remain in full force and virtue.

"The bond is made for the use and benefit of all persons who may become entitled to liens under the said contract, according to the provisions of law in such cases made and provided, and may be sued upon by them in proper person.

"In testimony whereof, witness the hands and seals of the said E. S. Boze, and said bondsmen hereto affixed, the day and year above written."

It will be observed that Norton, the defendant in error, is not a party to said bond. Neither was he a party to the original contract between Boze and the church. The theory of Norton's suit was that he was a beneficiary under said bond, with the right to sue thereon. He was a subcontractor under Boze, employed by Boze to install the heating and plumbing in the church building, and was to be paid by Boze \$2,500. The latter having failed to pay him all of the \$2,500, he seeks recovery from the sureties for Boze the balance due, relying upon that provision in the bond which provides as follows:

"This bond is made for the use and benefit of all persons who may become entitled to liens under the said contract according to the provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person."

The undisputed evidence shows, and there is no contention to the contrary, that Norton did not serve the First Baptist Church with written notice of his claim against Boze, as required by statute. In default of such written notice he is not entitled to enforce a lien against the First Baptist Church. *Berry v. McAdams*, 93 Tex. 435, 55 S. W. 1112; *Johnson v. Amarillo Improvement Co.*, 88 Tex. 511, 31 S. W. 503; *Horan v. Frank*, 51 Tex. 404; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500. But it is contended by him that the provision of said bond last quoted authorizes a recovery in his favor against the plaintiffs in error as sureties on said bond, because he had become entitled to fix a lien on said building whether or not he complied with the statute referred to, which requires written notice to be given. It was his contention that article 16, section 87, of the Constitution created a lien in his favor independent of the provisions of the statute referred to. Said constitutional provision is as follows:

"Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

The contention is that this constitutional provision created a lien against the church property to which the appellee became entitled, whether or not he gave the written notice to the church required by statute.

On the other hand it is contended by the plaintiffs in error that the constitutional lien did not attach and the appellee did not actually become entitled to the lien because he did not give written notice to the church in compliance with the statute; that it was necessary, in order to bring him within the beneficial provisions of said bond, to actually fix said lien, and that this could only be done by giving said written notice; that his failure to do so left him without a lien, and that, therefore, he did not become entitled to a lien, and hence could not recover.

The particular provision of said bond last quoted, disconnected from the other provisions of the bond, and disconnected from the provisions of the contract, whose faithful performance the bond was given to secure, is somewhat ambiguous in meaning. It is not entirely clear from that provision alone what the intention of the parties to the contract was. Standing alone it is probably subject to either construction contended for by the respective parties to the suit. But the entire bond should be considered in determining the intent of the parties, for by knowing the intent of the parties the apparent ambiguity disappears. It will be observed that preceding the last-quoted paragraph of said bond, it is provided that the condition of the obligation is such that if Boze shall perform the covenants, conditions, and agreements in the contract (meaning the contract between Boze and the Baptist Church) for the construction of the building, "and shall and duly and promptly pay and discharge all indebtedness that may be incurred by the said contractor in carrying out the said contract and complete the same free of all mechanic's liens," then the said obligation shall be void; else to remain in full force and virtue. We construe this to mean that the bond undertakes to secure the payment and discharge of all indebtedness incurred by the contractor in carrying out the contract whether in fact any lien should actually attach to the church property, and this provision, when read in connection with the portion of said bond that is made for the use and benefit of all persons who may become entitled to liens under the said contract, clearly indicates that the bond was given to secure all of the indebtedness incurred by the contractor in the construction of said building, even though he had not done the things necessary to give actual effect to fastening the lien. We think that under the bond the sureties became liable for all the debts incurred by the contractor in the construction of the building. This view harmonizes with the construction of the ambiguous section, herein placed upon it; that is, that it was not intended by said section that a lien should actually attach in order for it to be operative, but it was only intended that the person seeking to invoke its benefits should be such a person as had a right to fix a lien. This view is strengthened also by one of the

provisions in the contract between Boze and the church. It is as follows:

"It is agreed by the parties that 20 per cent. of the contract price shall be held by the owners as security for the faithful completion of the work, and may be applied under the direction of the superintendent in the liquidation of any damages under this contract; also furnishing the owners a release from any liens or rights of liens, by bond, herewith annexed, within ten days from date" (meaning October 20, 1909, the date of the contract).

The plain and unmistakable meaning of the latter portion of said contract quoted is, that a bond should be given by Boze which would dispense with the liens or rights of liens; that a bond should be given to the church of such a nature that all materialmen and subcontractors might look to it as their security instead of depending upon liens. It is only referred to in ascertaining the intent of the parties, as to whether it was in contemplation that the lien should actually attach before liability would be created in favor of materialmen. This bond, which was to be made and annexed in ten days from execution of the contract, was intended to be a substitute for all liens and rights of liens which, for some reason not essential to know or understand, appeared not desired by the church to be fixed upon their property. This view harmonizes with the construction placed by us upon that portion of the bond which provides that the bond is made for all persons who may become entitled to liens under the said contract. We think it assists in interpreting the meaning of this otherwise ambiguous language. It makes it clearly and plainly mean that the bond was made for the benefit of all persons who had a right to fix a lien, whether or not they did the things necessary to fix and enforce the lien. Undoubtedly the intention of the parties to the contract, and the principal and sureties upon the bond, was for Norton to look to the bond instead of to liens. This is plain. We hold that Norton belonged to a class which was entitled to fix and enforce a lien, and that he became a beneficiary under said bond, with the legal right to depend upon it to secure the payment of his debt, if he elected so to do, in lieu of a lien which he was entitled to secure on the church property.

[2] Notwithstanding Norton's legal right to look entirely to the bond for his security, a serious question is presented by one of plaintiffs in error's assignments, which charges that the sureties on said bond were released therefrom by the conduct of the principals to the original builder's contract. It is charged that the original contractor, Boze, and the First Baptist Church, by agreement, changed the terms of the original contract in material respects without the knowledge and consent of the sureties. In such a case the subcontractor would not be entitled to recover against the sureties, who would be thereby released from liability on the bond.

It was provided in the building contract between Boze and the church that Boze should

receive \$42,790 for the erection of the church; that he should be paid 80 per cent. of the estimated value of the work as it progressed, at intervals of 2 weeks, subject to the certificates of the architects or authorized superintendent; that the remainder should be paid on satisfactory completion and acceptance of the entire work after the expiration of 30 days.

The contract further provided that 20 per cent. of the contract price should be held by the owners of the church as security for the faithful completion of the work. It is claimed that the church and Boze altered the terms of said contract in that they agreed to, and did in fact disregard this provision in the contract.

The findings of fact by the district court substantiate this contention. The sixteenth finding of fact by the trial court is as follows:

"That the church failed to retain 20 per cent. of the contract price of the work done by Boze, as under the contract it should have done, for 30 days, and failed to retain 10 per cent. thereof as required by law."

The evidence abundantly supports this finding. In fact it appears to be undisputed. The evidence further shows that Boze applied to the trustees of the church for an advancement to him of the 20 per cent. named in the contract. Boze testified:

"I went to the building committee and told them that I was getting behind with my accounts and owed the bank some, and some other parties were pressing for money, and I insisted that the building committee allow me a little more than the contract price."

There is no testimony what the building committee said in reply, but the fact that they did comply with the request by advancing all of the 20 per cent. conclusively shows their assent to the proposition made by Boze. This amounted to an agreement between them to disregard the 20 per cent. provision in the contract.

The trial court's twenty-first finding of fact is as follows:

"The sureties of Boze did not require him to furnish them any statement, and had no knowledge of the application of the checks as drawn on the Citizens' National Bank in favor of Norton by Boze, and the payment of the balance due Norton on the Cisco Academy job, nor did they have any knowledge or notice of the advance of the church to Boze of more than 80 per cent. of the contract price of work being done. The sureties made no inquiries concerning these matters as the work progressed."

It is well settled that sureties are only bound by the precise terms of the contract whose performance they secure, and that any material alterations in the terms of the contract without their consent will release them from liability. This is true whether the change in the contract is injurious to them or favorable to them. There is no reason why this familiar rule should not have application to a builder's contract and bond under the same principles as apply to other characters of surety contracts. One of the most important provisions in the contract

was that the owners of the church would retain 20 per cent. of the total cost of the building 30 days after its completion. Reduced to figures the contract bound the owners to retain \$8,558 for 30 days after the completion of the contract. The owners and Boze, the contractor, agreed that said provision in the contract would be disregarded, and so it was disregarded, and nothing was held by the owners, but the entire contract was paid for by the church at its completion. At least a portion of this money that should have been retained by the church was paid by Boze for work which he owed Norton on a Cisco contract, which was in no way connected with the church contract. This might with propriety be contended to be one of the direct results of the waiver by the church and Boze of the 20 per cent. provision in the contract, for the evidence directly shows that at least a portion of this advance payment was used by Boze to pay Norton on the Cisco work. This shows direct injury to the sureties. However that may be, the sureties had a direct interest in that provision of the contract which provided that \$8,558 should be held by the owners until after the completion of the building. It had a direct bearing upon their risk as sureties. So far as the record shows, this provision in the contract was the only security which they had. It was stricken out without their knowledge or consent, and whether this change in the contract resulted in injury to them or not, it resulted in materially changing the terms of the contract upon which they were bound as sureties. That which remained after the change constituted a new contract. Upon this new contract they were not obligated, and cannot be bound. The old contract was annulled by the change. To the new contract they had not assented, and by it they were not bound. *Ryan v. Morton*, 65 Tex. 258; *Smith v. Montgomery*, 3 Tex. 203; *McKnight v. Lange Mfg. Co.* (Civ. App.) 155 S. W. 977; *United States v. Free* (C. C.) 92 Fed. 301; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 399.

[3] It is unimportant in a decision of this question that the sureties of Boze did not require him to furnish them any statement, and that they made no inquiries concerning the advancement by the church to Boze of more than 80 per cent. of the contract price of the work being done, as noted in the trial court's conclusions of fact. No duty rested upon them by law, or by the terms of the contract to make such inquiries. They were not required in law to anticipate that Boze, whose sureties they were, and the church trustees would change the contract. They had a right to reply upon it that the contract would be carried out in good faith, with no necessity for them to keep watch over the conduct of the parties. When the contract was altered, the plaintiffs in error were released as sureties on the bond. The

defendant in error Norton was not a party to the original contract between Boze and the church, and in no way a party to the bond, except that he became a beneficiary under the bond, and the sureties became liable to him, only in the event they were liable to the church. For Norton to recover on the bond he must affirm and establish its legality and binding force upon the sureties. He cannot hold the plaintiffs in error on the provisions of the bond that are favorable to him and deny to the plaintiffs in error the right to be bound only by the terms of the contract and bond. He cannot, for the purpose of recovering against the plaintiffs in error, affirm the provisions of the bond and contract without affirming it in its entirety. He is bound by the provisions of the bond and contract identically as the church was bound. The contract ceasing to be, on account of alterations, binding upon the sureties favorably to the church, it could not be binding on the sureties favorably to Norton. When the sureties were released, they were released from the contract in its entirety, including the provisions under which Norton had the right to sue as a beneficiary. The contract ceased to be binding under the undisputed evidence, either favorably to the church or to Norton. The sureties were entirely absolved from the contract, and Norton's recovery against them cannot be upheld. This holding renders it unnecessary to pass upon the other questions presented.

In accordance with these views, we hold that the judgment of the Court of Civil Appeals and the judgment of the district court should be reversed, and the cause here rendered in favor of the plaintiffs in error, Geo. P. Bullard, W. A. Crow, R. C. Johnston, J. W. Harrison, and J. L. Gammon, against the defendant in error E. L. Norton, and against the First Baptist Church of Abilene, Tex., as to the judgment which was rendered over against the plaintiffs in error in its favor.

The First Baptist Church of Abilene, Tex., not having appealed from the judgment of the district court, and not having asked here for affirmative relief from the lien which was declared against it in the district court in favor of E. L. Norton, it cannot be granted relief from the lien established by the judgment of the district court in favor of Norton, but the judgment of said court must be in all things affirmed in favor of E. L. Norton against E. S. Boze and said church. Likewise it must be affirmed as to the judgment in favor of the church over against Boze. The plaintiffs in error should recover from Norton and the First Baptist Church of Abilene all costs incurred by them in this court and in the Court of Civil Appeals and the district court. The defendant in error Norton should recover from the

defendants Boze and the First Baptist Church of Abilene, Tex., all costs incurred by him in the district court. It is accordingly so ordered.

KNIGHTS OF THE MACCABEES OF THE WORLD v. PARSONS. (No. 2809.)

(Supreme Court of Texas. Feb. 2, 1916.)

APPEAL AND ERROR \S 1108—DISCOVERY AFTER JUDGMENT THAT ASSURED IS LIVING—GRANT OF WRIT OF ERROR—REMAND FOR DISMISSAL.

In a suit by the beneficiary on a life policy, where, after rendition of judgment for her in the district court and Court of Civil Appeals, it appears that the insured has been discovered to be alive, plaintiff's and defendant's motion in the Supreme Court asking that the petition for writ of error be granted, the judgments of the district court and Court of Civil Appeals reversed, the cause remanded to the district court, and that it be dismissed at the plaintiff's cost, will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4410; Dec. Dig. \S 1103.]

Error to Court of Civil Appeals for First Supreme Judicial District.

Suit by Mrs. Lena Parsons against the Knights of the Maccabees of the World. On motions by defendant and plaintiff that the petition for writ of error be granted, the judgments of the district court and Court of Civil Appeals (179 S. W. 78) for plaintiff reversed, and the cause remanded to the district court, with instructions that it be dismissed at plaintiff's cost. Petition for writ granted.

Chas. B. Braun, of Waco, for plaintiff in error. Blount & Strong, of Nacogdoches, and Geo. S. King and Kahn & Williams, all of Houston, for defendant in error.

PHILLIPS, C. J. This was a suit by Mrs. Lena Parsons on a policy of life insurance issued to George Frank Parsons, in which Mrs. Parsons was the beneficiary. In the trial court a judgment was rendered in favor of the plaintiff, afterwards affirmed in the Court of Civil Appeals. The principal issue upon the trial was whether or not George Frank Parsons was, in fact, dead. It appears that since the affirmation of the judgment in the Court of Civil Appeals he has been discovered to be alive, revealing that no judgment on the policy ought to have been rendered. Under this condition both the plaintiff and defendant have filed motions in this court asking that the petition for writ of error be granted and the judgments of the district court and Court of Civil Appeals be reversed, and the cause remanded to the district court, with instructions that it be dismissed at the plaintiff's cost.

We think this is the proper disposition to be made of the case. The petition for writ of error is accordingly granted. The judgments of the Court of Civil Appeals and dis-

trict court are reversed, and the cause remanded to the district court to be there dismissed at the plaintiff's cost.

BRYANT et al. v. CONTINENTAL CASUALTY CO. (No. 2427.)

(Supreme Court of Texas. Feb. 14, 1916.)

1. INSURANCE — §455—ACCIDENT INSURANCE —SUNSTROKE—"DISEASE"—"PERSONAL INJURY."

Where an accident policy insured against death or disability through external, violent, and purely accidental means, provided that, if sunstroke should result independently of all other causes in the death of insured, the insurer would pay the indemnity, a sunstroke, while it may by medical experts be deemed a disease, is to be deemed a form of personal injury; it being considered such in common parlance, and, if a disease, not being an appropriate matter for accident insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. §455.

For other definitions, see Words and Phrases, First and Second Series, Disease; Personal Injury.]

2. INSURANCE — §455—ACCIDENT INSURANCE —SUNSTROKE—ACCIDENTAL "MEANS."

In such case, the term "means," in the phrase "due to accidental means," is used in the sense of "cause," and the insurer is liable for the death of the insured, caused by exposure to sun and humid atmosphere on a hot day, while pursuing his usual vocation in an ordinary way.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. §455.

For other definitions, see Words and Phrases, First and Second Series, Means.]

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Mrs. Amelia Bryant and another against the Continental Casualty Company. A judgment for defendant being affirmed on appeal to the Court of Civil Appeals (145 S. W. 636), plaintiffs bring error. Judgments of Court of Civil Appeals and district court reversed, with directions to enter judgment for plaintiffs.

B. F. Louis, of Houston, and John Charles Harris, of Galveston, for plaintiffs in error. Gill, Jones & Tyler and H. L. Stone, Jr., all of Houston, for defendant in error.

PHILLIPS, C. J. Mrs. Amelia Bryant, joined by her husband, brought this action to recover upon an accident insurance policy issued by the defendant in error to Calvin R. Perry, her brother, in the sum of \$2,000, in which she was named as beneficiary. The case was tried without a jury, resulting in a judgment for the company, affirmed by the Court of Civil Appeals. 145 S. W. 636.

[1] Calvin R. Perry suffered a sunstroke on an unusually warm afternoon in the month of August, while walking upon the streets of Houston in the ordinary course of his occupation as a collector of accounts, from which he died on the following day. The issue presented is whether there is any

liability under the policy for a death by sunstroke occurring under such circumstances.

The general insuring clause of the policy reads:

If the insured, while this policy is in force, shall receive personal bodily injury (suicide, sane or insane, not included) which is effected directly and independently of all other causes through external, violent and purely accidental means, and which causes at once and continuously after the accident total inability to engage in any and every labor or occupation, the Company will pay indemnity for loss of life, limb, limbs, sight or time resulting therefrom.

Part VI of the policy, under the title, "Special Accident Indemnities," contains the following provision:

If sunstroke, freezing, or hydrophobia, due in either case to external, violent and accidental means, shall result, independently of all other causes, in the death of the insured within 90 days from date of exposure or infection, the Company will pay said principal sum as indemnity for loss of life.

The defense of the Casualty Company is that sunstroke is a disease, and therefore not an accidental happening; that as a disease it was named as a risk of the policy; and that no indemnity is due for death resulting from it, under the policy, unless the preceding exposure be itself the consequence of an accident. This is the construction, in other words, which the Company insists should be given the term, "due to external, violent, and accidental means," as used in the policy in relation to sunstroke; and such was the view of the case taken by the District Court and the Court of Civil Appeals, the Company being held exempt from liability because Perry voluntarily went into the sun. As illustrative of the Casualty Company's theory, we take the following instances from its brief as presenting, in a general way, the state of circumstances necessary to exist, under its contention, for the creation of any liability under a policy of this kind for the suffering of a sunstroke by an assured: The happening of a shipwreck or train wreck, as a consequence of which he is exposed to the sun, with a sunstroke resulting; the breaking down of a vehicle in which he might be riding, causing similar exposure; or being thrown from a horse, and thereby compelled to walk some distance on a hot day, etc.

This position, it will be observed, requires that the prior accident be alone regarded as *the means* by which the sunstroke is effected. If sunstroke is a disease and therefore caused, never accidentally, but naturally, by excessive heat, it follows from the argument that the actual casualty, in such a case, is not the sunstroke, but the preceding accidental occurrence. Under this theory all idea of there being any element of accident in the sunstroke itself, or in the operation and effect of the abnormal heat as a direct cause of the stroke, is repudiated; and all that is unforeseen, unexpected, and unusual in the general event is related to merely the prior accident. It declines to consider ordinary sunstroke as

having in any sense the quality of an immediate and fortuitous injury, and treats it merely as a result, and more than that, a result not directly incurred in or produced by an accident, it will be noted, but as only influenced by a condition or situation which an accident creates.

One trouble with this position is that it assumes sunstroke was insured against in the policy merely as a disease, when a vital question in the case is whether such was the purpose of the policy. Another is that it denies any standing as "a means" to that which is essentially the cause, or in any event a very important part of the cause, of every sunstroke, namely, the operation of the rays of the sun if it be the usual form of sunstroke, or the operation of artificial heat if it be induced, as it may be, by other than solar heat (*Continental Casualty Company v. Johnson*, 74 Kan. 129, 85 Pac. 545, 6 L. R. A. [N. S.] 609, 118 Am. St. Rep. 808, 10 Ann. Cas. 851), and is alone that which, in common understanding and in fact, makes the cause of a sunstroke "external and violent."

There have been certain decisions which announce that sunstroke is a disease. Among them are *Sinclair v. Maritime Passengers Assurance Company* (England, 1861) 3 Ellis & Ellis, 478, and *Dozier v. Fidelity & Casualty Company of New York* (C. C.) 46 Fed. 446, 13 L. R. A. 114. But whatever it may be, technically, it is not regarded as a disease in the popular mind. In the common understanding it is accounted a kind of violent personal injury, from the very idea of sudden and external force carried by the word. If classed by medical authorities as, technically, a disease,—as to which it is not improbable that there is a conflict of expert view,—to none but an expert medical mind would the provisions of this policy have carried the significance that it was insured against as a disease. To men in general, such as those with whom a company of this kind deals and to whom its policies are issued, whether educated or ignorant, the use of the term in any character of contract, and particularly, we think, in an insurance contract, not generally insuring against death by disease, but against death from accidental injury, would have denoted merely what sunstroke is commonly understood to mean—heat prostration, frequently a casualty, a species of bodily injury, distinct in its kind and individual in its cause, and of known and not unusual occurrence. With the term having, as it does, this recognized popular meaning distinctly different from any technical significance it may possess, the proposition that the latter must prevail in the construction of the policy is not to be allowed. But let the question be further tested.

The best method for arriving at the accurate construction of a contract is for a court to simply put itself in the place of the parties, and, having particular regard to the subject-matter of the agreement, endeavor to ascertain their intention in their use of the

terms employed. Let that method be applied here. What is the result? That Perry, the assured, intended, under an accident policy, to insure against sunstroke, as, technically, a disease, and, in addition to that, as a disease which could be accidentally effected only in some such involved, remote, and improbable way as the Casualty Company here contends it is possible for a sunstroke to be accidentally caused, or that he understood such to be the effect of the policy, is hardly to be believed. Nor, in our opinion, is any such intention to be attributed to the Casualty Company in the making of the contract, if it is to be credited with a purpose, as it ought to be, of writing an accident insurance contract, as distinguished from a life insurance policy, and providing accident insurance against death occasioned by an accidental sunstroke under a policy agreement having in fact that virtue. This is made manifest, we think, by simply considering the general principles of personal accident insurance and the character of risk it is supposed and intended to cover, with which the present policy is presumably consistent.

The theory of such insurance, under the ordinary accident insurance contract, necessarily involves the element of bodily injury. That is primarily the kind of risk it contemplates and for which its indemnity is provided. This is manifest in the general insuring clause of the present policy, one common, in its general terms, to all ordinary accident policies. It runs:

"If the insured, while this policy is in force, shall receive personal bodily injury, * * * which is effected directly and independently of all other causes through external, violent and purely accidental means, * * * the Company will pay indemnity," etc.

It is not life insurance, but casualty insurance; and under the usual form of policy the nature of the casualty which gives rise to the liability of the insurer is that which consists in some character of bodily injury to the assured, either external or internal, accidentally caused, though the resulting effect be the development of a form of disease. There have been many adjudications on accident policies where the result of the different particular occurrences was the suffering by the assured of this or that form of disease, such as tetanus, or blood poisoning, and in some instances the more usual kinds of disease, as pneumonia, peritonitis, rheumatism, or fever; but the liability of the insurer has been upheld in all such cases, arising under the ordinary form of policy, because of the finding that the assured had accidentally sustained some character of antecedent bodily injury, of which the disease was but the proximate result.

If sunstroke is a disease, as the Casualty Company here contends, that is, a kind of brain fever, and was so dealt with in the present policy, its contraction, as we may in this connection call it, from exposure to excessive heat, its accepted inducing cause,

must be regarded as proceeding from a purely natural cause; just as the contraction of malaria from subjection to the conditions which produce that form of disease is recognized as due to a natural cause. Regarded as a disease, and as thus naturally produced, there is no element of bodily injury about it, any more so than there is in the ordinary disease of malaria. Neither, in this view, would sunstroke be any more the proper subject of risk in an accident policy than would malaria; nor would the proper basis of liability under such a policy be any more furnished by death resulting from it than by death from malaria.

The history of accident insurance, as found in the many judicial decisions upon the subject, reveals the constant denial by accident companies of any liability, under the ordinary form of policy, for disease, though accidentally effected, unless proximately caused by a bodily injury, and their constant maintenance of the proposition that any other theory of their liability is opposed to the general scheme of accident insurance. This position, generally, has been sustained by the courts; close questions having at times arisen as to whether the given physical condition was to be properly deemed a bodily injury. Not only, therefore, is insurance against disease, as such, not within the general scope of accident insurance; but equally disease effected by accident is not within its theory, as its interpretation by accident companies is disclosed in the decisions, unless there is distinctly present the element of bodily injury.

Under the contention of the Casualty Company, the sunstroke provision of its policy is a plain contradiction of this essential principle of the character of insurance it is intended to provide. It is a repudiation of the general insuring clause of the policy, as expressing the kind of risk which the policy covers, the risk of "personal bodily injury * * * effected by external, violent and accidental means." Accepting the Company's construction of the policy, it is in the position, in the first place, of making a disease, rather than a bodily injury, the subject of an accident risk, and further, a disease, the accidental causing of which in the way it says is necessary in order for it to be accidentally effected, would present no element whatever of bodily injury; with the accident, in truth, not directly causing the disease, but, at most, only producing a condition favorable for its being incurred.

Hydrophobia is a disease. But its common cause is the bite of an animal, a bodily injury; and its inclusion in the policy is therefore to be logically accounted for. It is generally thought of as a kind of casualty. But why was sunstroke here made the subject of accident insurance, in which the nature of the risk is some form of bodily injury, if in the construction of the policy it is to be considered as a disease, and is hence without

any element of bodily injury in its cause? It was in our opinion expressly designated as a risk, not as a disease, but for the purpose of avoiding the effect of those decisions which have held it to be a disease—in adoption of its popular conception as a species of personal injury, capable of accidental occurrence, and therefore properly a subject of this kind of insurance.

In the early *Sinclair Case*, supra, decided in England in 1861, it was held that no liability arose for an ordinary sunstroke under an accident insurance policy providing for indemnity in the event of "*personal injury* from, or by reason or in consequence of, any accident, etc." In the decision sunstroke was treated as a disease. So considered, it has no quality of personal injury about it, as already stated; and, under that theory, the determination that there was no liability under the policy was sound. This holding was followed in the *Dozier Case*, where the policy was in the same general terms,—providing insurance against "*bodily injuries*, sustained through external, violent and accidental means," as does the general clause of the present policy. In neither case did the policy designate sunstroke as a risk. It is to be assumed that the present policy was drawn in the light of that holding. That the purpose was to make sunstroke a part of the contract risk, as a distinct feature of the policy, is evident. We regard it as equally manifest that the purpose also was to so make it a feature of the risk in such a way as to avoid the effect of the holding in the *Sinclair Case*, and others like it,—under which, if treated as a disease, it would not fall within the general risk of the policy,—and as would be, at the same time, consistent with such risk as expressed in the general insuring clause, and in harmony with the theory of such insurance. This could only be done by in the policy recognizing it to be what in the common understanding it is considered,—a form of personal injury, and, when suffered under certain circumstances, a casualty. Such, we hold, is the meaning and force of the sunstroke provision of the policy.

[2] Considered as a form of bodily injury, the question as to when sunstroke is to be properly deemed as accidentally effected assumes a different character from that presented if it is regarded merely as a disease. The difficulty of introducing an accidental cause into its occurrence, treated as a disease, is apparent from the illustrations made in the Company's brief as to the state of circumstances necessary, in that view, to its accidental happening. But, treated as an injury, it is clear that it may be accidentally effected in ways much less involved and remote. When, therefore, is the suffering of sunstroke to be regarded as due to "accidental means," in the sense in which the latter term, in its relation to sunstroke, is used in the policy?

The word "means" is employed in the poli-

cy in the sense of "cause"; the phrase, "due to accidental means," is one of qualification; and the purpose of its use in the ordinary accident policy is to limit the liability of the insurer to injuries effected by an accidental cause, as distinguished from those which are merely accidental in their result. It is generally recognized, as it should be, that where a man undertakes to do a certain thing by a particular means, and the result of his act is such as follows, in not an unusual or unexpected way, from the means voluntarily used, it cannot be said to be due to an accidental cause, though, in the sense that it was not intended, an accidental result is the consequence. In the numerous adjudicated cases upon the subject, therefore, it is determined that where by the terms of the contract the risk insured against is an injury effected by "accidental means," the element of accident must consist in that which produces the injury, rather than in the mere fact that an injury occurs. The rule itself is well established. It is its application to the varying kinds of accidental injuries which is sometimes involved in difficulty, occasioning, in some instances, divergent opinions by the courts.

The inquiry at once arises as to when the cause of an injury is to be considered as accidental; that is, what is the proper construction of the term, "accidental means," as used in insurance policies of this nature? The best definition of the term in the books is that given by the United States Supreme Court in the leading case of *Mutual Accident Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. There the assured, Dr. Barry, with two other physicians, had visited a patient living in a house behind a drug store. They came out of the house on a platform which was between four and five feet from the ground. By getting down from the platform it was but a short distance to the drug store to which they desired to go. They jumped from the platform to the ground. The other two, who jumped first, alighted safely; but the evidence was that Dr. Barry, though alighting upon his feet, jumped heavily, the sound, as he struck the ground, being as if he had come down solidly on his heels, like an inert body. Shortly afterwards he appeared ill and vomited, and died nine days later, having retained nothing on his stomach and having passed nothing but blood and mucus. There was evidence that the cause of his death was a stricture of the duodenum, due, according to the plaintiff's contention, to the jump. The accident policy on which the suit was brought limited liability for death from bodily injuries, as does the policy here, to those effected through external, violent and accidental means. The Supreme Court, through Mr. Justice Blatchford, expressed its approval of the trial court's instruction to the jury under this provision of the policy in the following language, which embodies the substance of the instruction and has since

served as an accepted definition of the term, "accidental means":

"The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place, not according to the usual course of things, or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means."

In affirming the judgment for the plaintiff, the court also said:

"It is further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed, not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not."

Upon the admitted facts, was the sunstroke suffered by Perry, the assured, under this clearly stated general rule, an accident? It was, undoubtedly. He was at the time walking the streets in the ordinary way, unconscious of any danger from the heat of the sun, as is to be plainly inferred from the stated facts, with apparently no apprehension of injury from that source, and a sunstroke suddenly befell him. True, his exposure to the sun was voluntary. But that does not conclude the question. Though the exposure be regarded as "the means" of his injury,—to our minds an erroneous view,—and as purely voluntary, it cannot be said that the result was one following "in a not unusual or unexpected way" from such means. On the contrary, in the course of the exposure, the act immediately preceding the injury, the sudden prostration occurred, not the usual happening under such circumstances in common experience, but having forcibly in its event the elements of "something unforeseen, unexpected," and out of the ordinary course.

In the *Barry Case*, the jump of the assured, which constituted the act immediately preceding his injury and occasioned it, was likewise voluntary and intentional. It was "the means" of the injury. But the court repudiated the proposition that because of its having been voluntary, the resulting injury could not be regarded as due to an accident. It was held to have been an accident, notwithstanding the voluntary nature of the act which caused it, for the reason that it was an unforeseen result, following, not naturally from the act, but in an unusual and unexpected way.

The question might well be rested at this place, though the exposure to which the assured subjected himself be considered as "the means" of his injury. It is a mistake, however, to indulge that assumption. Exposure to the heat is the cause of a sunstroke only in the sense that exposure to any kind of external force furnishes the occasion of an injury as the result of its operation. In cases arising under accident insurance policies, where possible negligence on the part of the assured does not affect the question of liability, the efficient cause of a sunstroke, the vis major which inflicts the injury, is necessarily the excessive heat, and it must therefore be deemed "the means" of the injury. If it be solar heat, it is not caused, and, when operating naturally, is not controlled, by human agency; and under such circumstances it is impossible to associate with it the idea of its "voluntary employment," or to regard as not an accident an injury from it when suffered as here shown, in the sense that under certain conditions, as declared in the rule above noted, an injury resulting from a means voluntarily employed will not be so deemed.

A sunstroke caused by the sun's rays, happening under the circumstances found in this case, is in our opinion an accident; as clearly so as is a lightning stroke. *Hutchcraft's Executor v. Travelers' Insurance Company*, 87 Ky. 300, 8 S. W. 570, 10 Ky. Law Rep. 260, 12 Am. St. Rep. 484. It befell the assured without any human agency; and in the sudden, unexpected and unusual way in which he was affected by the heat as its cause, it had all of the elements of an accident in its occurrence and result.

It was urged in the argument that if the sunstroke which brought about the death of Perry is held to have been an accident, it would amount to a holding that every sunstroke suffered is an accident; and, as the consequence, the term, "due to accidental means," is denied any force as an express limitation upon the insurer's liability for sunstroke. This, however, does not follow from the decision, as is disclosed when once it is recognized, as is held in *Continental Casualty Company v. Johnson*, already noted (74 Kan. 129, 85 Pac. 545, 6 L. R. A. [N. S.] 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851), that sunstroke may be caused by artificial, as well as solar, heat, and the term has that meaning in an accident policy, in the absence of a contrary qualification. There is no decision, as we are aware, opposed to this holding.

In the *Johnson Case* the policy appears to have been one also issued, as is to be inferred from the name of the company, by the present defendant in error. It contained a provision as follows:

"The loss of * * * time, as above provided, due solely to * * * sunstroke or freezing due solely to necessary exposure while engaged in his occupation, shall be deemed to be due to external, violent and purely accidental causes

and shall entitle the insured to full benefits according to the terms of this policy."

The assured, Johnson, was a fume-welder, and while engaged in his occupation was overcome by heat from a forge or furnace near which he worked, becoming ill as the result and suffering loss of time; whereupon he brought an action on the policy, claiming that his loss was due to sunstroke. As is stated in the opinion, it was argued in behalf of the defendant company that the language of the provision quoted indicated "a conception of sunstroke as something of sudden and unexpected occurrence, more or less in the nature of an accident, and that this conception is only appropriate to an attack brought on by exposure to the sun's rays." It was admitted by the insurer in that case, in other words, both in its policy provision and in the interpretation of it which it invoked, not only that a sunstroke suddenly and unexpectedly suffered from the heat of the sun in the course of a necessary exposure, is to be regarded as an accident; but, furthermore, that only such a sunstroke, so suffered, is to be deemed as "due to accidental means." The court, in determining the case, overruled the contention that the term "sunstroke," as found in the policy, denoted only a condition brought about by the heat of the sun, and held that a sunstroke caused by artificial heat was equally within the risk of the policy.

If, as it thus appears, "the means" of a sunstroke may be artificial heat,—something which is produced and may be controlled by human agency,—under the rule above stated, "that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means," it follows that sunstroke, effected by such means, may occur under such circumstances as not to constitute it an accident, just as any other form of injury proceeding from a "means" likewise caused by and within the control of human agency may, under similar circumstances, be suffered and, as determined by the same rule, be not an accident.

The rule, just referred to, is but the statement of a fact of human experience with respect to all artificial agencies and their uses,—the announcement of the general recognition that an injury may result from the particular, voluntary use of such an agency for a given purpose, but not be an accident, because ensuing naturally, and in a usual and reasonably to be expected way, from the means thus employed. The consequences of the use of artificial heat are not to be exempted from its application. Where, because of the particular circumstances, the rule would apply to any other character of injury resulting from a given cause, it would, for the same reason, likewise apply to prostration brought about by artificial heat. While not as probable, from the nature of the injury, as in the

case of other kinds of injury, it is possible, therefore, under this recognized rule, for sunstroke to occur under such circumstances as not to be an accident; and our holding does not exclude that possibility.

There has been no decision of the question presented in this case by a court of last resort in any jurisdiction. It has been determined by appellate courts in Pennsylvania, Indiana and New York, in three different cases, in addition to the decision of the Court of Civil Appeals in the present case: *Semanck v. Continental Casualty Company* (by the Pennsylvania Superior Court, 1914) 56 Pa. Super. Ct. 392; *Elsey v. Fidelity & Casualty Company of New York* (by the Appellate Court of Indiana, 1915) 109 N. E. 413; and *Gallagher v. Fidelity & Casualty Company of New York*, (by the Appellate Division of the Supreme Court of New York, 1914) 163 App. Div. 556, 148 N. Y. Supp. 1016, now pending in the Court of Appeals of that state. In the *Semanck* case, the form of policy was the same as the policy here, and issued by the same company. In the *Elsey* case, the general clause of the policy, insuring against "bodily injury sustained through accidental means," was followed by a provision that, "sunstroke suffered through accidental means should be deemed a bodily injury within the meaning of the policy." In both cases it was held that sunstroke, caused by the heat of the sun and occurring under circumstances like those in the present case, is not to be regarded as an accident. In the *Gallagher* case, under a policy in the same terms and issued by the same company as that considered in the *Elsey* case, it was determined that such a sunstroke, suffered under like circumstances, is an accident, and the insurer was therefore liable. In the *Semanck* opinion it was said that the verdict, which was for the plaintiff, "could only be sustained by the determination of the court that sunstroke was purely accidental and not a disease," which ignored the important fact that sunstroke was insured against in the policy, in our view, not as a disease, but as an injury. That the exposure was voluntary appears to have been a ground of the decision; as well as the construction given the policy, that there was no liability for sunstroke unless occurring in consequence of a preceding accident. In the *Elsey* case the question was determined under a rule, announced by the same court in a previous decision, that, "where an injury occurs as the direct result of intentional acts, it is not produced by accidental means," which we decline to recognize as the true rule. This would practically mean that no injury immediately occurring in the course of an intentional act could be an accident. A large number of injuries, plainly accidents, are suffered in the performance of intentional acts. Whether the immediately preceding act

was intentional is a mistaken test of the question. The proper and true test, in all instances of voluntary action, is that defined in the *Barry* case: If in the act which precedes the injury, though an intentional act, something unforeseen, unexpected, and unusual occurs, which produces the injury, it is accidentally caused. If the injury followed in a usual or reasonably to be expected way from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected.

The rule followed by the Indiana court is substantially that announced by the Supreme Court of Connecticut in *Southard v. Assurance Company*, 34 Conn. 574, Fed. Cas. No. 13,182, from whose views on the subject the Supreme Court of the United States expressed its dissent in the *Barry* case.

We are unwilling to follow the holding in the *Semanck* and *Elsey* cases, and are content to rest the decision upon the grounds we have stated.

The question is an important one, and we have been deeply concerned in its correct decision. It challenges careful thought, and, sensible of its difficulty in certain phases, that we have endeavored to give it. That which is sound upon principle ought to be the law; and, believing that the conclusion reached is thus supported, it is adopted as our decision of the question.

The judgments of the Court of Civil Appeals and the District Court are accordingly reversed. It is ordered that judgment be entered for the plaintiff in error for the amount of the policy, with the statutory damages and attorneys' fees of \$225, agreed to be reasonable in amount, with legal interest from the date of the judgment of the district court.

BOGART et ux. v. COWBOY STATE BANK & TRUST CO. et al. (No. 747.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 30, 1915. On Motion for Rehearing, Dec. 4, 1915. Further Rehearing Denied Jan. 26, 1916.)

1. APPEAL AND ERROR ⇐1071 — FINDINGS — IMMATERIAL ISSUE.

In an action on a note, where a judgment was not rendered upon the original note, but upon the renewal, it was immaterial when the holder acquired the original note if it obtained the renewed note for value without notice before maturity, and the issue as to whether a former holder had indorsed the note more than two months after maturity was immaterial, so that the trial court's failure to find thereon was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ⇐1071.]

2. TRIAL ⇐397 — REQUESTED FINDINGS — FINDINGS MADE.

The refusal to make a requested finding was not error, where the trial court in another finding fully stated the matter requested to be found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. ⇐397.]

3. BANKRUPTCY — 425 — DISCHARGE — DEBT NOT SCHEDULED.

Where it did not appear that a bankrupt scheduled a debt, and the creditor had no actual notice of the bankruptcy proceedings, the bankrupt was not discharged from liability on such debt.

[Ed. Note.—For other cases, see Bankruptcy, Century Dig. § 775; Decennial Dig. — 425.]

4. BANKRUPTCY — 395 — DECREE SETTING ASIDE HOMESTEAD—PARTIES BOUND.

A creditor not a party to the debtor's bankruptcy proceedings was not bound by the decree of the federal court setting aside to the bankrupt and his wife certain lands as a homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. — 395.]

5. BANKRUPTCY — 395 — EXEMPT PROPERTY—JURISDICTION.

Exempt property is never really in the bankruptcy court, nor is the owner divested of his title where he properly urges his claim for exemption, as the bankruptcy court has no jurisdiction of it except to set it aside as exempt property, and as the rights of the lien creditors with reference to it must be determined in the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. — 395.]

6. HOMESTEAD — 115 — TRUST DEED—EXEMPTION.

Whether land claimed as a homestead is exempt from the operation of a trust deed must be determined by the conditions existing when the deed was given.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 183, 184, 186-190; Dec. Dig. — 115.]

7. HOMESTEAD — 181 — CONTINUANCE—PRESUMPTION AND BURDEN OF PROOF.

When property has been impressed with a homestead character it will be presumed to so continue until its use as such has been discontinued with the intention not to use it as a home, and the burden of proof rests upon the one asserting the abandonment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. — 181.]

8. HOMESTEAD — 181 — ABANDONMENT—EVIDENCE.

Certain and conclusive evidence of abandonment, with no intention to return and claim the exemption, is required before a homestead, once occupied as such, can be subjected to a forced sale.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. — 181.]

9. HOMESTEAD — 162 — ABANDONMENT—INTENTION.

A farm occupied as a homestead does not lose that character when abandoned by the owner partly on account of ill health, with the intention of returning at a later date.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. — 162.]

10. HOMESTEAD — 168 — "TEMPORARY RENTING"—EFFECT—CONSTITUTIONAL PROVISIONS.

A lease of land, including the part which had been used as a homestead, for a term of five years, in connection with the homesteaders' disposition of their farm in another state prior to the execution of a deed of trust on the land in this state, was a temporary renting within Const. art. 16, § 51, providing that any temporary renting of a homestead shall not change its

character when no other homestead had been acquired.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 333, 343; Dec. Dig. — 168.]

11. EVIDENCE — 589 — SUFFICIENCY—PARTIES.

In an action on a note and to foreclose a deed of trust, where the defendants claimed a homestead in part of the land, the trial judge was not bound to believe their statements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. — 589.]

On Motion for Rehearing.**12. APPEAL AND ERROR — 1071 — TRIAL — 395 — FAILURE TO FILE FINDINGS—EFFECT.**

The trial court's failure to file findings and conclusions is not cause for which the courts have reversed judgments when there is a statement of facts; but a conclusion of law going to the merits of the case must be supported by a corresponding finding of facts.

[For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. — 1071; Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. — 395.]

13. APPEAL AND ERROR — 1071 — TRIAL — 395 — CONCLUSION OF LAW — FINDING TO SUPPORT.

Where the trial court, in an action on a note and to foreclose a deed of trust in which the defendants claimed a homestead in part of the land, did not find that defendants had abandoned the homestead, but merely recited their testimony thereon without any finding, and concluded as matter of law that they had abandoned it prior to their execution of the deed of trust, such conclusion, without a finding on which it might have been based, made the judgment rendered in accordance therewith erroneous, so that it would be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. — 1071; Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. — 395.]

14. BANKRUPTCY — 436 — DISCHARGE—DEBTS SCHEDULED—BURDEN OF PROOF.

The burden of proving that a creditor's debt was duly scheduled in the debtor's bankruptcy proceeding, and that the creditor had either statutory or other actual notice of the proceeding, rested upon the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 840-842, 865; Dec. Dig. — 436.]

Appeal from District Court, Fisher County; Jno. B. Thomas, Judge.

Action by Cowboy State Bank & Trust Company against A. R. Bogart and wife, in which the National Stock Yards Bank of Ft. Worth and the Ft. Worth National Bank intervened, seeking judgments against the defendants Bogart. Judgment for interveners, and that defendants take nothing on their plea of homestead. Defendants appeal. Reversed and cause remanded.

Higgins & Hamilton, of Snyder, and L. H. McCrea, of Roby, for appellants. Jno. W. Woods, of Rotan, and Bryan, Stone & Wade, of Ft. Worth, for appellees.

HALL, J. Several parties and issues were involved in this suit, but the only appeal is by A. R. Bogart and wife from that part of the judgment denying them the right to their homestead of 200 acres out of certain lands

upon which liens were foreclosed. It will therefore not be necessary to make a full statement of the pleadings and facts. The Cowboy State Bank & Trust Company sued on a note signed by A. R. and W. R. Bogart, executed May 2, 1911, in the sum of \$7,251, due November 2d following, and stipulating for 10 per cent. interest from maturity and 10 per cent. attorneys' fees. Appellee Bank & Trust Company also prayed for foreclosure of a deed of trust lien on certain lands in Kent county given to secure said note and executed about four months after the date of the note.

The National Stock Yards Bank of Ft. Worth intervened and prayed for judgment upon a note for \$1,000 against the same parties, which was secured by deed of trust on part of the lands described in the first-named deed. The interest of this intervener was afterwards acquired by the Ft. Worth National Bank, which on July 28, 1914, also filed a plea of intervention, praying judgment upon a note for \$1,500, executed by A. R. Bogart to F. P. Shultz, and indorsed by Shultz, without recourse, to the Cowboy State Bank & Trust Company. This note was secured by deed of trust upon all of the land in controversy. This note was, after its execution, indorsed by the Cowboy Bank & Trust Company to the Ft. Worth National Bank. The Ft. Worth National Bank also sought to recover upon a note for \$7,460, which was alleged to be a renewal of and substitution for the first above described note for \$7,251. Several individuals were made parties to the suit and their rights determined by the judgment, but, since there is no complaint upon their part, it is not necessary to state the issues adjudicated as to them. As stated above, A. R. Bogart and wife claimed 200 acres as a homestead out of the land upon which the deeds of trust were given. The Ft. Worth National Bank held the notes secured by the deeds of trust as collateral for a debt of \$5,560.60, due it by the Cowboy State Bank & Trust Company. The \$1,500 note above mentioned represented part of the purchase money for all the lands involved. That portion of the judgment of which complaint is made is as follows:

"(10) It further appearing to the court that the defendants, A. R. Bogart and wife, Ethel Bogart, have no homestead right in or claim to any of the above-described lands, it is therefore, ordered, adjudged, and decreed by the court that said named defendants take nothing on their plea here, it being approved and adjudged by the court that the two hundred acres so claimed by them and described in their pleadings herein is subject to all of the liens found in favor of the interveners, Ft. Worth National Bank and the Stock Yards National Bank."

[1] By their first assignment of error, appellants insist that the court erred in refusing to find as a fact that a certain indorsement on the note for \$7,251 was made by the Cowboy State Bank & Trust Company more than two months subsequent to its ma-

turity, and that therefore the Ft. Worth National Bank could not be an innocent purchaser of said note for a valuable consideration before maturity.

Judgment was not rendered upon the original note, but upon the renewal. It is therefore immaterial when the Ft. Worth National Bank acquired the original note, if it obtained the renewal for value without notice before its maturity. The failure of the trial court to find upon an immaterial issue is not reversible error.

Under the second assignment appellants complain of the refusal of the court to find that no money was advanced to Bogart and wife when the deed of trust dated October 19, 1912, was executed to secure the original note dated May 2d, 1911. Appellants assert in their assignment that this was a material finding. The deed of trust itself recites that it is given to secure the original note, and, so far as we are able to see, no claim is made by any of the appellees that the lien was given to secure any other debt. It is true that the deed of trust recites that it should be a security for any indebtedness thereafter accruing, but no proof was made of any further indebtedness. The pleadings of the parties set out without contradiction the debt it was given to secure, and no witness seems to have denied it. We think, upon a fair construction of the twelfth finding, the court has fully complied with the request of appellees on this point.

[2] The third assignment is also without merit, since the court, in its seventh finding of fact, has stated fully the matters which appellants requested to be found.

[3] October 12, 1912, Bogart was duly adjudged a bankrupt, and the decree discharging him was entered June 7, 1913. The federal court set apart to him and his wife in that proceeding, the 200 acres as a homestead. The evidence does not show whether Bogart did or did not schedule appellee's debts, and the Ft. Worth National Bank had no actual notice of the bankruptcy proceedings. Under this state of facts the debtor of course could not be discharged from liability upon appellees' claims.

[4] Since appellee was not a party to the bankruptcy proceedings, it is not bound by the decree of the federal court setting aside to Bogart and wife the land as a homestead.

[5] The rule is that exempt property is never really in the bankruptcy court, nor is the owner divested of his title where he properly urges his claim for exemption. The court has no jurisdiction of it except to set it aside as exempt property. The rights of lien creditors with reference to it must be determined in the state courts. First Remington on Bankruptcy, §§ 1022, 1024; 1 Loveland on Bankruptcy, p. 88; Brooks v. Eblen (Ky.) 106 S. W. 308, and authorities there cited.

By the remaining assignments, save one, appellants assail the action of the court in

foreclosing the deed of trust dated October 19, 1911, upon that portion of the land designated by them as a homestead, and insist that the court erred in its finding of fact bearing upon this issue, and that the conclusions of law are neither supported by the findings nor by the evidence adduced. We will dispose of these assignments by a general discussion of the rules of law applicable to the facts rather than by a consideration of the assignments in detail.

Bogart and wife used the land in controversy as a homestead for several years prior to September 1, 1910. It was shown without controversy in behalf of appellees that on the last-named date Bogart leased the entire 1,470 acres, including the homestead, to one Roy for a period of five years; that on or about the 1st of October following he moved with his family to New Mexico, where three months later he purchased a small farm of 120 acres, upon which he resided and made a crop in 1911, and rendered the premises for taxes. After residing there nine months he sold the farm, his vendee assuming the unpaid purchase money, and moved to El Paso county, Tex., where he has since worked for wages for his father-in-law. That the deed of trust was executed October 19, 1911, following the sale of his New Mexico farm; that the sale was made several days before the execution of the deed of trust, but was not duly conveyed until October 18, 1911. The deed of trust contains a recital disclaiming any homestead interest in or to any of the 1,470 acres, but describes no property in that portion of the instrument left blank in the printed form for that purpose.

Opposed to the theory of abandonment, appellants both testified that they owned no other land except the 200 acres and had never owned any other homestead since they occupied the land in controversy; that in leaving Texas they never intended to abandon their home, but always intended to return and reoccupy it at the expiration of the five years lease; that their removal to New Mexico was on account of the husband's ill health; that upon arriving there they endeavored to lease a farm, and, failing in this, they were forced to buy the 120 acres in order to have land to work for that year; that they claimed their exemption in the bankruptcy proceedings instituted by the husband and had their home set aside to him; that they collected the rents from the entire 1,470 acres until the husband filed his petition in bankruptcy, and since then had received rents from the 200 acres only; that the husband never voted in New Mexico, nor had he ever voted in El Paso county.

[8] Whether or not land claimed as a homestead is exempt from the operation of a trust deed must be determined by the condition existing at the time the deed is given. *Crebin v. Moseley*, 74 S. W. 815; *Gaar-Scott Co. v. Burge*, 49 Tex. Civ. App. 599, 110 S. W. 181.

[7, 8] When property has been impressed with the homestead character it will be presumed to so continue until its use as such has been discontinued with the intention not to again use it as a home. *Archibald v. Jacobs*, 69 Tex. 256, 6 S. W. 177; *Drought v. Stallworth*, 45 Tex. Civ. App. 159, 100 S. W. 188. Certain and conclusive evidence of abandonment, with no intention to return and claim the exemption, is required before a homestead, once occupied as such, can be subjected to forced sale (*Cross v. Everts*, 28 Tex. 523; *Thomas v. Williams*, 50 Tex. 269; *Gaar-Scott Co. v. Burge*, supra; *Farmer v. Hale*, 14 Tex. Civ. App. 73, 37 S. W. 164; *Rollins v. O'Farrell*, 77 Tex. 90, 13 S. W. 1023); and the burden of proof rests upon the one asserting the abandonment (*Cooper v. Basham* [Sup.] 19 S. W. 704; *Graves v. Campbell*, 74 Tex. 576, 12 S. W. 238; *Harle v. Richards*, 78 Tex. 80, 14 S. W. 257).

[9] A farm occupied as a homestead does not lose that character when abandoned by the owner, partly on account of ill health, when the abandonment is accompanied with the intention of returning at a later date. *Reinstein v. Daniels*, 75 Tex. 640, 13 S. W. 21; *White v. Wadlington*, 78 Tex. 159, 14 S. W. 296; *Gaar-Scott Co. v. Burge*, supra; *Jones v. Robbins*, 74 Tex. 615, 12 S. W. 824.

[10] The lease in the instant case was for a fixed period, and, when taken with the testimony of Bogart, is such a temporary renting as brings it within the following provision of the Constitution, art. 18, § 51: "Provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired." *Oppenheimer v. Fritter*, 79 Tex. 99, 14 S. W. 1052. In this connection, it will be remembered that Bogart and wife had disposed of the farm in New Mexico prior to the execution of the deed of trust under which appellees claim.

The deed of trust was executed to secure a pre-existing debt. The issues of estoppel and fraud are not raised either by the pleadings or the evidence. The court did not find as a fact what were the intentions of Bogart and wife when they left the land in controversy, but concluded as a matter of law that they had abandoned it prior to the execution of the deed of trust, and at that time they had acquired a homestead in New Mexico. While the conclusion is unsupported by any finding, the rule seems to be that when there is a statement of facts in the record, and it is not made clear that a failure to file any findings and conclusions at all has injured appellant, it is no cause for reversal. *Banfield v. Emery*, 177 S. W. 952.

[11] There is a sharp conflict in the testimony upon the issue of intention as shown by the statement of facts before us; but the evidence is sufficient to support the judgment if the testimony of Bogart and wife be disregarded entirely. Being the parties in inter-

est, the trial judge was not bound to believe their statements, and he evidently did not do so. *Steeley v. Tex. Imp. Co.*, 55 Tex. Civ. App. 463, 119 S. W. 819.

So these assignments presenting mainly questions of fact are overruled and the judgment is affirmed.

On Motion for Rehearing.

[12, 13] Appellant insists that we erred in holding that, where there is a statement of facts in the record, the failure of the court to find a material fact necessary to support a conclusion of law is not reversible error. Upon further investigation, we find that this contention is correct. While it is the rule that the failure of the trial court to file findings and conclusions is not cause for which the courts have reversed judgments, when there is a statement of facts, the rule is equally well established that a conclusion of law going to the merits of the case must be supported by a corresponding finding of fact. As stated in the original opinion, the court did not find that Bogart and wife had abandoned the homestead, but merely recited their testimony upon that point without a finding either way; but did conclude as a matter of law that they had abandoned it prior to the execution of the deed of trust. There being no finding of fact upon which this conclusion could have been based, a judgment in accordance with such conclusion is erroneous and must be reversed. *Edwards v. Chisholm* (Sup.) 6 S. W. 558; *Sanders v. Sheran*, 86 Tex. 656, 2 S. W. 804; *Farmer v. Hale*, 14 Tex. Civ. App. 73, 37 S. W. 164; *Zachariae v. Swanson*, 77 S. W. 627; *West End Town Co. v. Grigg*, 93 Tex. 456, 56 S. W. 49; *Texas Midland Ry. Co. v. Johnson*, 65 S. W. 388.

Appellant further contends in the motion that we erred in the original opinion with reference to the effect of the decree rendered in the bankruptcy proceedings in the federal court. We do not assent to this contention. It is expressly provided by section 17 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1913, § 9601]) that a discharge shall release a bankrupt from all of his provable debts except such as have never been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had actual notice or knowledge of the proceedings in bankruptcy.

[14] The burden of proving that the bank's debt in the instant case was duly scheduled, and that the bank had either statutory or other actual notice of the proceedings, rested upon appellant. *Fields v. Rust*, 36 Tex. Civ. App. 350, 82 S. W. 331. As stated, in Third Ruling Case Law, p. 338, § 155:

"In as much as a discharge is for the benefit of the bankrupt, and the omission of a claim from the schedule is due to his default, it is said to be well settled that the burden is upon him

to prove that the omitted creditor had the requisite notice or knowledge of the proceedings."

Unless appellee's claim was properly scheduled, or appellee had actual notice of the bankruptcy proceedings in time to prove its claim, they would certainly not be bound by the judgment in any particular. Third R. C. L. "Bankruptcy," § 155.

The motion for rehearing is overruled in part and granted in part, and the judgment is reversed and the cause remanded.

McWHIRTER v. FIRST STATE BANK OF AMARILLO. (No. 895.) *

(Court of Civil Appeals of Texas. Amarillo. Jan. 12, 1916. Rehearing Denied Feb. 2, 1916.)

1. BANKS AND BANKING ⇨77—INSOLVENCY—ACTION—PARTIES.

Under authority of the commissioner of banking, an action to realize on assets may be maintained in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. ⇨77.]

2. ABATEMENT AND REVIVAL ⇨45 — INSOLVENT BANK — ACTION BY AGENT — ABATEMENT.

An action brought by authority of the commissioner of banking in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs will not abate on change of commissioner.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 226-236; Dec. Dig. ⇨45.]

3. BANKS AND BANKING ⇨39—INSOLVENCY—ACTION ON SUBSCRIPTION—DEFENSES.

The fact that, as between a bank and a subscriber for stock thereof, the subscription was on credit, with an agreement that it should be paid from dividends, is not available as a defense where he is sued on his subscription after the bank has defaulted and is in the hands of a special agent appointed by the commissioner of banking to wind up its affairs, and the action is for the benefit of creditors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 44-48; Dec. Dig. ⇨39.]

4. CORPORATIONS ⇨90 — INSOLVENCY — ACTION ON SUBSCRIPTION—DEFENSES.

One who for years went along as a stockholder of a corporation receiving dividends, being sued for the benefit of its creditors after it became insolvent, is estopped to assert that he is not a stockholder because the stock was issued for his note in violation of Const. art. 12, § 6, requiring it to be issued for money paid.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 245, 383-419; Dec. Dig. ⇨90.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by the First National Bank of Amarillo against H. K. McWhirter. Judgment for plaintiff, and defendant appeals. Affirmed.

Madden, Trulove, Ryburn & Pipkin and Kimbrough, Underwood & Jackson, all of Amarillo, for appellant. Turner & Rollins, of Amarillo, for appellee.

HENDRICKS, J. The appellee sued the appellant upon a note for the principal sum of \$1,000, dated October 3, 1912, payable to the First State Bank of Amarillo, due April 1, 1913, with interest from maturity at the rate of 8 per cent. per annum, and providing for the usual 10 per cent. attorney's fees—the petition acknowledging certain credits unnecessary to specify.

The plaintiff, the First State Bank of Amarillo, alleged that it was in the hands of one J. O. Roots, special agent under the appointment of W. W. Collier, commissioner of insurance and banking of the state of Texas; the appointment of Roots having been made after said bank had become insolvent; and further averred that Roots, as such special agent, was winding up the affairs of the bank and collecting its assets for the benefit of its creditors and stockholders, under the direction of Collier as commissioner of insurance and banking, and that said suit was instituted under the authority of both Roots and Collier.

[1] Appellant's first assignment of error is that:

"The court erred in overruling defendant's plea in abatement, * * * because plaintiff's petition fails to show any authority in the said W. W. Collier and J. O. Roots, to maintain the suit in the name of the plaintiff, First State Bank, and said petition shows that said First State Bank is incompetent to maintain said suit in its own name."

The Supreme Court of the United States, in the case of *Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 21 L. Ed. 555, referring to previous authorities, decided by the same court, said:

"We have already decided in the case of this very receiver that he may bring suit in his own name or use the name of the association. *Kennedy v. Gibson*, 8 Wall. (75 U. S.) 506 [19 L. Ed. 476]. The subject was also lately discussed in the case of *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (51 U. S.) 383 [20 L. Ed. 840], and the same views were held; the action in that case being brought against the insolvent bank."

Appellant admits, of course, the entitative existence of the corporation, whose affairs are in the hands of the government, except in so far as its duties and responsibilities are suspended by the possession, under the law by the state officers. The point is that the deprivation of dominion by the board of directors over the assets of the corporation is such that the corporation itself could not sue to realize upon the assets, and that the power could not be conferred upon it to sue for the benefit of the liquidator, or Collier, the commissioner.

The authorities, in similar matters, are against the contention. If a receiver could use the name of a national bank in bringing a suit, we can see no objection to the use of the name of a state bank by the commissioner for the same purpose.

[2] The plea in abatement further asserted that subsequent to the last continuance of the case, Collier, as commissioner, was out of

office and had been succeeded by one Patterson. Appellee replies that the plea in abatement, suggesting the matters indicated, comes too late.

We think, however, as a short cut to the whole matter, that the commissioner of banking had the right to use the name of the First State Bank in instituting and maintaining a suit for the recovery of its assets; that when the power is conferred and the suit is instituted, because the particular officer of government, who authorized the suit had retired and his successor had been appointed, this condition of itself would not operate as an abatement of the suit. The authority had gone forth, and we are not referred to any case, nor can we find any, that because of a change of officers such power would be presumptively revoked. Neither the case of *Warner Valley Stock Co. v. Hoke Smith*, Secretary of the Interior, 185 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621, nor the principles therein enunciated, apply to this condition.

The second assignment raises the same question as to the abatement of the suit produced by the retirement of Collier, and the succession of Patterson, as comptroller, as raised by the fourth proposition under the first assignment. Both assignments are overruled.

[3, 4] Appellant alleged in his answer that he originally subscribed for certain stock in the First State Bank, upon an understanding with one Le Master that appellant and one Holbrook, "could acquire the stock altogether on credit, and that the plaintiff would so handle their stock and note as to make the stock realize sufficient revenues from dividends and the increase in value to pay off the note which appellant and Holbrook would be asked to give." (The quotation is from the brief.) He also alleged that when the transaction was thereafter consummated, and the stock was delivered to him, it was redelivered upon request as collateral security for the note, and this was done with the knowledge of the officers of the bank of the agreement mentioned. His reconvention is that the promoters first, and the officers thereafter (on account of ratification), having made said agreement, it is one of indemnity to the extent that he would not be bound upon the original note, and was not obligated to pay any successive renewal of the first note executed on account of the violation of the bank of said agreement. The trial court sustained an exception to this agreement.

There is force in appellee's position that the allegations merely express a "puffing" transaction, or one of "trade talk," which, with its indefiniteness, is unenforceable. It is admitted by appellant in the pleadings that the assets of the particular bank are in the hands of Roots as special agent, under appointment by Collier, as commissioner. Under the law, the commissioner takes charge of a delinquent bank on account of default in the payment of its debts. It is inferable

from the testimony in this case that Roots, the special agent, took charge of this bank on account of its failure.

When the government takes charge of a defaulting bank and is administering its affairs, for the purposes indicated by statute, we think the question of solvency, or technical insolvency, of said bank, is a foreclosed proposition. If the bank were not insolvent, according to the ordinary acceptance of the term, however, the government having suspended its operations, its action for the purposes of this suit, as to that question, is final. We take it that the use of the bank's name as nominal plaintiff, is not the act of the bank, but the act of the government by virtue of the power vested in its officers under the law in assuming charge of its assets. The action of the commissioner, in charge of a state bank, in making an assessment against the stockholders under the provisions of our statute, is determinative, the same as the assessment of a receiver under the provisions of the National Bank Act. *Collier v. Smith*, 169 S. W. 1108, and authorities cited. We believe the same principle would apply to that question in the condition of this record. Hence, reverting to the question of the alleged indemnity, as pleaded by the defendant, we do not think that the same is available in this proceeding. The fund to be derived from a stockholder, in the present condition of this corporation, should be regarded as a trust fund to be devoted to all the creditors of the company. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 735; *Burleson v. Davis*, 141 S. W. 561. It is true that the cases, in regarding such assets as a trust fund, for the benefit of creditors, generally refer to actual insolvency of corporations whose affairs are before the courts or in the hands of an assignee for administration. As to this corporation, however, the statutes of this state have substituted a condition, whether actual insolvency or not, calling for the interposition of the officers of government for the administration of the assets of a defaulting corporation, primarily for the benefit of creditors. We think the same rule should prevail as applicable to this record.

Chief Justice James, of the San Antonio district, held, in the case of *Roach v. Burgess*, 62 S. W. 804, that a stockholder of a college corporation, sued after the insolvency of said incorporation for tuition owing the college, could not show a parol agreement contemporaneous with a stock subscription that the stock should be received in payment of said tuition.

Morawetz on Private Corporations, vol. 2, § 821, says:

"In equity * * * the shareholders of an insolvent corporation are held to be unconditionally liable to its creditors to contribute the amount of capital subscribed by them, although their subscriptions were conditional, as between themselves and the company, upon a regular call or assessment by the board of directors"—citing the case of *Hatch v. Dana*, 101 U. S. 205, 214, 25 L. Ed. 885.

The court submitted an issue to the jury whether or not the appellee originally issued its corporate stock to appellant for and in consideration of the note, to which the jury answered that the same was not so issued. Appellant questions this submission, and the jury's answer.

It is argued by appellee that the original note, executed by McWhirter, the appellant herein, was one made payable to Holbrook and indorsed in blank by the latter; that the officers of the appellee bank, as the agent of McWhirter and Holbrook, discounted the note to the Dallas bank, and the proceeds of that negotiation constituted a payment of the stock as between the bank and McWhirter; that the note was thereafter transferred by the Dallas bank to the Amarillo bank for a valuable consideration, and that this note, payable to Holbrook, was taken up by another note executed by McWhirter and Holbrook, direct to the First State Bank, and constituted a loan; that the present note for \$1,000 sued upon, after Holbrook had been eliminated from the transaction, is a renewal of the note payable direct to the Amarillo Bank as such loan. Hence the note sued upon, it is asserted, is not the payment of the stock; in a sense it had already been paid for.

Appellant contends that said renewal represents the original note; that said original note in reality was given for the stock which was delivered to him, and then redelivered to the bank as collateral security for the indebtedness; that the transaction by the First State Bank with the Dallas bank is a subterfuge; that the latter bank paid nothing for the original note, and when surrendered, and transferred by it to the Amarillo bank, just a few days after it had been delivered to the Dallas bank, no consideration likewise passed, but that the same was a juggling of debits and credits between the two banks; that stripped of circumlocution, the present note, in reality, represents the original note; that the stock originally was delivered to Mr. McWhirter, as it was recognized by the bank as having been "issued" by using it as collateral security, and hence such a transaction is in violation of the Constitution, for the reason that the stock was not issued for "money paid." Section 6, article 12, state Constitution.

The case of *Allen v. Edwards*, 93 Miss. 719, 47 South. 382, presents this condition. Section 850 of the Annotated Code of 1892, of Mississippi, prescribes that:

"A note, obligation, or security of any kind, given or transferred by one subscriber for stock in any corporation, shall not be considered taken or held as payment of any part of the capital stock of the company."

One Edwards was director and stockholder of a corporation, and continued to be director and stockholder of the institution throughout the period of the prosperity of the bank, receiving dividends. Edwards had transferred a note of another for six shares of stock in the bank, for which Allen had be-

come receiver, apparently in the face of the provision quoted. The receiver of the bank, after its insolvency, collected the note, and Edwards' contention was that this particular money should not have been applied on the subscription to this stock, but should have been credited to him individually, and allowed as an offset to the note sued upon by the receiver. The Supreme Court of Mississippi said:

"That section [850, supra] has no application in the solution of this case. It simply provides that there can be no valid subscription to stock without the payment in cash therefor. The rule declared by that section was intended to secure the corporation and its creditors and depositors, and not to benefit a defaulting subscriber. * * * The stock subscription of the bank was the means of the company, on the faith of which credit was given to it, and every subscriber was liable for debts contracted during his ownership of stock, and for a year after he had transferred it to the amount of his subscription. * * * The purpose of these statutes and section 850 is perfectly plain. They were all enacted for the purpose of protecting the depositors and creditors of a bank. They were not passed with any view to benefit a defaulting stockholder. * * * Edwards held himself out by all his conduct and dealings with the bank * * * as a stockholder of these six shares, * * * and, having so held himself out towards depositors and creditors, as a stockholder * * * the law will take him at his word and deal with him as if he in fact were a stockholder, whether he was or not. In other words, he is estopped to deny as against creditors, that he was a stockholder as to these six shares, by his own course of dealing in the matter."

As applied to an insolvent corporation, we think the rule is sound.

The case of *Sawyer v. Hoag*, supra, by the United States Supreme Court, was one where the assignee in bankruptcy was suing a stockholder upon a note, which, though regarded as a loan between the insurance company and the stockholder, the Supreme Court of the United States said, that:

"The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company," and this fund could not be appropriated by the debtor to the exclusive payment of his own claim, in an action of set-off.

In that case the set-off, it is true, was one acquired after insolvency, and the question of the indebtedness being void, on account of some prohibitory statute or constitutional enactment, was not involved.

This record shows that McWhirter went along for several years as a stockholder, receiving and acknowledging dividends paid by the bank, as having been earned upon the stock. The bank, as plaintiff in this suit, is a nominal party for the benefit of the officers of the state for the creditors and other stockholders. The bank has defaulted and the state is attempting to realize upon its assets for the purpose of executing the trust for the benefit of those entitled to the fund. This is not, in reality, litigation between the bank and McWhirter, with the latter asserting that his note is void because in violation

of the Constitution. It is an attempt upon the part of McWhirter, when pursued by the parties in charge of the assets, to invoke the Constitution, and abstract a fund for the benefit of the creditors and other stockholders after the crash has come. If courts permitted indemnities to be pleaded by stockholders, when corporations have become insolvent, conditions are conceivable where the creditors of a defaulting corporation might look into a vacuum.

We also think McWhirter is estopped to deny that he is a stockholder in the condition of the record. This discussion disposes of all other assignments.

Believing that the court rendered the proper judgment, it is affirmed.

AUTO TRANSIT CO. et al. v. CITY OF FT. WORTH et al. (No. 8304.) *

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 20, 1915. On Motion for Rehearing, Jan. 15, 1916.)

1. APPEAL AND ERROR \S 719—ASSIGNMENTS OF ERROR—NECESSITY.

On appeal from an order declining to continue a temporary injunction, appellants are not required to file briefs containing formal assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2968-2982, 3490; Dec. Dig. \S 719.]

2. INJUNCTION \S 85—SUBJECTS OF RELIEF—ENFORCEMENT OF ORDINANCES.

While, as a general rule, an injunction will not be granted to stay criminal proceedings, an injunction will be granted to prevent the threatened enforcement of a criminal ordinance, the validity of which is involved to avoid a multiplicity of suits, and irreparable injury, there being no adequate remedy at law where repeated prosecutions will seriously impair or destroy property rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 155, 156; Dec. Dig. \S 85.]

3. COURTS \S 1—"JURISDICTION."

The "jurisdiction" of a court is the power to consider and decide one way or the other as the law may require.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1-4, 6-9, 91-106; Dec. Dig. \S 1.]

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

4. COURTS \S 207 — JURISDICTION — COURT OF CIVIL APPEALS.

Where property rights are involved in the attempted enforcement of penal ordinances alleged to be invalid because of statutory and constitutional grounds, the Court of Civil Appeals, though a court of exclusive civil jurisdiction, may properly exercise its jurisdiction to inquire into the validity of the ordinance and to grant relief by injunction if it should determine the ordinance to be invalid.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 207.]

5. CARRIERS \S 2—CONSTITUTIONAL LAW \S 205—CLASS LEGISLATION—REGULATION OF JITNEY OR "MOTOR BUS."

An ordinance regulating the operation of motor busses, defining a "motor bus" as any automobile or trackless motor vehicle carrying passengers for hire, and held out or announced as operating or running over a particular route

to a particular point, or within any designated territory, requiring a license to be procured, imposing a license fee of \$10, and requiring the execution of a surety bond conditioned for the payment of damages for injuries or death caused by the negligence or willful act of the owner or operator, does not violate Const. art. 1, § 3, providing that all freemen have equal rights, and that no man or set of men is entitled to exclusive, separate public emoluments or privileges, except in consideration of public services, though no surety bond is required of street railways, taxicabs, or rent cars, and no license fee is required for the operation of the street railway, while a license fee of only \$3 is imposed on taxicabs and other rent cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ¶2; Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. ¶205.]

6. CONSTITUTIONAL LAW ¶136—IMPAIRING OBLIGATIONS OF CONTRACT—REVOCATION OF LICENSES.

A city ordinance imposing more burdensome conditions on the operation of jitneys or motor busses than were imposed by a prior ordinance with which parties operating motor busses had complied did not violate Const. art. 1, § 16, prohibiting the enactment of any law impairing the obligation of contracts where it provided that those who had paid a license fee under the prior ordinance might have a license granted them under the new ordinance for the unexpired term, or that in case the licensee should elect to discontinue the operation of his motor bus the portion of the fee for the unexpired term would be refunded to him.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 299, 300, 343, 362; Dec. Dig. ¶136.]

7. CONSTITUTIONAL LAW ¶297 — EMINENT DOMAIN ¶2—TAKING PROPERTY—PRIVILEGES AND IMMUNITIES.

A city ordinance requiring parties operating jitneys or motor busses to procure a license for which a license fee of \$10 was imposed, and to furnish a bond conditioned for the payment of damages for injuries or death caused by their vehicles, and authorizing the revocation or suspension of the license upon conviction for a violation of any provision of the ordinance, did not violate Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed or applied to public use without adequate compensation being made, or section 19, providing that no citizen shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of law of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. ¶297; Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. ¶2.]

8. LICENSES ¶7—"OCCUPATION TAX"—STATUTORY PROVISIONS.

Such ordinance did not violate Const. art. 8, § 2, providing that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, as the license fee was not in the nature of an occupation tax, and, moreover, the burdens placed upon different individuals engaged in the operation of motor busses were the same, and it is only when a discrimination is shown as between members of the same class that this constitutional guaranty may be invoked.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. ¶7.

For other definitions, see Words and Phrases, First and Second Series, Occupation Tax.]

9. MONOPOLIES ¶4 — VALIDITY OF ORDINANCES.

Such ordinance did not violate Const. art. 1, § 26, providing that a monopoly shall never be allowed, as it disclosed no intent or purpose to create a monopoly of the carrying of passengers in favor of a street car company, taxicabs, and other rent vehicles, and the court would not be authorized to speculate or surmise as to the existence of such motives on the part of the municipal legislative body, or that such a result would probably flow from the enactment of the ordinance.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 3; Dec. Dig. ¶4.]

10. CARRIERS ¶2—USE OF STREETS—REGULATION OF JITNEYS.

That parties operating jitneys or motor busses are not in a position to comply with an ordinance requiring as a condition to the granting of a license for the operation of motor busses the execution of a bond conditioned for the payment of damages for injuries or death caused by their vehicles, and will therefore be required to abandon the operation of their motor busses, does not in itself establish the unreasonableness or invalidity of the ordinance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ¶2.]

11. CARRIERS ¶2—USE OF STREETS—REGULATION OF JITNEYS.

That parties operating jitneys or motor busses will suffer a pecuniary injury from the enforcement of an ordinance regulating the operation of such vehicles does not even tend to establish the invalidity of the ordinance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ¶2.]

12. MUNICIPAL CORPORATIONS ¶708 — USE OF STREETS—REGULATION OF JITNEYS.

The Ft. Worth charter gives the board of commissioners exclusive power and control of the streets, and authorizes the board to regulate the speed of locomotives, trains, street cars, vehicles, and animals, abate nuisances, prohibit and restrain or regulate the use of vehicles, automobiles, or other conveyances, regulate and fix the fares, tolls, and charges of all street railways, public carriages, hacks, and vehicles, provide for license fees, police tax, and surveillance of drivers and owners of vehicles, and vests the board with general police powers to enact and enforce ordinances necessary to protect health, life, and property, and to prevent and summarily abate and remove nuisances and enforce the good government, order, and security of the city and its inhabitants, and to have and enjoy the general police powers of a city. Such board adopted an ordinance requiring persons desiring to operate motor busses, defined as including trackless motor vehicles, carrying passengers for hire, and operating and running over a particular route, or to a particular point, or within designated territory, to file an application for a license, giving certain specified information as to the vehicle intended to be operated, its proposed driver, route, etc., and providing that the board might for reasons therein designated refuse a license; that no license should be granted except on condition that a bond conditioned for the payment of damages for injuries or death should be furnished; that individual sureties thereon should furnish specified proof of their insolvency; and that the board might require a new or additional bond. It further promulgated rules for the operation of such vehicles, the loading and unloading of passengers, the number of passengers, the hours each day in which the motor bus must be operated, the speed of operation, etc., and made violations thereof a misdemeanor punishable by a fine not exceeding \$200, and authorized the

revocation or suspension of the license upon conviction for violations. *Held*, that this was authorized under the general police powers with which the board was vested by the charter, as well as the other charter provisions mentioned. [Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. ¶703.]

On Motion for Rehearing.

18. MUNICIPAL CORPORATIONS ¶703—REGULATION OF JITNEYS OR MOTOR BUSESSES.

An ordinance regulating the operation of jitneys or motor busses, and requiring as a condition to the granting of a license for the operation of any such vehicle the execution of a bond conditioned for the payment of damages for injuries or death caused by the operation thereof, was not discriminatory or invalid, though there was no similar requirement as to the operation of taxicabs or rent cars, or individuals operating their own cars, not for hire, as the operation of jitneys on crowded streets is a business peculiarly dangerous to the public, and the duty of care on the part of operators is more important than the performance of such duty in the case of one only occasionally or infrequently driving over such streets, and the danger therefrom is more imminent and frequent, and a city, in the exercise of its police power, may properly require a further guaranty than it does of others that operators of such vehicles will avoid acts of negligence and respond for any damage inflicted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. ¶703.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Suit by the Auto Transit Company and others against the City of Ft. Worth and others. From an order refusing to continue a temporary injunction, plaintiffs appeal. Affirmed.

Ike A. Wynn, of Ft. Worth, for appellants. T. A. Altman, of Ft. Worth, for appellees.

BUCK, J. This was a proceeding by the Auto Transit Company, a corporation domiciled in Ft. Worth, Tarrant county, Tex., and J. C. Walton, a resident of said county, professedly on behalf of themselves and 60 other "motor bus" or "jitney" owners and operators against the city of Ft. Worth, represented by its mayor and four commissioners, seeking to enjoin the enforcement of Ordinance No. 448, and as amended by Ordinance No. 470, theretofore passed by the said board of commissioners, regulating the operation of said motor busses, or "jitneys," in common parlance, on the streets of said city. Both ordinances were attached to and made a part of the petition. Petitioners alleged that they, and those for whom they sued, had complied with Ordinance No. 448 when it became effective, and had since been operating thereunder. Petitioners also alleged that Ordinance No. 442, theretofore passed by the city of Ft. Worth, provided that every owner of a motor-driven vehicle should register the same and pay a license number tax to the assessor and collector of \$1 per car, and that they, and those for whom they sued, had

complied with the said ordinance also. It was further alleged that the Auto Transit company owned and operated 32 motor busses, and had invested in its cars about \$17,500, and the plaintiff Walton about \$500. Others for whom suit was brought were also alleged to have invested approximately the sum of \$500 each; and it was averred that the effect of Ordinance No. 470 would be to drive the motor bus or "jitney" out of competition with the street railway company operating in Ft. Worth, and to give a monopoly to said street railway company of the transportation of passengers within said city; that the city of Ft. Worth embraces about 17½ square miles, and has a population of about 100,000; that it has many miles of streets which are traversed by the street cars, and by far the greater portion of its inhabitants do not live adjacent to street car lines, and that the "jitney" has been for some time a necessary public conveyance and utility, and is an economical and efficient development of local transportation necessary for the convenience and welfare of the great majority of the inhabitants of said city; that there are now in operation in said city about 150 "jitneys," which carry many thousands of passengers each day. It was further alleged that petitioners were unable to comply with the provisions of Ordinance No. 470 requiring a bond in the sum of \$2,500, payable to the mayor of the city of Ft. Worth, and executed by the person in whose name the license is sought as principal, and a solvent surety corporation, incorporated under the laws of the state of Texas, or with permit to do business in this state, conditioned that the principal shall pay all legal damages for injuries to property or person of any one, including injuries resulting in death on account of the negligence or willful act of the owner or operator of such motor bus, etc., inasmuch as the fee for said bond was unreasonable and even prohibitory, such companies charging from \$200 to \$250 for each said bond executed. Further allegations were made as to the terms, requirements, and conditions of said Ordinance No. 470 with reference to the operation of motor busses or "jitneys," as contained in subdivision "g" of section 5 of said ordinance, which petitioners alleged were discriminatory, and constituted an unnecessary and unreasonable regulation beyond the police power of the city, and violated the Constitutions of the United States and the state of Texas. It was further alleged that, inasmuch as it is practically impossible for petitioners to comply with the provisions of said ordinance, they would be greatly injured in their property and property rights, and would be deprived of the privileges and immunities guaranteed to them by the laws of the land, if such ordinance should be enforced, and that the city of Ft. Worth, through its said board

of commissioners, was threatening and attempting to enforce said ordinance, and that, unless it was restrained, it would subject plaintiffs, their agents and employes, and those in whose behalf they brought suit, in case they did not comply with the provisions of said ordinance, which compliance was alleged to be impossible, to innumerable arrests and prosecutions and much vexation, harassment, and oppression.

Accompanying, and in support of, said petition was an affidavit of E. M. Rogers, president of the Auto Transit Company, to the effect that said company had been incorporated for the purpose of owning, maintaining, and operating automobiles and other vehicles designed for the purpose of carrying passengers, freight, express, and mail in the city of Ft. Worth; that said company had paid its franchise tax for 1915; that the "jitneys" or "motor busses" in the city of Ft. Worth numbered about 150, and carried approximately 30,000 passengers each day for a five-cent fare; that there were a great many "taxicabs" and "rent cars" operating in Ft. Worth, and said "rent cars" were five-passenger Ford automobiles, and practically identical with those operated by plaintiffs, and such cars were operated over the streets in the same manner as plaintiffs' "jitneys," with the same attendant risks and dangers; that said taxicabs and rent cars charged many times as much for carrying a passenger as plaintiffs charged; that the Northern Texas Traction Company is a private corporation operating street cars over certain streets in the city of Ft. Worth for a fare of five cents; that an automobile is not a dangerous machine, or an unsafe means of conveyance, and that a careless or reckless driver makes the operation of an automobile just as hazardous when he is operating a "private car" or "rent car" as when he is driving a "jitney" or "motor bus"; that the "jitneys" constituted a great convenience to the inhabitants of the city of Ft. Worth, many of whom choosing and preferring this mode of travel. Affiant further averred the compliance by his company with the provisions of Ordinances Nos. 442 and 448, and the payment by it of various sums of money for registration of license fees and the purchase of indemnity contracts, as provided by said ordinances, that it was impossible to make personal bonds, as provided in the alternative in Ordinance No. 470, and was wholly impossible to comply with the provisions requiring bonds by surety companies, and that it would cost said plaintiff company \$6,600 to procure the bonds executed by a surety company.

Also there were affidavits from E. W. Scott and Adams B. Vera containing practically the same averments. Also an affidavit signed by some 11 persons alleged to be citizens of Ft. Worth, to the effect that the Northern Texas Traction Company owns and operates a street railway system in the city of Ft. Worth, and has about 77 miles of trackage.

and runs about 200 cars over the streets of said city, and that there are about 100 other carriers of passengers for hire in the way of taxicabs, omnibuses, etc., running over said streets, and that none of these mentioned carriers are required to carry passenger insurance as provided in said ordinances applicable to the "jitneys."

A temporary restraining order was granted by the trial court, and upon hearing on June 26, 1915, the court declined to continue said temporary injunction, which expired on the day of hearing, and denied plaintiffs' prayer so to do, to which order of the court the plaintiffs excepted and gave notice of appeal.

[1] Plaintiffs have not filed in this court briefs containing formal assignments of error, and under the law they are not required to do so (*Holbein v. De La Garza*, 126 S. W. 42; *F. W. & D. O. Ry. v. Craig*, 176 S. W. 827), but have contented themselves with filing a memorandum of authorities. But we have had the benefit of an able and exhaustive brief furnished by appellee.

On the threshold of the consideration of this cause we are met with two questions affecting the jurisdiction of this court, to wit: First, whether an injunction will lie to restrain the enforcement of a criminal statute or ordinance; and, second, even though it be admitted that in certain instances such relief may be granted, may the authority to grant such relief be exercised by a court of exclusive civil jurisdiction, or has the authority been delegated to courts exercising criminal jurisdiction?

[2, 3] First. As has been often said, it is a general rule that an injunction will not be granted to stay criminal proceedings, but, as we understand the authorities, this does not mean that an injunction will not lie to prevent prosecution under a criminal ordinance, or to prevent the threatened enforcement of such criminal ordinance, where the validity of the ordinance is involved. It seems clear from the authorities that in the latter case an injunction will be granted to avoid a multiplicity of suits, to avoid irreparable injury, and that there is no adequate remedy at law where repeated prosecutions will seriously impair or destroy property rights. A court of equity may entertain jurisdiction of a suit to enjoin the enforcement of an alleged invalid statute, for the absence of lawful power to impose the restrictions of the statute may result in irreparable loss to the party concerned; for "jurisdiction" is the power to consider and decide one way or the other, as the law may require. *Nolen v. Reichman* (D. C.) 225 Fed. 812. In the case of *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, the United States Supreme Court uses this language:

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

In line with and in support of these two authorities may be cited the cases of *Ex parte Warfield*, 40 Tex. Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724; *City of Houston v. Richter*, 157 S. W. 189; *Dibrell v. City of Coleman*, 172 S. W. 550, writ of error denied November 17, 1915; *City of Austin v. Austin Cemetery Ass'n*, 87 Tex. 330, 28 S. W. 529, 47 Am. St. Rep. 114; *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Greene v. City of San Antonio*, 178 S. W. 6; *Booth v. City of Dallas*, 179 S. W. 301; *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. In the last-cited case the Supreme Court of Missouri uses the following language:

"It is contended that, though it be conceded that the ordinances are invalid, the plaintiffs are not entitled to injunctive relief on the facts stated, for the reason that they have an adequate remedy at law. But is the remedy at law adequate? It must be remembered that the injury complained of here is continuous. The ordinances are continuous, and plaintiffs' business is continuous, and, under the ordinances, for each wagonload of coal sold and delivered in violation of the restrictive provisions thereof, the plaintiffs each become subject to an action in the municipal courts of the city for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy. They are entitled to be protected from the expense, vexation, and annoyance of such a multiplicity of suits, in consequence of their continuance of a legitimate business, except upon compliance with the condition or ordinances which it is alleged are and may be utterly void."

High on Injunctions (8d Ed.) p. 12, says:

"The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction."

Therefore we hold that question No. 1 must be answered in the affirmative.

[4] Second. We think also from the authorities cited, and from the allegations in the petition, to the effect that property rights are involved by the attempted enforcement of ordinances alleged to be invalid because of statutory and constitutional grounds, that this court may properly exercise its jurisdiction: First, to inquire into the validity of the ordinance attacked; and, second, in case it should determine said ordinances to be invalid, to grant the relief prayed for in plaintiffs' petition.

We now come to the consideration of the validity vel non of Ordinances Nos. 448 and 470. It would seem from the authorities that, since appellants have taken out a license under Ordinance No. 448, and have accepted the benefits thereof and operated thereunder, it cannot attack the constitutionality or validity thereof. *Young v. City of Colorado*, 174 S. W. 986; *Musco v. United Surety Co.*, 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851; *City of New York v. Manhattan Ry.*, 143 N. Y. 1, 37 N. E. 494; *Pierce v. Somerset Ry.*, 171 U. S. 641, 19 Sup. Ct. 64, 43 L. Ed. 316.

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In the case of *Pierce v. Somerset Ry. Co.*, supra, the United States Supreme Court said: "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute."

In the case of *Musco v. United Surety Co.*, supra, the surety company became a surety for one Ferrara on a bond given under and by virtue of an act of the New York Legislature regulating the taking of deposits by persons, firms, or corporations engaged in the selling of steamship or railroad tickets, etc. Suit was brought by plaintiff against defendant surety company under said act, and from an order overruling a demurrer to the complaint it appealed to the Court of Appeals for New York urging the unconstitutionality of the statute. The court says:

"The appellant, as surety, having executed an undertaking in accordance with the provisions of said act with and for a person engaged in receiving deposits as aforesaid, in this action brought in behalf of persons who made deposits with the principal after such undertaking was executed, which have not been accounted for, defends on the ground that said act is unconstitutional. * * * We are of the opinion that these contentions cannot prevail; that, in the first place, the appellant is debarred from making them."

In *Young v. City of Colorado*, supra, this court, speaking through Associate Justice Dunklin, used the following language:

"It is also well settled that a person may by his act, or omission to act, waive a right which he might otherwise have under the provisions of the Constitution. 8 Cyc. 791, 792."

In the case of *Mellen Lumber Co. v. Industrial Commission of Wisconsin*, 154 Wis. 114, 142 N. W. 187, Ann. Cas. 1915B, 997, the Supreme Court of Wisconsin held that appellant, by electing to come under the Workmen's Compensation Act of that state, was thereby precluded from objecting to its constitutionality, saying:

"The argument that the provision under discussion is violative of the 'due process of law' clause of the federal Constitution cannot prevail. It was optional with the appellant to come in under the Compensation Act or to stay out. It elected to take the former course. It accepted the provisions of the act as they were, the burdens as well as the benefits, and so long as it remains under the law it must take the statute as it finds it"—citing a number of cases.

But, inasmuch as the main contention of the appellants is predicated upon the provisions of Ordinance No. 470, which amended sections 1, 2, and 5 of Ordinance No. 448, we are probably not required to so declare the law as set forth in the authorities cited.

Said Ordinance No. 470 is quite lengthy and therefore we will not attempt to set it out in full, but only mention the provisions which seem to be directly involved in the consideration of the questions presented by plaintiffs' petition. In section 1, subd. "b," it defines the words "motor bus" as meaning and including "any automobile, automobile truck, or trackless motor vehicle engaged in the business of carrying passengers for hire

within the city limits of the city of Ft. Worth, which is held out or announced by sign, voice, writing, device, or advertisement to operate or run, or which is intended to be operated or run, over a particular street or route or to any particular or designated point, or between particular points, or to within any designated territory, district or zone."

Section 2 requires any person desiring to operate such "motor bus" within Ft. Worth to file with the city secretary thereof an application in writing, giving certain information, including the type of the motor car or motor bus, the horse power thereof, the factory number, the county license number, the seating capacity, the name and age of each person to be in the immediate charge thereof as driver, whether such proposed driver uses drugs, intoxicating liquors, or had been convicted of violating any traffic ordinance of the city of Ft. Worth, the termini between which such motor bus is to be operated, the street or streets over which it is to be run, and further provides that upon the filing of such application for license it shall be referred to the city commission, which board may for sufficient reasons designated in the ordinance refuse to grant said application and issue the license thereunder.

Subdivision "g" of said section provides that no license shall be granted to any person to operate a motor bus within the limits of the city of Ft. Worth except upon the condition that the applicant for such license enter into a bond conditioned as pleaded by plaintiff and hereinbefore set out. Said subdivision further requires that individuals offered as sureties comply with certain requirements of proof establishing their solvency, that the board of commissioners may require a new bond or additional bond from any licensee whenever the bond approved, or surety thereon, is by the board deemed insufficient, or when such bond shall have been decreased in amount by recovery thereon. The license issued under the provisions of this act is required to designate the route or termini along which or between which the said motor bus is to operate.

Section 5 provides the rules of operation of a motor bus and penalties for the violation thereof, and, among other things, prohibits such motor bus from remaining standing upon any street for the purpose of loading or unloading passengers, except it be brought as near as possible to the right-hand curb of said street; from driving or operating a motor bus without the city license number being displayed on the rear of said bus. It requires, further, that a sign or painting showing both the destination and the route of same be prominently displayed on and attached to said motor bus. It prohibits persons from riding on the running boards or fenders, or to occupy any other place thereon outside of the body thereof while such motor bus is in operation, and limits

the number of passengers which may ride in the front with the driver, and limits and fixes the number of hours each day in which said motor bus must be operated, except as to Sundays, and in case of accidents, breakdowns, etc., fixes the speed at 12 miles per hour in the business section of Ft. Worth, and 18 miles per hour in the residence section of Ft. Worth at which motor bus may be operated, prohibits the running of said car between sundown and sunup without lights, and prohibits racing with any other motor bus or driving rapidly to pass one in order to be first to any prospective passenger or any one waiting for another motor bus or other conveyance, etc. It further provides that each and every day's violation of any provisions of the ordinance shall constitute a separate offense, and that one so violating shall be guilty of a misdemeanor, and shall be punished by fine not exceeding \$200, and that in case of conviction of the owner or operator under such ordinance the commissioner of fire and police shall report the same to the commissioners, together with his recommendation, and that the commissioners shall consider and act upon said recommendation, and may revoke or suspend such license if they deem it proper.

Under chapter 5, section 1, of the city's charter, the exclusive power and control of the streets is given to the board of commissioners, and under section 2 of said chapter power is vested in said board, by ordinance or otherwise, to regulate within the limits of said city the "speed of locomotives, trains, street cars, vehicles and animals." By Chapter 9, section 3, the power to abate all nuisances is lodged in the commissioners, and under section 18 the authority to prohibit and restrain or regulate the use of vehicles, bicycles, automobiles, or any other conveyance. Under chapter 11, section 8, the authority is vested in the commissioners to regulate and fix the fares, tolls, and charges of all street railways, public carriages, hacks, and vehicles of every kind; under section 13 of said chapter to provide for license fees, police tax, and surveillance of drivers and owners of vehicles of every kind; and under section 4 of the same chapter said board is vested with general police powers "to enact and enforce ordinances necessary to protect the health, life and property, and to prevent and summarily abate and remove nuisances of all kinds and description, and to preserve and enforce the good government, order, and security of said city, and of its inhabitants, and have and enjoy general police powers of a city.

There are other provisions of the charter which might be mentioned as affecting the authority of the city sought to be exercised in this instance, but sufficient has been noted for the purposes of this opinion.

[5] We do not think because the fee for the operation of a motor bus is placed at

\$10, while the license fee for taxicabs and other rent cars is only \$3, and there is no license fee required for the operation of the street railway mentioned, and, further, that said ordinance requires the execution of a surety bond in the sum and terms mentioned, and none is required either for the taxicabs and other rents cars or for the street railway, make said ordinances obnoxious to the provisions of article 1, § 3, of the state Constitution, which reads as follows:

"All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

Nor is it the fact that said ordinance attempts to define as a separate class motor busses or "jitney" cars. As has been said by our Supreme Court in the case of *Supreme Lodge United Benev. Ass'n v. Johnson*, 98 Tex. 5, 81 S. W. 18:

"The Legislature may classify persons, organizations, and corporations according to their business, and may apply different rules to those which belong to different classes." *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; *Insurance Co. v. Chowning*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; *Marchant v. Railway Co.*, 153 U. S. 389, 14 Sup. Ct. 894, 38 L. Ed. 751; *Insurance Co. v. Mettler*, 185 U. S. 325, 22 Sup. Ct. 662, 46 L. Ed. 922.

As has been said in the case of *Nolen v. Reichman*, supra:

"[The presumption is always in favor of the validity of legislation; and, if there could exist a state of facts justifying the classification or restriction complained of, the courts will assume that it existed.]"

We can readily understand that greater danger may be caused to the public by the operation of numerous motor busses continuously throughout the day, over and along crowded streets filled with congested traffic, and without limitation as to the street or streets, or parts thereof, over which they may operate, than from the operation of taxicabs and other rent cars, which are required to occupy a fixed place or stand when not in operation, and which, when transporting passengers, do not ordinarily run over the streets on which the heaviest traffic exists, or from the operation of a street railway along a fixed track and on steel rails. As is said in *Nolen v. Reichman*, supra:

"Furthermore, a substantial distinction between the property of the owner of a street railway and that of the owner of a 'jitney' should not escape attention. The former consists of a fixed plant, including rolling stock, which is operative only along tracks provided for the purpose, while that of the latter is fugitive in character, since it is operative through its own power upon any portion of the surface of an ordinary highway. It results that the street railway property is in its nature an indemnity against the consequences of negligence, and so is at least an equivalent for the bond of indemnity which is here resisted by the owner of the 'jitney.' * * *

"It may well have been that the Legislature had in mind, when it enacted the statute in question, that those engaging in the business which the act sought to regulate operated vehicles susceptible of becoming dangerous to the

public by the manner of their operation; that they had no fixed track upon which to run, and were at liberty to move over the entire surface of the street; that they had no schedule; that pedestrians had no way of knowing when and where to expect them; that they increased the danger to persons using the street, whether as pedestrians or while boarding or leaving street cars or other vehicles; that they stopped at street crossings, or along the curb between street crossings, to receive and discharge passengers; that very often the driver owns the machine, or at least an equity in it; that many of them are financially irresponsible; that the patrons of such vehicles are composed of men, women, and children; that the vehicles, in the hands of careless drivers, might rush through crowded streets at a dangerous rate of speed, probably without any financial responsibility to their patrons or others upon whom damage might be inflicted by such machines, because of the negligence of the operators. * * *

"There is another distinction that should be noted. It concerns the taxicab. While the 'jitney' and the taxicab are physically the same, yet the services they perform materially differ. The service of the one is designed to accommodate persons traveling along distinct routes and at a rate of fare common to all; but the service of the other is intended for the accommodation of persons whose destinations involve varying distances and lines of travel and presumably at varying prices. The two kinds of service would signify substantial difference in numbers of vehicles needed to meet the respective demands; and so the dangers attending the operation of the 'jitney' presumably would materially exceed those arising in the taxicab service."

[8] Nor do we think that the ordinance discussed is inhibited by the provision contained in section 16, art. 1, of the state Constitution, which prohibits the enactment of any law impairing the obligation of contracts, as claimed by appellants in connection with their plea that they had complied with the requirements of Ordinances Nos. 442 and 448, and that, in effect, the enforcement of the provisions of Ordinance No. 470 would be an abrogation of the terms of the contract entered into between the city and appellants. It is stated in 8 Cyc. 938:

"As a license authorizing a person to practice a profession, or to carry on a particular business, is not a contract which vests a right, but merely the grant of a privilege, such a license is not protected by the constitutional prohibition as to the impairment of the obligation of contracts."

In *Doyle v. Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148, the United States Supreme Court says:

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable."

The application of this well-established principle certainly does not work any deprivation to the appellants, inasmuch as the ordinance provides that those who have paid a license fee under the prior ordinance may have a license granted them under this ordinance for the unexpired term, or, in case the licensee should elect to discontinue the operation of his motor bus, the portion of said fee for the unexpired term will be refunded to him.

[7] Nor do we think that the ordinance is in violation of section 17, art. 1, of the state Constitution, which provides, in part, that:

"No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made," etc.

—as plaintiffs alleged in their petition.

Nor do we think that it is contrary to section 19, art. 1, of the state Constitution, which provides that:

"No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

This contention, raised by appellants in their petition, may most pertinently be directed to section 6 of said ordinance, which authorizes the board of commissioners, upon a showing that a licensee has been convicted of a violation of a provision of this ordinance, to revoke or suspend such license if it deem proper. It has been held that, where the authority to revoke a license is not given a municipality in its charter, and is not expressly authorized by ordinance, such revocation is not within the powers of the governing officers of such municipality (25 Cyc. 625), though the authority of revocation, it seems, may be presumed by virtue of the charter power to issue the license (*Newson v. City of Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558, with notes thereunder).

But section 8 of Ordinance No. 448 contains the same provision as to the power of revocation or withdrawal of license as in section 6 of Ordinance No. 470. Plaintiffs had accepted such terms when they applied for license under the older ordinance; hence it would seem that they are not now in a position to complain. 25 Cyc. p. 626, subd. "c."

[8] Nor do we think that it can be successfully contended that the ordinance is in conflict with article 8, § 2, of the state Constitution, which provides that:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax," etc.

For, in the first place, the license fee there-in provided is not in the nature of an occupation tax (*Ex parte Sullivan*, 178 S. W. 537; *Hoefling & Son v. City of San Antonio*, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608); and, in the second place, it is not shown that there is any difference as to the license required of or in other burdens placed upon different individuals engaged in the operation of motor busses, and it is only when a discrimination is shown as between members of the same class that this constitutional guaranty may be invoked (*State v. Railway*, 100 Tex. 173, 97 S. W. 71; *Texas Company v. Stephens*, 100 Tex. 628, 103 S. W. 481).

[9] Nor do we think there is anything in the allegation that by the enforcement of

said ordinance there will be the creation of a monopoly of the carrying of passengers in the city of Ft. Worth in favor of the street car company or of the taxicabs and other rent vehicles, and in this respect in violation of section 26, art. 1, of the Constitution. The ordinance itself does not disclose any such intent or purpose on the part of the board of commissioners of Ft. Worth, nor does it suggest such a result. In the absence of such a showing, we would not be authorized to indulge in speculation or surmise as to the existence of such motives on the part of the municipal legislative body, or that such result would probably flow from the enactment of said ordinance. It is held that the motive of a legislative body in enacting a law will not be inquired into by the courts. *Soon Hing v. Crowley*, 113 U. S. 708, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Shenandoah Lime Co. v. Mann*, 115 Va. 865, 80 S. E. 753, Ann. Cas. 1915C, 973; *Cooley on Constitutional Limitations* (7th Ed.) 258; 36 Cyc. 1137.

[10, 11] Nor does the fact that the plaintiffs herein are not in a position to comply with the terms and provisions of the ordinance under discussion, of itself, establish the invalidity or unreasonableness of such ordinance. It is true that the provision requiring a surety bond may necessitate the incurrence of an expense which the plaintiffs may not be able to bear, and that therefore they will be required to abandon the operation of their motor busses, but that in itself does not establish the unreasonableness or invalidity of the ordinance. Nor does the fact that plaintiffs will suffer a pecuniary injury by reason of the enforcement of said ordinance even tend to establish the truth of the contention that the ordinance is invalid. As said by Mr. Justice Brewer in the *N. Y. & N. E. R. Co. Cases*, cited in *Grainger v. Jockey Club*, 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997:

"The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."

In the *Jacobson Case*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, Mr. Justice Harlan says:

"In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."

In the *Barbler Case*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, cited in the same opinion, Mr. Justice Field says:

"Though, in many respects, necessarily special in their character, they [statutory regulations] do not furnish just ground of complaint if they operate alike on all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all per-

sons similarly situated, is not within the amendment." Fourteenth Amendment, U. S. Constitution.

[12] In conclusion we desire to say that, so far as we have been able to determine, the ordinance in question was authorized under the general police powers with which the charter vested the board of commissioners, as well as other charter provisions hereinbefore mentioned, and that we cannot say that the ordinance should be held invalid on any of the grounds urged, or that it contains any unreasonable terms and conditions, or is discriminatory in its nature. Therefore we hold that the trial court did not err in denying the continuance of the injunction as prayed for, and the judgment of said court is hereby affirmed.

Affirmed.

On Motion for Rehearing.

[13] Counsel for appellants has filed an able and vigorous motion for rehearing, and in it insistently urges that in our original opinion, as well as in the opinions of all the other courts passing upon the "jitney" ordinances, the courts have overlooked, or at least failed to discuss, a feature which he thinks renders said ordinances discriminatory. It is urged that in the requirement of a surety bond of the "jitneys" the city can only justify such a provision upon the ground that it will tend to make the "jitney" operators more careful, exercise greater diligence to avoid injury to the public, but that this duty—i. e., not to negligently or willfully injure any person upon the streets of the city—is a duty which is no more chargeable upon the "jitney" operator than upon the driver of a rent car or taxicab, or upon an individual who is not operating his car for hire; that the conditions, in this respect, under which the several classes of motor-propelled vehicles operate upon the streets are the same; that the same driver may during a part of the day operate the "jitney," and during another part of the day drive a private car or a rent car; that the public is no more subject to injury from the same driver's operation of a "jitney" in the forenoon than from his operation of a car other than the "jitney" in the afternoon; that his duty in this respect is no greater in the forenoon than in the afternoon; that the rule is that the same obligations or restrictions must be imposed upon all persons similarly conditioned in reference to the duty regulated. He cites in support of his contention the case of *G. C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 667, a suit involving the validity of a Texas statute, passed April 5, 1889, providing that a plaintiff whose claim, under \$50 for stock killed by a railway company, which had not been paid within 30 days, should be entitled, in a suit, and upon establishing his claim, to recover reasonable attorney's fees, not to exceed \$10. The Texas Supreme Court had held this act valid, but the United States

Supreme Court, in reversing our state court upon this feature, said in part as follows:

"Considered as such [as a whole], it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. * * * That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment."

We do not believe our holding in the instant case and the holding of the other courts cited in "jitney" cases fails to measure up to the principle laid down in the *Ellis Case*. If we are correct in concluding from the facts submitted that the operation of the "jitney" on the crowded streets of a city is a business peculiarly dangerous to the public using the streets, then the fulfillment of the duty of care on the part of the operators is more important than the performance of such duty in the case of one only occasionally or infrequently driving a car over said streets. The danger is more imminent and frequent, and might be said to be continuous. Therefore, in the exercise of its police powers, a city may require of the "jitney" operators a further guaranty than it does of others that he will avoid acts of negligence, and that, in case of an accident, certainly more likely to occur than in the case of operators of other motor vehicles mentioned, he will be in a position to respond for the damage inflicted.

In *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909, a case in which the court was dealing with the question of alleged discrimination between producing and nonproducing vendors of such article, it being contended that such law was discriminatory, for the reason that nonproducing vendors might not exempt themselves from actions or penalties for violations of certain subdivisions of said act by showing that the milk sold or offered for sale by them was in the same condition as when it left the herd of the producer, a

privilege accorded to producing vendors, the United States Supreme Court, after stating that the purpose of the law was to secure to the population milk containing a certain standard of purity and strength, and to disclose other milk unclean, impure, unwholesome, etc., continued:

"It is not contended that such purpose is not within the power of the state, but it is contended that the power is not exercised on all alike who stand in the same relation to the purpose, and quite dramatic illustrations are used to show discrimination. A picture is exhibited of producing and nonproducing vendors selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted; the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose, as well as the ultimate purpose."

We feel that the language of the Supreme Court, as above quoted, is sufficient answer to appellants' contention.

It might be well to state that, though the "jitney" legislation is of recent origin, yet the question of the validity of ordinances similar to the one under consideration has reached the courts of last resort, both of civil and of criminal jurisdiction, in many of the states, and, in no case, so far as we have found from our examination, has the court sustained the contention of invalidity.

In addition to the cases cited in our original opinion we might cite *City of Memphis v. State* (Tenn.) 179 S. W. 631; *Ex parte Bogle*, 179 S. W. 1193, by the Texas Court of Criminal Appeals, decided November 3, 1915, not yet officially published; *City of New Orleans v. Le Blanc*, 70 South. 212, decided by the Louisiana Supreme Court November 29, 1915. In these cases ordinances with similar or more onerous provisions have been upheld.

Believing that in our original opinion we correctly disposed of all the issues involved, the motion for rehearing is overruled.

EVANS v. SAN ANTONIO MACHINE & SUPPLY CO. (No. 5550.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916. Rehearing Denied Feb. 9, 1916.)

1. JUDGMENT \Leftrightarrow 460—SETTING ASIDE JUDGMENT—PLEADING—SUFFICIENCY.

A petition to set aside a judgment, alleging that in the action in which it was rendered plaintiff was successful; that judgment entry was postponed awaiting a transcript of the evidence to ascertain the account; that plaintiff's attorneys prepared a proper judgment and left it with the files; that they were called to attend court at another place; and that defendant's attorneys procured the signature and entry of a judgment, omitting the principal defendant by representing to the judge that plain-

tiff's attorneys agreed to the entry—is not bad on general demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. \Leftrightarrow 460.]

2. PRINCIPAL AND AGENT \Leftrightarrow 178—AUTHORITY OF AGENT—NOTICE.

Where plaintiff's selling agent, before selling goods to a firm, was told that one member had left the firm and that the goods were bought by the other member for himself, the plaintiff could not recover from the retiring member, although the agent did not in fact have authority to extend credit, and orders had to be O. K.'d at a central office, since it was his duty to report to his principal the dissolution of a debtor firm, and the principal was charged with notice of all matters which his agent ought to have communicated.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680-684; Dec. Dig. \Leftrightarrow 178.]

Appeal from Hidalgo County Court; W. H. Gossage, Judge.

Suit by the San Antonio Machine & Supply Company against Marvin Evans. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Kibbe, Polk & Perkins, of Brownsville, for appellant. Brown & Strickland, of Mission, for appellee.

CARL, J. This is a suit by appellee to set aside a certain judgment rendered in cause No. 389 in the county court of Hidalgo county, wherein appellee was plaintiff and the Pharr Auto & Supply Company, a firm composed of E. C. Ruth and Marvin Evans, were defendants, and for judgment on the merits of the cause in said suit stated against said partnership and the members thereof. Substantially the grounds upon which it was sought to set the judgment aside were these: That after hearing the pleadings and evidence, the cause having been tried before the judge, the court stated that he would not render judgment for the plaintiff until he received a transcript of the evidence from the stenographer and fully examined the several items sued for; and thereafter on three several days the attorney for appellee inquired of the judge as to what action he had taken, and the court stated that final judgment would be rendered as soon as the testimony was received and the correct amount of the account was ascertained. Thereupon appellee's attorney prepared a judgment in favor of the plaintiff against the company and the members for \$794.26, and placed it among the papers of the case in cause No. 389, and notified the court of same; that thereupon the judge announced in open court that, as soon as he received the transcript of the evidence and found same correct, he would cause the same to be entered, and that if the amounts were not correct, he would make the necessary correction in regard thereto and enter same; that appellee's attorneys were compelled to attend a trial in San Antonio and could not remain, and the judge

stated that it would not be necessary for them to remain, as he would see that the proper judgment was entered. Thereupon said attorneys left for San Antonio and did not return until after the term closed, and they relied upon the court's assurance. It is further alleged that on the last day of the term one of the attorneys for Marvin Evans presented to the court a decree in said cause which gave the plaintiff judgment against the Pharr Auto & Supply Company and E. C. Ruth, the wholly insolvent member, but provided that no judgment should be taken against Marvin Evans, he to go hence without day, recovering his costs of the plaintiff. It is alleged that the judge told him that since the plaintiff had recovered judgment, it would be proper for its attorneys to draw the judgment; but this attorney thereupon said that plaintiff's attorneys had agreed with him that he draw the judgment, and that the one he had prepared was agreeable to plaintiff's attorneys. The trial judge was in a hurry to go to Brownsville, in another county, and when said statements were made to him, he entered his approval and signature on the decree so presented without reading the same, and did not know that Evans was left out of said decree, having relied on the statements of appellant's attorney that such judgment was in accordance with the agreement made between the attorneys. The term of court had closed when appellee's attorneys returned from San Antonio, and the trial judge did not know what the decree provided until some time after the term had closed. Fraud, accident, or mistake are relied upon to set the judgment aside, and it is alleged that the Pharr Auto & Supply Company has no assets and Ruth is wholly insolvent. These matters were all set out in the petition, and the judgment prepared by plaintiff below, the petition in cause No. 389, and the judgment entered as prepared by appellant's attorney were all attached thereto as exhibits and made a part of the petition in this cause.

[1] The first assignment is that the court erred in overruling the general demurrer to the petition, but we think this is without merit, and overrule the same.

[2] The second assignment complains of the refusal of the court to give an instructed verdict for defendant, Marvin Evans, because the uncontradicted evidence shows that the account was made after notice to appellee that he had withdrawn from the firm. The firm was dissolved on January 11, 1913, and this written agreement of dissolution was filed for record on February 23, 1913, in Hidalgo county. The first item of the account sued on is dated January 20, 1913. Ruth testified, and he was uncontradicted, that he told Mayfield, appellee's salesman, that he and Evans had dissolved partnership before the first order was given. He said he and Mayfield had talked about the matter,

and he told Mayfield that the reason he would not give him an order in December was because the firm was going to be dissolved, Evans retiring, and that when he did give the order, he told Mayfield that he had bought Evans out and therefore gave the order himself. So the uncontradicted evidence is to the effect that the salesman had actual knowledge of the dissolution at the time and before these items were bought. Appellee seeks to avoid the force of this by the testimony of its general manager at Corpus Christi, to the effect that the agent had nothing to do with extending credit; that all orders had to be O. K'd by him at the Corpus Christi office, and that he had received no notice of the dissolution of the firm; that Mayfield had no authority to receive such notice so as to bind the company, because it was contrary to his instructions. The only matter we need inquire into is as to whether the notice to Mayfield was notice to the appellee or his principal. The well-known, general rule is that notice to the agent is notice to the principal. The business of this agent was to sell goods for his principal, and it was his duty, as such agent, to make known to his principal such matters as came to his knowledge in regard to his duties in transacting that business; indeed, to disclose all facts coming to his knowledge which might be necessary for the protection or guidance of his principal.

"This duty the law presumes the agent to have performed, and, according to the view now being considered, imputes to the principal whatever notice or knowledge the agent then possessed, whether he has in fact disclosed it or not." *Mechem on Agency*, § 719.

"When a principal has consummated a transaction in whole or in part through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible as well for his agent's knowledge as for his agent's acts." *Irvine v. Grady*, 85 Tex. 124, 19 S. W. 1028.

Mayfield did not testify, and the uncontradicted evidence to the effect that he was notified of the dissolution would not be met by testimony that he had no authority to receive such notice, and that the general manager had no such knowledge, because his business was to represent his principal in selling goods and to keep his principal informed as to all matters pertaining thereto. The dissolution of a firm whereby the main man retired would certainly pertain directly to the duties of the salesman, and the law charges the principal with that knowledge which the agent, in line with his duty, ought to have communicated. This assignment and the third are sustained. *Bergman Produce Co. v. Brown*, 172 S. W. 558; *Rodgers-Wade Furn. Co. v. Wynn*, 156 S. W. 342; *Fordtran et al. v. Cunningham*, 141 S. W. 563.

There is nothing else in this appeal which we care to discuss. The judgment will be reversed, and the cause remanded for trial, as herein indicated.

SCRUGGS v. GAGE. (No. 8289.)

(Court of Civil Appeals of Texas. Ft. Worth.
Dec. 18, 1915. Rehearing Denied Jan.
22, 1916.)

1. APPEAL AND ERROR ¶1050 — REVIEW — HARMLESS ERROR.

Where a wife claimed as her separate property an automobile sold by her husband to defendant, erroneous admission of evidence concerning the wife's suit for divorce was harmless, where the court's finding that the machine was the property of the wife was based on transactions occurring before the suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

2. HUSBAND AND WIFE ¶202—WIFE'S PROPERTY—PURCHASE FROM HUSBAND — CONSTRUCTIVE NOTICE.

Defendant, who purchased an automobile from plaintiff's husband, is not charged with constructive notice of plaintiff's suit for divorce, where at the time of the purchase citation had not been served.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 429; Dec. Dig. ¶202.]

3. HUSBAND AND WIFE ¶137—PROPERTY OF WIFE—SALE BY HUSBAND.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621 and 4622, declaring that the husband shall have sole control over his separate property and the wife over her separate property, and that the husband shall have power of disposition of the community, a husband has no authority to sell an automobile belonging to his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 228-230; Dec. Dig. ¶137.]

4. HUSBAND AND WIFE ¶202 — WIFE'S PROPERTY—SALE BY HUSBAND—BONA FIDE PURCHASERS—PRESUMPTION.

Where defendant, who purchased from plaintiff's husband her automobile, which was bought during coverture with her funds, did not rely on the presumption that the machine was community property, but believed the husband to be unmarried, he cannot claim as a bona fide purchaser on the theory that a purchaser from the husband only of property acquired during marriage, but with the separate property of the wife, may rely on the presumption that it was community property and be protected as an innocent purchaser.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 429; Dec. Dig. ¶202.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by Blanche Gage against Lee W. Scruggs. From a judgment for plaintiff, defendant appeals. Affirmed.

W. O. Prewitt, of Ft. Worth, for appellant. McMurray & Gettys, of Decatur, for appellee.

DUNKLIN, J. In a statutory suit for trial of rights of property in an automobile between Mrs. Blanche Gage, wife of W. L. Gage, as plaintiff, and Lee W. Scruggs, as defendant, a judgment was rendered in favor of plaintiff, and defendant has appealed.

The case was tried without a jury, and the trial judge filed findings of fact and conclusions of law upon which the judgment was predicated.

Briefly stated, the facts found were as follows: Early in the year 1914, Mrs. Gage and her husband agreed to a separation, but no divorce was procured. Thereafter defendant Scruggs bought the automobile in controversy, then worth \$700, from W. L. Gage, husband of Mrs. Gage. At the time of such purchase the automobile was the separate property of Mrs. Gage, and prior to such sale she had instituted a suit against her husband in the county court of Wise county for the recovery of the machine, and at no time had she given her husband authority to sell it. Scruggs was not an innocent purchaser of the machine for value and without notice.

[1] While not specifically shown in the trial judge's findings, the following additional facts were established beyond controversy, and in support of the judgment may be presumed to have been found also: Scruggs bought the machine from W. L. Gage in Ft. Worth on the same day the suit was filed against him in Decatur by his wife to recover the machine and not more than two hours after the same was filed, paying Gage therefor \$525 in cash; but no proof was offered to show that citation in that suit had then been served upon Gage. At the time of the purchase Scruggs did not know that the machine belonged to Mrs. Gage, did not know that Gage was a married man, and did not know of the institution of the suit in Decatur to recover the machine. In that suit final judgment subsequently was rendered in favor of Mrs. Gage for recovery of title and possession of the machine.

It affirmatively appears from recitals in the court's findings that the conclusion reached that the machine was the separate property of Mrs. Gage was based on transactions between her and her husband, which occurred prior to the institution of her suit against her husband; hence, if there was error at all in admitting proof of the institution of the suit and of the judgment rendered therein, such error did not harm appellant, Scruggs.

We are of the opinion further that there was sufficient evidence to sustain the findings so recited, one of which was that the automobile was purchased with funds, the separate property of Mrs. Gage, and the other was that after the purchase her husband made a gift to her of any possible interest he might have had in the machine.

[2] But a more difficult question is presented by an assignment challenging the finding that Scruggs was not an innocent purchaser of the machine for value without notice of the wife's title thereto. Appellee insists that Scruggs was by law chargeable with constructive notice of the pendency of the suit by Mrs. Gage against her husband for the recovery of the machine and of her claim therein asserted. This contention must be overruled because there was no proof of service of citation on the husband prior to

his sale to Scruggs. In *Smith v. Cassidy*, 73 Tex. 165, 12 S. W. 14, in determining the question whether Swenson in taking a mortgage upon property was chargeable with notice of a prior suit which had theretofore been filed, but in which no citation had been served upon the defendant, our Supreme Court said:

"In some of the states suits are commenced as in our own by filing a petition, and in others by issuing a writ; but without regard to the act by which the suit is commenced for other purposes it seems to be universally held that for purposes of notice by lis pendens it does not begin till service of process or its publication in case of an absent defendant. *Lyle v. Bradford*, 7 T. B. Mon. 512; *Bennett v. Williams*, 5 Ohio, 461; *Goodwin v. McGehee*, 15 Ala. 241; *Metcalfe v. Larned*, 40 Mo. 575. Against such an array of authorities we should not feel inclined to oppose our unsupported opinion under any circumstances, but we see no reason to doubt their correctness upon principle. We think, therefore, that Swenson was unaffected by any notice of this suit at the time the mortgage was executed."

[3] Article 4621, 3 Vernon's Sayles' Texas Civil Statutes, contains, among others, the following provisions:

"All property of the wife both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired shall be the separate property of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal, and the wife shall have the sole management, control and disposition of her separate property, both real and personal."

It thus appears that W. L. Gage had no lawful authority to sell to Scruggs the automobile which was the separate property of Mrs. Gage. See, also, *Walker v. Farmers' & Merchants' State Bank*, 146 S. W. 312, and cases there cited; *Givens v. Carter*, 146 S. W. 623; *Ligon v. Wharton*, 120 S. W. 980.

Article 4622, 3 Vernon's Sayles' Texas Civ. Statutes, in part, reads:

"All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written."

The two statutes referred to embody amendments enacted by the Legislature in the year 1913, and were in full force and effect at the time Scruggs bought the machine from W. L. Gage.

[4] By article 4621, prior to said amendment, the husband was given the sole management and control of all the separate property of the wife, and article 4622 reads as follows:

"All property acquired by either husband or wife during the marriage, except that which is

acquired by gift, devise or descent, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only."

Under those former statutes a purchaser from the husband only of property which had been acquired during his marriage, but which was purchased with funds the separate property of his wife, might rely upon the presumption that the same was community property and be protected as an innocent purchaser, in the absence of actual or constructive notice of the wife's separate interest. Assuming, for the sake of argument, that the same presumption would obtain under the amended statutes, then if Scruggs had relied on that presumption when he purchased the machine from W. L. Gage, he would be in a position to invoke the benefit of that presumption; but that he did not rely on it is shown by his own testimony as follows:

"At the time I bought the automobile I did not know anything about Gage being a married man; I had never seen him before and knew nothing about it. I did not know whether he had ever been married or not, whether he had a wife living or dead, or what not. I thought it was his car. I bought it on the representation of Dick Gage that it was his car."

In the absence of any proof that in buying the machine Scruggs acted upon the presumption that it was the community property of W. L. Gage and wife, he is in no position to invoke the benefits of such a presumption.

The following announcement by our Supreme Court in *Kempner v. Comer*, 73 Tex. 196, 11 S. W. 194, decided under the former statutes, is conclusive of that question, and so far as we have been able to discover, has never been overruled by any subsequent decision of that court:

"Where the facts giving rise to the principle of protection do not exist, the principle cannot be invoked. It is conclusively shown that appellants did not act upon any presumption that the notes were community of Mrs. Fairris and her husband; they acted upon an entirely different presumption, or rather assumption; they took the notes as collateral, supposing they were correctly indorsed by the payee, without any information that the payee was the wife of T. L. Fairris or that he had indorsed them with her name. They knew nothing of any facts which would authorize a presumption of community and were not deceived in relation to such facts. They should not be credited with knowing such facts by a mere fiction when the proof is positive that they had no such knowledge. The law will not force them into the attitude of innocent and bona fide holders of the notes against the proof; it will not and ought not to thrust a benefit of a presumption upon them when it is affirmatively shown that the presumption had nothing to do with the transaction. A married woman's rights ought not to be construed away by any such inequitable process of reasoning."

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

TOM v. ROBERSON. (No. 507.) *

(Court of Civil Appeals of Texas. El Paso.
Jan. 6, 1916. On Rehearing
Feb. 10, 1916.)

1. EVIDENCE \S 450—PAROL EVIDENCE—"AMBIGUOUS" CONTRACT.

An "ambiguous" contract, to explain the terms of which parol evidence may be heard, is one capable of being understood in more senses than one; a contract obscure in meaning, through indefiniteness of expression, or having a double meaning.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2066-2082, 2084; Dec. Dig. \S 450.]

For other definitions, see Words and Phrases, First and Second Series, Ambiguous.]

2. CONTRACTS \S 93 — OMISSION OF PAROL AGREEMENT—MUTUAL MISTAKE.

Omission of part of the oral agreement from the written contract is not by mutual mistake, where one of the parties, at the time of signing it, knows that all the agreement is not embraced in it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 415-419; Dec. Dig. \S 93.]

On Rehearing.

3. LANDLORD AND TENANT \S 72—CONTRACT FOR LEASE—AMBIGUITY.

A contract reciting that R., having land leased for a year, leases it to T. at the same price R. paid N. for it, is not ambiguous as to the time T.'s lease is to run, which is only the year for which R. had a lease, even though R. again leases from N.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 218, 219; Dec. Dig. \S 72.]

Appeal from District Court, Martin County; S. J. Isaacks, Judge.

Action by J. B. Roberson against C. Tom. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. B. Littler, of Big Springs, S. W. Pratt, of Stanton, and Chas. Gibbs, of Midland, for appellant. Morrison & Morrison, of Big Springs, for appellee.

WALTHALL, J. This is a suit in trespass to try title, brought by J. B. Roberson, appellee, against appellant, C. Tom, seeking recovery of sections 21 and 29, block 36, township 2 N., T. & P. surveys in Martin county. Appellee claimed right of possession through a lease contract from J. F. Norton, the owner of the section. Appellant, Tom, pleaded "not guilty," and further pleaded his right of possession as sublessee from appellee. Appellee alleged that J. H. Epley, W. T. Epley, appellant, and appellee each own adjoining pastures in said county; that he (appellant) owns section 30, block 36, township 2 N., and is in the pasture of W. T. Epley; that section 33 in same block was formerly in the pasture of T. H. Epley, but is now in appellee's pasture; that said sections 21 and 29, involved in this suit, are now and for more than ten years have been in his (appellant's) pasture; that on February 18, 1912, a suit was pending in Martin

county, in which suit W. T. Epley sued appellee on certain notes and to foreclose a lien; that about the time the suit was pending appellee had procured a lease to said sections 21, 29, and 33, neither of which was then in appellee's pasture; that pending the suit the two Epleys and appellant and appellee entered into a blocking contract with reference to said lands, resulting in a dismissal of said suit, at appellant's expense, with the agreement that J. H. Epley should yield his possession of section 33 to appellee, and that appellant should yield possession of his sections to J. H. Epley, and retain possession of said sections 21 and 29, and maintain one mile of fence along the north line of section 33, belonging to him (appellant) for the benefit of appellant, during the continuance of said arrangement; that the said blocking arrangement resulted in all controversies being adjusted, each party went into possession of the respective sections, as arranged, the suit was dismissed, expenses paid, and appellee's notes extended for one year, according to agreement; that it was understood and agreed that said blocking agreement should continue as long as the parties to the agreement owned or controlled the lands involved; that said agreement was attempted to be reduced to writing, a copy of which is made a part of appellant's answer. Appellant alleged that said written agreement, as written is ambiguous, in that "the intention of the parties thereto" is not made clear; "that by mistake and oversight the scrivener who reduced said agreement to writing failed to state definitely the life of said agreement, and by mutual mistake the parties to same signed said agreement as drawn." Appellant alleged that at the date of said agreement appellee held a lease from J. F. Norton covering sections 21 and 29 for a term of one year; that at the expiration of said lease, and pursuant to said blocking agreement, appellee procured another lease to sections 21 and 29 for a term of one year, and collected from appellant the rental due thereon; that at the expiration of that lease appellee procured another lease for one year, and again collected of appellant the annual rental, paying same to Norton, the owner; that at the expiration of said first and second lease contracts appellee represented to appellant that he would procure a renewal of the lease covering said sections 21 and 29 for the use and benefit of appellant, and in all things acquiesced in the original blocking agreement as made until the date of the renewal of the lease contract for the year 1915, appellant continuing to remain in possession of said sections 21 and 29 under said agreement during the years 1912, 1913, and 1914. Appellant alleged that, on account of appellee's having acquiesced in said original blocking contract from year to year and respected

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

same as a permanent blocking arrangement, appellee is now estopped to deny the agreement and demand possession of sections 21 and 29; that on account of the conduct of appellee in procuring said lease contracts from year to year, for the use and benefit of appellant, appellant made no effort to secure a lease for himself from the owner, but relied upon the agreement, and has purchased cattle with which to stock said sections, and will be damaged; etc.; that at the renewal of said lease by appellee of sections 21 and 29 for 1915 appellant offered to pay the rental to appellee, and tendered same in court.

Appellee filed a supplemental petition, admitting and denying some of the facts alleged, not necessary to state here, but denied that there was any agreement as to permanency of the blocking agreement, and alleged that the written agreement signed by the parties was the agreement made, and denied that any mistake was made or any part of their agreement was omitted from the writing; alleged that appellant paid him the same rental he paid the owner, and that at the expiration of the written agreement he verbally let said sections 21 and 29 to appellant each year, and refused to extend the verbal lease to appellant for the year 1915, proffering, however, one of said sections to appellant for 1915, which appellant refused to accept.

The case was tried before the court without a jury. The court made and filed findings of fact, and thereupon entered judgment for appellant.

Findings of Facts.

Appellee leased from the owner sections 21, 29, and 33 on the 8th day of February, 1912, for a period of one year, and has renewed the lease each year since. Sections 21 and 29 were in appellant's pasture. After procuring the first lease a controversy arose between appellant and appellee on account of the two sections being in appellant's pasture. The following written contract was then made:

"The State of Texas, County of Martin.

"This article of agreement this day entered into by and between J. B. Roberson, of Martin county, Texas, and C. Tom, J. H. Epley, and W. T. Epley, of the county of Martin and state of Texas, witnesseth: That said J. B. Roberson, having all of sections Nos. 21, 29, and 33 in block No. 36, township 2 north, grantee, Texas & Pacific Railway Company, leased for the period of one year, and the said J. B. Roberson leases to O. Tom, at the same price he paid to Norton for said lease, and he, the said Roberson, retains the lease on said section No. 33 above described, and for such consideration for the two sections the said C. Tom agrees to pay all costs of a suit that was filed by W. T. Epley against the said J. B. Roberson to foreclose vendor's lien notes, provided it is agreeable with W. T. Epley for him to do so. It is further agreed that C. Tom is to have the fence on north line of said section 33 described, to be used by J. B. Roberson, during the life of this lease. It is further agreed that one-half of

fence is to be built by J. B. Roberson and W. T. Epley jointly on the east side of the south one-half of section No. 32, and I, J. B. Roberson, agree that the one mile of fence on the east side of section No. 33 belongs to J. H. Epley, and the said W. T. Epley agrees to give J. B. Roberson one year's time on the land notes that are owned by J. B. Roberson, as he, W. T. Epley, provided the same time can be secured from Norton. This contract is signed by J. B. Roberson and C. Tom with the understanding it will meet the approval of J. H. Epley and W. T. Epley and signed by them. Witness our hands at Stanton, Texas, this 13th day of February, A. D., 1912. [Signed] C. Tom. J. B. Roberson. J. H. Epley. W. T. Epley."

In the negotiations arising on account of the controversy, Roberson and Tom agreed between themselves that, if Tom would secure an extension from J. H. Epley for a period of one year on the time of payment of the notes due to Epley by Roberson, Roberson would let Tom use sections 21 and 39 so long as he (Roberson) should have same under lease or under his control, it being contemplated at the time that Roberson should secure a renewal of the one-year lease from year to year; after entering into the agreement orally, in which it was contemplated, as a part of it, that Tom should have the use of said two sections 21 and 29, so long as they were under the control of Roberson, Roberson and Tom went to F. O. Aiken to have their oral agreement reduced to writing and the written contract signed by the parties, including the two Epleys; that the above written contract was prepared by Aiken, but was not what was orally agreed to and intended to have been reduced to writing; Roberson permitted Tom to use sections 21 and 29 from the 8th day of February, 1912, to the 8th day of February, 1915, and collected the rent therefor.

Before signing the written contract, Tom read it or had it read within his hearing, and remarked that it did not go far enough, meaning thereby that it did not cover all the oral agreement between himself and Roberson, but signed the contract as written, after understanding that it did not contain all of the oral agreement. Roberson on the 8th day of February 1915, declined to further permit Tom to use sections 21 and 29, and filed this suit on March 1st to recover possession. No evidence was introduced as to the rental value of the two sections. The written contract failed to state the oral agreement of Roberson and Tom, in that it did not state that Tom should have the use of sections 21 and 29 (the land in controversy) so long as Roberson should have a lease upon the two sections or have them under his control. From the time the written contract was signed to the 8th day of February, 1915, Roberson acquiesced in that part of the oral agreement not put in the writing, that Tom should have the use of the two sections, so long as he (Roberson) should have them leased, or have control of them. At the time of Roberson's refusal to further

let Tom have the use of the sections 21 and 29, and at the time the judgment was entered, Roberson had a lease on said two sections, or had them under his control.

[1, 2] Appellant presents two assignments of error. The first is to the effect that the judgment of the court does not conform to the findings of facts made by the court; and the second assigns error in the court's refusal to consider the oral testimony offered for the purpose of explaining the alleged ambiguity in the written contract as to its duration. The trial court's findings of fact in all things conformed to and sustained the allegations in defendant's answer upon which he relied for defense, except that there was no finding on the issue of fact pleaded that there was a mutual mistake made in drafting the written contract, in that it omitted to state that Roberson agreed to let Tom use said two sections of land so long as he should have same under lease or under his control, and that the omission of said fact from the contemporaneous agreement was through mistake as alleged; that the omission was through mistake was an essential element of defense. Nor did the court find that the contract was ambiguous. The omission of that part of the parol agreement from the writing would not, in our opinion, make the contract ambiguous. An ambiguous contract is one capable of being understood in more senses than one; a contract obscure in meaning, through indefiniteness of expression, or having a double meaning. If a contract is in fact ambiguous, parol proof can be heard to explain the terms or expressions or language used, and only for that purpose can negotiations leading up to the written contract be used. *Lemp v. Armengal et al.*, 86 Tex. 693, 26 S. W. 941; *Clark v. Regan*, 45 S. W. 169. The evidence does not show that a mistake was made in omitting from the writing any part of the parol agreement. The court found that before signing the written contract Tom read same, or had same read within his hearing, and remarked that it did not go far enough, meaning thereby that it did not cover all of the agreement between himself and Roberson, but signed the contract after understanding that it did not contain all of the agreement. If Tom knew at the time he signed the contract that all of the parol agreement was not embraced in the written contract, its omission therefrom could not constitute a mistake. *Lott v. Kaiser*, 61 Tex. 665. In *Janes v. Fred Helm Brewing Co.*, 44 S. W. 896, the court said:

"If the defendants desired to show that the written contract did not embrace the entire terms of the contract between plaintiff and W. T. Jones, they should have alleged that fact in their pleadings, and further alleged that it was

omitted either through fraud, accident or mistake, and the evidence must have supported this allegation." *Railway Co. v. Garrett*, 52 Tex. 130.

Neither the evidence nor the findings of the court support the allegation of mutual mistake. The only material point of appellant's contention in the case, and to which his pleading is directed, is the issue of mistake in not embracing the alleged omitted part of the parol agreement in the written contract; and the evidence having wholly failed to show a mistake, the trial court could not properly have entered any other judgment than the one entered. The court was not in error in rendering judgment for appellee.

The case is affirmed.

On Rehearing.

[3] In passing upon motion for rehearing, we have concluded that the following should be added to the original opinion:

The writing recites:

"The lessor, Roberson, having the land leased for the period of one year, the said J. B. Roberson leases to C. Tom, at the same price he paid to Norton for said lease."

It is apparent from this language that the life of the lease was the time Roberson had it leased. Tom was bound to know that he got no more by his contract than Roberson himself had. The time for which Roberson had the section leased being stated in the writing in direct connection with the consideration to be paid by Tom, "the same price as paid to Norton by Roberson," leaves no doubt that the length of time the lease was to run was the time Roberson's lease then had to run, and there is nothing in the writing to indicate that Roberson would again lease from Norton, nor that required him to so do; therefore, the time for which the lease was to run being clearly fixed by the writing, it was not ambiguous for that reason.

If the time for which the lease was to run does not clearly appear upon the face of the writing, the contract as written would be ambiguous, as contended by appellant. *Willis v. Byars*, 21 S. W. 320; *Beard v. Gooch & Sons*, 130 S. W. 1022; *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1010; *Giddings v. Lee*, 84 Tex. 605, 19 S. W. 682. So parol evidence was not admissible to vary or add to the contract as written, except upon the theory that some matter under consideration at the time the writing was executed was left out by mistake of the parties to it. This proposition is, we think, properly disposed of by the original opinion.

The motion for rehearing is therefore overruled.

EL FRESNAL IRRIGATED LAND CO. v. BANK OF WASHINGTON. (No. 5593.) *
(Court of Civil Appeals of Texas. San Antonio. Jan. 26, 1916.)

1. SUBMISSION OF CONTROVERSY \S 17 — AGREED STATEMENT OF FACTS — EXAMINATION OF PLEADINGS.

It is proper for the court to examine the pleadings in determining a case on an agreed statement of facts.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. \S 19; Dec. Dig. \S 17.]

2. CORPORATIONS \S 300 — AUTHORITY OF PRESIDENT.

In the absence of authority through the charter or directors, the president of a corporation has no greater control over corporate property and funds than any other director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1320-1323; Dec. Dig. \S 300.]

3. CORPORATIONS \S 415 — IMPLIED AUTHORITY OF PRESIDENT.

Where the president of a corporation is authorized to execute notes, there is no implied authority to execute liens or mortgages on corporate lands to secure such notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1664-1669; Dec. Dig. \S 415.]

4. CORPORATIONS \S 415 — AUTHORITY OF PRESIDENT—MORTGAGE.

Where a corporation organized for irrigation purposes did not in the ordinary course of business give liens to secure loans made to it, its president could not mortgage corporate land without authority from the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1664-1669; Dec. Dig. \S 415.]

5. BILLS AND NOTES \S 840 — BONA FIDE PURCHASERS—AUTHORITY OF PRESIDENT OF CORPORATION—NOTICE.

Where plaintiff took as collateral security for a private debt of the president notes executed by the president of the defendant corporation and purporting to be secured by a lien on corporate land, plaintiff was charged with notice that the president was not authorized to give such liens, and it was not an innocent purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 825-828, 842-848; Dec. Dig. \S 340.]

6. CORPORATIONS \S 370 — PURPOSE—NOTICE.

Corporations exist by law for the purposes defined in their charters, and he who deals with them is charged with notice of these purposes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1511-1518; Dec. Dig. \S 370.]

7. CORPORATIONS \S 399 — AUTHORITY OF AGENTS—SCOPE.

Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1588, 1602-1610; Dec. Dig. \S 399.]

8. BILLS AND NOTES \S 842 — BONA FIDE PURCHASERS—NOTICE.

Where a bank took notes executed by the president of a corporation which purported on their face to be secured by a lien reserved in a deed to corporate land, which was recorded, the bank was charged with notice of the fact that no lien was reserved in the deed, and, although it took the note in the ordinary course of business, it was not an innocent purchaser.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1486-1488; Dec. Dig. \S 342.]

9. CORPORATIONS \S 414 — APPARENT AUTHORITY OF PRESIDENT.

The execution of notes is not within the apparent authority of the president of a corporation, even where he acts as general manager.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1640-1646; Dec. Dig. \S 414.]

10. CORPORATIONS \S 429 — AGENTS—ASSUMPTION OF AUTHORITY.

One cannot by relying upon its agent's assumption of authority, charge a corporation for an unauthorized act of its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1720-1723, 1725; Dec. Dig. \S 429.]

11. BILLS AND NOTES \S 345 — BONA FIDE PURCHASERS.

Where the president of the A. corporation, as such, executed two notes to the B. corporation without consideration, and on the same day the B. corporation assigned the notes as collateral security to the C. corporation, and later a bank made a loan to the president of the A. corporation in his private capacity and to the B. and C. corporations, and took among other collateral the said two notes, the circumstances were such as to put the bank on notice of a fraudulent conspiracy against the A. corporation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 996-1021; Dec. Dig. \S 345.]

12. BILLS AND NOTES \S 497 — GOOD FAITH—BURDEN OF PROOF.

In such a case the burden was upon the bank to prove that it was a bona fide holder of the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1443, 1675-1681, 1683-1687; Dec. Dig. \S 497.]

13. ESTOPPEL \S 52 — NATURE AND ELEMENTS.

Where the president of a corporation, as such, without authority executed two notes without consideration, and later the notes were produced to secure a debt partly owed by the president in his private capacity, there was no element of estoppel against the corporation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 121-125, 127; Dec. Dig. \S 52.]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Action by the Bank of Washington against the El Fresnal Irrigated Land Company. From a judgment for the plaintiff, the defendant appeals. Reversed.

Spears & Montgomery, of San Benito, for appellant. F. W. Seabury, of Brownsville, for appellee.

FLY, C. J. This is a suit instituted by appellee on two promissory notes for \$750 each, purporting to have been executed by appellant to the San Benito Land & Water Company, and it sought the foreclosure of a lien on certain land. The trial court rendered judgment in favor of appellee for \$1,955.25 and for the foreclosure of a lien on 2,000 acres of land.

The cause is brought to this court on the following agreed statement of facts:

(1) "The defendant is a corporation incorporated and existing under the laws of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, dams, reservoirs, lakes, and wells, and

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

for conserving, storing, conducting, and transferring water to all persons entitled to the use of same for irrigation," etc.

(2) "The defendant was at all the times hereinafter stated, and is now, the owner of a tract of 2,000 acres of land in Cameron county, Tex., known as the El Fresnal Irrigated Land Company's subdivision of land in the Espritu Santo grant in this county of Cameron, same being a part of share 1 in the partition of said grant, and being the same land conveyed by C. P. Barreda to Samuel Spears, trustee, by deed dated February 12, 1912, and recorded in Book 18, pages 144-147, of the deed records of this county, and by said Samuel Spears, trustee, conveyed to defendant by deed dated July 1, 1912, and recorded in Book 19, pages 452-454, of said records, having acquired and owing same for its corporate purposes."

(3) "On May 26, 1913, S. A. Robertson, as president and acting for said corporation, executed and delivered to the San Benito Land & Water Company the two promissory notes sued upon herein, same being in the principal sum of \$750 each, bearing the date aforesaid, and due, respectively, on July 1, 1913, and January 1, 1914, which notes are identical, except as to their dates of maturity, and said note first maturing is now here copied in full as a statement of the terms of said two notes, as follows:

"\$750. San Benito, Texas, May 26, 1913.

"On July 1, 1913, after date we promise to pay to the San Benito Land & Water Company, or order, seven hundred fifty and no/100 dollars, with interest at the rate of ten per cent. per annum from maturity until paid, interest payable annually, and further hereby agree that if this note is not paid when due to pay all costs necessary for collection, including 10 per cent. on all unpaid principal and interest for attorney's fees; past-due principal, interest, and attorney's fees to draw interest at 10 per cent. per annum the same as principal, with annual rests.

"This note is secured by a lien for water charges for the year 1913 on 2,000 acres of land in Cameron county, Texas, being El Fresnal Irrigated Land Company's subdivision of Espritu Santo grant, in Cameron county, Texas, which said lien is set out in a deed by the San Benito Land & Water Company conveying said land, and this note shall not be held to change the terms and provisions of said deed in any other respect except as herein expressly provided.

"Voluntary payments on this note shall be made at San Benito, Texas, but if suit be brought thereon for debt, or for debt and foreclosure, same may be instituted and tried in Cameron or Travis counties, Texas, at the option of the holder.

"El Fresnal Irrigated Land Co.,
"By S. A. Robertson, Pres."

(4) "At the time said notes were executed by S. A. Robertson, as president of the defendant corporation, there was no provision in the charter or by-laws of the corporation, nor was there any resolution, order, vote, or other action of its board of directors, as far as shown by the minutes of said board, expressly granting to said president power or authority to execute notes and obligations in its name, or create a lien on said land for the purpose of securing any debt owing by it, but he was, as such president, lawfully in charge of and personally managing the business of defendant corporation, and, as such president, customarily executed, without express authority, all notes and obligations that were issued in the name of the corporation, and all notes and obligations so executed by him, except the present notes, were regularly paid or honored by the corporation. The two notes in question were, however, executed by S. A. Robertson, as such president for defendant corpora-

tion, under a misapprehension of facts as follows: At said time the defendant was not at all indebted to the San Benito Land & Water Company, and has not since been indebted to said company, and the defendant did not receive, nor did the San Benito Land & Water Company pay, any valuable consideration for said notes. That the San Benito Land & Water Company had not then, and has not since, executed any deed to defendant conveying said land, nor entered into any contract with defendant whereby a lien was fixed on said land for water charges for the year 1913, and that said land was acquired by defendant only in the manner above stated, and that, while there was a contract between defendant and the San Benito Land & Water Company, then duly recorded in Cameron county, Tex., whereby the latter company undertook to furnish water for the irrigation of said land, yet said contract provides that no water charges shall be made against the defendant, or constitute a lien upon its said lands so long as same remain in the hands of defendant, it being contemplated that the land should be subdivided, and water charges were to run only on the subdivision thereof after same were sold by the defendant. Said contract did not create any obligation on defendant to pay any moneys to the San Benito Land & Water Company, or create any lien on said lands for the water charges of the year 1913, mentioned in said notes. That the foregoing facts were well known to both defendant and to the said San Benito Land & Water Company at the time said notes were executed and delivered, but same were overlooked by the parties, and said notes, in fact, executed by mutual mistake."

(5) "On May 26, 1913, the San Benito Land & Water Company became indebted to the Rio Grande Construction Company in the sum of \$3,500, to evidence which it on that day executed and delivered its notes for said sum to the said Rio Grande Construction Company, as collateral security therefor, the two notes herein sued on, which were duly indorsed by said San Benito Land & Water Company, the payee thereof, and in addition by S. A. Robertson."

(6) "On June 1, 1913, plaintiff herein loaned to the Hidalgo Construction Company, the Rio Grande Construction Company, and S. A. Robertson the sum of \$10,000, then and there paid to them in cash, and to evidence said loan took from them a note for said sum by the terms of which note the Rio Grande Construction Company pledged as collateral security therefor the said \$3,500 note given it by San Benito Land & Water Company, together with the notes herein sued on, collateral to said \$3,500 note, and delivered same to plaintiff, who has ever since been, except as hereinafter stated, the legal and equitable owner and holder of the notes here sued upon, as such pledgee. Plaintiff paid and loaned the said sum of money on the security of the two notes herein sued upon, with other securities, and at that time had not had, and did not have, any actual knowledge of the circumstances surrounding the execution and delivery of the two notes here sued upon, as above set out."

(7) "Subsequently, the said \$10,000 not having been paid at the maturity thereof, plaintiff, acting in accordance with its rights as pledgee, and in compliance with the terms of said pledge, did on June 15, 1914, and on September 21, 1914, sell the various collaterals pledged with it to secure said \$10,000 note, and at such sales became the purchaser of said \$3,500 note given by the San Benito Land & Water Company, and of the two notes herein sued upon, for a valuable consideration. That before the time of said two sales plaintiff had received information that the defendant herein denied the obligations of the two notes sued upon, and claimed same were given without consideration, and plaintiff then knew that the statement in said notes in regard to the lien securing same

was untrue in respect to the matters herein-before pointed out."

(8) "Plaintiff is now, under the pledgee's sale aforesaid, the legal and equitable owner and holder of said two notes and of any lien that under the foregoing facts may exist upon said lands securing the payment of said notes."

(9) "No part of the principal or interest of said notes has been paid, and that on October 22, 1914, plaintiff placed said notes in the hands of F. W. Seabury, an attorney, for collection, and contracted with him to pay for his services in making such collection the 10 per cent. attorney's fees in said notes respectively stipulated, which amount would be a fair and reasonable compensation for such service and the compensation usually allowed in suits of this character."

(10) "Plaintiff has collected a part of the other collateral to its said \$10,000 note, and has sold out all the collateral thereto not so collected, and realized from such sales and collections the sum of \$2,539.50, which has been credited on said \$10,000 note. That, the remainder of said note being overdue and unpaid, plaintiff in another suit in this court recovered judgment against the makers and indorsers of said note for the same, but an execution on said judgment has been returned unsatisfied, and that neither the makers nor the indorsers of said \$10,000 note have property subject to execution, and are wholly insolvent. That plaintiff will not be able to collect its aforesaid debt, even if it recovers and receives the full amount herein sued for. That the indorsers on the note herein sued upon are also insolvent."

(11) "Plaintiff was, before the pledgee's sale aforesaid, pledgee and holder for a valuable consideration of the two notes herein sued upon, without any notice whatever of any invalidity in or defense to said notes, except in so far as plaintiff may have been bound to take notice of the terms of the water contract aforesaid, which contract was of record in the real estate records of Cameron county at the time, and except as it may have been bound to take notice of the authority which said S. A. Robertson had as president of defendant corporation."

[1] The ninth assignment of error is taken up out of its order and disposed of adversely to appellant. The contention therein is that it is recited in the judgment that the court arrived at its conclusion "after hearing and considering the pleadings of the parties and the agreed statement of facts," and the court should not have considered the pleadings at all. There is no merit in the proposition. Of course, the pleadings were heard and considered as pleadings, and not as evidence. The court was necessarily compelled to consider the pleadings in order to ascertain what was the subject of litigation, because the defense does not very clearly appear from the agreed statement on which the cause was submitted. The recital as to pleadings is found in most judgments, and is merely formal in its nature, just as is a recital as to argument of counsel. There is no rule forbidding a court to consider the pleadings in an agreed case. There is nothing to the contrary in the case of *Thaison v. Sanchez*, 13 Tex. Civ. App. 73, 35 S. W. 478, wherein it was held that when an agreed case is submitted in an appellate court issues as to pleadings are laid aside.

The first assignment of error assails the power and authority of the president of the irrigation company to create a lien on the

land of the company in the absence of such authority being given in its charter, or by the board of directors, when no implication of authority arises from the manner and custom of the corporation in doing business with others. It is admitted that no such authority was vested in the president of the corporation by the charter or the directors, and the facts fail to show that it was customary for the president to execute liens on the land of the company. In the notes executed by the president no lien was given on the land, and no intention is evidenced to give a lien through the medium of the note. The recital in the note is that it is secured by a lien for water charges set out in a certain deed made by a certain corporation to appellant. In fact no such lien was reserved in any deed. However, we will consider the case as though the lien was attempted to be given by the note.

[2, 3] The well-established general rule is that the president, in the absence of authority through the charter or the directors, has no more control over the corporate property and funds than any other director. His official station in itself confers no power or authority to act or contract for the corporation, and, where he is clothed with the power to execute notes, no authority will arise by implication or otherwise to execute liens on corporate lands to secure such notes. The president of a corporation is not authorized to mortgage its property to secure a loan without specific authority from the board of directors. *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848; *Tempel v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; *Leggett v. Mfg. Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560.

[4, 5] According to the facts, the president had never before attempted to create a lien on the property of the corporation, and, his act being out of the usual course of business, appellee was bound to inquire as to the authority of the agent to create a lien on the property of the corporation. Appellant was a corporation organized for irrigation purposes, and it was not in the ordinary course of its business to give liens to secure loans made to it. Appellee was charged with notice that the president could not mortgage the land of his corporation without authority of the board of directors, and it knew that the debt was created in the interest of the president and not in that of the corporation, which did not receive a dollar of the money. It was not an innocent purchaser of the notes. *Land Co. v. McCormick*, 85 Tex. 421, 23 S. W. 123, 34 Am. St. Rep. 815; *Liquor Co. v. Magnus*, 43 Tex. Civ. App. 463, 94 S. W. 1117; *Gulf Grocery Co. v. Crews* (Civ. App.) 146 S. W. 657.

[6, 7] As said by the New York Court of Appeals in *Alexander v. Cauldwell*, 83 N. Y. 480:

"Every one knows that corporations are artificial creations existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and, when he deals with agents or officers of one of them, he is bound to know their powers and authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority."

[8] There was no lien reserved in a deed as recited in the notes, and appellee was charged with notice that there was no such lien reserved, for the deed was on record. The lien referred to as being in the deed was all upon which appellee could rely for the creation of a lien, and with that deed upon record appellee could not be an innocent purchaser. It was charged with knowledge of the falsity of the recital in the note. *Wagoner v. Dodson*, 96 Tex. 415, 73 S. W. 517.

[9] The act of Robertson in executing the notes was not, as claimed by appellee, within the apparent scope of his authority as president of the corporation. Appellee was charged with the knowledge that a president of a corporation has no apparent authority to execute liens on corporate property, and it should have made inquiry as to his authority under the charter or resolution of the directorate. The authorities cited by appellee have no applicability under the facts of this case. The facts did not indicate that Robertson had any authority to create a lien on the property of the corporation. It would not matter that he was general manager as well as president of the corporation; he could not, without authority from the charter or the corporation, place liens on its real estate. All the authority he had must have been given by the board of directors, for the general management of private corporations is placed in the hands of the directors by the statute, Rev. Stats. art. 1150; *Cable Co. v. Telephone Co.* (Civ. App.) 134 S. W. 429.

[10] As said in a quotation indorsed by the Supreme Court in *Railway v. Faulkner*, 88 Tex. 649, 32 S. W. 883:

"A party dealing with the agent of a corporation must, at his peril, ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority, which may prove, as it did in this case, to be entirely unfounded."

Appellee could not indulge in the presumption as to the authority of the agent of the corporation to create liens, because such authority was not necessarily incident to or customarily exercised by presidents of private corporations engaged in irrigation purposes. *Land & Irr. Co. v. Mercedes P. Co.* (Civ. App.) 155 S. W. 236.

The fact that appellee may have acquired the notes before maturity, in the ordinary course of business, for a valuable consideration, and without notice, would not render appellant liable for the unauthorized act of

its agent in endeavoring to place a lien on its property. Appellee presents no authority for the proposition that it would be an innocent purchaser, although the agent had no authority to execute the mortgage, and such act was not within the scope of his ordinary duties. The notes in question were not strictly commercial paper; for on their face they appear to be a mortgage, and they are relied on to give a lien on real estate. *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19. In that case it was held that it was the duty of a bank that bought the note, with a lien appended, to examine the record, which would have revealed the fraud of the party who assigned the note. Appellee knew that the money for which the notes were pledged was loaned to Robertson and his associates, and was not intended for the use and benefit of appellant. This was a suspicious circumstance, and appellee must have known that the president of a corporation is not given power to execute notes in the name of his corporation to be used to secure his individual debts. In discussing a similar question in *Ward v. Trust Company*, 192 N. Y. 71, 84 N. E. 538, the Court of Appeals held:

"The trust company had ample opportunity to learn all the facts; for it had representatives on the board of directors of the Hartman Company, the apparent owner of the check. According to the custom of business men, and especially of banks, the first inquiry would have called for a resolution of the board of directors authorizing Umsted to use the check to pay his own debts. The minute book of the board was open to examination by the representatives of the trust company, but, when examined, it would have shown no such authority; for the resolution relied upon, broad as it was, simply authorized Umsted as president to take charge of the property and business of the company and to sign checks, notes, and other obligations in its behalf. This meant that he could do these acts only in transacting the business of the company; for no other construction would be reasonable. There was no suggestion of permission to give away the assets of the company or to use them to pay the personal debts of its officers. Such dangerous power, which might involve the ruin of the company, cannot be conferred unless the intention is expressed with the utmost clearness."

[11] In the case under consideration the president of the corporation, with representatives of two other corporations, sought a loan of \$10,000, and among other paper produced two notes given by the president for his corporation to still another corporation, and gave them as collateral security to appellee. The two notes were executed on May 26, 1913, and on the same day were assigned to the Rio Grande Construction Company as collateral security, and in five or six days they are placed in the hands of appellee as collateral for a debt of two corporations and the president of appellant company. The transaction was sufficient to put any reasonable man on notice that some transaction was going on, not in the interest of appellant, but to its detriment and contrary to its wishes. There was enough evidence of a conspiracy

to arouse the suspicion of any business man or concern.

[12] The evidence showed unmistakably that the notes were given without consideration and fraudulently put in circulation, and it then devolved upon appellee to prove that it was a bona fide holder of the notes for value. The presumption arising from the mere fact of possession of the notes was overcome by the suspicious circumstances in evidence, and there should have been proof by appellee of its bona fides. *National Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676.

[13] There are no elements of estoppel in this case. Appellant's agent, without authority, executed two notes to a corporation to whom appellant owed nothing, and for which notes it received nothing, and the notes are then transferred to another corporation, and in a very short time are produced to secure a debt partly owed by the president. Is it not clear that the execution of the two notes, their transfer, and their placing as collateral security were parts of one and the same transaction? What did appellant do to estop it from refusing to pay notes fraudulently executed in its name? It has not sinned, but has been sinned against. The recitals in the two notes were not its recitals, but the recitals of one who had no authority to make them, and they were absolutely false. The facts form no basis for estoppel against appellant.

The least effort upon the part of appellee would have disclosed the fraud, for fraud it was to give notes in the name of a corporation for an imaginary debt, and then pledge them to secure a debt in which appellant had no interest whatever, but no effort was made. The circumstances were sufficient to put any one upon inquiry who had any interest in discovering the truth about the execution of the notes.

The judgment is reversed, and judgment here rendered that appellee take nothing by its suit, and that it pay all costs in this behalf expended.

KRUEGEL v. RAWLINS et al. (No. 5910.)
(Court of Civil Appeals of Texas. Dallas. Jan. 8, 1916. Rehearing Denied Feb. 12, 1916.)

APPEAL AND ERROR \Leftrightarrow 833—**MOTION TO VACATE JUDGMENT IN NATURE OF REHEARING—TIME FOR.**

A motion, to vacate the opinion and judgment of a Court of Civil Appeals in a case of which it had jurisdiction, made in such court nine years after such judgment was rendered, must be overruled, since all courts lose jurisdiction of final judgments rendered by them after

adjournment of the term, except for the correction of clerical errors, mistakes, or defects of form, or some matters necessary to carry out the jurisdiction of the court, or to declare a judgment void rendered in a case not legally before the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. \Leftrightarrow 833.]

Appeal from District Court, Dallas County.

Original motion in the nature of an application for rehearing, to set aside an opinion and judgment of the Court of Civil Appeals. Motion overruled. For former opinion, see 121 S. W. 216.

See, also, 103 Tex. 86, 124 S. W. 419; 148 S. W. 343.

Herman Kruegel, of Dallas, in pro. per.

RAINEY, C. J. This is a motion filed by Herman Kruegel to vacate, set aside, cancel, and hold for naught the opinion, decision, and judgment affirming the judgment of the Forty-Fourth district court of Dallas county, Tex., in case No. 507, styled *Herman Kruegel v. A. B. Rawlins et al.*, reported in 121 S. W. 216.

The grounds relied upon for the granting of such relief are numerous, all of which have been duly considered, but we are met at the threshold with the proposition that we have no jurisdiction to grant the relief sought. The action taken by this court in disposing of said case was had on June 2, 1909, and a rehearing denied July 2, 1909. An application for a writ of error was made to the Supreme Court of this state, which was denied by that court January 12, 1910. 103 Tex. 86, 124 S. W. 419. Thus, it will be seen that about nine years elapsed since the affirmance of the judgment by this court. It is well settled in this state that all courts lose jurisdiction of final judgments rendered by them after the adjournment of the term at which rendered—

"except for the correction of clerical errors, mistakes, or defects of form, or some matter necessary to carry out the jurisdiction of the court, or to declare a judgment void rendered in a case not legally before the court." *Chambers v. Hodges*, 8 Tex. 517; *Burke v. Mathews*, 37 Tex. 73.

The case was properly before this court on appeal. The errors complained of were properly urged, this court had jurisdiction to dispose of the case on appeal, and the motion now before us is in effect to obtain a rehearing of the case. The time having elapsed for a reopening of the case, whether the decision is right or wrong, we have no power, at this late day, to set it aside, as it is not void.

The motion is overruled.

FARMERS' & MERCHANTS' NAT. BANK OF ABILENE v. IVEY et ux. (No. 888.) *
(Court of Civil Appeals of Texas. Amarillo.
Jan. 12, 1916. Rehearing Denied
Feb. 9, 1916.)

1. DISCOVERY ⇐3—EQUITABLE DISCOVERY—STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, arts. 3679-3686, giving a party the right to examine the opposite parties as witnesses to secure information for maintaining an action or defense, superseded the bill of discovery as known to equity practice.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. ⇐3.]

2. DISCOVERY ⇐70—ORAL INTERROGATORIES—TAKING AS CONFESSED—STATUTES.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3680, allows a party to take the deposition of an adverse party, section 3682 makes it unnecessary to give notice of the filing of interrogatories, and removes any objection on account of their leading character, article 3683 provides that the answers of the party to interrogatories shall be taken and returned as other depositions, and article 3663 et seq. provide for taking testimony of witnesses by oral examination and answers. In a suit to remove a cloud from title to land the defendant filed notice of application for a commission to take the deposition of plaintiffs by oral examination, and plaintiffs appeared, with counsel, but refused to answer any of the interrogatories propounded. *Held* that, in the absence of statutory authority, the interrogatories could not be taken as confessed because of the failure to answer.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 84-86; Dec. Dig. ⇐70.]

3. HUSBAND AND WIFE ⇐119—WIFE'S SEPARATE PROPERTY—COMMUNITY PROPERTY.

In a suit to remove a cloud from title to town lots, alleging such lots to be the separate property of the wife, it appeared that the tract had been purchased with proceeds of the wife's separate property and of community property, and conveyed to the husband and thereafter conveyed by him to his wife; that they borrowed money on the property secured by a deed of trust, part of the proceeds of which was applied to the payment of community debts; that thereafter the husband and wife conveyed certain parts to each of their children, who subsequently sold the land conveyed to them and delivered to the wife the greater part of the proceeds, with which she paid off the loan. *Held*, that the transactions vested the title of the remaining part of the land in the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 172-174; Dec. Dig. ⇐119.]

4. APPEAL AND ERROR ⇐1064—HARMLESS ERROR—INSTRUCTIONS.

In such suit, an instruction, assuming that the land in controversy contained 205 acres, when in fact it contained but 145 acres, in view of the uncontradicted evidence fixing the rights of the parties, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ⇐1064.]

5. HOMESTEAD ⇐181—ABANDONMENT—EVIDENCE.

In the absence of any evidence from a husband as to their purpose in leaving and their intention to again occupy a homestead, the wife's statement as to such purpose and intent was competent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. ⇐181.]

Error from District Court, Hale County; L. S. Kinder, Judge.

Suit by R. F. Ivey and wife against the Farmers' & Merchants' National Bank of Abilene. Judgment for plaintiffs, and defendant brings error. Affirmed.

Sayles, Sayles & Sayles, of Abilene, and Graham & Graham, of Plainview, for plaintiff in error. Y. W. Holmes and W. B. Lewis, both of Plainview, for defendants in error.

HALL, J. Defendants in error filed this suit to remove cloud from their title to certain town lots in Plainview, Tex., and certain lands in Lamb county, Tex. They allege that all such real estate was the separate property of Mrs. Ivey, and that certain of the lots constituted their homestead; that said real estate had been levied upon and sold by the sheriffs of Hale and Lamb counties, respectively, under executions issued on a judgment in favor of plaintiff in error against R. F. Ivey and A. B. Britton. Plaintiff in error answered, denying that any of the real estate in controversy was Mrs. Ivey's separate property, and alleging that said town lots and lands were community property, and that title had passed to plaintiff in error by the levies, sales, and sheriff's deeds. It also denied that lots 5 and 6 in the College Hill addition to Plainview constituted the homestead of defendants in error, and that defendants in error were, prior to, at the time of, and since, the levy of the execution upon said lots, residing on the Highland addition lots in Plainview, also involved in this suit. The bank also attacked a conveyance made by R. F. Ivey to his wife on October 19, 1911, of the Lamb county land, as being fraudulent and void; that it was executed when R. F. Ivey was insolvent, and with the intent to hinder, delay, and defraud creditors. The suit was tried before a jury, who found upon every issue in favor of defendants in error, and judgment was entered accordingly.

Soon after the institution of the suit, plaintiff in error filed with the clerk of the trial court a notice directed to defendants in error and their attorneys, that it would apply for a commission to take the deposition of defendants in error on June 3, 1914—

"by oral examination and answer under oath to such questions as may be propounded to them by the respective parties."

A copy of this notice was served on the attorneys of defendants in error May 23, 1914. In response to the commission and notice given by the notary public defendants in error, with their attorneys, appeared before the notary on June 5, 1914, but refused to answer any of the interrogatories propounded to them by the attorney representing the bank. The interrogatories, if taken as confessed, would require a judgment to be entered in favor of the plaintiff in error.

[1, 2] The first assignment of error is predicated upon the action of the court in over-

ruling the defendant's motion to have all of the oral interrogatories propounded to defendants in error taken as confessed and judgment entered accordingly. There is no provision in title 53, c. 3, for taking the deposition of a party to a suit upon verbal interrogatories. Interrogatories can be taken as confessed only when the proceeding is strictly within the provisions of the statute. The bill of discovery, as known to the equity practice, is superseded in this state by the provisions of chapter 3, tit. 53, Vernon's Sayles' Civil Statutes. *Hamner v. Garrett*, 133 S. W. 1058, 1061; *Cargill v. Kountze Bros.*, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 24 L. R. A. 183, 40 Am. St. Rep. 853; *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631. The reasonable inference to be drawn from the language of articles 3680, 3682, 3683, Vernon's Sayles' Civil Statutes, is that written interrogatories must be filed as a prerequisite to taking the depositions of a party to the suit. Article 3683 et seq., relating to the taking of depositions of a witness in a case, upon oral interrogatories, do not, by their terms, provide for taking the deposition of parties in such manner. The whole matter of taking depositions of parties and witnesses is controlled by the statute. No such practice obtains under the common law; and, in the absence of statutory authority the taking of the party's deposition as confessed, because of a failure to answer oral interrogatories, cannot be done in this state.

[3,4] The second assignment is that the court erred in overruling defendant's first objection to the court's charge to the jury, in that, submitting the first issue to the jury, the court assumed as a fact that the land in controversy contained 205 acres, when in fact the tract of land contained only 145 acres. According to the contention of appellees their home in Abilene was Mrs. Ivey's separate property, and was valued at \$4,000. This amount was invested in the land in question. The community had invested therein money from their Tuscola homestead in the sum of \$1,000, and one-third of their equity in three other sections of land, amounting to \$666.66; the total consideration for the section of land in question being \$5,666.66. According to appellant's theory, 70.6 per cent. of this tract of land belonged to the separate estate of Mrs. Ivey, and the remainder, or 29.4 per cent. was community property and subject to appellant's debts. It seems to be conceded that instead of the tract of land in question consisting of 205 acres, it contained only 145 acres, which, if apportioned as above stated, would give to Mrs. Ivey a fraction over 102 acres, instead of 145. This error of the court was duly excepted to, and is properly presented in the brief of appellants, but under the uncontradicted evidence, it does not constitute reversible error. It appears from the record that the entire section, of which the 145

acres in controversy is a part, was conveyed first to R. F. Ivey in April, 1910, and thereafter in 1911 conveyed by Ivey to his wife. Thereafter, in 1911 they borrowed \$2,500 and secured the loan by a deed of trust on the entire section. Of this \$2,500, \$1,300 was applied to the payment of community debts in the form of notes against certain lands purchased by the community in Cochran county, \$600 was used in patenting the section of land upon which the loan was negotiated, and the remainder of \$2,500 was applied to the payment of community debts. After the negotiation of the \$2,500 loan, appellees conveyed to each of their five children 100 acres of the section, taking from each of them a note for \$500. Subsequently their children sold the land conveyed to them, delivering to Mrs. Ivey a greater part, if not all, of the proceeds of the sale. With this money she paid off the loan. The result of these transactions is to vest the title of the remaining portion of the land in Mrs. Ivey. The community estate having been fully reimbursed, through the loan of \$2,500 and its repayment, for the amount of the community, fund originally invested in the section had no further interest in it. The whole of the 145 acres, remaining after the five tracts of 100 acres each had been conveyed to the children of appellees, was, we think, the separate property of Mrs. Ivey. If we are correct in this, no part of it could be subjected to the payment of community debts, and the error of the court in assuming that 205 acres, instead of 145, remains is harmless.

[5] Under several assignments the sufficiency of the evidence to support the findings of the jury is assailed. A review of the statement of facts convinces us that the evidence required the court to submit the question of Ivey's alleged fraudulent intent in conveying the land to his wife to the jury. The detailed statement made by him, on direct and cross-examination, showing his assets and liabilities, is sufficient to raise an issue as to his solvency in January, 1911, when he executed the deed to his wife. In the absence of any evidence from the husband as to their purpose in leaving and their intention to again occupy the homestead, Mrs. Ivey's statements as to such purpose and intent are competent evidence to be considered. They had previously built a barn on the lots, in which they had resided for a time, and the statement of facts shows that since moving from the barn they nevertheless used the premises for purposes consistent with their homestead claim.

Appellant's brief contains a great many other assignments, in which the questions and issues heretofore discussed are presented in different form, and which we believe it is not necessary to consider in detail.

We find no reversible error in the judgment, and it is affirmed.

NORTH TEXAS GAS CO. v. MEADOR.
(No. 7432.)

(Court of Civil Appeals of Texas, Dallas.
Jan. 8, 1916. Rehearing Denied
Feb. 12, 1916.)

1. MUNICIPAL CORPORATIONS — §821—INJURY TO PEDESTRIAN—DITCH IN STREET—NEGLIGENCE—QUESTIONS FOR JURY.

Under the evidence in an action for injury to a pedestrian in attempting to cross a ditch in a street dug by a gas company, *held*, that whether she acted and relied on invitation of the company's foreman in such attempt, and whether he, in so inviting her, was guilty of negligence proximately contributing to her injury, and whether she exercised ordinary care for her safety, were questions for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. §821.]

2. TRIAL — §252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

There being no evidence that plaintiff's injury was caused by a weakened condition of her arm, though it had previously been broken, a requested instruction predicated on a finding of such fact was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. §252.]

3. TRIAL — §251—INSTRUCTIONS—APPLICABILITY TO PLEADING — CONTRIBUTORY NEGLIGENCE.

Defendant, having specifically pleaded certain acts as contributory negligence, was not entitled to have other acts submitted to the jury as a basis for finding contributory negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. §251.]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by Jennie Meador against the North Texas Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Suggs, of Denison, and Jones & Hassell, of Sherman, for appellant. Wolfe & Wood, of Sherman, for appellee.

TALBOT, J. This suit was brought by the appellee against appellant to recover damages for personal injuries. Appellee alleged, in substance, that appellant had dug and excavated in a street between her home and that part of the town of Whitesboro to which her business called her a ditch about 16 or 18 inches wide and 3 to 3½ feet deep, in which to lay its mains for conveying gas; that it was necessary for her to cross the ditch, or to go a considerable distance around, and appellant's employé and superintendent, engaged in the work and having charge of the ditch, invited and directed her to cross said ditch, and thereby assured her that it was safe for her to undertake to pass over the same; that, had it not been for such invitation and direction on the part of appellant's said employé, she would have gone a long way out of her way to have reached the point to which she was going by passing around the end thereof. Appellee further alleged that she was an old and feeble woman, with poor judgment, and unable to compre-

hend and understand the danger attending her attempt to cross the ditch in compliance with the invitation and direction of said employé, and believing and relying upon the superior judgment, knowledge, and understanding of said employé, believed that it was safe for her to attempt to do as she was directed. She further alleged that the ditch was dug in such manner as to leave about its edges and at the surface loose dirt, which would cave and slough off when weight or pressure was applied, which was unknown to her, but was known to defendant's employé; that in compliance with the invitation and direction of said employé she did attempt to cross the ditch, when she fell into the same and was injured. The specific acts of negligence alleged and relied upon are:

"(a) In inviting and directing plaintiff, an old, feeble, and infirm woman, with poor judgment and discretion, to attempt to pass over said ditch at said time and place; (b) in inviting and directing plaintiff to cross said ditch at said point, where the edges of the bank and the ground were loose, so that, when plaintiff's weight was placed thereon, the same was caused to break off and permit her to fall therein; (c) that said defendant was guilty of negligence in inviting and directing plaintiff to cross said ditch at said place, without knowing that the same was secure and safe for her to attempt to go over the same, or without making the same safe for ordinary use."

Appellant answered by denying that plaintiff received any injuries whatever as a result of its negligence. It denied that it had excavated a ditch of the depth alleged by appellee, and denied that any of its agents invited appellee to cross said ditch. It denied that appellee was feeble and of poor judgment, and unable to comprehend and understand the danger attending her to cross said ditch, and denied that loose dirt had been left on the edges thereof. It alleged that the condition of the ditch and its surroundings were open and obvious, and if there was any danger in crossing the same such danger was as open and obvious to appellee as to appellant, and that appellee assumed the risk incident to crossing the ditch in the manner that she did, and that she was guilty of negligence contributing to her injuries in attempting to cross the ditch in the manner she did attempt to cross the same, as alleged in her petition. It further alleged that there was an open and unobstructed way around the ditch which plaintiff could have traveled without the loss of time, and that she voluntarily selected the route which she was traveling, and in doing so was guilty of negligence which proximately contributed to her injuries, and that in taking the route which she did take she assumed the risk of injury therefrom. Further answering, the appellant charged that the appellee was further guilty of contributory negligence in this: That her said arm had been broken and injured before, and was weak and peculiarly susceptible to injury, which fact was not apparent to and

was unknown to defendant and its servants, but which was well known to plaintiff; that plaintiff, in attempting to cross said ditch, negligently threw the weight of her body upon said arm, and that her injury resulted, not from any fall, but from the weight of her body upon said weakened and injured arm; and that in undertaking to cross said ditch, and in putting the weight of her body upon said arm in said manner, she was guilty of negligence which proximately contributed to cause her injury, and assumed the risk incident to the manner adopted by her in crossing said ditch.

A trial, November 13, 1914, resulted in a verdict and judgment in favor of appellee for the sum of \$700, and appellant appealed.

The assignments of error from the first to the fourth, inclusive, complain respectively of the refusal of the trial court to give to the jury certain special charges requested by appellant, directing the jury to return a verdict in its favor. It is asserted that the court erred in refusing these charges because: (1) The evidence failed to show that appellant was guilty of any act of negligence, either in the construction of the ditch in question, or in the conduct of its foreman in charge of the digging of said ditch at the time appellee was injured; (2) because the undisputed evidence showed that appellee was guilty of contributory negligence in the manner in which she attempted to cross the ditch, in that she wholly failed to look and observe said ditch, and the place where she was stepping and about to step, and to take any precaution or exercise any care whatever for her own safety; (3) because the undisputed evidence showed that the ditch was as open and obvious to appellee as it was to appellant and its foreman, and she assumed the risk of undertaking to cross it at the time and in the manner she did; and (4) because the evidence wholly failed to show that appellee at the time she undertook to cross the ditch in question relied upon the invitation of appellant's foreman and accepted such invitation as an assurance of safety.

[1] We do not agree that the evidence was of the character here claimed, and hence not prepared to hold that the trial court would have been warranted by it in instructing a verdict for appellant. The appellee was an old lady 72 years of age. She testified:

"How I came to attempt to cross the ditch: The boss said to me, 'You can cross right here,' he says, 'it ain't very wide across.' I just walked up to it, and I said, 'Please take my hand,' and he took my hand, and the dirt gave way under my foot; and I think I slipped into the ditch."

On cross-examination she said:

"When I went to cross I didn't see any place to cross, and the boss says, 'You can cross right here.' I didn't look to see how wide it was. I didn't look to see how deep it was. I didn't look to see where I was going to step. I looked to see where I was putting my foot before I went to step. I looked to see whether my foot was on solid ground before I went to step. It was on solid ground."

The ditch appellee was attempting to cross when hurt was 12 inches wide, and the testimony varies as to its depth. Appellant's witness J. H. Wells testified that he measured it with a rule, and that it was 12 inches wide and 12 inches deep; while appellee's witness J. E. Davis testified that he would be safe in saying the ditch was 2½ feet deep. The testimony was also conflicting as to whether the appellant's foreman invited appellee to cross over the ditch and as to whether she actually fell in the ditch. That appellee's arm was broken, and her shoulder in some manner injured in attempting to cross the ditch seems not to be denied. Pannill, appellant's foreman, said in substance, that he caught hold of appellee's arm to assist her in crossing the ditch, and that as she "stepped astraddle of the ditch" he "heard something pop," and appellee then cried out, 'Oh, my arm is broken.'"

Considering the evidence as a whole, we think it must be held that whether appellee acted and relied upon the invitation of appellant's foreman, Pannill, in attempting to cross the ditch at the place she did, and whether appellant's said foreman was guilty of negligence in inviting her to cross at such place under the circumstances, which proximately contributed to her injury, and whether the appellee exercised ordinary care, in view of the circumstances and conditions surrounding her, for her own safety, were issuable facts for the determination of the jury. There was evidence to the effect that the soil was sandy, that loose dirt had been piled along the ditch, that it had been raining, and the edges of the ditch had in many places crumbled and "sloughed off." These were conditions known to appellant's foreman and not known to appellee. Appellee testified that she could not state how deep the ditch was, that she did not look to see how wide it was, nor where she was going to step, but that she did look to see where she was putting her foot before she attempted to step over the ditch, and that as she was in the act of stepping across the dirt gave way under her foot and she slipped into the ditch. Thus it appears, it seems to us, that the failure of appellee to acquaint herself with the width and depth of the ditch, and to observe just where she was going to place her foot on the opposite side thereof, had practically nothing to do with the accident and her injuries. The conclusion that the condition of the soil at and about the ditch where appellee was invited by appellant's foreman to cross over it, his invitation to appellee to cross at such place without exercising ordinary care to make the place reasonably safe for her to cross, or otherwise to exercise such care to prevent injury to her in her attempt to cross over the ditch, were the proximate cause or causes of her injury, is, to say the least, very reasonable; and at the request of appellant the court charged the jury that:

"Even though you believe from the evidence that defendant's foreman, Pannill, invited the plaintiff to cross said ditch on the occasion in question, and if you further believe from the evidence that such invitation was negligence, yet, unless you believe from the evidence that plaintiff relied on such invitation as to her being able to make said crossing in safety to herself, and would not have attempted to cross said ditch but for such invitation, you will find for defendant."

We do not think the issue of assumed risk was in the case. That the ditch was open to observation is clear, but it cannot reasonably be said, as a matter of law arising upon the facts, that the danger of attempting to cross over it, as appellee did, was obvious. That she did not assume the risk of crossing is evidenced by the fact that she declined to make the attempt until appellant's foreman invited her to do so. We conclude the peremptory instructions were properly refused.

[2] The fifth assignment of error complains of the court's refusal to give a special charge requested by appellant to the effect that, if appellee attempted to cross the ditch by the assistance of the foreman, Pannill, and Pannill acted as an ordinarily prudent person would have acted under the same circumstances, and that the injury, if any, resulting to the appellee, was caused by a weakened condition of her arm or shoulder, to return a verdict for appellant. We think there was no error in refusing this charge, for the reason that the evidence failed to raise the issue therein sought to be submitted. There was evidence that appellee's arm had been previously broken, but none that would have warranted a finding that because thereof appellee's arm was weakened and more liable to break on the occasion in question. Dr. Carey, the physician who attended appellee, testified that her arm having been broken prior to the accident out of which this suit grows "would not have rendered it more easily broken at another point, nor would it have rendered it more easily broken if it had been broken on the occasion in question at the same site as the previous fracture, provided union had been good"; that "if you get union the arm is just as strong after the fracture as it was previously." We have been unable to discover any testimony in the record tending to show that a good union had not been obtained after appellee's arm was broken, prior to her attempt to cross the ditch dug by appellant, and that the former fracture rendered her arm on the occasion in question more likely to break.

[3] The appellant requested the court to charge the jury as follows:

"If you believe from the evidence that a person of ordinary prudence, situated and circumstanced as plaintiff was on the occasion when she undertook to cross said ditch, would have looked and observed said ditch and the place where she was undertaking to step; and if you further believe from the evidence that plaintiff, on said occasion, failed to look and observe said ditch and the place where she was under-

taking to step; and if you further believe from the evidence that such failure, if any, upon the part of plaintiff, proximately contributed to cause the injury, if any, she sustained on said occasion, you will find for the defendant."

This charge was refused, and its refusal complained of in appellant's seventh assignment of error. In its general charge the court correctly defined contributory negligence, and told the jury that if they believed the appellee was guilty of contributory negligence in attempting to cross the ditch, or if they believed her injury was the result of her failure to exercise ordinary care for her own safety to find in favor of the appellant.

The contention of appellant is that, in view of the general charge on the question of contributory negligence, the appellant was entitled to have the facts enumerated in the special charge grouped as they were, and the judgment of the jury upon the evidence relative to the issue raised by such facts invoked. It is a well-established rule that the defendant in an action for personal injuries has the right ordinarily to prepare and demand the giving of a charge requiring the jury to find whether the evidence established the existence of any specified group of facts which it is claimed constitutes contributory negligence, with instruction that if it did to find for the defendant. But we do not find that the pleadings and evidence in the case at bar called for the giving of the special charge under consideration. As we have said in a former part of this opinion, the failure of the appellee to observe the width and depth of the ditch and the place where she was undertaking to step had practically nothing to do with the accident causing her injuries, and could not be regarded as a proximate cause of said injuries; besides, appellant in pleading the defense of contributory negligence did not plead that the appellee was guilty of negligence contributing to her injury, in that she failed "to look and observe the ditch and the place where she was undertaking to step." The specific plea of contributory negligence was that there was an open and unobstructed way around said ditch, which was open and obvious to appellee, and which she could have traveled without loss of time or inconvenience, and in safety, and that she voluntarily chose not to follow such safe and convenient way; that her arm had been previously broken and weakened, and that in attempting to cross the ditch she negligently threw the weight of her body upon said arm; and that her injury resulted, not from any fall, but from the weight of her body upon said arm. Having specifically pleaded the foregoing acts constituting contributory negligence, appellant was not entitled to have the acts specified in the special charge refused submitted to the jury as a further basis for a finding of contributory negligence on appellee's part, and there was no error in refusing the special charge. *Railway Co. v. Hagood*, 21 Tex. Civ. App. 442, 52 S. W. 574;

Railway Co. v. Locke, 67 S. W. 1082; Railway Co. v. Foster, 87 S. W. 879; Railway Co. v. Alberti, 47 Tex. Civ. App. 32, 103 S. W. 699; Railway Co. v. Stillwell, 46 Tex. Civ. App. 647, 104 S. W. 1071.

The evidence is sufficient to sustain the verdict, the issues were fairly submitted, and no reversible error being pointed out by appellant's assignments, the judgment of the court below will be affirmed.

Affirmed.

WARBURTON v. WILKINSON. (No. 5584.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 26, 1916.)

1. PRINCIPAL AND AGENT — 145—LIABILITY OF UNDISCLOSED PRINCIPAL—RATIFICATION.

Where the brother of the owner of cattle, having charge of them, rented lands for grazing purposes, and the owner reaped all the benefits of the contract with knowledge that his cattle were pastured on another's land, and ratified the contract by refunding the brother the amount he paid thereon, such owner was liable for the rent of the grazing lands.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.]

2. EVIDENCE — 207—ADMISSIONS.

In an action for the rent of grazing lands, the admissions of defendant as to the pasturage of his cattle thereon, made in another suit between him and another than the adverse party in the present suit, were admissible in evidence, since the voluntary admissions of a party, wherever and however made, can be used in any suit to which he is a party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 707-712; Dec. Dig. § 207.]

Appeal from Victoria County Court; J. P. Pool, Judge.

Action by B. J. Wilkinson against A. H. Warburton. From a judgment for plaintiff, defendant appeals. Affirmed.

C. F. & C. C. Carsner and R. L. Daniel, all of Victoria, for appellant. T. R. Wood, and Fly & Ragsdale, all of Victoria, for appellee.

FLY, C. J. This suit was instituted by appellee to recover of appellant the sum of \$650, the balance due on the rent of 2,000 acres of land for grazing purposes for the year beginning August 1, 1913, and ending July 31, 1914. Appellant answered that he had not made a contract to rent the premises, and that his brother, J. A. Warburton, who leased the premises, was not his agent and had no authority to rent the premises. A jury being waived, the court rendered judgment in favor of appellee for \$650, with interest at 6 per cent. from January 1, 1915.

[1] The facts show that J. A. Warburton

was the undisclosed agent of appellant and contracted for the land and pastured the cattle of appellant thereon. Appellant obtained the full benefit of the pasturage of the cattle, and ratified the acts of his agent by paying a part of the money due on the lease. We adopt the findings of fact of the county judge which are fully supported by the statement of facts.

The evidence clearly shows that J. A. Warburton, a brother of appellant, who had charge of the cattle of the latter, made the rental contract, and that appellant reaped all the benefits of the contract, and ratified the acts of his agent by repaying to him the sum of \$150 paid on the contract. J. A. Warburton was undoubtedly the undisclosed agent of appellant, and whether appellee knew this fact or not would not affect the liability of the undisclosed principal. The evidence shows that the cattle were the property of appellant, that he knew that they were pastured on the land of appellee, and that he paid all that was paid on the rental contract. He is undoubtedly liable for the rent.

It is the general rule that an undisclosed principal, when subsequently discovered, may be held liable on all simple nonnegotiable contracts made in his behalf by his duly authorized agent, although the contract was originally made with the agent in entire ignorance of the principal. This has been held in many cases. *Mechem on Agency*, § 1731, and authorities cited. To the same effect are *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764, *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913, and *Marx v. Luling Association*, 17 Tex. Civ. App. 408, 43 S. W. 596.

[2] The admissions of appellant as to the pasturage of the cattle, made in another suit between him and another party, were admissible in evidence in this suit. The voluntary admissions made by a party to a suit, made anywhere and under any circumstances, can be used in any suit to which he is a party. No reason can be given why the voluntary admissions of a litigant cannot be used against him, no matter where nor under what circumstances they were made. *Greenleaf on Ev.* § 341; *Jones on Ev.* § 683; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; *Bilger v. Buchanan* (Sup.) 6 S. W. 408. The voluntary admission of a party is an admission, no matter where and how made, and can be used against him. We overrule the third and fourth assignments of error.

The judgment is affirmed.

SEATON v. MAJORS. (No. 5589.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 26, 1916.)

1. PLEADING ~~34~~—PETITION—SUFFICIENCY. As against general demurrer, every intendment will be indulged in favor of the petitioner. [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. ~~34~~.]

2. JUDGMENT ~~250~~—PLEADING TO SUSTAIN. A judgment cannot be upheld, where the petition did not state a cause of action against the parties, regardless of what the evidence showed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. ~~250~~.]

3. CORPORATIONS ~~268~~—STOCKHOLDERS—ACTIONS AGAINST.

A petition by plaintiff, who rendered services for a corporation, by which he sought recovery against the corporation and its stockholders, alleged that defendants were the principal stockholders, and as such received and had the benefit of the services rendered, and by reason thereof became liable to plaintiff for his services. The petition contained no averments showing the stockholders liable, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1198, for unpaid stock, or bringing the case within articles 1206, 1208, on the ground of insolvency and dissolution. *Held* that, as a shareholder always receives the benefit of contracts made by the corporation, the petition did not state a cause of action against the defendant shareholders, notwithstanding every intendment must be taken in its favor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129, 1131, 1133-1147, 2276; Dec. Dig. ~~268~~.]

Error from Nueces County Court; W. F. Timon, Judge.

Action by W. E. Majors against the Nueces River Irrigation Company, a corporation, and others. There was a judgment for plaintiff, and the defendant Mildred Seaton brings error. Reversed and remanded.

B. W. Teagarden, of San Antonio, and Edward B. Ward, of Corpus Christi, for plaintiff in error. G. R. Scott, Boone & Pope, Claude Lawrence, and Gowan Jones, all of Corpus Christi, for defendant in error.

CARL, J. W. E. Majors sued the Nueces River Irrigation Company, a corporation, Mildred Seaton, a feme sole, and George Gee, and alleged that he was employed by the Irrigation Company about December 1, 1913, at \$40 per month, and entered into the company's service December 15, 1913, and worked for it under the terms of the oral contract of employment until the 1st of November, 1914, and that all he had been paid was \$6, which was duly credited. The corporation, George Gee, and plaintiff in error were duly served with citation, but made default, and a joint and several judgment was rendered against all the defendants.

[1-3] The only allegation whatsoever with

reference to plaintiff in error and George Gee is contained in the eighth paragraph of the petition, and is as follows:

"That said defendants Mildred Seaton and George Gee are the principal stockholders in said defendant corporation, and as such received the benefit of the services rendered by plaintiff to defendant corporation, and by reason thereof they, and each of them, became liable to this plaintiff for his said services, and that by reason thereof plaintiff is entitled to and does look to these defendants, and each of them, for the full satisfaction of his said debt."

The prayer was for judgment against all the defendants. There is no allegation that the corporation is insolvent. If we indulge every reasonable intendment in favor of this petition, which we must do in testing its sufficiency as against a general demurrer, does it state a cause of action against the plaintiff in error? We do not think it does. All the allegations of the petition are as to a contract made with the corporation, and that the service was performed for that company. The only charge against Gee and plaintiff in error is that they were the principal stockholders in the corporation sued, and received the benefits of the service. There is absolutely no allegation which charges them, or either of them, with anything which would show liability on their part. It matters not what the evidence showed. The petition must state a cause of action as to those against whom a judgment is sought. *Busch v. Broun* (Civ. App.) 152 S. W. 685; *Western Union Tel. Co. v. Stracner* (Civ. App.) 152 S. W. 845. It was not alleged that the corporation had been dissolved, and that its assets were in the hands of plaintiff in error and Gee, as mentioned in article 1208 of Vernon's Sayles' Civil Statutes; nor is it alleged that they were directors or officers at the time of the dissolution, if it was ever dissolved, as provided in article 1206, and thus trustees for the creditors. Neither is it alleged that plaintiff in error owed for stock in the corporation, so as to make her liable under article 1198.

In fact, this is just a straight suit declaring on a contract made with the corporation, and no fact whatever is alleged which would make the stockholders liable for the corporation's contract. Every stockholder is supposed to receive the benefits of contracts made by the corporation, but that fact in no wise makes such stockholders liable for the debts of that corporation; and the allegation that Majors looked to them to pay him does not show that the stockholders ever in any way promised to pay him, or were under any legal obligation to him whatsoever.

The petition did not state a cause of action against plaintiff in error, and the judgment is reversed, and the cause remanded.

BENNETT et al. v. RIO GRANDE CANAL CO. (No. 5569.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 10, 1916. Rehearing Denied
Feb. 16, 1916.)

1. APPEAL AND ERROR ¶173—MATTERS REVIEWABLE—REQUEST FOR SUBMISSION OF ISSUE TO JURY.

Where defendants failed to plead payment of water rent sued for, or to request submission of that issue to the jury, failure to submit it is not ground for reversal, since Rev. St. 1911, art. 1985, provides that failure to submit an issue not requested shall not be deemed ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. ¶173.]

2. APPEAL AND ERROR ¶263—MATTERS REVIEWABLE — NECESSITY OF BILL OF EXCEPTIONS.

Under Rev. St. 1911, art. 2061, as amended by Acts 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2061), providing that the ruling of the courts in giving, refusing, or qualifying instructions shall be regarded as approved, unless excepted to, where no bill of exceptions is reserved to a charge attacked on appeal, the charge cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. ¶263.]

3. APPEAL AND ERROR ¶699—MATTERS REVIEWABLE—RESERVATION OF EXCEPTIONS—TIME.

Where exceptions were reserved to an order overruling objections to a charge, but the order failed to show that the objections were made before the charge was given, the propriety of the charge could not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2864; Dec. Dig. ¶699.]

4. WATERS AND WATER COURSES ¶254 — CONTRACT FOR IRRIGATION SERVICE — SALE OF LAND.

Where defendant contracted to pay a sum certain for irrigation water rights, he could not escape liability for failure to pay by selling his land, or a part thereof, so that, in an action to recover the sum due, his contract with the buyer of his land was inadmissible.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ¶254.]

5. WATERS AND WATER COURSES ¶254 — CONTRACT FOR WATER SUPPLY—LEGALITY—LIMITATION OF LIABILITY FOR NEGLIGENCE.

Where a contract to supply water for irrigating purposes provided for the repair of the system, so as to place it in an efficient condition, and that during a "reasonable period of repair and construction" the company should not be liable for damages, it was not error, in an action to recover the contract price for water furnished, to admit testimony that delay in furnishing water was caused by extension of the canal system; the condition being valid, and not an attempt of the company to contract against its own negligence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ¶254.]

6. APPEAL AND ERROR ¶742—ASSIGNMENTS OF ERROR—STATEMENTS ACCOMPANYING.

Assignments of error to the failure to give certain special issues, which are not followed by

statements showing what the issues were, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ¶742.]

Appeal from Cameron County Court; Y. L. Yates, Judge.

Action by the Rio Grande Canal Company against W. H. Bennett and another, in which defendant M. M. Biggs filed a cross-action. Judgment for plaintiff against defendant Bennett, and against plaintiff as to defendant Biggs, and against defendant Biggs on his cross-action, and defendants appeal. Affirmed.

Kinder & Williams, Ira Webster, and R. A. Kitchen, all of Brownsville, for appellants. Oscar C. Dancy and Graham, Jones, West & George, all of Brownsville, for appellee.

FLY, C. J. This is a suit instituted by appellee against appellants, W. H. Bennett and M. M. Biggs, to recover the sum of \$408, alleged to be due it for water furnished during the year 1913 to irrigate 136 acres of land, under the terms of a certain written contract made by and between Frank Williford and W. H. Bennett, which contract had been assigned to appellee, whereby said Bennett bound himself to pay the sum of \$3 an acre for the use of said water. It was further alleged that Bennett was still the owner of 136 acres of land out of the tract of 160 acres described in the contract, and that Biggs, during 1913, cultivated a part of the 136 acres under some lease or contract, the terms of which were not known to appellee. It was alleged that water was furnished according to the terms of contract and that appellants had not paid for it. Biggs set up a cross-action against appellee for \$901.25. The cause was submitted to a jury on special issues, and on the answers judgment was rendered against Bennett for \$391.50, against appellee as to Biggs, and against the latter as to his cross-action.

[1] There was no plea of payment by appellants, and the uncontroverted evidence showing that 120 acres of land had been irrigated by appellee, and that Bennett had agreed to pay \$3 an acre for the water during the year 1913, the court had the power and authority, without a finding by the jury, to render judgment for the amount of the damages. This is statutory. Article 1985, Rev. Stats. Appellants requested the submission of no issue as to payment of the water rent. The first assignment of error is overruled.

[2, 3] The second and third assignments of error will not be considered, because no bills of exceptions were reserved to the charge of which complaint is made. Article 2061, Rev. St. 1911, as amended by Acts 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2061). The order of the court overruling objections to the charge, to which exceptions

were reserved by appellants, does not show that the objections were made before the charge was read to the jury. *Insurance Association v. Rhoderick* (Civ. App.) 164 S. W. 1067; *Roberts v. Laney* (Civ. App.) 165 S. W. 114; *Railway v. Love* (Civ. App.) 169 S. W. 922.

[4] The contract between Bennett and Biggs had no pertinency to the issues in the case and was properly rejected by the court. Bennett could not, by a sale of the land or a part thereof, escape the penalty of an infraction of his contract with appellee. The rejection of the contract did not injure Biggs, for he testified that he did not go into possession of the land until the latter part of 1913, the year for which the water rent was due, and in April, 1913, he applied for water, not in his own name, but in that of Bennett.

[5] The contract between appellee and Bennett provided for the repair of the irrigation system so as to place it in efficient condition, and that during a "reasonable period of repair and construction" the company should not be liable for damages. This was a valid condition, agreed to by the parties, and the court did not err in permitting J. B. Scott, a witness for appellee, to testify that delays in furnishing water were caused by extension of the canal system. We do not desire to draw any fine-spun distinctions between extensions, improvements, reconstructions, and repairs. The contract covered the work that delayed appellee, as testified by Scott. No negligence on the part of appellee appeared from the evidence, and appellants contracted with full knowledge that appellee had taken charge of a defunct concern, and that it would take much labor and expense to put the plant in a condition of efficiency. Appellee did not undertake to contract against its negligence, but against its inability under the circumstances to give perfect service. Bennett was fully notified of the condition of the plant before he signed the contract. As said by the Supreme Court in *Railway v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410, in discussing the liability of a common carrier for delay of goods arising from freight congestion:

"We regard the rule denying to carriers the right to excuse themselves for delays resulting from such conditions as those supposed, when they have received the property knowing of the existence of those conditions and giving no notice thereof to shippers, as defining a part of the duties imposed by law upon carriers, and

not as expressing merely the results of agreements. That duty is to give notice to customers whenever the transportation cannot be performed in the usual way, which notice gives to the shipper the opportunity to choose between different courses open to him. When the carrier has done this, it has fulfilled its legal duty in this respect, and should not be held responsible for a delay which it cannot prevent, if the shipper still insists on delivering his property for shipment."

Even in the absence of an express contract relieving appellee from damages arising from the condition of its plant, appellee could have shown that the condition of the plant and the necessity for repairs and reconstruction were known to appellants when the contract was made, and appellee would be relieved from liability. The contract served the purpose at least of bringing home to Bennett the condition of the plant and the probability of a failure to efficiently deliver water.

Bennett was liable to appellee for the water charges, and proof that he had sold part of the land to Biggs had no pertinency or force in the case. The sixth assignment of error is overruled.

The seventh and eighth assignments have been fully treated under other assignments, and they are overruled.

[6] The ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments complain of the failure to give certain special issues; but they are not followed by statements showing what the issues were, and they will not be considered. Every pertinent issue, however, was submitted by the court, and appellants could not have been injured by a refusal to submit other issues, no matter what they were.

The charges complained of in the sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments cannot be inquired into, for the reason that no bill of exceptions was reserved by appellants to the giving of such charges.

The twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh assignments are mere reiterations of the fifth assignment of error, which has been fully discussed herein. They are overruled.

The twenty-eighth assignment of error is in effect the same as the first, and has been disposed of by the discussion thereunder.

We find no error in the judgment, and it is affirmed.

KLABUNDE v. VOGT HARDWARE CO.
(No. 5580.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 12, 1916. Rehearing Denied Feb. 9, 1916.)

JUSTICES OF THE PEACE §174—APPEAL—AMENDMENT OF PETITION—JURISDICTION.

The amendment of the petition in the county court, on appeal from a justice, so as to increase the amount of damages asked to more than \$200 because of accrual of interest pending the action, did not oust the court of jurisdiction to render judgment for less than \$200.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. §174.]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by the Vogt Hardware Company against Carl Klabunde. From a judgment for plaintiff on appeal from a justice, defendant appeals. Affirmed.

Diedrich A. Meyer and T. E. Sinnang, both of San Antonio, for appellant. W. F. Hays, of Boerne, for appellee.

CARL, J. Appellee sued appellant in the justice court of Bexar county for a certain gasoline engine or its value, alleged to be \$185, with interest in the sum of \$11.25, making a total of \$196.25. In the event the engine should be recovered prayer was for \$15 damages. The petition was amended in the county court, where the case went on appeal, and it was alleged that the engine was worth \$185, and that the interest due to October 10, 1914, made up the total sum sued for, \$196.25, and that the interest on said sum from the date of filing brought the total to \$204.85. There is no doubt that the justice court did have jurisdiction to try the cause, and it came regularly to the county court on appeal, so that the last-named court acquired jurisdiction. Having so acquired jurisdiction of the cause of action, did it lose it when the amended petition was filed, praying for principal and interest, aggregating \$204.85? In a suit in tort, interest is a part of the cause of action for purposes of fixing jurisdiction, and this is such an action. This is one of those cases where damages will accumulate, for if the property is wrongfully detained so that the claimant is entitled to recover interest, the longer the suit is pending the greater will be the damages. If the suit had remained pending in the justice

court and interest had run long enough to make the amount exceed \$200, would the justice court have lost jurisdiction by reason of that fact? The amended petition in the county court does no more than ask for the same value of the converted property, together with interest up to that date, which at that time brought the amount as prayed for to \$204.85. In *Ft. Worth & D. C. Ry. Co. v. Underwood*, 100 Tex. 284, 99 S. W. 92, on certified question in a similar case from the Second district (*Railway v. Underwood*, 98 S. W. 453), Judge Williams, speaking for the Supreme Court, said:

"The cause of action asserted was of such a nature that damages might accumulate pending the action, which is true of many actions, as, for instance, those brought for the use of property detained, and the like; but the accrual of further damages in cases of that character does not take away the power of the court to give judgment for an amount claimed which is within its jurisdictional limits. The plaintiff in such cases, with proper pleadings, may recover the entire damage which he has suffered up to the trial; but this right may be restricted by the law limiting the jurisdiction of the court in which he has seen fit to sue. Having brought his action for an amount within the jurisdiction, he is entitled to such judgment as the court has power to render."

In that case, the suit as originally brought was for an amount within the jurisdiction of the county court, but by the third amended petition, in claiming interest to that date, placed the amount at more than \$1,000. In the case at bar the amount claimed in the amended petition was within the county court jurisdiction, but would not have been in that of the justice court. The court rendered judgment for \$163.50 or \$150, with 6 per cent. interest on that sum from October 1, 1913, to April 2, 1915, thus making the sum for which the judgment was rendered. Having regularly acquired jurisdiction of the cause, we think, under the authority of the above case, that the county court had jurisdiction to render such judgment as it entered. And this view is sustained by the following cases: *J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.*, 157 S. W. 228; *Adair v. Stallings*, 165 S. W. 140.

While there are more than one assignment of error, they are all predicated upon the proposition that the county court did not have jurisdiction, after the amended petition was filed in that court; and, since we hold that the county court did have jurisdiction, the assignments are overruled, and the judgment is affirmed.

HAMLIN v. J. M. RADFORD GROCERY CO.
(No. 8288.)

(Court of Civil Appeals of Texas. Ft. Worth.
Dec. 11, 1916. Rehearing Denied
Jan. 15, 1916.)

1. BANKRUPTCY — 407—DISCHARGE—"FALSE" STATEMENT.

A "false" statement in obtaining credit, which under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. 1913, § 9598), will prevent discharge of bankrupt, must not only have been untrue, but knowingly made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. —407.]

For other definitions, see Words and Phrases, First and Second Series, False.]

2. APPEAL AND ERROR — 1008 — REVIEW — FINDINGS.

Findings not being attacked, the evidence will not be looked to on appeal, to give them other than their apparent meaning.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. —1008.]

Appeal from District Court, Taylor County; Thos. L. Blanton, Judge.

Action by the J. M. Radford Grocery Company against M. H. Hamlin. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Oritz & Woodward, of Coleman, for appellant. R. W. Haynie, of Abilene, for appellee.

DUNKLIN, J. M. H. Hamlin secured his final discharge in bankruptcy in the federal court. One of the claims scheduled in those proceedings was in favor of J. M. Radford Grocery Company, who, after receiving a dividend thereon and after such discharge, instituted this suit against Hamlin to recover the balance due, and from a judgment in favor of the plaintiff, the defendant has appealed.

The account for the goods sold was closed by the defendant executing to the plaintiff his promissory note providing for interest and attorney's fees in the usual form, and the present suit was instituted upon that note. Replying to the defendant's plea of his discharge in bankruptcy, plaintiff, after alleging that the note was given for merchandise purchased, further alleged that the defendant in order to obtain said goods falsely and knowingly misrepresented his assets, the material misrepresentation shown by the evidence being the statement that he owned, among other assets, a tract of land worth \$4,000. The case was tried by the court without the aid of a jury, and the judge filed findings of fact and conclusions of law which appear in the record. The court found that, in order to induce plaintiff to sell him the goods, defendant through C. B. Lovelace, his authorized representative, made a statement in writing, which was afterwards signed by the defendant, in which a tract of land worth \$4,000 was listed as one of defendant's assets,

which representation was false; defendant as a matter of fact not owning such land at said time and has not since owned the same. The court further found that such misrepresentation was material, and that the plaintiff was induced thereby to sell the goods to the defendant. The court also found that, at the time the defendant signed said written statement containing said misrepresentation, he did not know what said written statement contained, but signed it relying upon his bookkeeper to give a true and correct statement of his business affairs. Two of the findings of fact by the trial judge are as follows:

"At the request of the defendant, the court finds that the clause in the written instrument, which formed the basis for credit, signed by defendant, to wit: 'The above statement is made to J. M. Radford Grocery Company as a basis of credit now or hereafter extended to me by said company, and all goods furnished me and all credit extended to me by said company, are to be furnished and extended upon the faith of said statement and the accuracy and correctness of each representation made therein, each of said representations being material, and upon this agreement, and this statement and agreement shall stand good as to all future credit extended to me by said company unless and until I have notified said company of any change in my financial condition above stated.'

"That the defendant did not know at the time he signed said statement, that such clause was a part of same, but in this connection the court finds that the defendant had theretofore been in business for a number of years, and that he knew that it was the custom of all wholesale merchants and jobbers to require similar statements as a basis of credit from all of their customers, and that he had been in the habit of giving such written and printed statements as to his financial standing and with such clause as that contained, to his creditors, in order to obtain credit."

The correctness of the court's findings of fact is not challenged, and the controlling question upon this appeal is whether or not, under the findings related, the plaintiff's claim against Hamlin was discharged in bankruptcy.

[1] Appellant contends that in order to defeat the discharge pleaded, it would be necessary to show that the misrepresentation found was knowingly and fraudulently made; while appellee insists that if appellant obtained the goods under false representations, that fact was sufficient to avoid the discharge, even though the misrepresentation was innocently made. By section 14b (3) of the Bankrupt Act, it is provided that a bankrupt shall not be discharged if he has—"obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." 32 Stat. 797, amended 1910 by 36 Stat. 839.

See, also, 1 Fed. Stat. Anno. Sup. 1912, p. 560.

The following quotation from 8 Ruling Case Law, § 133, is a correct statement of the interpretation of what is meant by "false statement," as used in the article of the statute quoted according to what appears to be an unbroken line of decisions:

"The word 'false' as here employed is not merely equivalent to 'untrue' or 'incorrect,' but it connotes a guilty scienter on the part of the bankrupt, and requires that the written statement made for the purpose of obtaining credit shall be knowingly and intentionally untrue in order to constitute a bar to the bankrupt's discharge. In the application of that principle a discharge has been granted to a bankrupt, notwithstanding he had obtained money on the ground of an incorrect statement of his book-keeper, where the bankrupt did not actually know what the statement contained, or did not know that it was materially false, and did not have a conscious intention to deceive the creditor."

See, also, *Cooper Grocery Co. v. Gaddy*, 141 S. W. 825; *Hardie v. Swafford Bros. D. Gds. Co.*, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785; *Gilpin v. Merchants' Nat. Bank*, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; also other decisions cited 1 Fed. Anno. Sup. 1912, p. 562. Also see *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Strang v. Bradner*, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; *Noble v. Hammond*, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621. In *Gilpin v. Merchants' National Bank*, supra, the following occurs:

"In other words, 'false statement' connotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word 'false' cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning: 'Uttering falsehood; unvarnished; given to deceit; dishonest.' As an adjective, it is correlative with the noun 'falsehood.' To charge a person with making a false statement is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to 'untrue' or 'incorrect.' But this is not the ordinary or usual signification attached to the word. To charge a person with making false entries in books of account means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of *Bouvier's Law Dictionary* says of the word 'false' that, when 'applied to the intentional act of a responsible being, it implies a purpose to deceive.' In *Black's Law Dictionary*, under the title 'False,' it is said: 'In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud.' In a recent and well-accepted publication called 'Words and Phrases,' the word 'false' is thus defined: 'False means that which is not true, coupled with a lying intent.' *Wood v. State*, 48 Ga. 192, 297, 15 Am. Rep. 664. 'False' in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.'"

It will be noted from the court's findings in the present suit that appellee not only failed to sustain its allegation that the misrepresentation upon which the goods were obtained was knowingly made, but the court has found the negative of that allegation.

[2] Appellee insists, further, in effect, that from the findings of fact by the trial judge, considered in connection with the evidence, it appears that although appellant did not ac-

tually know of the falsity of the statement in question, he had the opportunity of informing himself, and his act in making it was so reckless as to make the misrepresentation fraudulent and thus to deprive him of the right to claim the discharge. As noted already, no attack was made upon the findings of fact, which do not show any fraudulent intent in making the untrue statement, even though it should be said that such findings show the same to have been made without proper care and caution, and, under the circumstances, the evidence cannot be looked to to give a different meaning to those findings.

Under the authorities cited, we must hold that the court erred in its judgment, and in not rendering judgment in favor of the appellant. Accordingly, the judgment of the trial court is reversed, and judgment is here rendered in favor of appellant.

KANSAS CITY, M. & O. RY. CO. OF TEXAS v. LATHAM. (No. 8277.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 18, 1915. Rehearing Denied Jan. 22, 1916.)

1. ESTOPPEL — §70 — EQUITABLE ESTOPPEL — WHAT CONSTITUTES.

Where the federal court on discharging the receiver and returning the property to a railroad company required the railroad company, pursuant to its offer, to assume payment of claims arising during the receivership, plaintiff's failure to assert his claim by intervention in the receivership suit before discharge, coupled with his delay for two months thereafter, during which the railroad expended relatively small sums in the betterment of its property, works no estoppel preventing assertion thereafter.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 183-187; Dec. Dig. §70.]

2. RECEIVERS — §65 — APPOINTMENT OF RECEIVER — EFFECT.

The appointment of a receiver and his administration of the affairs of a railroad company impounds the property of the company, so that while it remains in the custody of the court, the receiver's possession cannot be disturbed by any other court.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 114, 115; Dec. Dig. §65.]

3. COURTS — §493 — RECEIVERS — APPOINTMENT — POWER OF STATE COURTS.

After discharge of a receiver appointed by the federal court, and during the pendency of the receivership suit, a state court may appoint a receiver who can hold the property to the exclusion of the power of the federal court to appoint a second receiver for it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1346-1352; Dec. Dig. §493.]

4. COURTS — §500 — RECEIVERS — POWER OF STATE COURTS.

Pending a receivership in the federal court, a state court may determine a claim against the railroad company whose property was so impounded, if it does not interfere with the receiver's custody of the property.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1407, 1408; Dec. Dig. §500.]

5. COURTS — §501 — RECEIVERS — ACTION IN STATE COURT.

Under Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1913, § 1048),

claimants against receivers of a railroad company appointed by the federal court may bring suit in the state court without consent of the appointing court, and it cannot, sitting as a court of equity, deprive claimants of that right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1409; Dec. Dig. ¶ 501.]

6. RAILROADS ¶212 — RECEIVERS — DISCHARGE—ACTION AGAINST RAILROAD.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2141, declaring that all parties and corporations whose property has been placed in the hands of a receiver, and which has been delivered back to the original parties or corporations without sale, shall be liable and held to pay all the unpaid liabilities of the receiver arising out of the receivership, a shipper whose claim arose while the property of a railroad company was in the possession of a receiver appointed by a federal court may, after termination of the receivership and return of property to the railroad company, sue the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 702-706; Dec. Dig. ¶212.]

7. RECEIVERS ¶204—DISCHARGE—JURISDICTION OF COURT.

Where the federal court appoints a receiver for a railroad company, such court acquires jurisdiction of all claims presented by petition or intervention, and the discharge of the receiver does not of itself release such jurisdiction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 319, 407, 408; Dec. Dig. ¶204.]

8. RECEIVERS ¶60 — DISCHARGE—JURISDICTION RETAINED.

In such case, the reservation of jurisdiction is necessarily limited to controversies pending in the federal court, and by such reservation that tribunal cannot acquire jurisdiction over claims not filed, for a court of equity has no inherent jurisdiction beyond that conferred by the Constitution and the statutes.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 106-107; Dec. Dig. ¶60.]

9. RAILROADS ¶265 — RECEIVERS — DISCHARGE—RETURN OF PROPERTY—EFFECT OF ORDER.

Where the federal court, which had appointed a receiver for the property of a railroad company, returned the property to the company on an application whereby the company agreed to accept the property subject to all liabilities or indebtedness accruing, or to accrue against the receiver of every kind, and the order of return provided that the company should assume all liabilities incurred by the receiver, the company was liable for claims against the receiver growing out of negligence in the operation of a train, notwithstanding the federal court reserved all questions not disposed of.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. ¶265.]

10. RAILROADS ¶265—RECEIVERS—REMOVAL.

Where a federal court removed a receiver of a railroad company, returning the property to the company, one having a claim against the receiver, arising out of negligence in the mismanagement of the road, may have the benefit of Vernon's Sayles' Ann. Civ. St. 1914, art. 2141, making the company liable on such claims, though the federal court, on ordering return of the property, reserved jurisdiction as to matters undetermined.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. ¶265.]

11. RAILROADS ¶265 — RECEIVERS—PARTIES TO ACTION.

Where receivers were not personally liable, and had been discharged, they are not necessary parties to an action against a railroad

company for damages, for negligent injury to a shipment during the receivership.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. ¶265.]

Appeal from District Court, Nolan County; W. W. Beall, Judge.

Action by J. H. Latham against the Kansas City, Mexico & Orient Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

H. S. Garrett, of San Angelo, for appellant. J. H. Beall and E. R. Spencer, both of Sweetwater, for appellee.

DUNKLIN, J. The Kansas City, Mexico & Orient Railway Company of Texas has appealed from a judgment against it in favor of J. H. Latham for injuries to a shipment of cattle resulting from negligent handling of the cattle by the employees of the receivers of that railway, who were appointed by the federal court and who were finally discharged prior to the institution of this suit.

The case was tried upon an agreed statement of facts, which is a part of the record here. The defendant railway company expressly agreed that the claim asserted by plaintiff was a valid claim against the receivers before their discharge for the amount awarded by the trial court; but by all the assignments of error presented it is insisted that appellant is not liable therefor. Appellant was the owner of the property at the time the receivers were appointed, and upon its application the receivers were discharged, and the property returned to the company without a sale.

In his petition in the present suit plaintiff sought to hold the company liable for the claim upon two special theories: First, that while the property was in the hands of the receivers, earnings derived from operating it, in excess of the aggregate of all debts and liabilities incurred by the receivers, were expended for betterments and improvements of the property, the benefits of all which were realized by the company after the property was restored; second, that by the terms of the railway company's application for the discharge of the receivers and the restoration of the property to its possession and control and, as a condition precedent to the grant of such relief, it expressly agreed to assume all outstanding liabilities of the receivers, and that by the terms of the order of court granting the application the property was released to the company charged with all such liabilities.

But plaintiff also pleaded that appellant was liable for his claim by operation of law, and, in connection therewith, alleged that by order of court the receivers were discharged and the property in their hands returned to defendant without sale. The proof explicitly refuted any right to recover upon the first theory mentioned.

In the application for the discharge of the receivers, many claims were mentioned specifically, including those outstanding against the company prior to the appointment of the receivers, some of which had been allowed by the master in chancery and approved by the court, and others were still pending and undetermined. It was further alleged that there were outstanding receivers' certificates in the sum of approximately \$1,470,000, secured by a preference lien on all the property of the company; and in addition thereto adjusted liabilities of the receivers in the sum of \$250,000. A further allegation relative to outstanding claims reads:

"Your petitioner further states that there are pending undetermined and adjudicated, by suit and in few instances by claims, other liabilities and demands against this company prior to the receivership, as well as against these receivers; but petitioner is unable to state what amount will finally be due upon the same."

The application concludes with the following:

"Now the premises considered, your petitioner prays for a proper order and decree discharging such receivers, and directing that all of its property and assets be taken from the possession and control of said receivers and delivered to this petitioner, and that it be authorized to take charge of said property and operate same, and in order that the rights and indebtedness of all parties may be fully protected, it hereby agrees to accept said property subject to the charge of all indebtedness which has been or may be finally adjudicated against it, and it further assumes all of the liabilities and indebtedness accruing or to accrue against said receivers of every kind and character whatever, and is willing that the court may make all proper and necessary orders which will protect the indebtedness of all parties having any claims or demands, either against this petitioner, or against the receivers herein.

"Wherefore, the premises considered, your petitioner prays that all due and proper orders be made and entered herein by this court, as herein prayed for."

The order of court granting the application contains the following:

V. "It is ordered, adjudged, and decreed by the court that said defendant, the Kansas City, Mexico & Orient Railway Company of Texas, hereby takes and receives, and shall take and receive, all of the property and assets of every kind and description owned by it involved in this receivership, including the assets of every kind and description held and delivered to it by the said receivers, involved in and conveyed by this order, directing the delivery of said property to the said defendant, the Kansas City, Mexico & Orient Railway Company of Texas, by the said receivers, expressly charged with and subject to the following claims, demands, and liabilities, to wit:

"(a) All of the court costs incurred in this receivership which are or may be properly chargeable to or against the complainant herein, or to or against the defendant, the Kansas City, Mexico & Orient Railway Company of Texas, or to or against said S. B. Hovey and M. L. Mertz, as receivers.

"(b) All of the liabilities which have heretofore been adjudicated and determined, and which may hereafter be finally adjudicated and determined and found to be just, true, and correct demands against the said S. B. Hovey and M. L. Mertz, as receivers, arising out of the operation of the lines or property of the defendant by such receivers.

"(c) All of the indebtedness and liabilities owed by and due from the said the Kansas City, Mexico & Orient Railway Company of Texas, which have been finally established and adjudged, or which may be hereafter finally adjudicated by this court, or by any other court of competent jurisdiction, and which may be found to be just and legal liabilities against the said defendant, the Kansas City, Mexico & Orient Railway Company of Texas.

"(d) Any allowances for compensation of any officer or officers of this court appointed in this cause, or officer or agents of the receivers, if, in the opinion of the court, any of such are entitled to such compensation, reservation being hereby made by the court of its right to hereafter determine such question.

"And it is further provided by the acceptance of the said the Kansas City, Mexico & Orient Railway Company of Texas of the provisions of this order and decree that it is deemed and held to have assumed all of such liabilities and indebtedness as herein provided for.

VI. "And it further appearing to the court that the Kansas City, Mexico & Orient Railway Company of Texas, through a bondholders' committee, has caused to be placed with S. B. Hovey and M. L. Mertz, receivers herein, the sum of three hundred fifty thousand dollars (\$350,000), which said sum the said Hovey and Mertz accepted as trustees for the purpose of paying off and discharging the indebtedness and liabilities of the receivers finally adjudicated and determined, and of the class and kind named in the petition filed herein by the Kansas City, Mexico & Orient Railway Company of Texas, and also paying off and discharging the indebtedness and liabilities of the Kansas City, Mexico & Orient Railway Company of Texas, adjudicated and determined as set forth in said petition, and the court having confidence in the said trustees aforesaid, hereby orders and directs that the said S. B. Hovey and M. L. Mertz, as trustees, proceed with due diligence to expend the amount so placed in their hands as trustees toward paying off the liabilities and indebtedness as aforesaid named and provided for.

"It is further ordered, adjudged, and decreed by the court that all questions not hereby disposed of are reserved for future adjudication, and the court reserves jurisdiction of this cause and of the property affected by this decree for the purpose of final disposition of all such questions and matters, and any party to this proceeding, and any claimant or intervenor whose claims have been or shall be filed herein, may apply to this court for further orders and directions as may be deemed right and proper. And the court reserves jurisdiction, upon due hearing, subject to the right of all parties interested to contest, to charge the property hereby directed to be delivered to the said defendant as aforesaid, with any and all liabilities which have been or which may hereafter at any time be finally adjudged against the receivers for or by reason of any act or omission of theirs in the administration of their trust as such receivers. And likewise, the court reserves jurisdiction, upon due hearing, subject to the right of all parties interested to contest, to charge the property here directed to be delivered to said defendant the Kansas City, Mexico & Orient Railway Company of Texas, or which may come into its hands under and by virtue of this decree, with any lien or liens which may be finally established to exist against such property, and to fix and determine the priority of such liens."

The receivers were appointed, qualified, and took possession of the property March 9, 1912. They were discharged and the property restored to the company on July 9, 1914. On March 25, 1912, Judge C. K. Bell was appointed special master in chancery, with power to hear and determine all claims pre-

sented by intervention and asserted against the receivers, or against the company, permission to file such pleas of intervention being expressly given in the order; and the master in chancery was ordered to appoint dates and places for hearing the same convenient to the claimants. He was directed to give due notice of such appointment, and to report to the court his findings upon all such claims. On April 24, 1913, Wm. H. Atwell was appointed special master in chancery to succeed Judge Bell, who had died, and was given the same powers. The duties imposed upon those appointees were duly performed.

November 23, 1913, was the date upon which the shipment of cattle in controversy in this suit sustained their injuries through the negligence of the receivers' employes. On December 29, 1913, plaintiff, Latham, filed with the general manager of the receivers his written claim for such damages, which was expressly rejected by them March 17, 1914, nearly four months before their discharge. Plaintiff never at any time filed said claim with the special master in chancery, and did not institute the present suit until September 7, 1914, nearly two months after the receivers were discharged.

Appellant contends that the decree of the federal court should be construed as limiting the liabilities which were fixed as a charge upon the property and which were assumed by the company to claims which were then pending or which already had been reduced to judgments either in that court or in state courts, or which might thereafter be asserted and adjudicated in the receivership court.

[1] The language used in the court's order designating the liabilities which the company, by accepting the property under the order, would assume and which would become a charge on the property restored, especially when construed in the light of the offer contained in the company's application, as should be done, is indeed broad and sweeping in its scope and clearly sufficient to comprehend the claim asserted by plaintiff in the present suit. Nor do we entertain the slightest doubt that such was the intention of the court in making the order and of the company in accepting the property under and by virtue of it. And if all such claims were expressly assumed by the company, and the property expressly charged therewith, as one of the considerations for discharging the receivers and restoring the property to the owner, we are unable to discern upon what principle of equity plaintiff would be estopped to recover in this suit, as appellant insists, by his failure to assert his claim by intervention in the receivership suit before the receivers were discharged, coupled with his delay in instituting the present suit for some two months thereafter, during which period the company expend-

ed \$25,000 and incurred obligations to expend \$83,000 more for betterments upon the property for its own benefit.

[2-4] The appointment of the receivers and their administration of the affairs of the company were but ancillary proceedings only. By those proceedings the property was impounded, and while it remained in the custody of the court the receivers' possession could not be disturbed by any other court. 11 Cyc. 1010. But after the discharge of a receiver appointed by a federal court and during the pendency of the receivership suit, a state court may appoint a receiver of the property who can hold it to the exclusion of the power of the federal court to appoint another receiver of it. *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660. And, pending a receivership in the federal court, a state court has jurisdiction to determine a claim against the defendant company which has not been filed in the federal court, if the same does not interfere with the receiver's custody of the property. *Calhoun v. Lanant*, 127 U. S. 634, 8 Sup. Ct. 1345, 32 L. Ed. 297.

[5] By authority of the act of Congress, of August 13, 1888 (25 Stat. L. 436), plaintiff, without permission of the court appointing them, could have sued the receivers themselves in a state court, and it was not within the powers of the federal court, sitting as a court of equity, to deprive him of that right. *M., K. & T. Ry. v. Chilton*, 7 Tex. Civ. App. 183, 27 S. W. 272; *T. & P. Ry. v. Johnson*, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; *Id.*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981.

[6] After the discharge of the receivers and the restoration of the property to the company, plaintiff had the right, under article 2141 of our statutes, to sue the company upon the claim asserted herein, and no court could deprive him of the benefits of that statute.

[7, 8] Independent of the receivership proceedings, the federal court acquired jurisdiction of all claims presented in the case by petition or intervention, including the power to determine and enforce all liens asserted against the property. The discharge of the receivers did not of itself operate to release such jurisdiction, and we construe the provision in the order of discharge to the effect that the court reserved jurisdiction over the property as but a precautionary recital precluding any possible assumption to the contrary. Furthermore, such reservation of jurisdiction, necessarily, was limited to controversies then pending in that case. A court cannot acquire jurisdiction over a claim before suit is filed therein. *T. & P. Ry. v. Johnson*, *supra*; *M., K. & T. Ry. v. Chilton*, *supra*. Jurisdiction is conferred by the Constitution and statutes only, and, aside from such authority, it is not inherent in the power of

a court of equity. *Messner v. Giddings*, 65 Tex. 301; 11 Cyc. 661.

Appellant has cited several decisions, such as *Fidelity Ins. Trust & Safe Department Co. v. N. & W. Ry.* (C. C.) 88 Fed. 815; *Stewart v. Wisconsin Central Ry.* (C. C.) 117 Fed. 782, in which the rule is announced that if it be one of the terms of the contract of purchase of property sold by a receiver that the purchaser shall assume such liability of the receiver as may be fixed and determined by the court appointing him, then the purchaser has the right to claim that he is not bound by the judgment of any other court fixing such liabilities. See, also, 34 Cyc. 881.

But as the appellant in the present suit did not purchase the property from the receiver, clearly, the reasons upon which those decisions are based do not obtain if the property is returned without sale, and therefore the decisions are not applicable, even though we should be inclined to follow them.

[9] Furthermore, it reasonably cannot be supposed that in making the order discharging the receiver and returning the property to the company, the court, contrary to the well-established rules and statutes mentioned above, intended to assume jurisdiction of claims that had not been and would not be filed in that court, and to bar them if they were not there presented; especially in the face of appellant's application for the discharge of the receivers, by the terms of which appellant, in consideration for such discharge, offered to assume and pay all outstanding liabilities of the receivers without any exceptions whatever.

We are of opinion, further, that independent of said order of court appellant assumed and became liable to pay plaintiff's claim by force of the provisions of article 2141, 2 Vernon's Sayles' Texas Civil Statutes, mentioned already, which reads:

"All parties and corporations whose property has been placed in the hands of a receiver by order of the court, and which was not sold by the receiver, and which property has been delivered back to the original parties or corporation, without any sale of said property, shall be liable and held to pay all of the unpaid liabilities of the receiver in causes of action arising out of and during the receivership; and, if there are any suits pending against the receiver at the date of discharge, on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivered the property which was in his hands as receiver a party defendant along with the receiver: and, if any judgment is rendered against the receiver for causes of action arising out of and during the receivership, then, the court shall also, at the same time (if the party or corporation receiving back the property have been made parties defendant), render judgment in favor of the plaintiff against defendants for the amount so found for plaintiff and all costs; and plaintiff shall have the right to foreclose his lien on the property delivered back by said receiver to said party or corporation."

[10] We are of the opinion that the benefits of this statute were available to plaintiff under the general allegation of legal liability in connection with the averment of the restoration of the property without sale as noted above, and that plaintiff was entitled to recover thereunder, irrespective of the special pleas mentioned.

[11] The receivers, having been discharged and not being personally liable, were not necessary parties defendant to plaintiff's suit. *S. A. & A. P. Ry. v. Barnett*, 44 S. W. 20.

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

EARDLEY BROS. v. BURT et al. (No. 5597.)
(Court of Civil Appeals of Texas. San Antonio.
Jan. 26, 1916.)

1. MECHANICS' LIENS — 199 — PRIORITIES — VENDOR'S LIEN.

A vendor's lien on land sold has priority over a mechanic's lien thereon based upon the drilling of an artesian well for the buyer.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 371-374; Dec. Dig. — 199.]

2. MECHANICS' LIENS — 59 — "OWNER" OF LAND.

One who has only a contract to purchase land is not the owner thereof within the meaning of the mechanics' lien statutes.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 75, 76; Dec. Dig. — 59.

For other definitions, see *Words and Phrases*, First and Second Series, Owner.]

3. PRINCIPAL AND AGENT — 22 — ESTABLISHMENT OF AGENCY—DECLARATION OF AGENT.

An agency cannot be established by the statement of the agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. — 22.]

4. MECHANICS' LIENS — 57 — CONTRACTOR'S DUTY TO INQUIRE.

Where the title to farm lands stood in the name of one other than the trustee for the farms who managed them and contracted for the cleaning and drilling of wells thereon, it became the duty of the contractors for the work to ascertain what rights had been acquired by such trustee.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 64-71, 74; Dec. Dig. — 57.]

5. PRINCIPAL AND AGENT — 23 — AGENCY — SUFFICIENCY OF EVIDENCE.

In an action for the value of services in cleaning and drilling wells, evidence held insufficient to support a finding that the one who ordered the work done was the agent of the owner of the land to contract for the work, or for any other purpose, or that he purported to act as agent in making the contracts.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. — 23.]

6. PRINCIPAL AND AGENT — 178 — RATIFICATION—SUFFICIENCY OF EVIDENCE.

In an action for the value of services in cleaning and drilling wells, evidence held insufficient to show any ratification by the owner of the land of the contracts for the work made by another.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 659-661; Dec. Dig. — 173.]

7. PRINCIPAL AND AGENT \S 164—RATIFICATION.

There can be no ratification of an unauthorized contract by a principal binding him, unless the ratified contract was made by one purporting to act as agent at the time.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 622-625; Dec. Dig. \S 164.]

8. MECHANICS' LIENS \S 76 — ACQUIESCENCE OF UNDISCLOSED OWNER.

Where the owner of farm lands did not know that a well was being drilled thereon pursuant to contract with one who later purchased the land until the work was in progress, and did not know that the contractors were not fully informed of the facts relating to the title to the land, which, though standing in his own name when the work was contracted for, was conveyed to the person who had contracted for the work prior to its completion, there was no acquiescence in or consent to the work on the part of the record owner such as would affect his rights.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 104-107; Dec. Dig. \S 76.]

9. MECHANICS' LIENS \S 76 — ACQUIESCENCE OF OWNER.

Under the mechanics' lien statute, the mere fact that the owner of property acquiesced in or even consented to the furnishing of material to be used on the premises, or the performance of labor, cannot fix liens on the property by one in possession.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 104-107; Dec. Dig. \S 76.]

Error from District Court, Dimmit County; J. F. Mullally, Judge.

Action by A. Eardley and John Eardley, composing the firm of Eardley Bros., against F. S. Burt and another. To review a judgment for the named and against the unnamed defendant, plaintiffs bring error. Affirmed.

Vandervoort & Johnson, of Carrizo Springs, for plaintiffs in error.

MOURSUND, J. A. Eardley and John Eardley, composing the firm of Eardley Bros., sued M. H. Burt and F. S. Burt for the value of services rendered in cleaning out a well and drilling a well on 80 acres of land in Dimmit county, being the west half of the S. W. quarter of section 29, alleging that said land was owned by F. S. Burt and was named "Wonderland Farms" by defendants, and that M. H. Burt represented himself to be trustee and manager of said "Wonderland Farms." The suit was upon two written contracts, which will be copied in stating the testimony. Plaintiffs sought to establish and foreclose a mechanic's lien on said land.

Defendants denied all the material allegations, and alleged that F. S. Burt never joined in the contracts for the work done, that he had no interest therein, and was in no way liable thereon; that M. H. Burt bought the land from O. T. Gregory, who was holding it with the balance of the section for defendant F. S. Burt under an unrecorded deed from the Artesian Land & Irrigation

Company, which deed was later recorded, and said Gregory later made a deed to F. S. Burt, who, on November 23, 1912, executed and delivered a deed to the 80 acres to M. H. Burt in consideration of a vendor's lien note dated November 23, 1912, for \$4,000, of which amount \$1,600 was for borrowed money.

Plaintiffs' first supplemental petition charges that the deed of November 23, 1912, was executed long after the work was completed and was and is, as to them, fictitious and fraudulent; also that if it be true that F. S. Burt had no interest in "Wonderland Farms," that he had full notice and agreed that M. H. Burt might take possession in name of "Wonderland Farms" and improve the same, and that he had taken possession and was improving the same, and F. S. Burt should be estopped from denying plaintiffs their lien thereon.

Defendants replied, to the effect that F. S. Burt had no interest in "Wonderland Farms," except his vendor's lien thereon; that he did not know what improvements had been placed thereon, and did not authorize, acquiesce in, or ratify any improvements that were placed thereon.

The court instructed the jury that plaintiffs were not entitled to recover against F. S. Burt, and that his lien to the extent of \$30 per acre was prior to that of plaintiffs. The jury returned a verdict against M. H. Burt for \$1,393.50, with foreclosure of mechanic's lien on 50 acres of land, subject to F. S. Burt's lien of \$30 per acre. Judgment was entered upon such verdict. Plaintiffs appealed, and by appropriate assignments of error complain of the court's action in instructing the jury that plaintiffs could not recover against F. S. Burt, and in effect that his lien to the extent of the purchase money had priority over that of plaintiffs if they found that plaintiffs were entitled to recover.

In May, 1911, the Artesian Land & Irrigation Company, a corporation of which Asher Richardson was president and M. H. Burt was secretary and treasurer, and which owned about 20,000 acres of land in Dimmit county, entered into a contract with O. T. Gregory, whereby he undertook to sell such land. Defendant F. S. Burt owned stock in the corporation. On June 10, 1911, he surrendered a portion of his stock in exchange for section 29. The deed was taken in Gregory's name, for convenience in selling, and he conveyed it to F. S. Burt by deed dated November 16, 1911, which was not recorded until April 22, 1912. F. S. Burt conveyed to M. H. Burt the 80 acres out of survey 29, described in plaintiffs' petition, by deed dated and acknowledged November 23, 1912, but not filed for record until September 1, 1914. The consideration recited in the deed is \$4,000, evidenced by a promissory note, to secure which a vendor's lien was retained in

the deed. Plaintiffs' mechanics' lien was filed December 14, 1912.

The contracts sued upon read as follows:

"Asherton, Texas, May 27, 1912.

"Agreement entered into this day and date above written between M. H. Burt and Eardley Bros. of Carrizo Springs in which the said Eardley Bros. agree to move rig on section 29 on 80 acres now cleared and work on well now there at rate of \$15 per day until an agreement is reached as to what is necessary. The said M. H. Burt agrees to give said Eardley Bros. the job of drilling new well if one is necessary and such other wells as he may have drilled on this section.
[Signed] M. H. Burt."

"San Antonio, Texas, June 17, 1912.

"Contract Agreement.

"This agreement entered into this day and date above written by and between M. H. Burt, of San Antonio, Texas, party of the first part, and Eardley Brothers of Carrizo Springs, Texas, parties of the second part, witnesses:

"Party of the first part in the capacity of trustee and manager of Wonderlands Farms does hereby employ party of the second part to drill a well for artesian water on the west one-half of the southwest one-quarter of section 29 in the Asher Richardson survey, Dimmit county, Texas. Said well to be drilled to and through both stratas of the water bearing sands known to exist in this section. Party of the first part to furnish all casing necessary to case said well but party of the second part to furnish everything else and drill the well as far as possible as a 8¼-inch hole and finish same as a 6¼-inch. Well to 700 feet or more if necessary.

"For and in consideration of the faithful performance of said work by the parties of the second part the party of the first part hereby agrees to pay said second party the sum of one dollar (\$1.00) per foot for such actual depth as the well may measure when completed and accepted by said first party.

"Witness our hand and signatures this day and date above written.

"[Signed] M. H. Burt.
"John Eardley."

John Eardley testified:

"I looked to F. S. Burt because F. S. Burt was interested in that land and M. H. Burt was working under F. S. Burt. As to whether I knew that at that time, I would say I know it by M. H. Burt's own talk to me. I think he told me that not a great while before this contract was signed up. He told me that he and his brother was interested in that land, this M. H. Burt was just working for this F. S. Burt. I got that information through M. H. Burt. I could not recall now what Mr. M. H. Burt said to me that caused me to believe that. I might have recalled it if this matter had come up shortly after this work was done, I believe I could have recalled everything, but it had been two years and more since it came up."

He also testified that when he got down to 550 feet he found it advisable, on account of the well caving in, to reduce the hole to 5½ inches; but as the contract called for 6¼ inches at the bottom, he got Vaughan, the tenant in possession of the land, to ascertain whether it would be satisfactory to make such reduction in the size of the well; that Vaughan in about four days told him to go ahead, that it would be all right; that F. S. Burt had said so. Vaughan testified that he did not talk to F. S. Burt; that Eardley asked him to talk to M. H. Burt, and he talked to the latter over the telephone at San Antonio, and received the reply that M. H. Burt

wanted the well according to contract and the amount of water contracted for, but if he could get the water he might reduce the size of the casing; that he communicated this answer to Eardley. F. S. Burt testified he never had any conversation with Vaughan. M. H. Burt denied having ever authorized the reduction of the size of the well, and testified he had no information that such reduction was contemplated. After the well was completed John Eardley went to San Antonio and had a conversation with F. S. Burt. He testified he asked F. S. Burt for his money, and was told by F. S. Burt that he could not do anything until his brother, M. H. Burt, came back to San Antonio; that he said as soon as his brother returned they would come to Asherton, and in fact named the day they would be there; that F. S. Burt spoke about going 1,000 feet, and witness told him he could not and would not do it at that price; that witness had fulfilled his contract and that after he paid witness for that work witness would make a new contract and go as deep as he wanted to go; that on the day appointed John and Will Eardley met M. H. and F. S. Burt at Asherton and had a conversation with them about the well; that F. S. Burt said they would like to go out and look over the place before they could settle with Eardley Bros., and they would meet John Eardley in Carrizo Springs the next day and settle up for the work on the well; that the Burts did not come to Carrizo Springs the next day, but John Eardley received the following letter:

"W. A. H. Miller, Attorney at Law, Lands & Loans.

"Asherton, Texas, October 8, 1912.

"Mr. John Eardley, Carrizo Springs, Texas—Dear Sir: You seem determined for reasons unknown to us not to complete our well according to contract. We now wish to notify you that unless you start operation at once and finish the well to the second strata of the water sand according to contract without any further delay that you can pull out your 5½ casing and remove your machinery from the place at once and we will pay you for the 8¼ casing you put in the well of your own. We will pay you \$1 per foot as per contract when you complete the well through the second strata of the water sand and if this is not encountered previous to drilling 1,000 feet we will then pay you \$1,000 and enter into another contract providing we want to go any further down at that time but will consider your contract completed when you have drilled 1,000 feet as you advised me at the time of making this contract that you had an outfit capable of going this depth.

"Kindly give me an immediate answer as to what you intend to do in the matter, addressing me at our office in San Antonio, Texas.

"Yours very truly,

"[Signed] M. H. Burt."

The testimony of M. H. Burt, F. S. Burt, and Gregory is to the effect that during the latter part of June, 1911, Gregory sold to M. H. Burt the 80 acres of land for \$2,400, and reported such sale to F. S. Burt at Wichita, Kan., during the latter part of July, 1911; that F. S. Burt approved the sale and at Gregory's request loaned M. H. Burt \$1,000

to improve the land, Gregory having informed him of M. H. Burt's plan to sell "Wonderland Farms" on the unit plan; that in October, 1911, F. S. Burt loaned M. H. Burt \$600 more to pay for improvements. Both M. H. and F. S. Burt testified that F. S. Burt had no interest in the 80 acres or in the "Wonderland Farms" enterprise other than his lien for purchase money and loans. M. H. Burt explained his plan as follows:

"My object was to raise onions, and I was already selling the land—I was selling the land out on a unit plan. By that I mean this: A unit was one acre, and when I sold them I sold them on contract and I became the trustee and manager for the man I sold to. When he paid out he had a deed to the acre or 2 acres or 5 acres, and the contract that I had extended for 5 years, that I was to raise onions for him and I got 25 per cent. of the net profits. I sold about 60 acres of those units. * * *

He explained that he used the expression, "our well," in the letter because he always expressed himself in the plural on account of handling it in units, and representing himself and others in developing the property.

F. S. Burt testified that he had nothing to do with the matter of drilling the well on the 80 acres by Eardley Bros., and knew nothing of it until the latter part of July or August, 1912; that he stated to Eardley he had no interest in the well; that he came to Asherton with his brother because he was interested in seeing a good well on the 80 acres, on account of the effect upon the balance of the land, as well as the value of his lien; that he was to loan his brother \$1,000 to pay for the well if it was completed to a depth of 1,000 feet.

[1, 2] Appellants' theory apparently is that the parol sale of the 80 acres to W. H. Burt was not enforceable by him because of the fact that he had not paid the purchase money, and therefore the land should be treated as absolutely owned by F. S. Burt. It is evident that if M. H. Burt was the owner within the meaning of the mechanics' lien statute, the land was incumbered by a vendor's lien for \$2,400, which would have priority over the mechanics' lien. But if M. H. Burt only had a contract to purchase, he was not the owner within the meaning of such statutes. *Galveston Exhibition Association v. Perkins*, 80 Tex. 62, 15 S. W. 633. We will therefore inquire into the question whether the evidence would support a finding that F. S. Burt authorized the execution of the contracts or is liable thereon. There is no testimony from which it can be said that F. S. Burt authorized M. H. Burt to execute such contracts or that he even knew a well was being drilled until the latter part of July or in August, 1912. The only evidence that

tends to show that M. H. Burt was agent for F. S. Burt is that of John Eardley to the effect that he knew from M. H. Burt's talk they were both interested in the land, and that M. H. Burt was working under F. S. Burt; that he thought Burt had told him not a great while before this contract was signed up.

[3-6] Aside from the fact that agency cannot be established by the statement of the agent, such statement is far from being one to the effect that M. H. Burt was the agent of F. S. Burt for the purpose of making improvements costing over \$700. M. H. Burt represented in the principal contract that he acted in the capacity of "trustee and manager for Wonderland Farms." Eardley Bros. made no inquiry as to the ownership or what the term "Wonderland Farms" stood for. As the title stood in the name of F. S. Burt, it became their duty to ascertain what rights had been acquired by M. H. Burt, trustee, etc., and had inquiry been made it must be assumed it would have developed the fact that M. H. Burt and his unit associates could get no other title than one incumbered with a vendor's lien for \$2,400. The evidence would not support a finding that M. H. Burt was the agent of F. S. Burt for the purpose of contracting for the cleaning and drilling of wells, or for any other purpose, or that he purported to act as agent for him in making the contracts. The evidence fails to show any ratification by F. S. Burt of the contracts made by M. H. Burt, and in fact as in such contracts M. H. Burt did not purport to act as the agent of F. S. Burt, there was no acting as agent for him to ratify. *Sheer v. Cummings*, 80 Tex. 294, 16 S. W. 37.

[7-9] As F. S. Burt did not know the well was being drilled until the latter part of July or in August, and did not know that Eardley Bros. were not fully informed of the facts relating to the title to the land, we think there was no acquiescence or consent on his part such as would affect his rights. In addition under statutes such as ours the mere fact that the owners of the property acquiesced or even consented to the furnishing of material to be used on the premises or to the performance of labor, could not fix liens on the property. *Galveston Exhibition Association v. Perkins*, 80 Tex. 62, 15 S. W. 633; *Faber v. Muir*, 27 Tex. Civ. App. 27, 64 S. W. 938. The evidence wholly fails to sustain any theory of liability on the part of F. S. Burt such as is pleaded by plaintiff, and the court did not err in instructing a verdict.

Judgment affirmed.

KIDD et al. v. PRINCE et al. (No. 7435.)*

(Court of Civil Appeals of Texas. Dallas.
Jan. 8, 1916. Rehearing Denied
Feb. 12, 1916.)

1. COURTS \hookrightarrow 155 — JURISDICTION — TITLE TO LANDS.

A suit to divest title out of defendants is one to try title to land, jurisdiction of which is by Rev. St. 1911, art. 1705, in district court, though the alleged ground for divestiture be that plaintiff, survivor of the community, had from his separate estate paid debts of the community in excess of the value of the community property, of which the land in question was part, and that defendants' interest was only as heirs of deceased, their mother, and wife of plaintiffs.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 378, 402½; Dec. Dig. \hookrightarrow 155.]

2. HUSBAND AND WIFE \hookrightarrow 273 — COMMUNITY PROPERTY — APPROPRIATION BY SURVIVOR.

The right of the surviving husband to appropriate the community property to reimburse himself for payment of community debts out of his separate estate is not a claim against his minor children, who have inherited a portion of their mother's interest in the community, and so need not be presented to the county court in which administration of their estate is pending, but, notwithstanding such pending administration, may be exercised by suit in the district court to divest title to such property out of them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. \hookrightarrow 273.]

3. GUARDIAN AND WARD \hookrightarrow 117 — RIGHT TO SUE WARD.

Absent statute on the subject, there being only the rule that the general guardian cannot represent his wards where their interests are adverse, the general guardian of minors may maintain suit against them; he procuring the appointment of a guardian ad litem to represent them.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 407-410; Dec. Dig. \hookrightarrow 117.]

4. HUSBAND AND WIFE \hookrightarrow 273 — COMMUNITY PROPERTY — APPROPRIATION BY SURVIVOR — ESTOPPEL.

The surviving husband is not estopped to appropriate community property to reimburse himself for payment of community debts from his private estate, because as guardian of his minor children in guardianship proceedings he inventoried an interest in the land as property of his wards.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. \hookrightarrow 273.]

5. JUDGMENT \hookrightarrow 335 — BILL OF REVIEW — FUNCTION.

While a bill of review is a proceeding independent of the remedy of appeal or writ of error, it cannot be invoked to review errors apparent on the record of the trial court or as a means by which the facts may be retried, but its function is to review cases in the trial court when the adverse judgment is the result of fraud, accident, or mistake.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

6. JUDGMENT \hookrightarrow 335 — BILL OF REVIEW — MINORS.

The function of a bill of review, where judgment is rendered against a minor legally served and represented by guardian ad litem

regularly appointed, is no greater than in the case of a person sui juris.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

7. APPEAL AND ERROR \hookrightarrow 5 — JUDGMENT \hookrightarrow 335 — PROPER MODE OF REVIEW — ERROR OR BILL OF REVIEW.

The remedy against a judgment voidable because against a minor not represented by a guardian ad litem, the fact of infancy appearing on the face of the record, is by writ of error, and not bill of review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. \hookrightarrow 5; Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

8. LIMITATION OF ACTIONS \hookrightarrow 72 — BILL OF REVIEW — MINORS.

Under Rev. St. 1911, art. 5684, the two years in which to institute a bill of review does not in the case of a minor commence to run till he attains majority.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec. Dig. \hookrightarrow 72.]

9. APPEAL AND ERROR \hookrightarrow 1040 — HARMLESS ERROR.

Error in sustaining special exceptions to the petition is harmless, if the general demurrer was properly sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4106; Dec. Dig. \hookrightarrow 1040.]

10. JUDGMENT \hookrightarrow 335 — BILL OF REVIEW — ALLEGATIONS.

A bill of review based on fraud must allege facts sufficient to show that, if true, complainant would have had judgment in the original action but for fraud of his adversary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

11. JUDGMENT \hookrightarrow 335 — BILL OF REVIEW — ALLEGATIONS — FRAUD.

The mere allegation of a bill of review that the alleged fact on which the judgment was based, that land was community property, was untrue, is insufficient; but facts in relation to the title supporting the charge of fraud, such as the source of the title, or facts precluding the claim that it was community, should be alleged.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

12. JUDGMENT \hookrightarrow 335 — BILL OF REVIEW — EXCUSING FAILURE.

A bill of review based on fraud must make some explanation of failure to urge at the trial the falsity of allegations or testimony on which the judgment was based, showing that complainants were without fault or were hindered or obstructed, or had newly discovered evidence which they could not with reasonable diligence have discovered at the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. \hookrightarrow 335.]

13. HUSBAND AND WIFE \hookrightarrow 273 — COMMUNITY PROPERTY — APPROPRIATION — "COMMUNITY DEBT."

Money spent by the surviving parent from his individual estate for the support of his children of whom he was guardian is not a community debt for which he can appropriate the community property to reimburse himself.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. \hookrightarrow 273.]

For other definitions, see Words and Phrases, First and Second Series, Community Debt.]

14. JUDGMENT — 335 — BILL OF REVIEW — PRESUMPTION.

Where the petition alleged two grounds, one of which would, and the other would not, support the judgment, it will be presumed on bill of review that the judgment was based on the proper ground, and that the allegations of fact respecting it were established by the evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. — 335.]

Error from District Court, Ellis County: F. L. Hawkins, Judge.

Proceeding by Bettie Kidd and others against E. B. Prince and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. L. Gammon, of Waxahachie, and Brooks & Worsham, of Dallas, for plaintiffs in error. Farrar & McRae, of Waxahachie, for defendants in error.

RASBURY, J. In this proceeding the general demurrer and certain special exceptions leveled against the petition of plaintiffs in error were sustained by the trial judge. The plaintiffs in error declined to amend, and the cause was dismissed. From the action indicated, appeal has been perfected to this court.

Since the action of the court as related is to admit the truth of the allegations of the petition, but to decree as matter of law that they fail to disclose a cause of action, we will not copy the petition with its formalities and exhibits, but relate in condensed form the essential facts deducible therefrom. Those facts are, in substance, as follows: B. F. Thornhill married Mrs. Sue Lancaster, in the year 1881. She died intestate in Ellis county in the year 1896. There was no administration upon her estate. Surviving her, as sole issue of her marriage with Thornhill, was Alice, Bettie, Frankie, and Manning Thornhill. As the sole issue of her former marriage, she was survived by Mary and Johnnie Lancaster. When she died, she was seised of a one-half interest in certain community estate of herself and husband, B. F. Thornhill, in Ellis county, consisting in part of lands. After the death of his wife and in the year 1896, Thornhill was appointed guardian of the estate of his minor children by the county court of Ellis county, and qualified as such. On July 11, 1898, Thornhill, in connection with appraisers appointed by the county judge, filed in the guardianship proceedings an inventory and appraisement of the estate of his wards showing that his wards owned an undivided one-third of certain lands, among them being the land in controversy in this suit, which was the homestead of Thornhill and wife at the time of her death, and will hereafter be designated as such.

Subsequent to the foregoing, J. O. Hammett and wife (formerly Mary Lancaster),

and Johnnie Lancaster, Mrs. Thornhill's children by her first husband, sued B. F. Thornhill and his minor children, Frankie, Alice, Bettie, and Manning, in cause No. 3801, district court, Ellis county, for partition of the estate of Thornhill and wife. J. L. Gammon was appointed guardian ad litem for the minor children of Thornhill, and the interest of each party to the suit in the several tracts of land involved was declared and determined. As to the homestead tract, the court found that B. F. Thornhill was entitled to an undivided one-half, his children, Alice, Bettie, Frankie, and Manning, to an undivided one-twelfth each, and that Mary Hammett and Johnnie Lancaster were entitled to one-twelfth each. By agreement of the parties and upon approval of the court, Mary Hammett and Johnnie Lancaster relinquished to B. F. Thornhill their right, title, and interest in the homestead, and as compensation therefor Thornhill relinquished to Mary Hammett and Johnnie Lancaster his life estate in and to certain other lands set aside to them. The ownership of the homestead was then decreed to be eight-twelfths in Thornhill and four-twelfths in his minor children. Being the homestead, the court found it was not subject to partition at that time, and that the interest of Thornhill's children therein was subject to his homestead right.

Following the foregoing suit, Thornhill, in cause No. 6824 of the district court of Ellis county, sued his children and wards, Bettie, Frankie, and Manning, Alice having died after the death of her mother intestate and unmarried, averring the death of his wife, his appointment as guardian of the estate of his children, the existence of a community estate, a part of which was the homestead, and his acquisition of the interest therein of Mary Hammett and Johnnie Lancaster. He also averred that the probate court had allowed him as guardian \$5 per month for each ward for his or her support and maintenance, and that he had expended at the time his petition was filed out of his separate estate more than such allowance for said purpose and which was more than the value of his ward's estate as shown by his inventory. He also alleged that subsequent to the death of his wife he had, out of his separate estate, paid more than \$3,000 of community debts, which was a charge against the community estate and in excess of the interest of his wards therein. He prayed for citation to his wards, that a guardian ad litem be appointed to represent them, and that upon hearing he have judgment divesting title out of his said wards to the land in controversy and vesting same in him. The wards were legally served with citation. John D. McRae was appointed guardian ad litem for the said wards in said

proceeding. Upon hearing judgment was for Thornhill, the record reciting that "the court finds the material allegations of plaintiffs' petition to be true" and that plaintiff is "entitled to the relief prayed for. Wherefore it is considered, ordered, adjudged, and decreed by the court that all the right, title, and interest which the defendants" (naming them) have in the land in controversy in this proceeding "be and the same is divested out of them and each of them and vested in plaintiff B. F. Thornhill."

Approximately six years subsequent to the judgment just detailed, the instant suit was filed by Bettie Kidd (joined pro forma by her husband, Walter Kidd) and the State Bank & Trust Company of Waxahachie, guardian of the estate of Manning Thornhill. Incidentally, Thornhill, who married again after the death of his wife Sue prior to the commencement of the instant suit, died testate and bequeathed the homestead to his wife, Kate Thornhill. His will was probated, and E. B. Prince qualified as executor thereunder. The suit is against such executor, Mrs. Kate Thornhill, and Sterling Spaulding, guardian of the estate of Frankie Thornhill. The object of the suit is to revise, vacate, annul, and set aside the decree by which the wards and children of B. F. Thornhill were divested of the title to the homestead, and to remove from said title the cloud cast thereon by said proceeding, and to recover from Mrs. Kate Thornhill, sole legatee of B. F. Thornhill, their interest in said lands, and that the land, not being susceptible of partition, be sold, and the proceeds thereof divided among those entitled thereto. The grounds urged as basis for the relief sought are set out at length in the petition, but inasmuch as no question of the sufficiency of the pleading in that respect is raised, and inasmuch as the several assignments of error disclose such ground with sufficient particularity, it will not be necessary to set out the issues raised by the pleading.

[1] The first issue presented is that the court erred in sustaining the general demurrer of defendants in error for the reason that the district court of Ellis county was without jurisdiction to divest the minors of title to the homestead while the estate of said minors was being administered by the county court and which homestead defendant in error was in possession of as guardian of such wards. Waiving for the time all other issues which are urged as important in determining the jurisdiction of the district court, we will consider the object of the suit, since that fact must ordinarily be controlling. The relief sought, as disclosed by Thornhill's petition, is, as we have shown, to divest title which in effect is the title of title to land. Jurisdiction of such suits is by article 1705, R. S. 1911, conferred exclusively upon district courts. It appears from Thornhill's petition that the homestead was part of the

community estate of Thornhill and wife at the time she died, and that his wards and children inherited from his wife, burdened with the community debts, an undivided four-twelfths interest therein, and that Thornhill owned eight-twelfths; he having, as we have shown, acquired from his wife's children by a former husband their two-twelfths interest therein. The grounds alleged for divesting title was that he had paid community and other debts out of his separate estate in excess of the value of the interest of his wards and children in the land, but clearly that fact did not change the purpose or object of the suit, or make it any the less a suit involving the trial of title to land. Free then from any other complications, and based solely upon the relief sought by the suit, we think it demonstrably clear that the district court had cognizance of the proceeding.

[2] But it is argued by the plaintiff in error that the effect of the proceeding so begun and effectuated was an attempted sale of the wards' property by the district court pending administration of their estate in the county court. Such a result, in our opinion, is neither directly nor indirectly presented by the record. If it did so appear, we readily concede it would be ineffectual to divest title, for ordinarily minors, pending administration, cannot be divested of title to lands save in payment of some duly approved and allowed debt they owe or for support and maintenance, and upon a sale by the county court ordered in the manner directed by the several statutory provisions in that respect. But the claim of Thornhill was not a claim against his wards, and, had it been presented to the county judge for allowance, acting lawfully, he would have been compelled to disallow same. Thornhill's wards were in no respect liable for the community debts of their parents, nor were they bound to reimburse Thornhill for any such debts he may have paid. They might have done so, and perhaps had that right had it appeared that their interest in the homestead reasonably exceeded the amount of the debts; but it affirmatively appears from the record that the debts were largely in excess of their interest in the homestead. Nor was the debt similar in any sense to lien claims or mortgages as they are ordinarily understood and which must, pending administration, be presented and allowed, and the land sold in the usual manner. In our opinion Thornhill's rights under the allegations of his petition are certain and fixed, and arise and exist and may be exercised independently of and free from interference by the probate court upon the sole condition that he at all times proceed fairly and without detriment to the estate. Without reference to the manner of procedure which he may adopt to accomplish the result, and waiving for the moment whether pending administration would af-

fect such right, it is conceded by all authority in this jurisdiction that the survivor of the community estate has the legal right to sell or appropriate the community estate to reimburse himself for community debts paid out of his separate estate. *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173; *Martin v. McAllister*, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585; *Jennings v. Barton*, 44 Tex. Civ. App. 280, 98 S. W. 445. Repeated similar decisions will be found in the books, and the cases are intended as typical of the rule, rather than exhaustive of the holdings. It is also the rule that the survivor in community has the same control thereof, without qualifying as community survivor under the statute, that he or she would by such qualification. *Wiseman v. Swain*, 114 S. W. 145. Also, it has been held that a sale of community lands by the survivor to pay community debts concludes the right of a minor child. *Wolf v. Gibbons*, 69 S. W. 238.

Then does the fact that administration had been granted upon the estate of the minors, and that they had inherited a portion of their mother's interest in the homestead, subject to the charge against same for the payment of the community debts, circumscribe or modify the right of the survivor to proceed in the manner indicated in the preceding portions of this opinion? We have been unable to find but one case that bears exactly upon the point in issue, but that case seems conclusive of the issue. *Moody, Adm'r, v. Smoot*, 78 Tex. 119, 14 S. W. 285. In that case Moody, as administrator of the estate of Amanda C. Hay, and as next friend of her two minor children, sued John C. Hay, the surviving husband and father of the minors. The object of the suit was to enjoin Hay from selling certain personally alleged to be a part of the community estate. Injunction was issued, but upon hearing was dissolved, and Hay proceeded to sell the property. By amendment the purchaser of the property was made a party defendant to the suit. Prayer was for a recovery of the property belonging to the community estate to be administered by Moody for the payment of community debts, and for alternative relief. Among others, the trial court sustained a special exception which asserted that Moody, as administrator of the estate of Hay's wife, had no right to the possession or control of the common or community property. The Supreme Court, speaking through Mr. Justice Gaines, said: "This presents a question which seems never to have been decided in this state." The court then proceeds to review certain adjudicated cases bearing upon the rights of the survivor in community, as well as certain subsequent statutory enactments, and concludes that by the subsequent acts the survivor's authority in dealing with the common property was enlarged. Resuming the discussion of the correctness of the

trial court in sustaining the special exception noted, the court say:

"The wife's interest in the common property after the community debts are paid is equal to that of the husband. He has the sole management during the life of his wife, but it is a mistake to assume that it is only in this respect that their rights and obligations in regard to that property differ. His control of it during her life is absolute. Barring any disposition made with intent to defraud her, he may sell, barter, or give it away. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and he is subject to be sued therefor both before and after his wife's death. The community debts are his debts, but are not ordinarily the debts of the wife, except in the sense that the community property is burdened with the liability for their payment. Being liable to a suit on the community obligations and to have his separate property sold under execution for their payment, it is but reasonable that upon the death of the wife he should have the right to administer the common estate for the payment of the common debts without interference on part of her legal representatives. Upon the death of the wife, he occupies the relation of a surviving partner in an ordinary partnership. * * * The case of the wife upon his death is different. She, it is true, is a surviving partner; but as a general rule she is personally liable for none of the debts of the partnership. It follows therefore, in our opinion, that while his administrator should have the right to administer the common property and to apply it to the payment of his debts, it was never contemplated that the administrator of the wife, so long as he survived, should have the same right. The laws of Louisiana in relation to the community estate of the husband and wife are very similar to those of our state, and the Supreme Court of that state distinctly held that the administrator upon the estate of the deceased wife has no control over the community property so long as the husband survives. *Hawley v. Bank*, 26 La. Ann. 230; *Williams v. Fuller*, 27 La. Ann. 634. If it should be urged that the administrator of the estate of the deceased wife should have control at least of the wife's half of the community in order to subject it to the payment of her debts, the reply will be that her debts are all chargeable upon the community property and may be enforced against it by a suit against the husband. * * * It follows from what we have said that in our opinion appellant Moody as administrator had no right to prosecute this suit as to so much of the property as was the community property of John D. Hay and his wife."

The rule announced by the Supreme Court is reaffirmed in *Cullers v. May*, 81 Tex. 114, 16 S. W. 814, and in *Henry v. McNew*, 29 Tex. Civ. App. 288, 69 S. W. 217.

In conclusion of the discussion of the rights of the survivor to appropriate the common property in payment of community debts, it may be said that it occurs to us that the method pursued by Thornhill was the one most calculated to secure fair dealing and preserve other property, if any there was. The survivor is not bound to pursue any fixed or peculiar method for the appropriation, since, as said in *Leatherwood v. Arnold*, supra, "the means of accomplishment are as varied as the circumstances and discretions of men." But we do gather from the expressions contained in *Martin v. Mc-*

Allister, *supra*, that the method pursued by Thornhill is approved.

[3] It is next urged, in effect, that Thornhill was incapable in law of maintaining the suit filed against his wards, and that the district court should have dismissed same for the reason that he was at that time the duly qualified and acting guardian of his said wards. The record does disclose the facts included in the proposition. On this issue we have but little authority to guide us. Prior to 1895 it was definitely provided that in all proceedings where the general guardian had an interest adverse to his ward a special guardian or guardian ad litem should be appointed. Article 6973, Paschall's Dig. Laws. This statute, however, was not in force at the time the Thornhill case was adjudicated. The only law in force on the subject at that time was article 4124, R. S. 1911, being a portion of the act governing guardian and ward, which declares that a part of the powers and duties of guardians is the right "to bring and defend suits by or against him"; and article 1942, R. S. 1911, directing that in all cases where a minor, etc., is defendant in a suit and has no guardian within the state, it is the duty of the court in such cases to appoint a guardian ad litem for the minor. The latter article, however, gives no direction in case the interests of the general guardian, as in the Thornhill suit, is adverse to those of his ward, as did the former statute. Hence there was not at the time Thornhill filed his suit, nor is there now, any statutory rule covering the exact situation presented in that suit. That the general guardian in any proceeding at law or in equity is disqualified to represent his ward when their interests are adverse is clear in reason, and it has been so decided. *Sandoval v. Rosser*, 86 Tex. 682, 26 S. W. 933.

However, the question was, in effect, decided in *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439, in which case a writ of error was denied by the Supreme Court. In that case it appears that, when the executors of the estate of Emma Shiner applied to the county court for partition and distribution of the estate under the provision of her will, there arose among the distributees a difference. An appeal from the distribution ordered in the county court was taken by some of the distributees to the district court. Prior to the partition and distribution in the county court, M. C. Shiner was appointed general guardian of his children, Milton, Gordon, and Vernon, as well as general guardian of his nephews, J. D. and Walter Shiner. By the will of Emma Shiner, M. C. Shiner's children were to receive one-sixth of her estate, which was to go to M. C. Shiner in case his children died before reaching 21 years of age. By the will, also, his nephews were to receive one-sixth of the estate. In the district court the judge would not per-

mit Shiner, the general guardian, to represent his nephews, and George C. Altgelt was appointed guardian ad litem to represent them in the partition. Being dissatisfied with the judgment of the district court, Altgelt appealed. In the Court of Civil Appeals, Altgelt's right to appeal was challenged, presumably on the ground that, there being a general guardian for the minors, the appointment of Altgelt was unlawful, though the ground is not disclosed by the opinion. The court say:

"So far as the appointment of such representative for the minors J. D. and Walter Shiner is concerned, we believe it was proper and authorized, under the facts. Their regular guardian was M. C. Shiner, to whom was devised the one-sixth interest of his children in the event of their death before reaching 21 years of age. He was interested, therefore, against J. D. and Walter Shiner, in obtaining for his children an advantageous allotment. By the statute of 1870 (Paschal's Digest, 6973), it was expressly provided that the regular guardian was ineligible to represent his ward, if he was a party to the proceedings in his own right, or had an interest adverse to that of the ward. The existing statutes contain no such restriction. We believe, however, that, where the statute does not expressly declare a guardian so circumstanced to be capable of defending the interest of the ward, the disqualification of being adversely interested should be recognized, on well-settled legal principles. *Sandoval v. Rosser*, 86 Tex. 685, 26 S. W. 933. This being so, the court properly regarded him as not entitled to defend for these minors, and treated the case as one requiring a guardian ad litem for them. The guardian so appointed was authorized to take the appeal, and the case is properly here for revision."

As relates to Thornhill's case, we conclude that other grounds both in reason and necessity existed for the court pursuing the course it did. Our statutory laws recognize the parents of children as their natural guardians and in directing who shall administer the estates of minors prefer the parents in that respect. The reason is clear, since the promptings of nature ordinarily inspire in the parents a greater degree of care and integrity in the administration of the estate of their children than obviously would repose in a stranger. At the same time, as we have shown in this opinion, when the surviving parent undertakes to appropriate the community estate for the payment of community debts, an interest adverse to his children arises, and as said in *Sandoval v. Rosser*, *supra*, the general guardian is incompetent to represent his wards. But it seems to us that the situation can be met and the rights of the wards safeguarded without pursuing the extreme remedy of requiring the general guardian, in all other matters best qualified to represent his wards, to resign the trust; an eventuality which would entail upon the wards the additional expense resulting from a change of general guardians. As we have said at another place, we are without statutory rule in such cases; neither a statute providing for the appointment of a guardian ad litem, nor one denying the general guardi-

an the right to maintain the suit pending guardianship if the wards are otherwise fairly and legally represented. The most we have is the rule of decision that the general guardian cannot represent his wards when their interests are adverse. Being then without a statutory rule of action, it occurs to us that the instant case presented an occasion for the exercise of the inherent power of the court. Such inherent power has always included the right to appoint a guardian ad litem to represent minors, etc., as was done in the instant case. And in connection with the course pursued by the trial court, if it is true, as has often been said, that the law regards substance rather than form, then it can truthfully be said that Thornhill's resignation as general guardian would have been a formal and useless thing, when it is considered that even after his resignation he would have been equally incapable of defending the suit for his children, and the court would have been called upon to do the identical thing it did do. It is not, nor could it be intelligently, claimed that Thornhill did not have a cause of action if the allegations of his petition were true; nor is it claimed that cause of action was lost because he was guardian of his children. The claim in the last analysis is that he could not maintain it because he was incapable of defending it for his wards. The answer, it seems to us, is that he could not have done so had he resigned. Such a situation, it seems to us, was properly and legally met when the court in the exercise of its inherent power appointed a guardian ad litem to represent his wards. No other course consistent with his rights and those of his wards could have been properly pursued.

[4] It is next urged that Thornhill, having in the guardianship proceeding inventoried the land sought to be appropriated for the payment of community debts as the property of his wards, could not subsequently dispute their title thereto. We conclude that the act of Thornhill in the respect stated did not prevent him appropriating the land for the purpose sought. It was correct to disclose all interest of his wards in the inventory, certain or contingent; but the performance of that duty would not, if the contingency arose, prevent him from enforcing against his wards' interest in the land the superior interest he had therein. However, the point has been finally settled by prior decisions of the appellate courts of this state. *Koppelman v. Koppelman*, 94 Tex. 44, 57 S. W. 570 and cc.

[5-12] It is next urged that the court erred in sustaining two special exceptions leveled against the sufficiency of the petition in the instant suit. The first exception asserts, in effect, that an equitable proceeding by bill of review cannot be maintained for the purpose of correcting errors apparent upon the record in the Thornhill suit, since the remedy in such cases is by appeal or writ of error, and

since it also appears from the petition that the Thornhill judgment was entered approximately six years prior to the commencement of the instant suit, and hence all right of review lost by the lapse of time. The second exception, in effect, asserts that the instant suit, which seeks by the equitable proceeding of bill of review to set aside the judgment in the Thornhill case, cannot be maintained, since it appears from the petition that plaintiffs in error were personally and legally served with citation, appeared by guardian ad litem duly appointed, joined issue, introduced evidence, and failed to appeal from the judgment rendered, which was their remedy, and since it also appears from said petition that approximately six years elapsed after the rendition of said judgment before the commencement of the instant suit, whereby the same became and is a final judgment. While a bill of review is a proceeding independent of the remedy of appeal or writ of error, it cannot, as we understand its purpose in this jurisdiction, be invoked to review errors apparent upon the record of the trial court or as a means by which the facts may be retried in an adjudicated case. *Seguin v. Maverick*, 24 Tex. 526, 76 Am. Dec. 117; *Talbert v. Barbour*, 16 Tex. Civ. App. 63, 40 S. W. 187. It is an equitable proceeding, its recognized function being to review cases in the trial court when the adverse judgment is the result of fraud, accident, or mistake. *McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357; *Kruegel v. Cobb*, 124 S. W. 727. It also appears that minors, where they have been legally served with citation and appear in the proceeding by regularly appointed guardians ad litem, are affected by the rule in the same manner that persons sui juris are. *Jones v. Parker*, 67 Tex. 76, 8 S. W. 222. In that case it was said:

"If the appellee was in fact a minor at the date of the judgment, as the petition alleges, then, in order to estop him by the finding by the court of a jurisdictional or other fact, he must have been represented by a guardian ad litem. At common law, a judgment rendered against an infant not so represented, although he is served with process, is voidable; and it would seem that a motion for the purpose, or a writ of error coram nobis, is an appropriate remedy in the court where rendered in order to set it aside. * * * That such a judgment is irregular and erroneous is recognized by our own courts. *Pucket v. Johnson*, 45 Tex. 550; see, also, *Wheeler v. Ahrenbeak*, 54 Tex. 535. A writ of error is the proper remedy to vacate such a voidable judgment in the district court, if the fact of the defendant's infancy appeared upon the face of the record."

However, notwithstanding our conclusion in the preceding pages of this opinion that Thornhill was authorized to appropriate the land in payment of community debts by the method he did, that the district court had jurisdiction of the proceeding, that the pending guardianship was no impediment to his right, that Thornhill, while general guardian of the minors, could maintain the suit by serving his wards with citation and procur-

ing the appointment of guardian ad litem, and that the minors were bound to review all errors apparent of record by appeal or writ of error, it was error to sustain the special exceptions complained of. The petition did allege that the Thornhill judgment was procured by fraud. Suits by bill of review to set aside and annul judgments of trial courts on the ground of fraud, accident, or mistake may be begun at any time within two years after the rendition of the judgment sought to be avoided. *Best v. Nix & Storey*, 6 Tex. Civ. App. 349, 25 S. W. 130. While the petition in the instant suit does disclose that at the time the suit was commenced approximately six years had elapsed since the rendition of the Thornhill judgment, it also discloses that one of the plaintiffs in error, Manning Thornhill, was yet a minor; and while it discloses that the other plaintiff in error, Bettie Kidd, née Thornhill, is a married woman, it fails to disclose that she had reached 21 years of age before or after her marriage and if after her marriage that two years had elapsed between the time she became 21 years of age and the time she begun her suit. Such a state of facts would have to be disclosed by the record before the trial judge could have properly sustained the special exceptions. Article 5684, R. S. 1911. However, it will be seen from our statement of the case that the trial judge sustained a general demurrer to all the allegations of the petition, including the allegations of fraud on the part of Thornhill in procuring his judgment, save as to the matters enumerated in the special exceptions. Hence it follows that the error in sustaining the special exceptions is obviously harmless if the allegations of fraud, taken as true, are insufficient to show a cause of action as ruled by the trial court.

Accordingly, we are brought to a consideration of that precise issue. After alleging generally that the proceedings in the Thornhill suit were null and void, and after specifically alleging the matters we have already disposed of, the plaintiffs in error on the issue of fraud aver as follows:

"Because the allegations in said petition that the property therein described constituted the community property" of Thornhill and wife "was wholly untrue and contrary to the decree entered in case No. 3801, wherein the interest of these plaintiffs in said property had been duly adjudged and determined," * * * and "because the allegations that the plaintiff had expended large amounts out of his own private funds for their support and maintenance in excess of the amount made (allowed) by the county court were false and untrue and fraudulently made for the purpose of inducing the said district court to render and enter said decree, and that the said district court was induced thereby to make and enter said decree, and that the same would not have been entered except for said false and fraudulent allegations and the false testimony offered in support thereof."

As will be seen, the foregoing has reference to the allegations of fact contained in

Thornhill's petition in the suit in which he divested title out of his wards, and it is necessary to an intelligent consideration of the issue that said allegations also be disclosed. Those attacked by plaintiff in error are as follows:

"That at the time of her death said Sue Thornhill was seised and possessed of a one-half community interest in and to certain lands in Waxahachie, Ellis county, Tex., being the lands in controversy, 'plaintiff being the owner of the other one-half thereof, subject to community debts in excess of \$3,000.'"

Thornhill then alleges in his petition that he was appointed guardian of his four minor children and had been allowed \$5 each for the support of the minors, and that he had expended in excess of the sums so allowed for the benefit of said wards the sum of \$500, a sum also in excess of the value of his wards' interest in the community estate. He also further pleaded:

"That, since the death of his said wife, he has paid out of his separate estate community debts of himself and Sue Thornhill more than \$3,000, which sum he alleges is largely in excess of the community interests of defendants in the property above described," being the property in controversy; "that having expended and paid out community debts largely in excess of the community property, and having paid out for the benefit of his minor children out of his separate estate in excess of the value of the interest of the defendants or either of them in said lands, they have no equity in or to the same."

These allegations were followed by appropriate prayer for divestiture of title. We will discuss first the issue made by the pleading that the claim in Thornhill's suit that the property was not in fact community and was contrary to the decree in case No. 3801, the partition suit. The pleading alleging that the land was not the community property of Thornhill and wife is in the light of the adjudicated cases clearly insufficient. In an equitable proceeding such as the instant case, facts must be alleged sufficient to show that, if true, the complaining party would have recovered in the original suit but for the fraud of his adversary. The mere allegation that facts upon which the judgment was based were untrue is not sufficient. Plaintiffs in error should at least have alleged some fact or facts in relation to the title that would support the charge of fraud, such as the source of title to the land in controversy, or facts relating to the title that would have precluded the claim that it was community or common property. Or that it was the separate property of their deceased mother or their separate property, together with the facts or chain of title that, if true, would have established title. Even had the foregoing essentials been complied with, it would also have been necessary to make some explanation of the failure to urge such matters at trial, or to have shown that plaintiffs in error were without fault or were in some way hindered or obstructed in that respect, setting out the facts which so hindered, obstructed, or prevented the de-

fense. Or if it had been claimed that the testimony upon which the judgment was based was false, it should have appeared from the petition that plaintiffs in error were unable to or prevented from showing such falsity, alleging how they were so unable or prevented; or that they had discovered since the former trial other testimony, stating it, which would produce a different result, which they could not, in the exercise of reasonable diligence, have discovered at the former trial. *Overton v. Blum*, 50 Tex. 417, *Kruegel v. Cobb*, 124 S. W. 723.

[13, 14] The next issue made by the plea of fraud is that Thornhill's claim that he paid out \$500 in the support and maintenance of his wards is also untrue. This allegation is also insufficient for the reasons we have just stated in reference to the property being community. However, if the judgment in the Thornhill suit was dependent for its validity upon proof of such allegations, the judgment could not be sustained, for the obvious reason that money spent by a parent and guardian for the support of his wards and children is in no sense a community debt, and we believe it would be to hold something never contemplated by the rule to say that such a debt was a charge against the community upon which could be based divestiture of title to or a sale of the community property. We cannot, however, assume that the trial court based its action upon such allegations. On the contrary, we must presume that the trial court based its action upon grounds alleged in the petition that would permit him legally to do that which he did do. The trial court could legally have divested title on the allegation that the property was community and that Thornhill had paid community debts amounting to \$3,000 subsequent to the death of his wife out of his separate funds. He alleged as much, and the presumption is that he established the allegations as a fact. Incidentally, the allegation of Thornhill that he paid \$3,000 of community debts and by which the judgment of the court is sustained is in no respect challenged by the plaintiffs in error in their petition.

We are unable to see how the proceedings in the partition suit, No. 3801, affected Thornhill's right to appropriate the homestead in payment of community debts. There was no partition of the homestead. In fact, the court held it was not subject to partition. The finding by the court of the respective interests therein of Thornhill and his children was but declaratory of the law of descent. He could, as consistently, have found in his judgment that all community property, not exempt, was subject to the payment of community debts. Neither finding was necessary, however; nor did the finding affect Thornhill's remedy.

Finding no reversible error in the record, the judgment is affirmed.

DELAY v. TRUITT. (No. 885.)*

(Court of Civil Appeals of Texas. Amarillo. Jan. 5, 1916.)

1. ACKNOWLEDGMENT \S 36—SUFFICIENCY.

An acknowledgment to an officer is sufficiently shown when the certificate shows that the person signing, "acknowledged" the instrument, though the words "to me" are omitted.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184–198, 221–223; Dec. Dig. \S 36.]

2. VENDOR AND PURCHASER \S 231—ASSIGNMENT OF CERTIFICATE—RECORD AS NOTICE—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6831, providing that every recorder shall record all copies of titles recorded in the General Land Office presented for record, if attested with the seal of the office, and article 6842, providing that the record of any grant or instrument in writing, when properly acknowledged, shall be notice to all persons of the existence of such grant, the record of an assigned land certificate, which was a certified copy of the same recorded in the records of a county, with a proper acknowledgment of one of the assignors, was constructive notice to subsequent purchasers of the divestiture of that assignor's interest, though the transfer of the certificate was before location, and the registration of the certified copy was after patent, where the transfer clearly designated the certificate, to whom issued, the date of issuance, the number thereof, and the amount of land called for, and named the act under which it was earned.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513–539; Dec. Dig. \S 231.]

3. VENDOR AND PURCHASER \S 231 — REGISTRATION—TRANSFER OF CERTIFICATE—SUFFICIENCY OF DESCRIPTION.

Where a deed was written on the back of the original patent to the land and its record immediately followed a registration of the patent, the registration of the deed could not be excluded on account of alleged insufficiency of description.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513–539; Dec. Dig. \S 231.]

4. ACKNOWLEDGMENT \S 25—WIFE'S CONVEYANCES.

While the statutes prior to 1879 did not require that a married woman's conveyance of her personal property should be in writing, yet, if such conveyance was in writing, it was required to be properly acknowledged, and otherwise was void.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133–148; Dec. Dig. \S 25.]

5. ACKNOWLEDGMENT \S 36 — POWER OF ATTORNEY—SUFFICIENCY.

The acknowledgment to a power of attorney to receive a land certificate and to transfer the maker's interest therein, failing to recite that the maker "willingly" signed the power, if the acknowledgment of a single woman, was sufficient.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184–198, 221–223; Dec. Dig. \S 36.]

6. HUSBAND AND WIFE \S 267—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—EFFECT.

A deed of a husband, properly acknowledged and recorded, conveyed the community interest in the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929–933; Dec. Dig. \S 267.]

7. ACKNOWLEDGMENT §47 — MARRIED WOMAN'S DEED—DEFECT—CURATIVE STATUTE.

Act April 23, 1907 (Acts 30th Leg. c. 165), providing that every written instrument which has been or may be recorded after being acknowledged as provided by law, and every instrument which shall be actually recorded for 10 years, whether properly acknowledged or not, shall be admissible in evidence without proof of execution, related only to the admissibility of deeds in evidence, and not to the validity of conveyances, such as the sufficiency of a married woman's conveyance, where a proper acknowledgment is necessary to convey the title.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. §47.]

8. VENDOR AND PURCHASER §242 — BONA FIDE PURCHASER—EQUITABLE TITLE—BURDEN OF PROOF.

The holder of an equitable title has the burden of showing that a subsequent purchaser invested with the legal title is not an innocent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. §242.]

9. VENDOR AND PURCHASER §242 — BONA FIDE PURCHASER—BURDEN OF PROOF.

Parties claiming under a subsequent deed, as against a prior deed of their grantor, have the burden of showing that they are innocent purchasers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. §242.]

10. VENDOR AND PURCHASER §238 — BONA FIDE PURCHASER—SUBSEQUENT PURCHASER.

Where an innocent purchaser places his deed on record first, a purchaser from him would acquire title, though he was not an innocent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 580-582; Dec. Dig. §238.]

11. VENDOR AND PURCHASER §231 — BONA FIDE PURCHASER—INQUIRY.

A purchaser is required only to look for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derived his title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. §231.]

Appeal from District Court, Swisher County; R. C. Joiner, Judge.

Action by J. H. Truitt, Sr., against James R. Delay. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin, Kinder, Russell & Zimmermann, of Plainview, for appellant. Davis & Davis, of Center, and Culton & Taylor, of Tulla, for appellee.

HENDRICKS, J. On the 1st day of May, 1875, the Commissioner of the General Land Office issued certificate No. 48 to S. J. Arnold and Angelina M. Barrett, in consideration of work performed in "opening and cleaning" the Angelina river. The certificate was located August 30, 1875, and the patent was issued the 17th day of October, 1876, vesting the legal title in the original holders of the certificate. On the 15th of February, 1875, Angelina M. Barrett executed a power of attorney to S. J. Arnold, for the purpose of au-

thorizing him to receive the land certificates earned by them, for the work mentioned, from the Land Office, and transfer her interest in the certificates after having been received. On the 19th day of May, 1875, S. J. Arnold, for himself, and as attorney in fact for Angelina M. Barrett, before the location of the land, purported to convey in writing the whole of said certificate No. 48 to Joshua H. Truitt, the appellee herein. This transfer described the certificate as—"No. 48, for 640 acres of land, issued by the Commissioner of the General Land Office, on the first day of May, 1875, to S. J. Arnold and A. M. Barrett, as contractors for opening and cleaning out a channel in Angelina river, in accordance with an act to improve the navigation of the Sabine, Nechus and Angelina rivers and Pine Island bayou, in the state of Texas, approved April 29, 1874."

On the 27th day of May, 1879, after the issuance of the patent, Lyne T. Barrett and Angelina M. Barrett, as husband and wife, executed a deed reciting that—

"for and in consideration of the sum of \$200.00, paid to us by Joshua H. Truitt, * * * for two land certificates, issued May 1st, 1875, by the Commissioner of the General Land Office, * * * and numbered respectively 31 and 48, have this day of the date hereof, sold, transferred and conveyed, and by these presents do sell, transfer and convey, unto the said J. H. Truitt, all the right, title and interest and claim that we have in and to the land described in the within patent,"

—the instrument closing with a special warranty. The foregoing deed was properly acknowledged by the husband, but improperly acknowledged by the wife, in that the certificate fails to recite that she "willingly" signed the instrument, and falls to use any equivalent expression synonymous with said term. *Tiemann v. Cobb*, 35 Civ. App. 289, 80 S. W. 250 (writ of error denied). This instrument was recorded May 7, 1900, in the deed records of Swisher county.

The acknowledgment of Angelina M. Barrett to the power of attorney executed to S. J. Arnold is in the same condition with reference to defective acknowledgment as the deed last mentioned. Arnold's acknowledgment, however, is in substantial compliance with the statute.

As we construe the record, the instrument registered in the deed records of Swisher county, evidencing the transfer of the certificate from S. J. Arnold and Mrs. Barrett to Truitt, was a certified copy by the Commissioner of the General Land Office of the original transfer on file in his office. This copy was recorded May 3, 1900, in the deed records of Swisher county. The foregoing constitute the documentary title of Truitt, the appellee.

The trial court peremptorily instructed the jury in favor of Truitt, to which appellant objected and properly excepted, on the grounds that the transfer of the certificate was not properly acknowledged, and the deed from Barrett and wife did not describe the

land; that the record did not show a deed or transfer which would convey the interest of Arnold and Barrett; and, second, if title vested in Truitt, the same was not exhibited by the record, and the court had no right to assume notice to Delay as a matter of law.

The appellant Delay also objected to the introduction of the transfer of the land certificate on the grounds of defective acknowledgment and insufficient description, and likewise objected to the introduction of the deed of Barrett and wife, and the record of same, on the same grounds.

[1] An acknowledgment to an officer is sufficiently shown when the certificate shows that the person signing, "acknowledged" the instrument, though the words "to me" are omitted. *Hays v. Tilson*, 18 Civ. App. 610, 45 S. W. 479 (writ of error denied).

[2] Article 6831, Vernon's Sayles' Civil Statutes, prescribes:

"Each recorder shall record all copies of titles recorded in the General Land Office presented for record; provided, such copies are attested with the seal of the General Land Office."

Article 6842 recites that—

"the record of any grant, deed or instrument of writing authorized or required to be recorded, * * * (when properly acknowledged) shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."

The record of the land certificate, with a proper acknowledgment of S. J. Arnold, it being a certified copy of same recorded in the deed records of Swisher county, affords constructive notice to subsequent purchasers of the divestiture of Arnold's interest, purchasing subsequent to the date of the record, though it is a transfer before location, and the registration of the certified copy of transfer was after patent. The transfer clearly designated the certificate—to whom issued, the date of issuance, the number of same, the amount of land called for—and named the act under which it was earned. The location of the land, and the patenting of same, if there were no intervening claims under the law, inured to the benefit of the transferee of the certificate, and in this instance placed the equitable title (at least of S. J. Arnold) in said transferee. *Abernathy v. Stone*, 81 Tex. 430, 16 S. W. 1102.

If there had been a warranty in the transfer of the certificate to Truitt, the subsequent location and patenting of the land would have carried with it the legal title, at least of Arnold, to the assignee of said certificate, though the patent was issued in the name of the original state's grantee of said certificate. *Barroum v. Culmell*, 90 Tex. 93, 37 S. W. 313; *Miller v. Gist*, 91 Tex. 335, 43 S. W. 264, 265; *Baldwin v. Root*, 90 Tex. 548, 40 S. W. 3. The last authorities mentioned, particularly *Barroum v. Culmell* and *Miller v. Gist*, in connection with the decision in *Abernathy v. Stone*, 81 Tex. 430, 16 S. W. 1102, exhibit the distinction.

[3] As to the description in the deed from

Barrett and wife, assigned as insufficient, the proof showed that the instrument was written on the back of the original patent to the land. The record of this deed from Barrett and wife to Truitt discloses that the deed immediately followed upon the records a registration of the patent, there being nothing whatever between the record of said patent and the record of the deed. The case of *Harlowe v. Hudgins*, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21, presents a record of a deed in such a similar condition, with some immaterial differences not necessary to note, as to constitute a controlling authority. It was there held error to exclude the registration of the deed on account of the alleged insufficiency of description.

The defendant, Delay, appellant herein, claims under a deed from Angelina Barrett and husband to T. C. Arnold; a deed from S. J. Arnold (one of the grantees of the certificate) and T. C. Arnold to John R. Arnold and R. H. Thompson; a deed from John R. Arnold to Thompson of the former's interest; a deed from R. H. Thompson to R. J. Dillard; from Dillard to A. L. Neal; and a judgment canceling a deed from A. L. Neal to him; said judgment establishing an equitable lien upon the land as a fund for reimbursement of money paid for said land. The deed from Barrett and wife to T. C. Arnold was executed in 1892, and placed of record in 1893. The deed from S. J. Arnold and T. C. Arnold to John R. Arnold and R. H. Thompson was executed in 1894, and placed of record the same year. The deed from John R. Arnold to R. H. Thompson, conveying an undivided interest, was executed October 18, 1912, and filed for record in Swisher county May 3, 1913. Appellee introduced the deed records of Swisher county (as well as the certified copy of the transfer of the certificate issued by the Land Commissioner and of the Barrett deed) without any objection, except as stated.

[4, 5] It is asserted that the land certificates earned by Mrs. Barrett with S. J. Arnold constituted her separate property. There is no basis in the statement of facts for that assertion unless it be said that at the time she signed the power of attorney she was a single and not a married woman. Appellant seems to concede in the brief that Angelina M. Barrett was a married woman at that time, and is for that reason questioning the certificate of acknowledgment to the power of attorney. It is the law that a married woman, if she purported to convey her personal property in writing, even with the consent of her husband, under the acts prior to the revision of 1879, which required the wife's written conveyance of personal property to be separately acknowledged and certified, that the instrument is void if not properly acknowledged as a married woman. *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734. The Statutes, prior to 1879, did not require the conveyance of her personal property to be in

writing (except slaves); but if in writing, it had to be properly acknowledged; otherwise the instrument was void. (Same case.) If at that time she was single, the acknowledgment was sufficient; if she were married when she acquired the certificates, in so far as this record shows, the same were community property.

[6] The deed of Lyne T. Barrett, her husband, properly acknowledged and of record, however, conveyed the Barrett interest in the land, it being presumptively community, and hence placed the title of that interest in Truitt unless acquired by T. C. Arnold and Thompson.

[7] We infer from appellee's brief that the contention is made that, the deeds having been of record more than 10 years, the defective acknowledgments are cured under the act of April 23, 1907 (Acts 30th Leg. c. 165). This act relates only to the admissibility in evidence of deeds not properly acknowledged, and not to the validity of conveyances, such as that of the sufficiency of a married woman's conveyance, where a proper acknowledgment is necessary to convey the title. *Holland v. Votaw*, 103 Tex. 534, 131 S. W. 406.

J. J. Dillard traded an equity in some property in Oklahoma to Thompson for the land. Thompson's deed to R. J. Dillard was made to the latter upon request of J. J. Dillard. If J. J. Dillard owned the property traded to Thompson, he was the beneficial owner of the title in R. J. Dillard; if he were acting as agent of R. J. Dillard, whatever J. J. Dillard knew would be imputed to R. J. Dillard. This record is conclusive that J. J. Dillard knew of Truitt's interest in the land before Thompson executed the deed to R. J. Dillard. He had actual as well as constructive notice. The record is silent as to any actual knowledge of Neal (who received a conveyance from R. J. Dillard) as to the title of Truitt to the land. Delay, however, was put upon notice before he purchased from Neal that a deed from Truitt was necessary to perfect the title. Neither is there any proof of any consideration paid by Neal for the land. A forged deed was delivered to Delay, purporting to convey the interest of Truitt to R. H. Thompson in the land.

R. H. Thompson testified that T. C. Arnold and John R. Arnold and himself knew of the transfer by S. J. Arnold of said certificate to Truitt before they became the recipients of the title. John R. Arnold and Thompson were associated, from 1888 to 1896, as partners in the abstract business. One J. M. Arnold, it seems, was the active agent in procuring the conveyance from S. J. Arnold and Barrett and wife, recorded in 1893 and 1894 respectively, and probably furnished the consideration. The deed to the property was taken in T. C. Arnold's name for the purpose of bringing a suit to recover the land on the theory of defective acknowledgments.

J. M. Arnold had the same notice; he was to get half if they recover in the suits. The consideration, we infer from some hearsay testimony, was a bunch of angora goats, but the number, the value of same, nor the value of the land at the time, are not stated. Referring to the Barrett deed, Thompson said: "I am not sure whether we had the deed before us or not, but I am under the impression that we did." This deed was not of record until afterwards, and is not shown to have been of record in any other county prior to the time the Arnolds and Thompson procured their title.

We have in this case an equitable title in Truitt to one half of the land from S. J. Arnold through the transfer of the certificate; also the whole title to the other half of the land by virtue of Barrett's deed to him, if, under the record made, it is entitled to precedence over Barrett's subsequent deed.

[8] The general rule is that the holder of an equitable title is burdened with the duty of showing that a subsequent purchaser, invested with the legal title, is not an innocent purchaser. T. C. Arnold and Thompson obtained the legal title from S. J. Arnold by a subsequent deed made after location and patent. If this litigation were between Truitt and the Arnolds and Thompson, without other complications, Truitt would recover upon his equitable title to one-half of the land, through the S. J. Arnold transfer, because the burden of proof would have been fully discharged. *Baldwin v. Root*, 90 Tex. 546, 40 S. W. 3.

[9] Upon the Barrett deed, prior in date, against T. C. Arnold and Thompson, the burden would have been upon them as subsequent purchasers to show they were innocent purchasers, which is not done in this instance, nor attempted. *Watkins v. Edwards*, 23 Tex. 448; *Davidson v. Ryle*, 103 Tex. 215, 124 S. W. 619, 125 S. W. 881; *a. c.*, 102 Tex. 233, 115 S. W. 30.

We are not holding that notice of Truitt's interests, by Thompson and the Arnolds, by virtue of their knowledge of the S. J. Arnold transfer, before they acquired title, would also impute notice presumptively of the Barrett deed to Truitt, upon the doctrine of inquiry. The following cases seem to assert a contrary principle: *Fire Ass'n of Phila. v. Flournoy*, 84 Tex. 632, 19 S. W. 793, 31 Am. St. Rep. 89; *Wynne v. Admire*, 37 S. W. 33; *s. c.*, 4 Civ. App. 45, 23 S. W. 418. We are not concerned with that principle.

[10] Of course, if Thompson and the other Arnolds, having placed their deeds of record first, had been innocent purchasers, Dillard would have acquired title, though he was not an innocent purchaser. The conveyances to Truitt having been placed of record from the common source, and being prior in date to the Thompson and T. C. Arnold deeds, and Delay being a subsequent purchaser, as well as Thompson and the other Ar-

nolds, and failing to show as to the Barrett title that they were innocent purchasers, and Truitt showing, as to the equitable title, that Thompson and T. C. Arnold were not innocent purchasers, the only escape for Delay would be to successfully maintain that Truitt's conveyances going upon the record subsequent to the conveyances to Thompson and T. C. Arnold, Neal was not affected with constructive notice by the record of said deeds.

[11] It is true that, if the conveyances to Truitt had been subsequent in date, though going of record prior to the deeds to R. J. Dillard and Neal, they would not have been affected with the record notice of such deeds. The deeds would not have been in the chain of title. *White v. McGregor*, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875. Chief Justice Gaines reasons, however, in the same case, though dicta, that a prior deed, though subsequently recorded, is constructive notice to all subsequent purchasers from a grantor whose deed from the common source was second in execution and delivery, notwithstanding it was first upon the record. Same case, 92 Tex. 559, 50 S. W. 564, 71 Am. St. Rep. 875. He cites the New York decision of *Jackson v. Post*, 15 Wend. 588, and approves

the holding of that court, which had just such a case under consideration as is presented here. In the case of *Jackson v. Post*, the second purchaser from the common source placed his deed of record anterior to the first vendee from the common grantor, but had notice of the first vendee's claim. The fourth subsequent purchaser from the second vendee of the common source paid value for the land without actual notice of the first vendee's deed. The latter's deed, however, being a prior one in date, though subsequent of record, and the holder of the second deed having notice of the first deed, all subsequent purchasers were further affected with notice afforded by the record, and would lose the land. In that case the questions of legal or equitable title and burden of proof were not involved. Chief Justice Brown said, in the case of *Houston Oil Co. v. Kimball*, 103 Tex. 108, 122 S. W. 540, 124 S. W. 85, that: " * * * A purchaser is required to look only for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derives his title"

—citing *White v. McGregor*, *supra*.

We think the trial court was correct in giving the peremptory instruction to the jury, and the judgment of that court is affirmed.

KENNARD et al. v. EYERMANN et al.
(No. 17545.)

(Supreme Court of Missouri. Division No. 2.
Jan. 6, 1916. Rehearing Denied
Feb. 15, 1916.)

1. MUNICIPAL CORPORATIONS — 450 — PUBLIC
IMPROVEMENT DISTRICT — CHARTER —
"STREET."

Under St. Louis City Charter, art. 6, § 14, providing that benefit districts shall be established by the drawing of a line midway between a street to be improved and the next parallel or converging street on each side of such street, which line shall be the boundary of the district, an avenue adjacent to a park, the title to which was conveyed to the city with a stipulation that it should always be used as a "carriage avenue," subject to the immediate government of the commissioners of the park, accepted as a highway and always so recognized by the city in conformity to the terms of the conveyance and used for general street purposes and improved by paving, lighting, sewerage, and water mains, and policed by the police department and which had always been carried as a public street in the city department, was a "street," and hence properly designated as a boundary determinative of a district for special taxation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. ¶ 450.]

For other definitions, see Words and Phrases, First and Second Series, Street.]

2. DEDICATION — 5 — GRANT — CONSTRUCTION.

The conveyance of land for an avenue adjacent to a park, to be a part thereof, to be maintained as a "carriage avenue," subject to the rules of the park commissioners, indicated a purpose to dedicate for a public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 2, 4; Dec. Dig. ¶ 5.]

3. DEDICATION — 58 — CHANGE OF PURPOSE.

Land dedicated for street purposes cannot thereafter be diverted for park purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. ¶ 58.]

4. DEDICATION — 57 — ACCEPTANCE AND USE.

A city's acceptance of dedicated land and its course in uniformly regarding it as a highway fixed its status, so far as municipal affairs are concerned.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. ¶ 57.]

5. DEDICATION — 20 — KNOWLEDGE AND ACQUIESCENCE OF GRANTEE.

The knowledge and acquiescence of the grantor of title to a strip of land adjacent to a park for use as a carriage avenue in the city's permanent improvements by paving, lighting, etc., was proof of his intention to dedicate it for a public use in all that the term implies.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30; Dec. Dig. ¶ 20.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Proceeding by Samuel M. Kennard and others against Gottlieb Eyermann, Jr., and another, to enjoin the collection of special tax bills issued by the city of St. Louis. Judgment for defendants, and plaintiffs appeal. Affirmed.

Barclay, Orthwein & Wallace and Smith & Percy, all of St. Louis, for appellants. Schnurmacher & Rassieur, of St. Louis, for respondents.

WALKER, J. This is a proceeding to enjoin the collection of special tax bills issued by the city of St. Louis to the defendant G. Eyermann & Bro., contractors, who reconstructed Waterman avenue between Kingshighway and Union boulevard, public streets of said city.

The charter of the city of St. Louis provides how the benefit district which shall bear a portion of the cost of such improvements shall be fixed; section 14, article 6, of the charter, in relation thereto, being as follows:

"The districts herein referred to shall be established as follows: A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district," etc.

Waterman avenue, on which the work was done, runs from east to west and is parallel with and quite a distance north of Forest Park.

Plaintiffs, who were the owners of property fronting on Portland place (a private "place" within the benefit district), attack the validity of the tax bills and claim that the board of public improvements, in determining the amount of tax required to be paid by the respective lots in the benefit district, failed to include the entire area legally subject to the tax, and therefore the bills against their lots are for excessive amounts.

On the north the board drew the line midway between Waterman avenue and the next street north. This plaintiffs concede. On the south the board drew the line midway between Waterman avenue and Lindell avenue, claimed by the board to be the next street south. But plaintiffs claim that Lindell avenue is not a street within the meaning of the charter, and that the board should have drawn the line midway between Waterman avenue and Berthold avenue, or possibly Clayton avenue, a street running through the park, and that the district should thus have included a large part of Forest Park. Plaintiffs concede that the contract was properly let and the bills were otherwise properly issued. The only ground urged by them is as to the validity of the board's action in fixing the taxing district.

The contract for the work was let and the special tax bills were issued in 1910, and the status of Lindell avenue as of that date must be determined. Its history is as follows: William D. Griswold was the owner of a tract of 80 acres lying immediately north of Forest Park, bounded on the east by Kingshighway, and on the west of Union avenue. In 1876 Griswold conveyed to the county of St. Louis a strip 50 feet wide off the south side of said 80 acres, adjoining the north line of Forest Park and extending from Kingshighway to the St. Louis, Kansas City & Northern railroad. This strip now is Lindell avenue, the street in question.

The deed to the county was for the following uses and purposes:

"To have and to hold the same to said St. Louis county for the uses and purposes following, viz.: That same shall be incorporated into and be held, improved, used, and controlled as a part of Forest Park, and shall be subject to the jurisdiction and government of the commissioners of Forest Park in same manner and to same extent as pertains to the general territory and property of same. That said board of Commissioners shall cause to be constructed a carriage avenue over the premises described, embracing part of the present north line of the said park adjoining the land hereby conveyed; such carriageway to be not less than 50 feet in width extending from Kingshighway to the line of said railroad, the same for the width of 15 feet to be completed after the best manner of the other carriage avenues of said park, and for the balance of width to be graded in conformity with the said 15 feet of width so as to form in connection with same a common avenue, that they shall grade a footwalk along the north side of said avenue corresponding with the level or elevation of same and fronting the said tract of 80 acres, and during the current winter or coming spring plant shade trees along the curbing or border of said footwalk of such kind and in such distances as to the said commissioners may seem expedient and in harmony with the general improvement of the park. * * * And also said Griswold and persons holding under him, owners or occupiers of the land and lots fronting upon said avenue and footwalk, shall have outlet and inlet from and into their premises and right of temporary stoppage in front thereof, for all such carriages and teams as by the regulations and rules governing the park may be allowed to run in the same, and that the streets which may be laid out upon the said 80 acres may enter and be connected with said avenue, and that said streets shall be accessible through the same for all such carriages and teams."

Upon the separation of the city and county, the strip passed to the city.

Griswold owned the tract until May, 1887, when he conveyed it to the Forest Park Improvement Association; the deed specifies the metes and bounds of the entire 80-acre tract. In May, 1888, the grantee platted the tract and laid it out in blocks and lots. The association also dedicated to the city, for the same uses, a short strip 50 feet wide, adjoining the railroad tracks, and extending the strip dedicated by Griswold through to Union boulevard, thus making a continuous strip from Kingshighway to Union boulevard. This 50-foot strip from Kingshighway to Union boulevard is designated on the city plat as the "Park Road." The part dedicated parallels the railroad tracks and runs diagonally into Union avenue. Subsequently the city condemned as a street a strip 50 feet wide, extending the Griswold strip on a straight line from its western terminus to Union boulevard, and the strip west of Union boulevard was also acquired for uses similar to the uses created by Griswold, and the same was similarly improved and now makes one continuous straight street from Kingshighway to Skinker road, although the diagonal piece, connecting Union boulevard with Lindell avenue is also used as a street.

Soon after the improvement was complet-

ed the property was placed on the market and the association disposed of the lots for residence purposes, and all lots fronting on this strip were described as having so many feet fronting on Park road. In 1903 the name of the street was changed, by ordinance, from Park road to Lindell avenue, and since the plat was filed, in all conveyances of lots fronting on this street they were described as fronting on Park road (prior to the change of name), and thereafter as fronting on Lindell avenue. After the association acquired the property, under permit from the board of public improvements, it installed a main sewer, water and gas mains therein. The street was also paved, and from time to time, as lots were sold, residences were erected and the owners were granted permits by the sewer department to connect with this main sewer, and by the street department to connect with the water and gas mains and to construct granitoid sidewalks in front of their premises.

In 1889 the city refunded to the association the amount expended by it for the water main and took it over as part of its system, and also the sewer main as part of the district sewer and relieved the property from special taxation for district sewer purposes. The city also installed lamp posts for street lighting and fire plugs for fire protection. The lots have all been sold and improved with residences. The houses are numbered, as on other streets. In the plat books in the assessor's office, in the street department, and in the special tax department, the strip has always been carried and treated as a public street.

When Union boulevard was reconstructed, Lindell avenue was treated as a public street and the special taxes were issued on that basis. When Kingshighway, extending north of Lindell avenue, was widened, Lindell avenue was again treated as a public street, and the tax bills were issued on that basis. At no time in any of these departments has Lindell avenue been treated otherwise than as a public street. The police department patrols this street as any other, although the park itself is patrolled only by employes of the park department. There was evidence that Lindell avenue was kept in repair only by the street department, but there also was evidence that the street department did so only at times when the park department was short of funds and that the park department at other times also made repairs.

Lindell avenue has always been sprinkled by the city, as other streets; the advertisements and contracts call for its sprinkling, and the property fronting on the street has always been charged therefor by special taxation, the same as other property fronting on streets in the city of St. Louis. For a number of years the street has been oiled, which eliminates sprinkling, but the sprinkling taxes are levied as before to pay for the

olling instead of sprinkling. The street has at all times been used for every purpose for which a public street may be used, except that after 1907 or 1908 the park commissioner ordered that no heavy traffic be permitted on the street, and since that time an effort is made to keep off heavy traffic, except such as is necessary to supply the residences on the street with coal, ice, building material, etc. Such heavy traffic is now and has always been permitted. There was evidence also that only heavy traffic intended for the residences on the street was permitted prior to 1907, except during the World's Fair period. Lindell avenue is a continuation of Lindell boulevard, an established street, long in use before Lindell avenue was dedicated, and (excepting a slight jog at Kingshighway) it makes one continuous street from Grand avenue to Skinker road—a distance of three or four miles.

Upon the facts above set forth the circuit court found that Lindell avenue is a street within the meaning of the charter, and that the board of public improvements was right in fixing the midway line between Lindell avenue and Waterman avenue as the southern boundary line of the benefit district. From the judgment dismissing the petition, plaintiffs appealed to this court.

[1-4] *Is Lindell Avenue a Public Street?* The sole matter at issue is whether Lindell avenue, between Kingshighway and Union boulevard, is a street within the meaning of the charter; if so, then the judgment of the trial court, which denied the right of relators to the injunctive process herein prayed for, should be affirmed; otherwise, reversed.

The title to the strip of ground now designated as Lindell avenue, between the limits stated, was conveyed to St. Louis county (now city) by William D. Griswold in 1876, with stipulations as to the use to which the ground was to be put by the grantee, viz., in general terms, that it was always to be used as a "carriage avenue." While it was to be a part of Forest Park, it was to be constructed and maintained as a carriage avenue, by which the grantor meant, not merely a passageway for carriages, but such a highway as would afford the occupiers of lots fronting on said avenue egress and ingress to and from their premises "for all such carriages and teams as by the regulations and rules governing the park may be allowed to run in same." This, as well as other terms in the grant, is indicative of a purpose to dedicate for a public use. *Hannibal v. Draper*, 15 Mo. 634. There is no claim that the city, which became invested with the control of the street as a successor to the county upon the adoption of the scheme and charter, has ever attempted to divert the use of same to other purposes than those designated by the grantor, but on the contrary all the official acts of the municipality, in whatever department exercised, have been in recognition of and in conformity to the

terms of the deed of grant. These are set forth in detail in the statement, and their repetition would serve no useful purpose. The fact that the strip granted is by the terms of the deed subjected to the "immediate government of the commissioners of Forest Park" means such regulation as may be exercised by the commissioners in the control of a public street—nothing more. For such purpose was the grant made, and an attempt to exercise other control by the park commissioners would defeat the very purpose of the dedication. In short, the street, or as now designated, Lindell avenue, must always be open to the public as a highway under the limitations stated; and the fact that it remains a part of the park detracts in no wise from its use as a street, nor is it in any manner inconsistent with its defined character as such. It is too well established to admit of argument that land dedicated for street purposes cannot thereafter be diverted for park purposes. Under any reasonable construction of the grant, therefore, the strip must remain a highway, and it was so accepted and has uniformly been so regarded by the city. This fixes its status so far as municipal affairs are concerned. *Collier Est. v. Wes. Pav. Co.*, 180 Mo. 387, 79 S. W. 947. Lindell avenue is not the only instance of the establishment of a public street in Forest Park. There are others, not necessary to be enumerated, which, upon their dedication, became permanent in their nature, free from change by the park commissioners, but to an extent subject to their control, as is that part of Lindell avenue in question, but nevertheless subject to the general control of the city; and unlike drives or roads, which may be abolished or changed as the judgment or taste of the commissioners may dictate.

It was contended that the city had used the avenue for general street purposes; this, if true, and in violation of the terms of the grant, would avail appellants nothing, because evidence in support of this contention would simply serve to show a further dedication by the city to public use. The establishment of permanent improvements on said street by the city in accordance with the demands of modern municipal life, such as paving, lighting, sewerage, and placing water mains therein, in no wise conflicts with the terms of the grant, but constitutes further evidence of the permanent public character of the street.

[5] The knowledge and acquiescence of the grantor in this work is further proof of his intention to dedicate this street for public use in all that the term implies. It is established that the intention of the owner to dedicate for a public use may be shown in various ways, and his approval of the city's action in this case may well be classified as one of same. *Brinck v. Collier*, 56 Mo. 165; *Price v. Thompson*, 48 Mo. 365.

After all, the real question is not what is

seemingly admitted, viz., has Lindell avenue been established and dedicated as a public street, but has it been so dedicated as to authorize the board of public improvements to designate it as a boundary in the determination of a special taxing district? That it has been established as a public street for general purposes, both by private deed and public recognition, the facts sufficiently show. This character having been established, the board of public improvements, under the fourth paragraph of section 14 of article 6 of the former charter of the city of St. Louis, is authorized to designate it as a boundary determinative of a district for special taxation.

Arguments as to strict construction of a grant and what technically constitutes a dedication, what is "park use," or the extent of the separate government of the Forest Park commissioners, as contradistinguished from the general control of the city of St. Louis, and the claim that the grantees under the Griswold deed must be confined literally to the terms of same, have but little substantial weight in the face of the many cogent facts to establish the dedication of the strip as a street and its recognition and adoption as such by the city.

We have reviewed the numerous cases cited and discussed by counsel for appellants as sustaining their contention, but find no substantial merit in them. We therefore hold that the judgment of the trial court denying the right of appellants to the injunctive relief prayed for should be affirmed, and it is so ordered. All concur.

PULLAR v. ST. LOUIS & S. F. R. CO.
(No. 17368.)

(Supreme Court of Missouri. Jan. 25, 1916.)

APPEAL AND ERROR \S 592, 773—**DETERMINATION—AFFIRMANCE.**

Where appellant duly took and perfected an appeal, filing a short-form transcript, but failing to file an abstract of the record and a brief within the time required by rules 11, 12, 13, 15 (169 S. W. ix), the appeal will be dismissed, and judgment cannot be affirmed on plaintiff's motion based on a duplicate transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2618-2620, 3104, 3108-3110, 3126; Dec. Dig. \S 592, 773.]

Revelle, J., dissenting.

In Banc. Appeal from Circuit Court, Newton County; Carr McNatt, Judge.

Action by J. A. Pullar against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. On motion to affirm. Appeal dismissed.

Mann, Johnson & Todd, of Springfield, and O. L. Gravens, of Neosho, for appellant. Sizer & Kemp, of Monett, and Spencer & Donnell, of St. Louis, for respondent.

FARIS, J. On the 6th day of June, 1912, respondent had judgment against appellant in the circuit court of Newton county for the sum of \$20,000. Appellant duly took and perfected an appeal from such judgment to this court, taking in that behalf all requisite steps, none of which are pertinent here, except the filing of a short-form transcript, which transcript was timely filed here on the 3d day of July, 1912.

Appellant failed and neglected to comply with our rules by filing an abstract of the record and a brief, within the time by our said rules required, or at all (rules 11, 12, 13, and 15 of this court [169 S. W. ix]), but in lieu thereof, for reasons sufficient unto itself for its failure in that behalf, but not pertinent here, comes now and asks leave to dismiss its appeal. Such dismissal in such situation, we may order of our own volition. Rule 16 (169 S. W. ix) of this court.

But respondent's counsel, averring an attorney's lien upon the judgment appealed from, come into this court and file another or duplicate short-form transcript, and now by motion ask us not to dismiss the appeal, but to affirm the judgment.

This identical controversy, touching the right to an affirmance under a like condition of the record, arose in the case of Hermann Savings Bank v. Kropp, decided at this term, but not yet officially reported. We there held that the appeal should be dismissed. That case governs this. Let the motion to affirm be overruled, and the appeal herein dismissed, without prejudice in any wise to the rights of the lienors to proceed as they are advised they are by their rights entitled so to do.

WOODSON, C. J., and GRAVES, BOND, and WALKER, JJ., concur. REVELLE, J., dissents.

STATE ex rel. SCHMOHL v. ELLISON et al.,
Judges. (No. 18995.)

(Supreme Court of Missouri. Dec. 22, 1915.
Rehearing Denied Feb. 9, 1916.)

1. INSURANCE \S 179—**CONSTRUCTION OF CONTRACT—POLICY AND SUPPLEMENTAL POLICY.**

An accident policy issued to plaintiff, naming his mother as beneficiary and insuring against death from injury sustained "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running board of railway or street railway cars)," and a supplemental policy on a separate sheet, separately signed, covering the life of his mother, naming him as beneficiary, and insuring against accidents "while riding as a passenger in a railway passenger car," executed at the same time and covered by the same premium, did not cover the same subject-matter and created different and distinct causes of action, and hence could not be construed as one contract to limit the language of the latter by the language of the former.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 384-390; Dec. Dig. \S 179.]

2. COURTS \Leftrightarrow 91 — COURT OF APPEALS — CONFLICT WITH RULINGS OF SUPREME COURT — QUASHING JUDGMENT.

Where the holding of the Court of Appeals entrenches upon the decisions of the Supreme Court, its judgment will be quashed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. \Leftrightarrow 91.]

Bond, J., dissenting.

In Banc. Certiorari by the State of Missouri, on the relation of Arthur J. Schmohl, against James Ellison and others, Judges of the Kansas City Court of Appeals, to review their judgment in *Schmohl v. Travelers' Ins. Co.*, 177 S. W. 1108, on the ground of conflict with the rulings of the Supreme Court. Judgment quashed.

Robert A. Brown and A. L. Guitar, both of St. Joseph, for relator. O. C. Mosman, of Kansas City, and Vinton Pike, of St. Joseph, for judgment defendant.

GRAVES, J. The case may be stated in small compass. Judge Johnson of the Court of Appeals in an opinion filed thus states some of the substantial facts:

Arthur J. Schmohl, Respondent, v. Travelers' Insurance Company, Appellant.
No. 11518.

Appealed from Buchanan Circuit Court.

This is an action on a policy of accident insurance issued by defendant June 7, 1912, and in force at the time of the injury and death of the assured. The defense is that the cause of the injury was one for which the policy provided no indemnity. A jury was waived, the cause was submitted on agreed facts, judgment was rendered for plaintiff, and defendant appealed.

Defendant, for a premium paid by the plaintiff, Arthur J. Schmohl, and upon his application, issued to him an accident policy in which his mother, Anna Schmohl, was named as beneficiary, and which in its "Schedule of Indemnities" provided for the payment of \$10,000 to the beneficiary in the event of his death resulting from injuries sustained "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running board of railway or street railway cars)." Attached to this policy and as part of the obligations assumed by defendant in consideration of the stipulated premium was a supplementary policy in which Anna Schmohl, the mother, was the assured, and plaintiff the beneficiary. The undertaking of defendant in this "supplement" was "to insure Anna Schmohl, the mother of the insured under policy No. F. B. 4420, issued to Arthur J. Schmohl against loss resulting from bodily injuries effected directly and independently of all other causes through external violent and accidental means (suicide, sane or insane, not included) while riding as a passenger in a railway passenger car or vessel licensed for the transportation of passengers, provided in either case by a common carrier and propelled by mechanical power." Mrs. Schmohl was accidentally killed in Germany, June 20, 1913, while riding as a passenger on a passenger train, and this suit is for the recovery of the indemnity provided in the supplementary policy.

Mrs. Schmohl, accompanied by her friend, Frau Pauline Frank, became a passenger on a train running from Esslingen to Nuertingen. The cars were similar in interior arrangement to the ordinary American passenger coach, but the train was not vestibuled and the platforms

at the ends of the cars were uninclosed. Where two cars were coupled together there was rather a wide space between the platforms which was spanned by a sheet iron folding bridge slightly arched. A person in going from one car to the next would cross this bridge which was not provided with guards. On the inside of the door of each car a notice was posted which read: "Stepping onto the platform and stepboard while the car is in motion is forbidden."

Mrs. Frank testified that before boarding the train, Mrs. Schmohl spoke of not feeling well, that she was cold, "that everything around her seemed to dance in a circle, and that she had a feeling as if spiders were running up her legs." After the train started and while they were seated in a car, Mrs. Schmohl declared her intention of going to the next car, to see if a mutual friend who was intending to go on that train were there. Mrs. Frank testified, "I dissuaded her from doing so, saying that passengers were forbidden to leave the car while the train is in motion and that a penalty is attached to doing so." This warning was disregarded. Mrs. Schmohl, replying that "she always does it in America," left her seat and proceeded to the platform. Mrs. Frank observed her as she disappeared through the door. No one saw her fall from the train, and, as stated in the agreed facts, "it does not appear and is not known by what means or from what cause deceased fell or was thrown from said platform or steps." It is agreed that "after she had passed through the door onto the platform and while on the platform aforesaid, she fell or was thrown from the train to the ground, receiving injuries from which she instantly died."

The only reasonable inference that may be drawn from the disclosed facts and circumstances is that the assured accidentally fell or was thrown by the motion of the train while she was endeavoring to pass from one car to another. The burden is upon plaintiff to show that the cause of his mother's death was accidental and violent. The latter fact being conceded, the existence of the former will be presumed in the absence of proof to the contrary. In showing a violent cause plaintiff made out a prima facie case of an accidental death. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, 12 O. C. A. 544, 27 L. R. A. 629; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; *Lovelace v. Travelers' Ins. Co.*, 128 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638; *Collins v. Fidelity & Casualty Co.*, 63 Mo. App. 253; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640; *Young v. Railway Mail Ass'n*, 126 Mo. App. 335, 103 S. W. 557; *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497.

It is conceded the accident occurred while Mrs. Schmohl was riding upon a moving train on the open platform or unguarded bridge, and, therefore, while she was not in the interior of a passenger car and the principal question for our solution is whether or not she was "riding as a passenger in a railway passenger car" within the meaning the supplementary policy was intended by the parties to give to that term.

Later on in the opinion the learned jurist takes up both provisions in the two policies, and ultimately holds that the words used in the supplemental policy restricts the right of the beneficiary therein, relator herein, to recovery only for such accident as might have occurred to relator's mother whilst actually within the car in which she was riding. This holding of course defeated relator's action, for the reason that the accident occurred

whilst on the platform of the car and not whilst the deceased was within the car. This ruling, it is averred, is contrary to our rulings, and hence the case is here.

I. It will be observed from the statement of this case that there can be but two possible questions. First, whether the Court of Appeals was wrong in holding that the two contracts must be considered as one, and, secondly, if right in this construction, whether or not their views upon the merits of the case is diverse from views previously expressed by this court. Of course, there would also be the question as to whether or not the construction of the language in the supplemental contract was in accord with the views of this court. This case was tried upon an agreed statement of facts which is not set out in the opinion, yet the substance thereof is so set out. The learned judge of the Court of Appeals says:

The weight of authority supports the view that such expressions in an accident policy as "riding in or on a public conveyance" operated by a common carrier for the transportation of passengers should be construed as extending the liability of the insurer to injuries received while the insured is upon the platform of a moving train. The term "public conveyance," when applied to a passenger train on a steam railway, refers to the train, and not to any particular unit which enters into its composition. A passenger is in or on a public conveyance when he is riding as a passenger inside a car, on the platform of a car, or, as in the *Berliner Case*, when he is riding on the locomotive by invitation. And we agree with Judge Thayer's view in the *Vandecar Case* that to construe the word "in" used in the phrase "in a passenger conveyance" as meaning only inside a passenger car, is highly technical and, in our opinion, ignores the significance that should be attached to the selection by the insurer of the word "conveyance" which, generally, is understood as referring to the entire train. As he well observes, people in ordinary conversation employ the terms "by train," "on a train" and "in a train" as synonymous, and it would be just as sensible to say that "in a train" requires the insured to be inside a passenger car as to say that "in a passenger conveyance" was intended to have no other meaning. All rules for the judicial interpretation of language employed in written contracts are merely a means to an end; the end being to ascertain and enforce the mutual intention of the parties. Such intention is to be gathered from the whole instrument by weighing and giving proper consideration to all pertinent stipulations and expressions. Since the ordinary man who makes contracts is not expert in orthography, words should be given their common everyday meaning, and definitive refinements should be ignored.

With these rules in mind we turn to the policy to gather from all its terms and provisions the expressed mutual intention of the parties with respect to the liability defendant assumed for injuries Mrs. Schmohl might receive, while traveling on steam railways. While the covenants in the supplementary policy were independent and divisible, both policies were parts of the same transaction, were supported by a single consideration, and were one contract. In substance, defendant agreed to insure plaintiff and his mother for the stated premium and prescribed the terms upon which it would become liable as an insurer for personal injuries to each. To plaintiff it said: "If your death results from injuries you received while a passenger in or on a public conveyance provided by a

common carrier, including the platforms of railway cars, we will pay your mother \$10,000," expressly granting to plaintiff, who is a young man, permission to ride on the platform of cars, but as to injuries the mother might receive, the liability defendant assumed was hedged about by most restrictive language. Not only was no express permission given her to ride upon car platforms while the train was in motion, but the broader term "in or on a public conveyance" employed in the principal policy was narrowed in the supplementary policy to "in a railway passenger car." If common sense is to prevail, as it should, in the construction of contracts, can there be any reasonable doubt that defendant clearly provided for immunity from liability, except for injuries this comparatively old and inactive woman might sustain while riding inside a passenger car? Circumstances alter cases. As shown, "in," "on," and "by" may be used as synonyms, and so may "in" and "inside." The context and disclosed contractual purposes must often decide. Plaintiff's interpretation of "in a railway passenger car" gives that phrase the same meaning and scope as the phrase employed in the principal policy to define the liability for injuries to plaintiff, with its express permission to him to ride on car platforms. Obviously the parties did not intend the liability of the insurer should be the same in either event, but did endeavor to restrict liability for injuries to Mrs. Schmohl to those she might receive while riding inside a passenger car.

The learned trial judge erred in rendering judgment for plaintiff. The judgment is reversed.

This portrays clearly the views of the Court of Appeals. They are: (1) That the two contracts must be construed together to get the intent of the supplemental contract; and (2) when thus construed together, the meaning of the latter is that no recovery can be had, unless the accident occurred whilst the deceased was "in a passenger car" and not while she was on the platform thereof. We have therefore, first, the question, whether under our rulings the Court of Appeals was right in holding that the two contracts must be construed together; and, secondly, if they must be so construed, whether or not the construction given violates our holdings. There may also be the further question, whether or not, if the Court of Appeals erred in holding that the two instruments must be construed together the said court was in error, according to our rulings in giving to the supplemental contract the construction given. These questions we take up in order.

[1] II. It will be observed that the Court of Appeals says that the supplemental contract was attached to the principal contract. Copies of the two contracts are in the record. As a matter of fact they are on separate sheets, but this much we can gather from the statement of facts given by the learned justice who wrote the opinion. The two papers refer to different subject-matters; i. e., one to indemnity for the accidental injury of Arthur J. Schmohl, and the other to indemnity for an accidental injury to Anna Schmohl. In the principal policy the obligation to pay is from the insurance company to Anna Schmohl, whilst in the latter the obligation is upon the part of the insurance company to Arthur J. Schmohl. The con-

tracts are separately signed. The main contract by the insurance company and Arthur J. Schmohl, the "Supplement," as it is headed and styled, is signed by the insurance company and Anna Schmohl. In these regards the two instruments are wholly separate and distinct, creating entirely different obligations and liabilities. The only things in common are: (1) That the two instruments were executed at the same time; and (2) that a single premium seems to have covered both contracts. What proportion was to carry the one or the other does not appear. The Court of Appeals says:

"While the covenants in the supplementary policy were independent and divisible, both policies were parts of the same transaction, were supported by a single consideration and *were one contract.*" (The italics are ours.)

The court might have added that the covenants were not only independent and divisible, but were very different. The two contracts do not cover the same subject-matter, and as a fact create different and distinct causes of action. They are executed by different parties, and holding that they constituted one contract for the purpose of limiting the language of the one by the terms of the other was error. Not only was it error, but it was in violation of our rule in *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523, wherein we held that although the two subject-matters of insurance were in fact covered by one policy or contract, yet we should separate the provisions of the contract, as we found the same applicable to the different subject-matters of insurance. The subject-matters of the two contracts here are as distinct as they were there. The ruling is likewise violative of our rule in *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154, where we discuss the doctrine as to what is necessary to make two instruments, executed at the same time, one contract.

III. The Court of Appeals concede in the opinion before us, that unless they can limit the meaning of the language used in the supplemental contract, by the language found in the main contract, then the words used in the supplemental contract "while riding as a passenger in a railway passenger car" are broad enough to entitle recovery for an accident happening on the platform of such a car. Holding as we do that such court could not call these two instruments one contract for the purpose of limiting the meaning of this language in the contract sued on in this case, it follows that by their own concession the opinion is wrong. Their holding is predicated solely on the ground that they could give this language a limited meaning by reading it in connection with the other contract. Standing alone they say the plaintiff is entitled to recovery, and on that proposition cite and discuss the cases.

[2] If they intrench upon the decisions of

this court in holding the two instruments to be one contract, as we hold, it necessarily follows that their judgment should be quashed; and it is so ordered. Other questions raised become immaterial under the above views. All concur, except BOND, J., who dissents.

STATE ex rel. O'MALLEY v. REYNOLDS
et al., Judges of St. Louis Court of Appeals. (No. 18385.)

(Supreme Court of Missouri. Dec. 22, 1915.
Rehearing Denied Feb. 9, 1916.)

1. MECHANICS' LIENS — 134 — SUFFICIENCY OF CLAIM.

A lien account must fairly apprise the owner and the public of the nature and amount of the demand asserted as a lien, and it must disclose on its face that the demand is within the lien law, and must be fairly itemized, showing what the materials are and the work that was done and the price charged.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 208; Dec. Dig. — 134.]

2. MECHANICS' LIENS — 139 — FORM OF CLAIM—DESCRIPTION—ABBREVIATIONS.

A lien account filed by a lumber company for lumber described in abbreviations and trade terms known and understood by business men in the trade, complies with Rev. St. 1909, § 8217, declaring that a just and true account of the demand shall be filed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 234-236; Dec. Dig. — 139.]

3. MECHANICS' LIENS — 149 — ACCOUNT—INADEQUACY.

An owner against whom a lien for materials furnished a contractor erecting a building for the owner is claimed, may not complain because the lien account does not contain all the items for which a lien may have been maintained, in the absence of bad faith of the lien claimant.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. — 149.]

4. MECHANICS' LIENS — 149 — ACCOUNT — CONSOLIDATING ITEMS.

That a lien account for materials furnished a building contractor consolidated in one undated item a few charges for lienable materials, does not invalidate the whole lien account.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. — 149.]

5. MECHANICS' LIENS — 149 — ACCOUNT — DATING ITEMS.

Where a lien account showed that the materials for which a lien was demanded were furnished between given dates falling within the beginning and close of the account, the absence of dates in connection with particular items in the account was immaterial.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. — 149.]

6. MECHANICS' LIENS — 149 — ACCOUNT — CONSOLIDATING ITEMS.

That a lien account for materials consolidated in one undated account several charges, did not invalidate the claim as to the consolidated items in the absence of any proof of fraud or bad faith, or resulting injury, where the consolidated item showed that each item was for material of the same grade, quality, character,

and price, and which, in the aggregate, included the identical quantity of material and the identical amount charged in the consolidated item, the whole being lienable.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. § 149.]

In Banc. Certiorari by the State of Missouri, on the relation of Frank C. O'Malley, administrator of Margaret O'Malley, deceased, against Hon. George D. Reynolds and others, Judges of the St. Louis Court of Appeals, to review a judgment (168 S. W. 244). Writ quashed.

Frank C. O'Malley, of St. Louis, in pro. per. Robert W. Hall, of St. Louis, for respondents.

BLAIR, J. Relator was the defendant in the circuit court of the city of St. Louis in a mechanic's lien suit in which judgment went for him. The plaintiff in that court, the Banner Lumber Company, appealed to the St. Louis Court of Appeals, which reversed the judgment and remanded the cause for new trial (168 S. W. 244), whereupon relator sued out this writ of certiorari, bringing here the record of the Court of Appeals.

In his brief, relator confines the questions he raises to those he asserts arise out of the facts stated in the opinion of the Court of Appeals. Not being asked to go beyond the opinion of that court for the facts, the question whether we can do so is not involved. Relator contends that the Court of Appeals failed to follow designated controlling decisions of this court upon the question as to (1) the sufficiency of the description in the lien paper, or account of plaintiff's demand of the materials furnished; and (2) the sufficiency of the evidence offered in support of the lien account. The facts pertinent to each of these contentions, as here presented, will be stated in connection with the discussion of the questions of law raised for decision.

1. The Court of Appeals, in its opinion, describes the lien statement or "account of the demand," in so far as it concerns the issue here, as follows:

"It [the lien statement] sets out that the plaintiff, with a view to avail itself of the benefit of the mechanic's lien statute 'files the account below set forth for the work and labor done and materials furnished by it under contract with J. J. Robson, contractor,' etc.

Then follows the description of the property with the statement that the account filed is "as per itemized bill attached hereto and marked 'Exhibit A.'" Then follows Exhibit A, which sets out the account of plaintiff with Robson, the contractor. It is dated April 1, 1908, and is on office stationery of the Banner Lumber Company. The various columns are headed "Date," "Pieces," "Sizes," "Length," "Feet," "Prices," "Amount," "Total." The account contains a long list of debit items expressed chiefly by

abbreviations and trade terms. Among a number of credit items appear cash credits on account of "lumber," "millwork," and "lath," respectively.

Except as hereafter noted, these are all the facts appearing from the opinion of the Court of Appeals bearing upon the character of the lien statement or account so far as concerns the description of the materials furnished. Upon these facts, after discussing and quoting from numerous decisions, the Court of Appeals held:

"It would appear that the lien account here in question sufficiently reveals the material for which the lien is sought to apprise the owner and the public of the nature thereof, and to disclose that the demand is one within the lien law."

Relator insists this conclusion is in conflict with certain decisions, including the following decisions of this court: *Mitchell Planing Mill Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544; *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118; *Rude v. Mitchell*, 97 Mo. 373, 11 S. W. 225.

[1] The principle announced in those cases which relator contends is contravened by the decision of the Court of Appeals in the record before us is that:

"The account which this law contemplates is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien. The account may consist of one or more items. It may be all on one side or mutual in its showing. To be valid, it must disclose on its face that the demand is a sort within the terms of the lien law. When it calls for a just and true account, it means a fairly itemized account showing what the materials are and the work that was done and the price charged so that it can be seen from the face of the account that the law gives a lien therefor."

[2] The specific complaint relator makes is that the "lien paper does not show on its face what it is for." This objection in the circumstances of this case amounts to a complaint that the Court of Appeals' description of the lien account shows that the account did not describe the materials furnished in the manner required by the statute as construed in the cases cited.

The real objection relator makes to the lien account is that the account does not sufficiently set out the character of the materials furnished; and the sole question this objection presents, when the Court of Appeals' statement of facts in this connection is analyzed, is whether a description of materials furnished when made in abbreviations and trade terms is a compliance with the statutory requirement that a "just and true account of the demand shall be filed." Section 8217, R. S. 1909.

In *Henry v. Plitt*, 84 Mo. loc. cit. 241, and *Lumber Co. v. Edward B. Stoddard Co.*, 113 Mo. App. loc. cit. 314, 315, 88 S. W. 774, it was held that the use of abbreviations and trade terms in the description of the items of the account was permissible. In *Henry v. Plitt*, an item reading "May 8, 1880—3, 2,

12, 16, 96. * * * 17½ * * * \$1.68," under a heading indicating that the figures related to lumber, was held sufficient; the court saying the figures were—"known to business men to mean, when applied to a lumber account, that on the 8th day of May, 1880, there were furnished 3 pieces of lumber 2x12 inches in thickness and width, and 16 feet long, aggregating 96 feet of lumber, which, at \$17½ per thousand, result in \$1.68 for the value thereof."

We have the record in that case before us. The heading of the account which is there said (84 Mo. loc. cit. 241) to "show that the figures relate to lumber" reads as follows:

"Henry, Barker & Coatsworth,
"Wholesale and Retail Dealers in Lumber, Lath,
Shingles, Doors, Sash, Blinds, Moulding,
Lime, Plaster, Hair, Cement, Building Paper
and Paints.

"Sold to J. S. Southerland & Co., contractors
with Mr. A. M. Plitt, Kansas City, Mo."

Then follows the account of several pages, a large per cent. of the items in which are similar to that set out in the opinion. In that case, as in this, the account was upon a bill head or stationery, which first stated the name of the lien claimant, and then disclosed the character of its business. In that case there was an express statement that the claimant was in the lumber business. In this, there appears an equivalent disclosure, in that the heading shows that the claimant is a lumber company; that it is a corporation is apparent from its bringing the suit as it did; being a business corporation its name, necessarily, designates its business. Section 3339, R. S. 1909.

From the facts stated by the Court of Appeals it is clear the lien account in this case is well within the rule announced in *Henry v. Plitt*, supra.

Further, it is stated in the opinion of the Court of Appeals that the purpose of the suit was to enforce a lien for labor and materials "for the erection of certain buildings." In view of the fact that no point was made upon it, we are at liberty to assume that the lien account contained a statement of that character, describing the buildings.

From what has been said, it appears, therefore, that the Banner Lumber Company, a corporation engaged in the lumber business, filed this lien account for the purpose of fixing a lien upon certain described property for materials used in the construction of designated buildings, and that the items of the lien account are for materials which are described in abbreviations and trade terms known and understood by business men as in use in the trade in which plaintiff's name disclosed it was engaged. The Court of Appeals so held, in effect. That this sort of description of the materials is, in such circumstances, sufficient under the statute (section 8217, R. S. 1909) we have no doubt, and so held in the *Plitt* Case. The lien account contemplat-

ed by the law "is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien." *Mitchell Planing Co. v. Allison*, 188 Mo. loc. cit. 53, 40 S. W. 121, 60 Am. St. Rep. 544. These liens "should not be defeated on mere technical grounds." *Rude v. Mitchell*, 97 Mo. loc. cit. 374, 11 S. W. 227. The statute is remedial "and should be construed with reasonable liberality." What is requisite is a "substantial compliance with all the requirements of the statute, according to its reasonable intent." *Grace v. Nesbitt*, 109 Mo. loc. cit. 17, 18 S. W. 1120. These decisions are those which relator insists are opposed to the decision of the Court of Appeals upon the question before us. We discover nothing in them contrary to the conclusion reached by the court in *Henry v. Plitt*, supra, and think that case exactly in point, correct in principle, and decisive of the question. There is ample authority outside this jurisdiction supporting the same proposition. Other decisions of the Courts of Appeals approach the same ruling closely. The case of *Dwyer Brick Works v. Flanagan et al.*, 87 Mo. App. 340, need not be critically examined, since it is apparent it is distinguishable from this case.

[3] 2. Relator's second contention is, in substance, that there is no substantial evidence tending to support the lien account. This insistence is grounded upon the following facts. In the circuit court, plaintiff attached to the petition an account marked "Exhibit A," and referred to in the petition as "a bill of particulars." The Court of Appeals finds this exhibit differed in some respects from the lien account. In the first place, it contained items of the value of \$2.46 in addition to those appearing in the lien account. Also, it contained more items than the lien account; this resulting from the subdivision in the exhibit of some of the items of the lien account. Illustrating this, the Court of Appeals says the ninth item in the lien account was undated and for 7,790 feet of star yellow pine flooring. In the exhibit this item was "subdivided into six items, which are scattered through the latter account," and the resulting items are given dates. There were several instances of this sort, though it is fairly inferable that relatively a small number of items were affected. The evidence taken before the first referee was directed to the proof of the various items, as set out in the exhibit attached to the petition. The referee's report being set aside, the petition was amended so as to conform it exactly to the lien account. The cause was then referred to a second referee and submitted to him upon the evidence taken before the first referee. Relator contends there was, consequently, a total failure of proof, since, he says, plaintiff "by proving one account necessarily disproved the truth and justice of his own lien paper." The Court of

Appeals decided against him on this question, and he urges this holding conflicts with the decision in *Coe v. Ritter*, 86 Mo. loc. cit. 287. In that case plaintiff brought ejectment, claiming under a deed of trust record August 9, 1873. Defendant's title depended upon a sale under a judgment in a mechanic's lien suit in which the claimant had judgment on September 21, 1874, upon a lien account, the first item in which was charged as of September 2, 1873, over three weeks after the trust deed was recorded. Neither the trustee nor the beneficiary in the trust deed was a party to the proceeding. On the trial, defendant offered to show, contrary to the dates of the lien account, that the materials, upon the furnishing of which the lien depended, were actually furnished, in part, prior to the recording of the trust deed under which plaintiff claimed. Upon those facts, this court held, in substance, that the tenure of those interested in land ought not to be made to depend upon extrinsic evidence coming from the mere memory of (perhaps) interested witnesses, as against a permanent record designed to set out the facts. And the court concluded that:

"A lienor must stand or fall by the lien which he files, and the dates and items which he specifies, and is not at liberty to defeat or postpone a prior lienor or incumbrancer, by matter in pais."

Relator here relies upon this last-quoted sentence. What the court said in that case is to be understood and applied in the light of the facts before it. That case is wholly unlike this, and that holding has no sort of bearing upon the question relator raises in this. There is no question here as to priorities between liens and incumbrances. This is simply a suit by the lien claimant. Relator endeavors to lift out of the opinion in *Coe v. Ritter* a statement applicable to the facts of that case and apply it broadly to a case in which the facts are wholly different. His contention, in the last analysis, is based upon the assumption that the exhibit attached to the original petition materially differs in its substance from the lien account. The fact that the aggregate of the items in the bill of particulars exceeded those of the lien account by the insignificant sum of \$2.46 is of no consequence. Relator is in no position to complain that the lien account did not contain all the items for which a lien might have been maintained. There is no suggestion of bad faith, and bad faith could not easily be predicated upon an omission to include in the lien account items for which a lien might have been had but was not asked.

[4] So far as concerns the items in the exhibit which seem to be consolidated in the lien account, it appears from the statement of the Court of Appeals that the aggregate amounts and charges are equal to the amounts and charges of the consolidated

items in the lien account. In no event could the consolidation of a few items in this manner invalidate the whole lien account, whatever its effect upon the items so consolidated. *Walden v. Robertson*, 120 Mo. loc. cit. 44, 45, 25 S. W. 349; *Allen v. Mining & Smelting Co.*, 73 Mo. loc. cit. 693.

[5] Further, the absence of dates in connection with particular items in a lien account is not important when, as here, it appears from the account that the materials were furnished between given dates, which fall within the beginning and close of the account. *Ittner v. Hughes*, 133 Mo. loc. cit. 691, 34 S. W. 1110.

[6] We are also of the opinion that the mere fact that the lien account, in the manner shown here, consolidates in one undated item several charges which show that each was for lumber of the same grade, quality, character, and price, and which, in the aggregate, include the identical quantity of material and the identical amount charged in the consolidated item, the whole being otherwise lienable matter, is not an objection the owner can urge as against the lien claimant, even to the extent of avoiding the consolidated item, there being no proof of fraud or bad faith or suggestion of resulting injury to any one.

"These betterment statutes are remedial in their character, and, when reasonable and not oppressive, are to be liberally construed. * * * A fair and substantial compliance with the statute is all that is required." *Walden v. Robertson*, 120 Mo. loc. cit. 43, 25 S. W. 350; *McDermott v. Claas*, 104 Mo. loc. cit. 23, 15 S. W. 995.

Because of the errors it pointed out, the Court of Appeals properly reversed the judgment, and because the evidence fell short of proving a few of the items of the lien account, as the Court of Appeals held, it was necessary to remand the cause. Relator's argument that the remandment without a direction of judgment for respondent conclusively shows that the Court of Appeals found the evidence insufficient to support any judgment for plaintiff in the lien suit does not impress us.

Our writ is quashed. All concur; BOND, J., in result only.

STATE ex rel. MOBERLY SPECIAL ROAD DIST. v. BURTON et al., County Judges.

(Nos. 18488, 18489.)

(Supreme Court of Missouri, Division No. 2.

Nov. 30, 1915. Rehearing Denied

Feb. 15, 1916.)

1. CONSTITUTIONAL LAW § 26—STATES—LIMITATION OF POWER.

The organic law of a state is not a grant of power, but a limitation on power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.]

2. CONSTITUTIONAL LAW § 48—POWER OF LEGISLATURE.

The Legislature may enact any law which does not contravene the federal or state Consti-

tution, and in its interpretation the courts will hold it valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48; Statutes, Cent. Dig. § 56.]

3. HIGHWAYS §122—ROAD DISTRICTS—STATUTES—CONSTITUTIONALITY.

Rev. St. 1909, § 10482, as amended by Laws 1913, p. 669, providing for the apportionment by county courts of taxes collected for road purposes within special road districts within the county is not violative of Const. art. 10, § 22, empowering the county court, in its discretion, to levy and collect a road tax, in that the county court is given exclusive power to disburse such tax over the whole county, in view of article 10, vesting inherent power to tax in the Legislature, which power extends to the determination of the time, the amount, the nature, and the purpose for which the tax is levied, and notwithstanding that by article 6, § 36, county courts are created for the transaction of county business.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.]

4. STATUTES §77—SPECIAL LEGISLATION.

A statute is not special or class legislation if it applies to all alike of a given class, provided the classification is not arbitrary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.]

5. STATUTES §95—CLASS LEGISLATION—SPECIAL ROAD DISTRICTS—DISBURSEMENTS OF TAXES.

Rev. St. 1909, §§ 10482, 10591, 10594, as amended and re-enacted by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, are not invalid under Const. art. 4, § 53, as special or class legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 106, 106; Dec. Dig. § 95.]

6. STATES §119—APPROPRIATIONS FOR "PRIVATE PURPOSES"—SPECIAL ROAD DISTRICT.

Neither are such acts invalid as an appropriation of money for private purposes prohibited by Const. art. 10, § 3; as the construction of highways cannot be considered a private purpose.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.]

For other definitions, see Words and Phrases, First and Second Series, Private Purpose.]

7. TAXATION §44—UNIFORMITY—SPECIAL ROAD DISTRICTS.

Such acts do not violate the constitutional requirement as to uniformity of taxation; the acts operating alike on persons within such districts.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 44.]

8. HIGHWAYS §122—SPECIAL ROAD DISTRICTS—STATUTES—VALIDITY.

Such acts do not violate Const. art. 10, § 10, forbidding use of taxes collected in city outside such city.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.]

9. STATES §119—GRANT OF MONEY TO PUBLIC CORPORATIONS—SPECIAL ROAD DISTRICT.

The acts do not grant public money to municipal or other corporations within the prohibition of Const. art. 4, § 46, or lend its credit in aid of any individual or corporation in violation of section 47.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.]

10. HIGHWAYS §122—SPECIAL "ROAD DISTRICTS"—STATUTES—VALIDITY.

These acts are not violative of Const. art. 10, §§ 11, 12, fixing the tax rates for county, city, town, and school purposes, as road districts are not included therein.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.]

11. CONSTITUTIONAL LAW §48—PRESUMPTIONS—VALIDITY OF ACT.

As the Legislature has unlimited power in the creation of public corporations and municipalities, it must be presumed that in the creation of special road districts by Laws 1913, p. 669, the Legislature deemed them necessary, expedient, and to the public interest.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48; Statutes, Cent. Dig. § 56.]

12. HIGHWAYS §90—SPECIAL ROAD DISTRICTS—POWER OF LEGISLATURE.

The Legislature having power to create special road districts, as it did by Laws 1913, p. 669 et seq., it has the necessary further authority to provide means for the perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 80.]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Mandamus proceedings by the State, on the relation of the Moberly Special Road District, against G. R. Burton and others, Judges of the County Court. From the judgment rendered, cross-appeals were filed. Affirmed.

Willard P. Cave, of Moberly, for relator.
Jerry M. Jeffries, of Moberly, for defendants.

WALKER, J. The city of Moberly and contiguous territory in Randolph county for a distance of four miles in each direction from said city was, under the authority of sections 10577, 10586, R. S. 1909, as amended by Laws 1911, p. 370, organized as a body corporate, to be thereafter designated as the "Moberly special road district." This action by mandamus was brought in the circuit court of said county by the state, at the relation of said road district, as plaintiff, against the judges of the county court of Randolph county, as defendants, to compel the latter to pay over (under the provisions of section 10482, R. S. 1909, as amended by Laws 1913, p. 669) to said road district all money arising from a 25-cent levy for road and bridge purposes collected on the property within said district. The levy, however, was made upon all the property of the county. The total fund collected in said district under said levy for road and bridge purposes was \$9,334.60. In anticipation of the revenue to be derived from said 25-cent levy, defendants had caused work to be done and debts to be contracted for roads and bridges over the entire county and had issued warrants therefor. Upon a hearing on the application for the writ of mandamus the circuit court found that defendants had issued warrants in said district for \$3,303.90

for work done therein, and it was ordered that they pay or issue warrants to plaintiff in the sum of \$6,030.70, or the balance remaining in the county treasury which had been collected in said district under the 25-cent levy.

Cross-appeals were perfected from this judgment; plaintiff contending that it was entitled to the entire revenue collected in said district for the preceding year for road and bridge purposes, and defendants that the statute under which the levy was made was unconstitutional, and hence void.

The constitutionality of section 10482, R. S. 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is assailed by defendants on various grounds. It is first contended that this statute violates section 22 of article 10 of the state Constitution. It will be recalled that this section provides, in addition to taxes authorized to be levied for county purposes (under section 11, art. 10, Const. Mo.), that the county courts of the several counties not under township organization and the township board of directors in counties having township organization may levy and collect as state and county taxes are collected a special tax of not more than 25 cents on each \$100 valuation to be used for roads and bridges, but for no other purpose whatever, and the power thus conferred on the county courts and township boards is declared to be discretionary. Three limitations, two express and one implied, say defendants, are found in this section—the first is as to the rate; the second as to the application of the tax when collected; and the third (which defendants say is implied) that the tax must be expended under the direction of the county court over the entire county.

[1-3] As to defendants' contention in regard to the first and second limitations, there is no question; the Constitution in this regard being expressed and unequivocal. As to the third, it may be conceded as a general proposition that, under section 36 of article 6 of the state Constitution, county courts are created for the transaction of county business, and express jurisdiction is given them in this regard, but it must be borne in mind, despite this provision, that our organic law is not like the federal Constitution, a grant of power, but is simply a limitation upon power which the Legislature otherwise possesses. *McGrew v. Railroad*, 230 Mo. 496, 132 S. W. 1076; *State ex rel. v. Sheppard*, 192 Mo. 497, 91 S. W. 477; *State ex rel. v. Warner*, 197 Mo. 650, 94 S. W. 962; *Glasgow v. Rowse*, 43 Mo. 479. Broadly stated, therefore, the Legislature may enact any law which does not contravene the federal or state Constitution, and in its interpretation the courts will hold it valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt. *State v. Buente*,

256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915D, 879; *Board Com. v. Peter*, 253 Mo. loc. cit. 530, 161 S. W. 1155, Ann. Cas. 1915C, 310; *Harris v. Bond Co.*, 244 Mo. 664, 149 S. W. 603; *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. The admitted implied existence of the third limitation renders it necessary for same to be so clear and unmistakable as to leave no other reasonable construction than that insisted upon by defendants; otherwise their contention cannot be maintained. *Board of Com'rs v. Peter*, 253 Mo. loc. cit. 530, 161 S. W. 1155, Ann. Cas. 1915C, 310.

It is only upon the assumption that the entire business of the county must be conducted by the county court, and that the Legislature cannot provide otherwise, that any basis can be found for defendants' contention as to the third limitation. No words in the section authorize it. Consequently it is not such a clear and unmistakable implication as would, under the rule, authorize an affirmative conclusion as to its existence in harmony with defendants' contention, but, on the contrary, it is simply an inference. Constitutional provisions cannot be construed by inferences, especially when it is sought by such construction to render a legislative enactment invalid. In thus construing the section of the Constitution under consideration we are not unmindful of the fact that it contains restrictive language, but the purpose of this language is unmistakable, and is expressly limited to the amount of the levy on each \$100 valuation, and the purpose for which the tax is to be used, and not to the officials or body corporate by which it is to be expended. We are not impressed, therefore, with the soundness of defendants' reasoning in so construing section 22, art. 10, Const. Mo., as to confine the disbursement of the taxes therein authorized to the county courts of the respective counties, the effect of which would be to render invalid section 10482, R. S. 1909, as amended.

A fitting supplement to what has been said, and one of the primary principles underlying the system of taxation, is the fact that the inherent power to tax and to appropriate taxes is vested in the Legislature (article 10, Const. Mo.), and may be exercised within its discretion when not violative of an express provision of the federal or state Constitution. *Hann. & St. J. Ry. Co. v. State Board*, 64 Mo. 294. The comprehensiveness of this power, in the absence of the restrictions indicated, extends to the determination of the time, the amount, the nature, and the purpose for which the tax is to be levied. In *re Sanford*, 236 Mo. loc. cit. 684, 139 S. W. 376; 37 Cyc. 724, and cases. The legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection, and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating in

this case the disbursement of the taxes collected to a board of commissioners of a special road district is not an improper exercise of such power.

[4, 5] In addition to assailing the validity of section 10482 as amended (Laws 1913, p. 669), as being in conflict with section 22 of article 10 of the state Constitution, defendants claim that section 10594, R. S. 1909, as repealed and re-enacted in 1913 (Laws 1913, p. 675), concerning, among other things, funds to be used in special road districts and the apportionment by county courts of county taxes for road and bridge purposes upon property within such special road districts, and section 10591, R. S. 1909, as repealed and re-enacted in 1913 (Laws 1913, p. 674), providing, among other things, that boards of commissioners in special road districts may contract for the building, repair, and maintenance of bridges and culverts in such districts and county courts may, in their discretion, assist in same, are each, as well as section 10482, as amended, invalid as special legislation.

The particular provisions of the Constitution (section 53, art. 4, Const. Mo.) prohibiting this character of laws are not pointed out. The Constitution does not prohibit local or special laws in all cases; such laws being forbidden only upon the subjects named in the Constitution or where a general law could have been made applicable. *State ex rel. v. Speed*, 183 Mo. 186, 81 S. W. 1260. What are general laws as meant by the Constitution has been frequently determined. It is held generally that a statute is not special or class legislation if it applies to all alike of a given class, provided the classification is not arbitrary. *Miners' Bank v. Clark*, 252 Mo. 20, 158 S. W. 597; *State ex rel. v. Taylor*, 224 Mo. 398, 123 S. W. 892. Applying this rule to the statutes under review, we find from their terms that they apply alike to all road districts in the state which may be organized as bodies corporate and are conducted in conformity with the provisions of these acts. It does not matter whether much or little of the territory of a county is included in the districts thus organized; the test of validity being: Is the class created by these acts not arbitrary, and is each of the districts subject to and governed by these statutes? If so, then they are not inimical to the constitutional provision in regard to special or class legislation. In our opinion, they comply with the requisites of general laws, and should be so construed. We so held in construing a similar statute in *Elting v. Hickman*, 172 Mo. loc. cit. 256, 72 S. W. 700, and in *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

[6] There is no merit in the contention that the acts referred to are violative of that constitutional provision (section 3, art. 10, Const. Mo.) which prohibits the Legislature from appropriating public money

for private purposes. These statutes were enacted to authorize the construction and provide for the maintenance of highways, which are for the use and benefit of the public, and under no rule of construction can the appropriation of money for this purpose be considered a private one.

[7] It is also urged that the provision of our organic law requiring uniformity in taxation is violated by these statutes. We have adverted to the power of the Legislature in regard to taxation; with it rests the mode of levying, collecting, and disbursing taxes. Therefore, where statutes relative thereto operate alike upon all persons within a certain defined district or subdivision of the state, for example, these special road districts, and the taxes authorized are for the benefit of the inhabitants thereof, as well as the general public, they are not open to the objection of nonuniformity in taxation.

[8] Under section 10, art. 10, of the Constitution the Legislature is forbidden to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities. It is claimed that the statutes under review, in authorizing the levy and collection of taxes in these special districts outside of such cities, violate this constitutional provision. It is held to the contrary in *Elting v. Hickman*, 172 Mo. loc. cit. 258, 72 S. W. 700, on the ground primarily of the plenary power of the Legislature in the absence of express constitutional inhibitions, and secondarily, and as a practical reason, the interest of such cities in the improvement and maintenance of the roads leading thereto.

[9, 10] It is further claimed that section 46 of article 4 of the Constitution, prohibiting the Legislature from granting public money to individuals, municipal, or other corporations, and section 47 of article 4 of the Constitution, prohibiting the Legislature from authorizing any municipality or other political corporation from lending its credit in aid of any individual or corporation, are violated by the statutes under consideration. These statutes do not grant or authorize the granting of public money or thing of value to any individual, association, municipal, or other corporation, and they are therefore not violative of section 46, supra. *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. Nor do the acts authorize any subdivision of the state now existing or that may be established to lend its credit or grant public money or thing of value in aid of any person, firm or corporation. Section 47, supra, is therefore not violated. This has been fully determined in *Elting v. Hickman*, supra, in which the statute there under review is in all of its essentials similar to these at bar.

[11] It is urged that the acts in question are in violation of sections 11 and 12 of article 10 of the Constitution, which fix the limit of tax rates in the various counties. The

limitations of said sections are confined by their express terms to "taxes for county, city, town and school purposes." There is no authority for including road districts therein. We have held that they are not to be so included. *Lamar W. & El. Light Co. v. Lamar*, 128 Mo. loc. cit. 216, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; *Harris v. Bond Co.*, 244 Mo. 664, 149 S. W. 603.

[12] The power of the Legislature in the creation of municipalities and public corporations of every description is not only absolute, but unlimited, in the absence of constitutional inhibitions. In the presence of this power we must presume that in the creation of the special road districts the Legislature deemed them necessary, expedient, and in the public interest. Thus formed, authority exists as a necessary consequence of legislative power to provide means for their perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best. *Harris v. Bond Co.*, 244 Mo. 664, 149 S. W. 603.

In view of all of the foregoing, we hold that the statutes in question do not, within the meaning of the Constitution, authorize the granting of public money to a corporation, nor do they interfere with the transaction of a county's business required to be exclusively performed by a county court, nor do they involve a going into debt by counties as prohibited by the Constitution, or authorize the expenditure of public money for another purpose than that for which it was collected, nor conflict with either the letter or spirit or the intent and purpose of section 22 of article 10 of the Constitution of this state.

From all of which it follows that the judgment of the circuit court is affirmed; and it is so ordered.

FARIS, P. J., concurs. REVELLE, J., not sitting.

STATE ex rel. COLUMBIA SPECIAL ROAD DIST. v. JOHNSON et al. (No. 18613.)

(Supreme Court of Missouri, Division No. 2. Nov. 30, 1915.)

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Mandamus proceedings by the State, on the relation of the Columbia Special Road District, against W. T. Johnson and others. From the judgment rendered, respondents appeal. Affirmed.

N. B. Hays, of Columbia, for appellants. McBaine & Clark, of Columbia, for respondent.

WALKER, J. The same questions are submitted for determination in this case as in *State ex rel. Moberly Special Road District, Plaintiff, v. G. R. Burton et al.*, Judges of the County Court of Randolph County, Defendants, 182 S. W. 746, in which we affirmed the judgment of the trial court and held the statutes in relation to the organization of special road districts and

the disbursement of taxes for the support of such districts valid.

From this it follows that the judgment in this case should be affirmed; and it is so ordered.

FARIS, P. J., concurs. REVELLE, J., not sitting.

CITY OF ST. LOUIS v. ST. LOUIS, I. M. & S. RY. CO. et al. (No. 17549.)

(Supreme Court of Missouri, Division No. 2. Jan. 6, 1916. Rehearing Denied Feb. 15, 1916.)

EMINENT DOMAIN — 147 — COMPENSATION — ELEMENTS OF COMPENSATION FOR LESSEE.

A lessee for years of a parcel of land condemned for a public use is not entitled to recover for loss of profits in its business during removal of its stock of goods, nor for the expense of the removal of the goods and personal property as distinguished from fixtures, from the location, condemned, to a new location, nor for the depreciation in value of such personal property and stock caused by removal and reinstallation, and is entitled to be paid the reasonable market value of its fixtures affixed to the premises condemned; but where the party condemning does not want the fixtures, and the lessee elects to take them, the damages which the party condemning must pay as such value should be reduced to the extent of the reasonable market value of the fixtures as they stood on the premises condemned diminished by the necessity of immediate removal and reinstallation elsewhere.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 394-396; Dec. Dig. § 147.]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by the City of St. Louis against the St. Louis, Iron Mountain & Southern Railway Company and others to condemn land. From a judgment awarding compensation to the Regal Buggy Company, the City appeals. Reversed and remanded.

The city of St. Louis brought this action to condemn a strip of land for the western approach to its Municipal Bridge. Damages were assessed in favor of the several defendants by a commission of three freeholders, to whose report the city filed exceptions. The case came on for hearing in the circuit court of the city of St. Louis, wherein the exceptions of appellant city were overruled, and it appealed.

The Regal Buggy Company, respondent herein, was the lessee for years of one parcel of the real estate which was condemned in this action. The lease of respondent, at the date of the making of the commissioners' report, had a little over three years to run. Specifically touching the land occupied by respondent, the commission assessed the value of said land taken, plus the damages to the remainder of the parcel, at the sum of \$41,310. They then apportioned this sum by allowing to the owner thereof \$38,610, and to this respondent as lessee, the sum of \$2,700, being the appraised value of its lease over and above the monthly rent reserved. After making allowances of damages afore-

said, the commission allowed the respondent the further sum of \$8,450 on account of injury to its business and for its damages and expenses arising from the removal of the fixtures and personal property of respondent from the premises condemned to a new location and for installing said property therein. The commissioners' report, which was approved by the circuit court upon exceptions taken thereto, states the specific elements of damages going to make up the last-mentioned sum thus:

"(1) For the cost of removal of their several stocks of goods and fixtures from their present place of business to new locations and installing said goods and fitting said fixtures therein; (2) for depreciation in the value of such goods and fixtures caused by the removal and reinstallation of the same; (3) for injury to their said businesses caused by the interruption of the same during the period of removal of their said stocks of goods and fixtures."

The allowance of damages for the three items above enumerated is the sole matter of contention here. It is conceded even that, if these three items were proper subjects of damages, then the amount allowed respondent therefor is fair and reasonable; but appellant contends that under the laws of eminent domain of this state no such damages may be paid by the condemner to him whose land is taken for public uses.

These three propositions and the contentions of appellant and respondent pro and con, respectively, form the points up for decision.

Charles H. Daues and Truman P. Young, both of St. Louis, for appellant. Rassieur, Kammerer & Rassieur, of St. Louis, for respondent.

FARIS, P. J. (after stating the facts as above). As forecast, there is no contention made by appellant that respondent as the owner of a lease for a term of years was not entitled to compensation therefor; nor that the amount of damages awarded as the market value of respondent's lease, to wit, \$2,700, is unfair or unreasonable. It is only the damages awarded for the three items set out in our statement herein that are in controversy.

I. For convenience of discussion we will consider all items or elements of damages together, except that having to do with the fixtures which we leave for subsequent separate discussion, since, under the law as we view it, this may be conveniently done. In brief, these elements have to do with the allowance of damages (a) for the removal of the stock of goods of respondent from the right of way taken to a new location and placing them therein; (b) for depreciation in the value of said goods, caused by such removal and reinstallation; and (c) for injury to the business of respondent on account of the interruption or cessation thereof during the period of removal of said stock of goods and fixtures.

When this case was argued, the writer was of the opinion that it ought to be affirmed upon principle, if not upon authority; but, upon coming to examine the authorities, I have been forced to a different view. Coming to the question of authority first, we have had our attention directed to but one case squarely on all fours in favor of the allowance of damages for the expense of removal of personal property from the right of way condemned. That is the case of *Blincoe v. Railroad*, 16 Okl. 286, 83 Pac. 903, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689. In the latter case the question of the allowance of such expenses was squarely before the court, and he whose lease was taken was adjudged entitled to expenses of removing certain personal property, to wit, lumber, from the lands taken. In that case, however, the learned court admitted that the rule in other jurisdictions was contrary to the conclusion reached; but it held that the law in Oklahoma warranted a different holding because of the language of the statute of that state, which in substance required the commission to consider the injury which the owner of the land might sustain and assess the damages caused him by reason of the appropriation of his lands.

The case of *Philadelphia, etc., R. Co. v. Getz*, 113 Pa. 214, 6 Atl. 356, is urged upon us as announcing a rule in favor of the contention that damages of the sort here under discussion may be allowed; but that case did not deal with ordinary personal chattels but apparently with machinery and fixtures. Besides, the Pennsylvania court, in the later case of *Becker v. Philadelphia, etc., Railroad Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583, held to the contrary, in that they held that it was proper to refuse to allow proof as to the expense of the removal from such land of the personal property of him whose land was being taken, and said that the expense of such removal could not be considered as an element of damages for the condemnation of real estate for public uses.

The case of *Atchison, Topeka & Santa Fe R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422, is urged as an authority for the awarding of damages of the sort here under discussion. But we need not consider whether that case is an authority or not, for the reason that it was distinguished and practically overruled by the later case of *Braun v. Railroad*, 166 Ill. 434, 46 N. E. 974. So, we cannot see that respondent's contentions are at all aided by either of the above cases.

The case of *Railroad Company v. Piel*, 87 Ky. 267, 8 S. W. 449, is cited by respondent as an authority for a modicum of the position taken by it. This case seems to an extent to bear out respondent's contention touching the phase of its right to damages for and during the interruption of its business caused by the taking of its property. We need not consider whether this is so or not, nor need

we microscopically analyze the latter case, but pass it by, saying merely that it is opposed in its doctrine by the great weight of authority everywhere and in this state as well, and that in reaching the conclusion stated the learned court wholly overlooked and failed to consider the necessarily hypothetical and speculative character of such damages. *United States v. Wiener*, 127 C. C. A. loc. cit. 385, 210 Fed. 832.

The rule announced by Mr. Lewis, in his excellent work on Eminent Domain, is as follows:

"While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the Constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and, where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part of the purpose proposed. The business conducted upon the property is not taken, and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sale of the general good in which he participates. In a few instances, the statute has expressly provided that compensation should be made for injury to business." *Lewis on Eminent Domain*, § 727; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; *Jacksonville & S. E. Ry. Co. v. Walsh*, 106 Ill. 253; *Chicago & Evanston R. Co. v. Dresel*, 110 Ill. 89; *De Buol v. Freeport & Mississippi River Ry. Co.*, 111 Ill. 499; *Braun v. Metropolitan W. S. El. R. Co.*, 166 Ill. 434, 46 N. E. 974; *Cook & R. Co. v. Sanitary District*, 177 Ill. 599, 52 N. E. 870; *Marshall v. Chicago*, 77 Ill. App. 351; *Sanitary District v. McQuirl*, 86 Ill. App. 392; *Whitman v. Boston & Maine R. R. Co.*, 3 Allen (85 Mass.) 133; *Cobb v. Boston*, 109 Mass. 438; *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Sawyer v. Met. Water Board*, 178 Mass. 267, 59 N. E. 658; *Bailey v. Boston, etc., R. Co.*, 182 Mass. 537, 66 N. E. 203; *Boston Belting Co. v. Boston*, 183 Mass. 254, 67 N. E. 428; *Nashua River Paper Co. v. Commonwealth*, 184 Mass. 279, 68 N. E. 209; *St. Louis, etc., R. Co. v. Knapp-Stout & Co.*, 160 Mo. 396, 61 S. W. 300; *St. Louis, etc., R. Co. v. Continental Brick Co.*, 193 Mo. 698, 96 S. W. 1011; *Petition of Mt. Washington Road Co.*, 35 N. H. 134; *Ranlet v. Concord R. Co.*, 62 N. H. 561; *Matter of Department of Public Parks*, 53 Hun. 290, 6 N. Y. Supp. 750; *Van Buren v. Fishkill Waterworks Co.*, 50 Hun. 448, 3 N. Y. Supp. 336; *Matter of Grade Crossing Com'rs*, 17 App. Div. 54, 44 N. Y. Supp. 844; *Matter of Gilroy*, 26 App. Div. 314, 49 N. Y. Supp. 798; *Cincinnati Iron Stove Co. v. Cincinnati So. Ry. Co.*, 9 Ohio Cir. Ct. 103; *Schuylkill Navigation Co. v. Farr*, 4 Watts & S. (Pa.) 362; *Schuylkill v. Thoburn*, 7 Serg. & R. (Pa.) 411; *Pittsburgh & Western R. Co. v. Patterson*, 107 Pa. 461; *Hamilton v. Pittsburgh, etc., R. Co.*, 190 Pa. 51, 42 Atl. 369, 51 L. R. A. 319; *Schonhardt v. Pa. R. Co.*, 216 Pa. 224, 65 Atl. 543; *Porter v. Scranton City*, 36 Pa. Super. Ct. 218; *Fuller v. Edings*, 11 Rich. (S. O.) 239; *Eddings v. Seabrook*, 12 Rich. (S. C.) 504; *Richmond, etc., Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Hunter v. Chesapeake, etc., Ry. Co.*, 107 Va. 153, 59 S. E. 415, 17 L. R. A. (N. S.) 124; *Stadler v. Mil-*

waukee, 84 Wis. 98; *Esch v. Chicago, etc., R. Co.*, 72 Wis. 229, 39 N. W. 129; *Union Steamboat Co. (C. C.)* 39 Fed. 723; *Bigg v. Corporation of London*, L. R. 15 Eq. Cas. 376; *Queen v. Vaughn*, 4 L. R. Q. B. 190.

In the case of *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290, the Georgia Supreme Court said:

"The measure of her damages is the injury to her property which is injuriously affected by the public improvement. In arriving at that damage, neither the profits in the business conducted on the premises, nor the cost to the tenant of the fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor the diminution in value of fixtures, improvements or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

The general rule as regards including as elements of damages expenses of removal of personal property, as well as that regarding the status of fixtures, below discussed, is thus stated by Mr. Lewis:

"Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damages to the soil itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost), and what they were worth to be removed from the premises and applied to other purposes. In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood. But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid. But when both parties proceed upon the theory that the owner is entitled to the cost of removing machinery, the condemning party cannot complain. Where the statute provided that the commissioners should 'inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess damages which said owner will sustain by such appropriation of his land,' it was held that the words in italics required that compensation should be made for the removal of personal property." 2 *Lewis, Em. Dom.* § 728, citing *Blincoe v. Railroad*, supra.

But this matter has also been before our Missouri courts, and, if we are now to hold that respondent is entitled to damages for the three elements under discussion, we must of necessity overrule two Missouri cases wherein the point involved was squarely lodged, and wherein it was held that no such compensation is allowable under our laws. *St. Louis, etc., Railroad v. Knapp-Stout & Co.*, 160 Mo. 396, 61 S. W. 300; *Springfield, etc., R. Co. v. Schweltzer*, 173 Mo. App. 650, 158 S. W. 1058. In the *Knapp-Stout* Case, supra, at page 412 of 160 Mo., page 303 of 61 S. W., Judge Gantt, writing the opinion of the court, in defining the measure of damages, and touching the identical question

of the allowance of damages of the sort here under discussion, said:

"It is the settled law of this court that the measure of compensation and damages in cases in which only a part of a tract in condemned, as in the case at bar, is the market value of the land taken for the right of way, and the damages to the remainder by reason of the railroad running through it, less any benefits that are peculiar to the tract of land arising from the running of the road through it. *Bridge Co. v. Ring*, 58 Mo. 491; *Railroad v. Waldo*, 70 Mo. 629; *Railroad Co. v. Story*, 98 Mo. 611 [10 S. W. 203]; *Railroad Co. v. Baker*, 102 Mo. 553 [15 S. W. 64]. Injury to business, loss of profits, inconvenience to the owner, damage to personal property, or the expense of removing it, are not to be estimated as distinct elements of damages."

In the very late case ruled by the Springfield Court of Appeals practically all of the Missouri cases were examined and discussed, and such of them as seem upon casual glance to oppose the conclusion reached were successfully distinguished. Many of these cases are urged upon us as announcing a different rule, but we do not think they so far announce a different rule when carefully considered, and when the precise point up for judgment is regarded, as to warrant us in overruling those on all fours; a fortiori, when they but follow the overwhelming weight of the authorities upon these questions everywhere. Since all of these cases have been so lately fully and ably discussed in *Railroad v. Schweitzer*, supra, we need not take up space to consider them again.

In the *Knapp-Stout Case*, supra, precisely the same question was before this court that was before the Oklahoma court in the *Blincoe Case*, viz., the question of whether he whose land was taken for public uses could recover the expenses necessarily incurred in the removal of personal property from the land, to wit, lumber, lying thereon. In both cases parts of lumber yards were taken, yet we ruled that such expenses were not proper elements of damages.

At first glance, it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattels who is compelled to remove them, for his expense in so removing them to a point at least beyond the edge of the right of way. It is equally clear, on the other hand, that no logical reason can be found for compensating him for the expense of removal beyond such point. This is so, for the reason that A. might desire to move his chattels only into the next adjoining house, while B. might desire to have his taken several blocks, or even several miles, and C., on the other hand, his business being broken up, might desire to remove his goods to some other place, or city. No reason in logic therefore can be found for the condemner's paying more than is sufficient to move the personal property off the right of way. A rule which would require the condemner to do more would be variant and indefinite, and therefore speculative.

It is obvious that a lessee stands in no better condition touching his right to be compensated for expenses of this sort than does the owner of the fee. In fact, the reasons are more cogent for permitting the owner of the fee to recover as damages expenses of this sort than they are in favor of the lessee, for the lessee may be compelled to move at the end of his term; and, since his occupancy of the premises is founded on contract, it may even be said that the presumption is that he will move. Or if there be no such presumption, or no presumption either way, the lessee is not aided by a discussion of this moving matter, for arguments in his favor in this behalf are founded upon the presumption that he will renew his lease and remain at the end of his term. But as regards the owner whose lands are taken, no requirement exists for his removal at any time, unless he sells the premises—a contingency too remote for consideration in this connection.

We apprehend that back of the rule against allowing damages of this nature also lie the considerations that loss of profits during removal is necessarily so speculative as to afford as a measure of computation no rule except a mere guess; that likewise, beyond the mere moving of goods to a point just outside the bounds of the right of way condemned, the expenses of removal being variant, damages would be arbitrary and highly speculative, and removal but to a point only just beyond the edge of the right of way would fall into the category *de minimis*; and that, moreover, the inclusion of expenses of removal of personal property and compensation for loss of profits during removal is merged and included in the price paid for the easement to the owner, or to the lessee, as the case may be. Viewed as a forced purchase by the public for the public good, as a condemnation action is in the last analysis, the latter consideration seems of great weight; for, if he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily no thought would occur to either one, absent agreement to that end, that the seller should be compensated by the buyer for the removal from the sold premises of mere personal goods and chattels. That one is a voluntary sale, and the other an involuntary sale, does not peculiarly detract from the force of the argument.

But be all these things as may be, the overwhelming weight of authority both in this state and in all other jurisdictions is as we hold, and having had other views in the beginning, by reason of the apparent, rather than real, crying equities in the case, we have yet been compelled to follow the law as it is written both here and elsewhere. To rule otherwise would necessitate the overruling of at least two Missouri cases squarely in point and of most carefully distinguishing three or four other cases. *Railroad v. McGrew*, 104 Mo. 282, 15 S. W. 981; *Hannibal*

Bridge Co. v. Schaubacher, 57 Mo. 582; Railroad v. Porter, 112 Mo. 361, 20 S. W. 568.

We therefore hold, in consonance with the great weight of authority everywhere, that respondent was not entitled to recover for loss of profits in its business during the removal of its stock of goods; nor for the expense of the removal of its stock of goods and personal property, as contradistinguished from fixtures, from its old location which was condemned, to a new location; nor for the depreciation in value of such personal property and stock of goods, caused by such removal and reinstallation.

II. What we have said above disposes of a part of the contentions involved in contention 1 supra; that is, to that part of this contention having to do with the cost of the removing of mere personal property and chattels. The other phase of the case mooted in both contentions 1 and 2, viz., that touching the cost of removal of trade fixtures, which we left over for subsequent separate discussion, presents a somewhat different question. We assume, of course, nothing further appearing, that the word "fixtures" is used in its legal and technical sense, and not as a mere mercantile designation applied to chairs, tables, iron safe, et id omne genus.

A fixture appertains to the real estate itself, which real estate to the extent, at least, of an easement therein, is being taken by condemner. We need not enter into any intricate discussion of fixtures (since such a discussion does not belong here) for the reason above given, which is well settled, to wit, that a trade fixture such as is herein involved, and such as was to an extent involved in the case of Hannibal, etc., R. Co. v. Schaubacher, supra, is a part of the realty; and since it passes ordinarily as between vendor and vendee, upon a voluntary sale, we see no reason why it should not pass to the condemner upon an involuntary transfer, such as this is. We find nothing in the Missouri cases, nor in the cases from other jurisdictions, which seriously militates against this view. Those mentioned below sustain it. It seems to be right on principle; to do full justice and afford full compensation.

In passing we may say, arguendo, that the view that the owner should be compensated for the expense of tearing out, moving, and reinstalling fixtures in another location has much of logical cogency. But it seems out of consonance with our own rulings, and subject to the objection that the expense of carriage from the old to the new location would be speculative, and so, having reached a view which affords full compensation for the injury done, we hesitate to overrule our former holdings. Many of the cases from other jurisdictions which have been urged upon us as sustaining all of respondent's contentions are cases which allowed compensation for removing and reinstalling fixtures, and ruling that such compensation was permissible. This for the reason that if the owner of the

land or lease condemned take such fixtures off the hands of the condemner, who ordinarily does not want them, thus minimizing the damages accruing, both the owner and the condemner ought to be held to the rule that their reciprocal duty toward each other is to so act as not unduly to augment the damages arising from the appropriation of the land.

In a very late case, decided in the United States Circuit Court of Appeals for the Second District, it was held that an award in a condemnation proceeding for the value of certain trade fixtures, to wit, machinery of an engraving plant, was proper; the court holding that, in condemnation proceedings where the land is taken in invitum, the rule which obtains as to such fixtures is analogous to that between vendor and vendee, and not that between landlord and tenant. *United States v. Wiener*, 127 C. C. A. 382, 210 Fed. 832. In the latter case the court quoted with approval what was said in *Block Boundary* (Avenue A), 66 Misc. Rep. 488, 122 N. Y. Supp. 321, wherein it was ruled:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

In the above case of *United States v. Wiener*, the court, upon the other phases of this case discussed supra, says:

"There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The District Court allowed \$2,500 as damages which may result from the change of location. This was based upon hypothesis and speculation, and we are unable to find any controlling authority to support the award."

Since houses, which are but fixtures to real estate, pass to condemner (*Kansas City v. Morse*, 105 Mo. loc. cit. 519, 16 S. W. 893), and since trade fixtures under the vendor and vendee rule would pass to the buyer, they pass here to the condemner, and it must pay for them. Respondent, absent an election on its part and consent of the city to that end, could not take fixtures which the city had condemned, nor obtain as damages pay for moving property which by condemnation became that of the city. *Kansas City v. Morse*, 105 Mo. loc. cit. 519, 16 S. W. 893; *Springfield, etc., R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058.

It follows from all this that respondent was entitled to be paid the reasonable market value of its fixtures (contradistinguished from mere goods and chattels) which were contained in, and affixed to, the leased premises condemned. But the apparent present status of the instant case causes us to further rule that, if appellant does not want

these fixtures, and respondent elects, or has elected, to take them (or, as seems probable, has already taken them), then damages which appellant will be held to pay as such value of them should be recouped to the extent of their reasonable market value, as they stood in their old location, when confronted, however, as diminishing such value, by the necessity of immediately tearing them out and re-installing them elsewhere.

Upon the other phases of the case, and to the extent last discussed upon the latter one, we are of the opinion that the court erred, and that for such error this case must be reversed and remanded, to be retried in such wise as is not inconsistent with the views herein expressed. Let this be done. All concur.

CITY OF ST. LOUIS v. ST. LOUIS, I. M. & S. RY. CO. et al. (No. 17547.)

(Supreme Court of Missouri, Division No. 2. Jan. 6, 1916.)

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by the City of St. Louis against the St. Louis, Iron Mountain & Southern Railway Company and others to condemn land. From a judgment awarding compensation to Frank B. Stephan and another, the City appeals. Reversed and remanded.

Chas. H. Daues and Truman P. Young, both of St. Louis, for appellant. Edw. J. White and J. F. Green, both of St. Louis, for respondents.

FARIS, P. J. This case being a companion case to City of St. Louis, Appellant, v. R. Co., Regal Buggy Company, Respondent, 182 S. W. 750, this day decided, and having been argued and submitted with it, and involving the same questions as are to the fore in the Regal Buggy Company Case, is to be ruled by it.

Let it be reversed and remanded, to be retried in such manner as is not inconsistent with the views expressed in the Regal Buggy Company Case. It is so ordered. All concur.

CITY OF ST. LOUIS v. ST. LOUIS, I. M. & S. RY. CO. et al. (No. 17550.)

(Supreme Court of Missouri, Division No. 2. Jan. 6, 1916. Rehearing Denied Feb. 15, 1916.)

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by the City of St. Louis against the St. Louis, Iron Mountain & Southern Railway Company and others to condemn land for a public use. There was a judgment awarding compensation to the Mueller Brothers House Furnishing Company, and the City appeals. Reversed and remanded.

Charles H. Daues and Truman P. Young, both of St. Louis, for appellant. Sale & Frey, of St. Louis, for respondent.

FARIS, P. J. This case being a companion case to City of St. Louis, Appellant, v. R. Co., Regal Buggy Company, Respondent, 182 S. W. 750, this day decided, and having been argued and submitted with it, and involving the same questions as are to the fore in the Regal Buggy Company Case, is to be ruled by it.

Let it be reversed and remanded, to be retried

in such manner as is not inconsistent with the views expressed in the Regal Buggy Company Case. It is so ordered. All concur.

PENNEY & PENNEY FEED CO. v. KRAMER. (No. 11726.)

(Kansas City Court of Appeals. Missouri. Dec. 6, 1915. Rehearing Denied Feb. 7, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 1033—**REVIEW—HARMLESS ERROR.**

Instructions imposing a heavier burden on plaintiff than was required under the pleadings and evidence cannot be complained of by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. \Leftrightarrow 1033.]

2. ESTOPPEL \Leftrightarrow 92—**EQUITABLE ESTOPPEL—RIGHT TO INVOKE.**

Defendant's gristmill, which was being operated by two relatives, was destroyed by fire, and with it grain belonging to plaintiff was destroyed. A policy on the mill, covering grain received or placed therein on consignment or held in trust, was collected by defendant, who received indemnity for plaintiff's grain. Held that, as the policy was in defendant's name and as he received the proceeds, he is, regardless of his relation to the operators of the mill, estopped from denying liability to plaintiff for the insurance money received for plaintiff's grain.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 260-263; Dec. Dig. \Leftrightarrow 92.]

3. EVIDENCE \Leftrightarrow 178—**DOCUMENTARY EVIDENCE—SECONDARY EVIDENCE.**

Where plaintiff demanded insurance money received by defendant under a policy which covered plaintiff's grain, and a mill that was destroyed, a copy of the policy is admissible in evidence, the original having been destroyed after payment of the loss.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. \Leftrightarrow 173.]

Appeal from Circuit Court, Buchanan County; Thos. B. Allen, Judge.

"Not to be officially published."

Action by the Penney & Penney Feed Company against J. E. Kramer. From a judgment for plaintiff, defendant appeals. Affirmed.

John S. Boyer, of St. Joseph, and Broadus & Crow, of Kansas City, for appellant. Spencer & Landis, of St. Joseph, for respondent.

JOHNSON, J. In the first count of the petition plaintiff, a corporation, sued to recover \$483, the value of a carload of corn it delivered to a gristmill operated by defendant in St. Joseph. Defendant undertook to grind the corn into feed and deliver the feed to plaintiff, but was prevented by a fire which destroyed the mill and its contents on October 11, 1912. The ground on which the alleged liability is predicated is that defendant had a policy of fire insurance on the contents of the mill, including grain and feed belonging to customers, and in his proofs of loss and subsequent settlement with the insurance company, included and received in-

demnity for the loss of plaintiff's corn. In the second count plaintiff sued as the assignee of a similar demand for \$33, the value of certain hay stored in the mill by another dealer in feed. The answer is a general denial. A trial to a jury resulted in a verdict and judgment for plaintiff on both counts, and defendant appealed.

At the time the policy was issued defendant owned the mill, but the business was carried on by a corporation of which defendant was a stockholder, and the policy was issued to the corporation. Afterward defendant took over the business and had the insurance transferred to him. He made some sort of an arrangement for his brother and the latter's daughter to run the business, either for him, or on their own account. There is a dispute over the nature of the arrangement, but there is substantial evidence that defendant rented the mill to his brother and niece, sold them the personal property therein which belonged to him, taking their note for \$976 in payment of the purchase price, with the understanding, as stated by the niece, that "we were to run the mill as best we could, and at any time that he saw fit to take the mill back, we were to deliver to him either the money or the goods." In short defendant retained the title to the property—the sale being conditional—and, of course, carried the policy of insurance in his own name. The corn and hay in controversy were received at the mill in the usual course of business, while defendant's brother and niece were in charge as stated, and were destroyed by fire, which consumed the mill and its contents. They were there as bailments, the title remaining in the respective bailors.

The policy, which was in the standard form, covered not only the stock of grain, hay, feed, sacks, etc., owned by defendant, but also all such commodities in the mill or afterwards received and placed therein on consignment, or held by defendant in trust or on storage, etc. The fire destroyed the books of the business, but defendant, with the assistance of his brother and his niece, prepared proofs of loss which defendant verified by his affidavit and forwarded to the insurance company. The entire loss was adjusted at \$1,787.38, and that sum was paid to defendant by the company.

[1, 2] It appears from the testimony of the brother and niece that the full amount of the loss on the corn and hay in dispute was included in the proofs and adjustment, and defendant is placed in the reprehensible position of refusing to pay to the rightful owners money he received as trustee for their account. Defendant in his testimony denies that the loss on property not his own was included in the adjustment, but the most that may be said of his testimony is that it raised an issue of fact for the jury to determine. The jury decided it in favor of plain-

tiff, under instructions which also submitted other issues. This was unnecessary, but it was not prejudicial error, since the instructions merely imposed a heavier burden upon plaintiff than was required of it under the pleadings and evidence. The fact that defendant, under the terms of the policy, successfully asserted the right to indemnity for property in the mill on consignment or in bailment, was enough to charge him with liability to the bailors of such property. With that fact established, he is estopped from asserting in this action that not he, but his brother and niece, as his tenants and vendees, were the bailees. It is immaterial whether his brother and niece were his agents in the operation of the business or were acting for themselves. With their acquiescence and active co-operation, he collected the indemnity as bailee, and he must account for it as such to its rightful owners. While it is true that estoppels are odious, and the doctrine should never be applied without a necessity for it, it should be applied where a person against whom it is used has so conducted himself that, unless estopped, he would be saying something contrary to his former conduct. It is a rule of conscience, founded on the fundamental principle of morality, that a man should not be suffered to profit by taking inconsistent positions. *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525.

[3] There was no error in the admission in evidence of a copy of the policy, since it appears by competent evidence that the original, in the usual course of business was delivered to the insurer and was destroyed after the loss was adjusted and paid.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

WILSON v. JONES et al. (No. 11810.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916. Rehearing Denied
Feb. 7, 1916.)

1. LANDLORD AND TENANT §164, 167—APARTMENT HOUSES—PERSONAL INJURIES—LIABILITY OF LANDLORD.

The owner of an office building or apartment house, who retains control over the common entrance, stairways, elevators, halls, etc., owes a duty of reasonable care to construct and maintain such places and utilities in a reasonably safe condition for use, and a negligent breach of such duty will give a cause of action to a tenant or invitee for personal injuries caused by such breach.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-637, 639, 641, 668-674, 676-679; Dec. Dig. §164, 167.]

2. LANDLORD AND TENANT §167—APARTMENT HOUSES—AREAWAYS—INJURY TO EXPRESSMAN.

Where a coping along a wall of a basement areaway of an apartment house was a narrow passageway from the alley to the rear stairs, at which articles must be delivered, and the areaway was unguarded and unlighted, an expressman, handling the rear end of a trunk, who falls into the areaway on a wet, dark night, has

a cause of action against the landlord, who retains control of the common entrance, stairways, etc., of the apartment house.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 668-674, 670-679; Dec. Dig. ¶167.]

8. LANDLORD AND TENANT ¶169—APARTMENT HOUSES—INJURIES TO EXPRESSMAN—CONTRIBUTORY NEGLIGENCE.

Under such facts, plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. ¶169.]

Appeal from Circuit Court, Jackson County; A. C. Southern, Judge.

"Not to be officially published."

Action by William A. Wilson against Mary C. Jones and W. D. Jones. From a judgment for plaintiff against both defendants, both defendants appeal. Reversed as to W. D. Jones on confession of error, and affirmed on the merits as to Mary C. Jones.

Sebree, Conrad & Wendorff, of Kansas City, for appellants. T. F. Railsback and Reed & Harvey, all of Kansas City, for respondent.

JOHNSON, J. Plaintiff sued to recover damages for personal injuries he sustained on the night of October 10, 1913, by falling into an unguarded and unlighted areaway on premises owned by defendant Mary C. Jones, in Kansas City, which he had entered on the implied invitation of the owner. The answer is a general denial and a plea of contributory negligence. The jury returned a verdict for plaintiff for \$700, judgment was rendered thereon against both defendants (who are husband and wife), and, after their motions for a new trial and in arrest of judgment were overruled, both defendants appealed.

Plaintiff confesses that under the decision of the Supreme Court in *Boutell v. Shellabarger*, rendered March 2, 1915, and reported in 264 Mo. 70, 174 S. W. 384, L. R. A. 1915D, 847, the judgment was erroneously rendered against the defendant husband, and should be reversed as to him, but argues that it should be affirmed as to Mary C. Jones, the owner of the property. Counsel for Mrs. Jones contend that her request for a peremptory instruction should have been sustained, on the ground that the evidence entirely fails to support the allegation that plaintiff's injury was caused by negligence of Mrs. Jones, to whom we shall hereafter refer as the defendant, and does show, as a matter of law, that the injury was caused by plaintiff's own negligence.

Defendant was the owner of a three-story and basement apartment building at the southeast corner of Fourteenth street and Troost avenue. There were six suites of rooms, two on each floor, occupied by various tenants, and defendant retained control over the stairways, halls, and other portions of

the building used in common by the tenants. At the rear were latticed porches for all the apartments, and the rear stairway, ascending in the space between the north and south porches, also was latticed, except at the entrance from the alley. The basement floor, on which were the apartments of the janitor employed by defendant, was 40 inches lower than the alley, and an areaway on the level of the basement floor extended eastward from the east wall of the building proper to the east line of the rear porches. A wall between the areaway and the alley was 6 or 7 inches higher than the alley, and was capped by stone coping 21 inches wide. The top of the coping was 4½ or 5 feet below the outer edge of the first floor of the rear porch and stairway structure, and this space was open at the entrance to the stairway from the alley. The stairway started from the floor of the areaway, and, ascending, turned from an east to a north direction, attaining the latter direction at a step which was at the top of the coping and projected over and rested upon the coping 6 or 7 inches. Thence upward, to the landing on the first floor, the east line of the stairway was on a line with the step just mentioned, so that the top of the coping south of that step served as a narrow approach to the stairway to a person coming from the alley, as plaintiff did just before his injury. He and the driver of a motor truck were engaged in delivering baggage, and had a trunk weighing 150 pounds to deliver to an apartment on the third floor. In obedience to a notice posted at the front entrance they drove to the alley, unloaded the trunk, and carried it down the alley to the rear entrance, intending to take it up the stairway to the third floor.

Plaintiff had the rear end of the trunk and followed the lead of the driver. The course they had to take was, first, south down the alley, then a turn to the west as they stepped upon the coping, and thence a turn northward to ascend the steps. The driver had reached the second step, when plaintiff, who had stepped onto the coping and was proceeding to swing his end around toward the west, in order to put the trunk in proper line, inadvertently stepped off the coping, fell into the areaway, and was injured. The evidence of plaintiff tends to show that the night was rainy and very dark, and it is conceded that no light was maintained at this entrance, nor any guard placed along the west edge of the coping to guide and protect persons approaching the stairway from the alley.

[1] The owner of an office building or apartment house, who retains control over the common entrance, stairways, elevators, halls, etc., owes a duty of reasonable care to construct and maintain such places and utilities in a reasonably safe condition for

use, and a negligent breach of such duty will give a cause of action to a tenant, or person visiting the building on business with a tenant, for personal injuries caused by such breach. Plaintiff, entering the building on business with a tenant at the proper entrance, became an invitee of defendant, the owner, and as such was entitled to assume that defendant, who owed him the duty of reasonable care, had provided a reasonably safe entrance for his use.

[2] Without a barrier inclosing the narrow path on the top of the coping, or a light to disclose the difficulties and dangers of the place at night, the entrance was a veritable trap or pitfall, of such unusual character as to expose an invitee, such as plaintiff, who was unfamiliar with the place, to unusual hazard. In an effort to bring this case within the doctrine of *Richardson v. Boston*, 156 Mass. 145, 30 N. E. 478, defendant contends there is nothing to show that there was anything improper or unusual about this areaway. It may be granted that basement areaways are common features of office and apartment buildings; but it does not follow that it is a common practice to maintain them in unguarded and obscure proximity to entrances, to the undoing of unwary invitees, and if such were the practice its prevalence should not exempt it from condemnation as an actionable wrong. Some customs are more honored in the breach than the observance, and this, if there is such a custom, would be one of them. No other reasonable conclusion may be drawn from the evidence of plaintiff than that negligence of defendant was a proximate cause of the injury.

[3] We do not share the view of counsel for defendant that plaintiff was guilty in law of negligence which directly contributed to his injury. Proceeding in darkness as they were, it was the duty of plaintiff to move cautiously, and not to rely entirely upon the presumption that defendant had provided a reasonably safe way for them to travel. The principle of the cases relied upon by defendant is that a person coming into an unfamiliar situation, where darkness renders the eyesight ineffective, must act with the caution expected of an ordinarily careful and prudent person, and will not be heard to complain of negligence in others if he failed to make proper use of his other senses for his own protection. *Rohrbacher v. Gillig*, 203 N. Y. 413, 96 N. E. 733; *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420; *Piper v. N. Y. Central Railroad*, 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724, 66 Am. St. Rep. 560; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580; *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Diamond v. Kansas City*, 120 Mo. App. 185, 96 S. W. 492; *Burnett v. Railroad*, 172 Mo. App. 51, 154 S. W. 1135; *Dey v. Rail-*

way, 140 Mo. App. loc. cit. 473, 120 S. W. 134; *Stepp v. Railroad*, 85 Mo. loc. cit. 235.

We think the issue of plaintiff's care in the situation disclosed was one of fact for the jury to determine. Though plaintiff and the driver picture the darkness as intense, the latter testified he was able to see objects in very dim and vague outline, but with enough definiteness to enable him to distinguish and reach the stairway in safety. Plaintiff, at the rear end of the trunk, was not so well placed to see, and was compelled to follow his leader. The jury were entitled to infer that an ordinarily careful and prudent person in such situation would assume that, if the pathway was safe for the leader, it was safe for him, and that plaintiff should not be pronounced negligent for not feeling to either side with his feet, to discover if the path were on the very brink of a dangerous pitfall.

The request for a peremptory instruction was properly refused. The judgment is affirmed. All concur.

VINING v. LIPPINCOTT. (No. 11842.)

(Kansas City Court of Appeals. Missouri.

Feb. 7, 1916.)

PRINCIPAL AND AGENT \S 81—COMMISSIONS—RIGHT TO.

A defendant, a manufacturer of soda fountains, authorized plaintiff to sell such appliances for an agreed commission; the contract therefor reciting that defendant might change the terms and prices of sale, but not the commissions. Plaintiff procured an order for a soda fountain which, though it was not accompanied by the cash required, was accepted by defendant, who manufactured the fountain and attempted to hold the purchaser. Some time after date fixed for delivery plaintiff wrote defendant that he thought he could get the purchaser to accept the fountain; the purchaser having failed to comply with its contract because the amusement park for which it desired the fountain was not complete. Thereafter defendant made the sale to the purchaser directly for an amount less the agent's commission. Held that, as defendant had waived strict compliance with the contract, it could not thereafter make a new contract of sale and avoid payment of commission to plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. \S 81.]

Appeal from Circuit Court, Jackson County; D. E. Bird, Judge.

Action by H. B. Vining against A. H. Lippincott, begun in justice court, and appealed to circuit court. From a judgment for plaintiff, defendant appeals. Affirmed.

Ellis, Cook & Barnett and Roy K. Dietrich, all of Kansas City, for appellant. W. B. Dickinson, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff and defendant entered into a written contract whereby plaintiff was authorized to sell for defendant a certain described soda fountain manufactured by defendant in Pennsylvania and

known as "Leader," for the price of \$1,600, in certain payments, viz., \$80 should accompany the order, \$240 to be paid April 1, 1912, upon tender of fountain, and balance in installment notes. Plaintiff's commission was to be 15 per cent., amounting to \$240, if the sale was in compliance with defendant's rules upon settlement by the purchaser made in compliance with the order to be taken by plaintiff. Plaintiff on November 9, 1911, procured an order and sold a fountain to an Electric Park Company in Kansas, to be shipped from Philadelphia April 15, 1912.

[1] But the Park Company did not accompany the order with \$80 cash as agreed. Nevertheless defendant accepted the order and made the fountain, undertaking to collect the \$80 itself, and as late as the 3d of September 1912, recognized that it was yet in force and threatened suit. Defendant claims the contract was terminated, and that in the following April it sold the fountain to the Park Company. But that fountain was manufactured under the sale made by plaintiff under an order which defendant recognized after it knew of noncompliance with its terms by the Park Company.

It seems that failure to get the park in proper condition caused the failure on part of that company to comply with the terms of purchase, but it wanted the fountain when it got in position to put it in use, and plaintiff wrote defendant in February, 1913, being near ten months after the fountain was to have been delivered, that he thought he could get the company to take it, and in a few weeks thereafter the Park Company did take it. The effect of this latter transaction between defendant and the Park Company is the principal point of dispute between the parties. Defendant insists that plaintiff failed, and that its negotiation with the Park Company "was a new transaction." We cannot agree to that. Defendant had waived a strict compliance with the order taken by plaintiff, and it finally accepted the purchaser discovered and obtained by plaintiff at the same price, less plaintiff's commission, that was to be paid in the original sale.

Defendant, with knowledge that the terms of payment in the order had not been met, itself undertook to collect them, and proceeded to, and did, manufacture the fountain under the order. In other words, it accepted the order and itself undertook to perform a duty which it now says plaintiff should have performed. We regard the action of defendant in what it terms a new transaction whereby it sold to the Park Company as an attempted avoidance of its obligation to plaintiff, and the small change made in the terms, including the same price, less plaintiff's commission, will not justify dropping plaintiff out of consideration after having accepted his labor and his purchaser. The fact that defendant, on its own motion,

made a sale for a less consideration than it authorized plaintiff to offer did not deprive the latter of his right to a commission. *Glade v. Mining Co.*, 129 Mo. App. 443, 445, 107 S. W. 1002.

Much is said in defendant's brief concerning plaintiff's obligations under the contract; but with it all the fact stands out that it has accepted plaintiff's purchaser of a fountain for the same net price agreed to be paid by the contract negotiated by plaintiff, and that it waived terms of the order it now insists upon; it being provided in the contract engaging plaintiff as agent that defendant could change the terms and prices of sale, "but not the commissions to the salesmen." The case was begun before a justice of the peace, where formal or technical pleadings are not required.

In view of the conceded or undisputed facts in the case, we think no reversible error is to be found in the instruction for plaintiff, and though defendants were more favorable than its case warranted no complaint can be made by it on that score. Those instructions practically directed a verdict for defendant, unless the Park Company complied with the order as to payments, when the undisputed evidence shows that defendant had waived such provisions.

The judgment was manifestly for the right party, and is affirmed. All concur.

KANSAS CITY AUTOMOBILE SCHOOL CO. v. HOLCKER-ELBERG MFG. CO.

(No. 11816.)

(Kansas City Court of Appeals. Missouri. Feb. 7, 1916.)

1. BAILMENT §18—ARTISAN'S LIEN—RIGHT TO LIEN—"CHASSIS."

Plaintiff employed defendant to construct an automobile body and put it upon his "chassis," which, as applied to a motor car, means the rectangular metal framework, as distinguished from its body and seats, but including its accessories for propulsion, as the tanks, motor, etc., and general running gear. Held that, while there can be no artisan's lien unless the labor or expense is bestowed or performed on the identical or specific thing left in the artisan's possession, defendant was entitled to a lien on the chassis, as the making and fixing of the body on the chassis necessarily involved some work on it in order to fasten it permanently thereto, and the work, if well done and according to the contract, added value to the chassis, and made it a completed and entire instrumentality.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. §18.]

2. BAILMENT §31—SUITS FOR ENFORCEMENT OF LIEN—QUESTIONS FOR JURY.

In an action in which defendant sought a recovery for constructing an automobile body for plaintiff's automobile, the jury was not bound to accept the testimony of plaintiff's witnesses that the body was not constructed according to contract, and that, when placed on the automobile its operation was impossible, where there was evidence that the work was well done and in accordance with the contract, and that the operation of the automobile was perfectly satisfactory, and no complaint was made

as to it until after it was discovered by plaintiff that defendant was not going to allow the automobile to be taken away until the work was paid for.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. ¶31.]

3. WORK AND LABOR ¶30—ACTIONS—REASONABLE VALUE—QUESTIONS FOR JURY.

In an action in which defendant sought to recover on a quantum meruit for constructing an automobile body for plaintiff's automobile, the jury were the judges of the facts, and the reasonable value of the work was one of the questions for it to pass upon, and it was not bound to accent the estimates placed thereon by defendant's witnesses, and hence a verdict for \$150 was responsive to the issues, though this was less than the lowest estimate placed by the evidence on the value of the work.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. ¶30.]

4. WORK AND LABOR ¶30—ACTIONS—REASONABLE VALUE—QUESTIONS FOR JURY.

Though the parties to a contract for the construction of an automobile body agreed upon a contract price, where defendant sought to recover for such work upon a quantum meruit, it was for the jury to say what was a reasonable price.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. ¶30; Contracts, Cent. Dig. § 130.]

5. WORK AND LABOR ¶29—EFFECT OF EXPRESS CONTRACT—RECOVERY ON QUANTUM MERUIT.

That there was a contract price agreed upon by the parties for work for which a recovery was sought did not prevent defendant from placing its case upon a quantum meruit, but only prevented a recovery beyond the agreed price.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 56-58; Dec. Dig. ¶29.]

6. TRIAL ¶296 — INSTRUCTIONS — ERROR CURED.

Where, in an action in which defendant sought to recover for work in constructing an automobile body, defendant's instructions purporting to cover its case and direct a verdict in its favor omitted no feature essential to its case, and in plaintiff's instructions the jury were explicitly told that, if the work was not done according to contract and so as to allow the perfect operation of the automobile, or if it was so done that the automobile could not be properly operated, the verdict must be for plaintiff, there was no error in the instructions of which plaintiff could complain, since, where an instruction purporting to cover the whole case and directing a verdict contains all the elements necessary to entitle a party to a recovery, but omits some defensive feature raised by the testimony of the opposite party, such omission is cured if the opposite party obtains an instruction clearly covering such defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ¶296.]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

"Not to be officially published."

Action by the Kansas City Automobile School Company against the Holcker-Elberg Manufacturing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Park & Brown, of Kansas City, for appellant. Scarritt, Scarritt, Jones & Miller, of Kansas City, for respondent.

TRIMBLE, J. This is a suit in replevin, originating in a justice court, going from thence to the circuit court, and coming from there here by appeal on the part of the plaintiff.

Defendant is engaged in the business of manufacturing carriages and other vehicles. Plaintiff owned the chassis of a Tinchler automobile. As applied to a motor car, the term "chassis" means the rectangular metal framework thereof, as distinguished from its body and seats, but including its accessories for propulsion, as the tanks, motor, generator, gear, springs, axles, wheels, tires, fan, and general running gear.

Desiring to have a body constructed and put upon this chassis, plaintiff's president or representative took it to defendant's shop and left it there for that purpose. Defendant agreed to do the work for about \$250—at least not over that. In addition to any agreement the law would imply from such arrangement, the parties agreed that plaintiff was to pay cash for the work when completed, and that defendant was to have a lien upon the chassis for the bill.

Upon completion of the work the defendant notified plaintiff thereof. According to defendant's evidence, plaintiff's president or representative, who took the car to defendant's shop and who made the contract in reference thereto, examined the automobile and expressed himself as well pleased with the job, and then asked for 30 days' time in which to pay for it; he to be allowed in the meantime to take the automobile away. Defendant refused to agree to this, demanding the cash. Plaintiff's representative then asked to be allowed to pay \$100 on it and take the car, agreeing to pay the rest later. This was also refused. The plaintiff failed to pay for the work, and the car was left in defendant's shop. Finally defendant notified plaintiff that, if its bill was not paid, proceedings would be at once begun to obtain payment thereof by sale of the automobile. Thereupon plaintiff brought this replevin suit, and, under the writ, took the chassis from defendant's possession.

Defendant in its answer set up an artisan's lien upon said chassis in the sum of \$235 as the reasonable value of the work done thereon, including the building and placing thereon of said body, and asserting that defendant was entitled to the possession of said car until the value of such work was paid, and praying that it have judgment for the return of said car or judgment against plaintiff and its sureties on the replevin bond in the sum of \$235 and costs of suit.

Upon a trial de novo in the circuit court the jury found for the defendant, and further found that at the commencement of the suit defendant was entitled to the possession of the automobile in question, and that the reasonable value of the work done thereon by

defendant was \$150, and that defendant had been damaged by the taking and withholding of said automobile in the sum of \$14.47. Thereupon the court rendered judgment on said verdict, adjudging the return of the automobile to defendant, or, at the discretion of the latter, the payment of the \$150 assessed by the jury, and also judgment for the damages assessed and for costs. Plaintiff appealed.

[1] It is urged that the body of an automobile is an entirely separate, distinct, and independent article from its chassis, and, as the labor or expense must be bestowed or performed on the identical or specific thing left in the artisan's possession, there could be no lien in this case. But, while we do not question the principle of law invoked, we deny its application to the facts of this case. The making and fixing of the body on the chassis necessarily involved some work on the latter in order to fasten it permanently thereto. The work, if well done and according to contract, certainly added value to the chassis and made it a completed and entire instrumentality. The evidence, even from plaintiff's side, was to the effect that an automobile body is no more a separate and distinct part of an automobile than a buggy body is a separate part of a buggy. Neither is complete without a body of some sort.

[2] Point is made that there is no evidence to support the verdict. Plaintiff introduced evidence tending to show that the body was so constructed and placed on the automobile as that its operation was impossible, and that the body was not otherwise constructed according to contract. Plaintiff's view is that there is no evidence from which the jury could find to the contrary. If this be true, then, of course, defendant was not entitled to a lien. But the jury was not bound to accept the testimony of plaintiff's witnesses in this regard, and there was ample evidence from which the jury could find that the work was well done, and that the body was made and placed upon the automobile in accordance with the contract and in strict compliance with a sketch thereof agreed upon between the parties before the work was done. As to the operation of the automobile there was evidence from which the jury could reasonably find that the automobile was all right and perfectly satisfactory, and that no complaint in regard to it was made until after this suit was brought, or at least until after it was discovered that defendant was not going to allow plaintiff to take it away until paid for.

[3-5] The point that the verdict is not responsive to the issues is without merit. It is based on the fact that the lowest estimate placed by the evidence on the value of defendant's work is \$235, while the jury found it to be only \$150. The defendant's answer was based on a quantum meruit, and the determination of the value was clearly for the

jury. It was not bound to accept the estimates placed thereon by the witnesses for defendant. The jury are the judges of the facts, and the reasonable value of defendant's work is one of the questions for the jury to pass upon. *McDonald v. Mossman*, 181 Mo. App. 475, 168 S. W. 816. Even if the parties agreed upon a contract price of \$235, yet the defendant placed its case upon a quantum meruit which would leave it to the jury to say what was reasonable. The fact, if it be a fact, that there was a contract price, would not prevent the defendant from placing its case upon a quantum meruit basis, but would prevent any recovery beyond the agreed price. *Barnett v. Sweringen*, 77 Mo. App. 64; *Warder v. Seltz*, 157 Mo. 140, loc. cit. 148, 57 S. W. 537. The case of *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476, was a suit on the contract, and not for the reasonable value of the services, and, in addition to this, there was no evidence in that case as to the reasonable value of the services had the petition contained such a count. Hence the verdict was not within the issues, nor did it have evidence to support it. And the Supreme Court therefore held that the fact that the plaintiff did not complain and that the defendant would not have to pay as much as he would have had to pay had the verdict been responsive did not help the matter; that, is did not keep the verdict from being arbitrary, outside of the issues, and without evidence to support it. But in the case at bar the defendant's case was on quantum meruit, and though defendant's evidence as to value was higher than the verdict, the jury were not compelled to accept the evidence of the valuation at par, but could decide for themselves what that value was.

[6] There is no conflict between the instructions for plaintiff and those for defendant. Nor do defendant's two instructions contain reversible error. In one the jury were required to find that the defendant did the work "as ordered by plaintiff." In the other they were required to find that a sketch of the work to be done was approved by plaintiff, and that the work was done "in accordance with such sketch." That is to say, these questions were submitted to the jury, and the jury had to find such facts, along with others, before they could find for defendant. Plaintiff's complaint is that the two instructions purport to cover defendant's case and direct a verdict in its favor, but omit plaintiff's defense that the work was not done in such a manner as to make the automobile capable of being operated. But defendant's instructions omit no feature essential to its case; and in plaintiff's instructions the jury were very explicitly told that, if the work was not done according to contract and so as to "allow the perfect operation" of the automobile, or if the work was so done that the automobile "could not be properly operated," then defendant was not entitled to a lien, and

the verdict must be for plaintiff; so that, taking the instructions as a whole, they clearly submitted the whole case. If an instruction purporting to cover the whole case and directing a verdict contains all the elements necessary to entitle that party to a recovery, but omits some defensive feature raised by the testimony of the opposite party, such omission is cured if the opposite party obtains an instruction clearly covering such defense. We have recently had occasion to go into this question in the case of Bettokl v. Northwestern Coal and Mining Co., decided December 6, 1915, 180 S. W. 1021, not yet officially reported. Therein Ellison, P. J., very clearly states and discusses the rule in this state on the point now under consideration, and we refer to his opinion, and to the authorities therein cited, for a fuller statement of the subject. We need not go into a discussion of the question whether plaintiff's instructions were or were not more favorable than the law warrants.

The contention that no right to a lien existed because the work of defendant was not done upon, and did not enhance the value of, the identical article upon which the lien is claimed, had no question of fact upon which to rest. Hence instructions presenting such feature were properly refused.

There was no error in the trial of this case, and the judgment is affirmed. All concur.

McNEIL v. MISSOURI PAC. RY. CO.
(No. 11673.)

(Kansas City Court of Appeals. Missouri.
Dec. 6, 1915. Rehearing Denied
Feb. 7, 1916.)

1. TRIAL — 139—NEGATIVE EVIDENCE—QUESTION FOR JURY.

Negative testimony that plaintiff and others riding in a bus did not hear crossing signals given by an engine carrying a snowplow is, as against positive evidence that the signals were given, insufficient to carry that issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. — 139.]

2. RAILROADS — 312—CROSSING ACCIDENTS—HEADLIGHT STATUTE.

The Kansas Statute requiring every locomotive to be equipped with a headlight being to secure protection to railway passengers, employes and travelers, removal of the headlight from a locomotive propelling a snowplow will not render the railroad company liable for a crossing accident in that state, where the force of the snow would have demolished the headlight had it not been removed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 988-1001, 1003-1005; Dec. Dig. — 312.]

3. NEGLIGENCE — 80—ACTIONS—CONTRIBUTORY NEGLIGENCE.

Under the Kansas laws, as those of the forum, contributory negligence, though ever so slight, will bar recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 84, 85; Dec. Dig. — 80.]

4. RAILROADS — 327—CROSSING ACCIDENT—DANGER.

A railroad crossing of itself is a danger signal warning travelers to look and listen for trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. — 327.]

5. RAILROADS — 333—CROSSING ACCIDENT—ACTIONS—CARE.

Where plaintiff, whose vehicle made a great noise, knowing that a passenger train was due or about due, and that some train was actually coming from that direction, attempted by a wild drive to beat it to a crossing a considerable distance away, he is guilty of contributory negligence barring recovery for injuries received in a collision with an engine pushing a snowplow, which was preceding the train; plaintiff not exercising reasonable care in looking and listening at a point near enough to the tracks to have discovered the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1080-1083; Dec. Dig. — 333.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by Alexander McNeill against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Edward H. Batson, of Kansas City, for appellant. White, Hackney & Lyons, of Kansas City, for respondent.

JOHNSON, J. Plaintiff was injured March 1, 1913, in a collision at a public railroad crossing in Cawker City, Kan., and sued to recover damages on the ground that his injury was caused by negligence of defendant. The answer, among other defenses, alleged contributory negligence. The cause is before us on the appeal of defendant from a verdict and judgment for \$2,500 recovered by plaintiff in the circuit court.

Defendant's railroad runs through Cawker City on a straight course from southeast to northwest, and near the station is crossed at right angles by a street or road connecting the depot with the town, the central portion of which is half a mile distant. Plaintiff owned and was the driver of an omnibus which met all passenger trains, and was driving to the station with a full load of passengers to meet an east-bound passenger train scheduled to arrive at about 10 o'clock p. m. He was late in leaving the hotel, and drove rapidly, almost at a gallop, and part of the way in a gallop. When about three blocks from the crossing he heard a whistle which he thought was from the expected passenger train, and for a crossing a mile or more west of the station. It was necessary to cross the main track to reach the station, and he drove fast in order to clear the crossing before the arrival of the train. He sat in an open seat in front, but the passengers were inside the inclosed body of the vehicle and all of the windows were closed. The bus was not new, and, of course, was noisy when running at high speed. There was

nothing but the darkness to obscure the view along the track, and plaintiff states that he looked attentively, but saw no locomotive and heard no sound of an approaching train until the horses were at the crossing, when he was confronted with the sudden apparition of a locomotive coming from the west. Realizing that he would be unable to drive over the crossing in safety, he endeavored to avoid a collision by sharply turning the horses to the left. But the engine struck the turning horses, and plaintiff was injured. The body of the vehicle was unscathed, and no passenger was injured.

There had been a snowstorm with high wind, and the locomotive was pushing a snowplow, and had been sent out in advance of the passenger train to clear the track of drifted snow. It carried no headlight, but carried small signal lights on the sides and at the rear end of the caboose. Neither plaintiff, who states he was looking attentively, nor the passengers in the bus, who were facing westward, observed these lights, nor did they hear the train, though it made the usual noise of a running train, and doubtless would have attracted their attention if their own vehicle had been less noisy. A statute in Kansas pleaded in the petition (section 6998, c. 99, Gen. Stat. 1909) provides:

"That railroads in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies."

Another statute also pleaded requires every railroad company "to equip and maintain and use upon each and every locomotive engine being operated in road service within the state of Kansas a headlight of a power that will outline the figure of a man on or adjacent to the track, plainly visible at a distance of 800 feet preceding the locomotive," etc., and denounces as a misdemeanor and prescribes adequate punishment for every violation of that enactment.

[1] The negligence of which plaintiff complains is: (1) The alleged failure of the operators of the locomotive to whistle or ring the bell for that crossing; and (2) the negligent violation by defendant of the headlight statute. The evidence adduced in support of the first charge is not satisfactory, since it consists entirely of testimony of plaintiff and the omnibus passengers of a negative character, the force of which is greatly weakened by the fact that they were in a position where they could not know with certainty whether or not the crossing signals were being given. Testimony that one did not hear a sound or see an object, become invested with a positive instead of a merely negative character, must proceed from one who was in a situation in which he must have seen or heard that which is asserted to have been visible or audible. In the face of a mass of positive evidence adduced by defendant to the effect that the whistle was blown and the bell continuously rung, the

negative testimony on which plaintiff relies is too weak to raise an issue of fact.

[2] And relative to the absence of a headlight from the locomotive the incontrovertible evidence of defendant is that it was impracticable to carry one, owing to the force with which masses of upward-thrown snow collided with the whole front of the engine. The headlight was removed from this engine when the snowplow was attached because of its uselessness and the certainty of its being demolished, broken, or at any rate obscured by the masses of snow hurled against it. The manifest object of the statute was to secure the protection to railway passengers, railway employes, and travelers at public crossings which a useful headlight would afford, and not to attempt to compel the carrying of a headlight where none could be carried and kept in use owing to the nature of the work being performed by the engine.

[3-5] But, conceding for argument that plaintiff was entitled to have the jury pass on these questions as issues of fact raised by the two pleaded charges of negligence, how may he in reason be suffered to escape the imputation in law of contributory negligence? In Kansas, as in this state, contributory negligence, howsoever slight, is a complete defense (this is not a case under the humanitarian doctrine) and a railroad crossing of itself is a signal of danger. The apposite rule is well stated in the following quotation from *Railway Co. v. Wheeler*, 80 Kan. 187, 101 Pac. 1001:

"The law regards a railway crossing as a place of danger, and a view of the track itself as a warning of danger to an approaching traveler. *U. P. Ry. Co. v. Adams*, 33 Kan. 427 [6 Pac. 529]. In many cases it has been held that a traveler who approaches a railway crossing with which he is familiar without looking or listening for approaching trains or using reasonable care to ascertain whether there is a present danger in crossing is guilty of contributory negligence which will bar recovery for injuries sustained in a collision. It is not enough for a traveler to look where an approaching train cannot be seen or to listen when it cannot be heard. Nor will it suffice that one has looked some distance away from the crossing when a view on a closer approach would have revealed the danger. *Railroad Co. v. Holland*, 60 Kan. 209 [56 Pac. 8]; *Railroad Co. v. Entminger*, 76 Kan. 746 [92 Pac. 1095]. Where by reason of obstructions or noises an approaching traveler cannot see or hear a coming train, it may be necessary for him to stop or take some other suitable precaution to ascertain whether there is a train in dangerous proximity. *A. T. & S. F. Ry. Co. v. Hagne*, 54 Kan. 284 [38 Pac. 257, 45 Am. St. Rep. 278]. In short, he must exercise care proportionate to the perils of the place."

With knowledge that a passenger train from the west was due or about due, and that a train actually was coming from that quarter, plaintiff, in a wild effort to beat the train to the crossing, drove "like Jehu"—right into the sphere of danger. If this were exercising care "proportionate to the perils of the place," it would be difficult to imagine a traveler's approach that could be denom-

inated negligent, and just as difficult to give a meaning to or find application for the rule that a railway crossing is a danger signal. That rule means that a traveler must use his senses, and not rely implicitly upon the servants of the company performing their duties, and, where by the exercise of ordinary care he is in position to see or hear, he must look and listen. If we should concede that plaintiff did look and could not see the train—a concession opposed to the great weight of the evidence—there is no ground on which he may be excused for not reducing speed in order that he might have the benefit of his sense of hearing. The most that may be said of his conduct in his favor is that he relied entirely upon the performance of defendant's statutory duty to carry a headlight, but he was not justified, in law, in reposing so much confidence in any human being and his injury must be attributed, in part at least, to his own contributory negligence, and this, of course, will defeat him in this action. The demurrer to the evidence should have been sustained.

The judgment is reversed. All concur.

SMITH v. WABASH R. CO. (No. 11369.)
(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. CARRIERS \hookrightarrow 134 — CARRIAGE OF GOODS—
ACTIONS—EVIDENCE.

In an action for damages for injuries to a shipment of apples, evidence held to show the injuries were caused by defendant's delivery of a beer car, instead of a refrigerator car, and not the shipper's delay in having the car forwarded by the connecting carrier to the destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592, 607; Dec. Dig. \hookrightarrow 134.]

2. CARRIERS \hookrightarrow 129 — CARRIAGE OF GOODS—
DEFENSES.

Where defendant delivered a beer car, instead of a regular refrigerator car, for shipment of apples, the shipper's direction, after transportation by defendant to the connecting carrier, to transport the apples to their destination, does not absolve defendant from liability for injuries to the apples, caused by the improper car, as the shipper did not discover the damage until the car reached its destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 545-551; Dec. Dig. \hookrightarrow 129.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by George A. Smith against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. Minnis, of St. Louis, Jones & Conkling, of Carrollton, and J. M. Davis & Son, of Chillicothe, for appellant. Scott J. Miller, of Chillicothe, for respondent.

ELLISON, P. J. Plaintiff's action is for damages sustained in consequence of a carload of his apples, shipped over defendant's

road, becoming withered, rotten, and unmarketable by reason of the alleged negligence of defendant. It appears that plaintiff applied to defendant's agent at Chillicothe for a refrigerator and ventilated car in which to ship the apples from that point to Shreveport, La.; that defendant undertook to furnish such a car, but through negligence furnished a car designed for shipping beer, but which could not be refrigerated for apples. The car was so constructed as to deceive plaintiff by its appearance; the result being that, while plaintiff asked for and was told he had a refrigerator car for apples, he got one constructed so that it could not be ventilated, or iced, so as to preserve the apples, but was designed for beer, which, it is said, does not need air, and which could be iced by direct application to the barrels. The shipment was by way of Texarkana; the destination, as above stated, being Shreveport. Plaintiff did not discover the mistake in the car until arrival at the latter place, when he opened it and found the apples heated and injured. He obtained the best price he could for them and brought this action for damages. The evidence in plaintiff's behalf tended to prove facts as we have stated them.

[1] It is conceded that the car was a beer car, but it is claimed in defense of plaintiff's case that he let the car stand four days at Texarkana, then forwarded to Shreveport; that defendant did not undertake to furnish a car for storage; and that there was no evidence that the apples were injured in transit, either to Texarkana or Shreveport. Plaintiff did testify that when he opened the car at Shreveport they were in fair condition, but he explained that he meant those on top, which he could see, and that the further he got down into them the more heated and injured they were. He admitted that he sold the apples from the car knowing that they were rotting, but stated it was the best he could do; that it was the intention to ice the car at Shreveport, if, as it turned out, it needed icing, but defendant's error in furnishing a car which could not be iced prevented that. In our opinion, notwithstanding defendant's insistence that the chief damage occurred after the apples were delivered to plaintiff, we think the better expression would be that the chief damage developed after the delivery. The proximate cause of the injury was in defendant furnishing a car which disabled plaintiff from protecting the apples.

[2] From argument advanced by defendant it seems to be thought that, because plaintiff gave an order to another carrier to transport the apples on to Shreveport, he accepted the apples at Texarkana, and it was thereby absolved from any claim of damage. That theory is not justified by the evidence in plaintiff's behalf. He did not know, and could

not very well know, of his damage until he came to look into the car at Shreveport, when he discovered both the damage and the cause. We do not see where *Kellerman v. Railroad*, 136 Mo. 189, 34 S. W. 41, 37 S. W. 828, *Freeman v. Railroad*, 118 Mo. App. 533, 93 S. W. 302, and other cases cited by defendant, have any application to the facts of this case. Accepting the facts as the evidence in plaintiff's behalf tends to prove them, it is clear that the proximate cause of his damage is that the car furnished for his shipment was not fit, and was not the character of car he ordered.

We think there is no ground for the claim of excessive damages. The case was tried by the court without a jury, and no objection is urged to instructions, except the refusal of a peremptory one.

We find nothing in the record which would justify us in interfering, and hence affirm the judgment. All concur.

METROPOLITAN ST. RY. CO. v. BRODERICK ROPE CO. (No. 11875.)

(Kansas City Court of Appeals. Missouri. Feb. 6, 1916. Rehearing Denied Feb. 21, 1916.)

1. SALES — 436 — REMEDIES OF BUYER — ACTION FOR BREACH OF WARRANTY — PLEADING.

Waiver of a breach of warranty of rope sold is not in the case unless pleaded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1246; Dec. Dig. — 436.]

2. SALES — 446 — ACTION FOR BREACH OF WARRANTY — INSTRUCTIONS.

In an action by a carrier of passengers for breach of warranty of a rope sold to it, an instruction as to the high care required of the carrier in selecting material or continuing it in use, in order to perform its duty to passengers, and excusing further use of the rope if it had gotten into such worn condition as to make impossible its use if such care was exercised, was properly refused, where it was not conditioned on the carrier having used the rope with care.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. — 446.]

3. TRIAL — 244 — INSTRUCTIONS — REQUISITES — SINGLING OUT CIRCUMSTANCES.

In an action for breach of warranty of a rope, an instruction singling out the circumstance that, though the rope may have deteriorated, so as to affect its durability, because of delay in putting it into service, that was not a controlling circumstance, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. — 244.]

4. EVIDENCE — 441 — PAROL EVIDENCE AFFECTING WRITINGS — ADMISSIBILITY.

In an action for breach of warranty of a rope, evidence of a conversation showing that the agent of the seller was informed of the cables then on hand, offered to establish a certain time as a reasonable time, was properly excluded, where the written contract did not fix the time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723, 1763, 1765-1845, 2030-2047; Dec. Dig. — 441.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by Metropolitan Street Railway Company against Broderick Rope Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John H. Lucas and L. A. Laughlin, both of Kansas City, for appellant. T. B. Wallace, of Kansas City, for respondent.

ELLISON, P. J. This is an action for breach of warranty of a wire cable rope sold by defendant to plaintiff. This is the second appeal, and the case will be found fully stated in 156 Mo. App. 640, 137 S. W. 633.

[1] After the case was remanded on the former appeal, defendant filed an amended answer, conforming its defense to the views of the court as expressed in the opinion then promulgated. Plaintiff stood on its original petition, and its reply to the amended answer was merely a denial. The objection made by plaintiff in support of the present appeal relates principally to the action taken by the court in refusing instructions which it offered. These relate to the matter of waiver, wherein the jury were directed that if defendant waived or consented to certain delays in putting in the rope for use, or in the manner of its use, no defense could rest on that ground. No waiver was pleaded by plaintiff, and hence that question was not in the case. In this state a waiver must be pleaded. *Pier v. Heinrichhoff*, 52 Mo. 333; *Bank v. Hatch*, 78 Mo. 13; *Thompson v. St. Charles Co.*, 227 Mo. 220, 126 S. W. 1044; *Mohney v. Reed*, 40 Mo. App. 99. Exception to this rule has been allowed in actions on insurance policies. *Thompson v. St. Charles Co.*, supra. This matter of waiver is said by plaintiff to be the "very marrow of plaintiff's case," and in thus ruling we are disposing of the principal grounds for the appeal.

[2] There were, however, one or two other instructions refused for plaintiff which were on a different subject. Instruction No. 2 was a statement of plaintiff's duty to passengers, and the high care which must be taken in selecting material or continuing it in use in order to perform that duty to passengers. This is then applied against defendant by excusing the further use of the rope if it had gotten into such worn condition as to make impossible its use if such care was exercised. We do not see any necessary connection between plaintiff's duty to its passengers and a contract it may have made with defendant. But, however that may be, the instruction was properly refused for the reason that it was not conditioned on plaintiff having used the rope with care.

[3] Instruction No. 7 was properly refused. It singled out the circumstance that, although the rope may have deteriorated in quality, so as to affect its durability, because of delay in putting it into service, that was not a controlling circumstance in deter-

mining this question. The criticism offered on the instruction given by the court of its own motion is strained and unsubstantial.

[4] It is insisted that the trial court erred in excluding a conversation, said to have taken place between plaintiff's superintendent and defendant's agent, showing that the agent was informed of the cables then on hand which had been ordered for the line in controversy. The effect sought to be given to this evidence was to establish a certain time as a reasonable time. The effect was to fix a time which the written contract, afterwards executed, did not fix. It was decided on the other appeal that a written contract, silent as to the time in which an act is to be performed, implies a reasonable time, and proof of any other time is not admissible. It is quite true that the situation of the contracting parties and the surrounding circumstances may be shown without violating the rule which excludes oral evidence varying the written contract. But here the contract is the same as if "reasonable time" had been written in it, and the effect of plaintiff's offer of evidence (while not so expressed) is to show the contracting parties had, or came to, a prior understanding of what would be a reasonable time. The evidence was properly excluded.

The case was fairly tried, and no substantial ground is discovered which would justify our interference, and the judgment will therefore be affirmed. All concur.

DOUGHERTY et al. v. McCLELLAND et ux.
(No. 11846.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. HUSBAND AND WIFE — 151—OBLIGATIONS OF HUSBAND—NECESSARIES.

Under Rev. St. 1909, § 8309, declaring that the separate property of the wife shall be subject to execution for any debt or liability of her husband created for necessities for the family, but that before execution shall be levied on the separate estate of a married woman she shall have been made a party to the action, there can be no personal judgment against a wife for a debt created by her husband for necessities; the right to levy upon her property being in rem, and not in personam.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595, 599; Dec. Dig. —151.]

2. HUSBAND AND WIFE — 151—LIABILITY OF WIFE—DEBTS FOR NECESSARIES—"NECESSARY."

While a debt by the husband for the rent of a suitable residence for the family is a "necessary" within Rev. St. 1909, § 8309, making the property of the wife liable for such debts, yet damages for the husband's breach of a contract for the leasing of such premises is not a necessary, and the wife's property cannot be reached to satisfy such claim.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595, 599; Dec. Dig. —151.]

For other definitions, see Words and Phrases, First and Second Series, Necessary.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by C. B. Dougherty and R. B. Dougherty, doing business as Dougherty Bros., against C. B. McClelland and Mrs. C. B. McClelland, husband and wife. From a judgment against the husband and in favor of the wife denying plaintiffs' right to satisfaction out of attached property of the wife, plaintiffs appeal. Affirmed.

John A. Showen and Ed. B. Aleshire, both of Kansas City, for appellants. Milton Schwind, of Kansas City, for respondents.

JOHNSON, J. Plaintiffs leased apartments to defendant C. B. McClelland for a term of one year from November 1, 1913, at a rental of \$32.50 per month, and the apartments were occupied by McClelland and his family as a residence until May 15, 1914, when they were vacated. The rental was paid for the time of actual occupancy, and this suit is to recover damages measured by the contract rental price of the apartments for the remainder of the term, less rentals received during that period from another tenant to whom plaintiffs rented the apartments after the breach of the lease. The wife of defendant lessee was joined as a defendant and a writ of attachment issued in aid of the suit was levied upon household goods which were her separate property. Among the grounds of attachment alleged in the affidavit was the ground that "defendants were about to remove out of this state with the intent to change their domicile." The issues raised by separate pleas in abatement filed by the respective defendants were tried and adjudged in their favor, but in the view we take of the case on the merits it will not be necessary to determine questions discussed in the briefs relating to the attachment branch of the case.

The petition prays for personal judgment against the defendant husband for the damages to plaintiffs from the breach of the lease which is conceded, and, recognizing that the defendant wife, not being a party to the lease, could not be held personally liable for the default of her husband, prays that the judgment against him "be adjudged a debt for necessities within the meaning of the statutes relating to the separate estate and property of married women, that the same be adjudged a lien on the personal effects of the wife, and that the attached property be sold for the satisfaction of the judgment."

A trial of the merits resulted in a judgment for plaintiffs against the defendant husband for the full amount of plaintiffs' demand and in favor of the wife. Plaintiffs appealed, and contend that they are entitled to the satisfaction of the judgment out of the attached property of the wife.

[1] Passing other questions, we hold the

judgment should be affirmed for the following reason: The statutes relating to married women (section 8309) provide that the separate property of the wife shall be subject to execution—

"for any debt or liability of her husband created for necessities for the wife or family: * * * Provided, that before any such execution shall be levied upon any separate estate of a married woman, she shall have been made a party to the action, and all questions involved shall have been therein determined, and shall be recited in the judgment and the execution thereon."

There can be no personal judgment against the wife for a debt created by her husband for necessities (Harned v. Shores, 75 Mo. App. 500), and the right to levy execution upon her property to satisfy such debt is in rem, not in personam (Megraw v. Woods, 93 Mo. App. 647, 67 S. W. 709; Moran v. Montz, 175 Mo. App. 360, 162 S. W. 323), and is restricted to debts or liabilities created by the husband for necessities for the wife or family.

[2] A debt of the husband for the rent of suitable apartments occupied as a residence by him and his family is a debt for necessities within the statutory meaning of that term. Bell v. Tuttle, 83 Mass. (1 Allen) 219. As is well said in the cited case:

"A habitation or place of abode is needful to the decent and comfortable support of a family, and the preservation of the health and lives of its members, and is little, if at all, less essential for that purpose than fuel, food, or raiment."

But the demand in the present case is not upon a debt of the husband for necessities furnished to his family, but is for the recovery of damages for the breach of the husband's executory contract which, if performed, would have ripened into a debt or liability for necessities.

"The liability of the wife's personal estate to respond to an execution for the husband's judgment debt for family necessities is nothing but a statutory qualification or condition annexed to the separate ownership conferred." Gabriel v. Mullen, 111 Mo. loc. cit. 126, 19 S. W. 1101.

It does not proceed from any contract of hers, but from the statute, and its scope should not be extended by judicial construction beyond that defined in the terms of the statute reasonably construed. The statute recognizes the primary duty and liability of the husband to provide his family with necessities, but in the interest of the preservation of the family gives the creditor who furnishes such necessities under contract with the husband the right to look to the separate personal estate of the wife for the satisfaction of his demand. It does not extend the liability to a demand for damages resulting from the husband's breach of a contract which, if performed, would have created a debt for necessities. Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. It is for necessities furnished, not those contracted for, but not furnish-

ed, that the wife's property may be levied upon to satisfy the judgment debt of the husband.

The judgment is affirmed. All concur.

CITY OF HUNTSVILLE v. EATHERTON et al. (No. 11294.)

(Kansas City Court of Appeals. Missouri.
Nov. 22, 1915. Rehearing Denied
Feb. 7, 1916.)

1. STATUTES \S 161 — REPEAL BY IMPLICATION.

As repeals by implication are not favored, for a later enactment to repeal a former by implication, the two must be irreconcilably inconsistent, or it must clearly appear that the Legislature intended by the later act to prescribe the only rule that should govern in the case provided for.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. \S 161.]

2. MUNICIPAL CORPORATIONS \S 266 — CONSTRUCTION OF SIDEWALKS — EXPENSE OF CITY—REPEAL OF STATUTES.

Rev. St. 1909, \S 9260, authorizing the construction of sidewalks by a city of the third class at its own expense where no bids are received, is not impliedly repealed by section 9652, authorizing an entirely different method where no bids are received, as the later act is of general operation as to all cities having less than 30,000 population, in view of Const. art. 9, \S 7, authorizing the Legislature to divide cities into classes and define power of each by general laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 712; Dec. Dig. \S 266.]

3. STATUTES \S 220 — REPEAL — LEGISLATIVE CONSTRUCTION.

Where it is contended that an act is repealed by one of later date relating to the same subject-matter, it is persuasive that no repeal was intended if the Legislature amends other acts inseparably connected with the act claimed to have been repealed without indicating anything to the contrary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 298; Dec. Dig. \S 220.]

4. MUNICIPAL CORPORATIONS \S 304 — CONSTRUCTION OF SIDEWALKS — ORDINANCES — INDEFINITENESS.

An ordinance for the construction of a sidewalk at the expense of the city is not indefinite as to location, where it provided that it should be laid "along and in front of" described property, and giving the number of front feet on a specified street, and that the property fronting or abutting on the sidewalks should be liable for the cost.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811-816; Dec. Dig. \S 304.]

5. MUNICIPAL CORPORATIONS \S 304 — CONSTRUCTION OF SIDEWALKS—ORDINANCES—INDEFINITENESS.

An ordinance for the construction of a sidewalk at the expense of a city was not indefinite in saying the work of building was "left to the street and alley committee," as the personnel of that committee was a matter of record, and the ordinance did not mean that the walk was to be built in any way the committee saw fit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811-816; Dec. Dig. \S 304.]

6. EVIDENCE ¶387 — PAROL EVIDENCE—ORDINANCES.

In an action on tax bills to cover the cost of a sidewalk, the recorded ordinance under which the work was done cannot be supplanted by parol evidence of a lost ordinance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1698-1713; Dec. Dig. ¶387.]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

"Not to be officially published."

Action by the City of Huntsville against Major A. Eatherton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

O. R. O'Bryan, B. E. Cowherd, and John N. Hamilton, all of Huntsville, and Hunter & Chamier, of Moberly, for appellants. Norman Johnston, of Huntsville, and Jerry M. Jeffries and Willard P. Cave, both of Moberly, for respondent.

TRIMBLE, J. Plaintiff, a city of the third class, brought this suit on a special tax bill issued to cover the cost of the construction of a sidewalk along, and in front of defendant's property. Said city had, by ordinance, directed that said sidewalk should be built, and had advertised for bids, but no bids were submitted or received. Thereupon, under section 9260, R. S. Mo. 1909, the city built the sidewalk at its own expense, and now sues on the tax bill to recover the cost of such construction. The case was tried before the court without a jury. No declarations of law were asked or given. The court found for plaintiff, and defendant appealed.

[1] The main objection raised against the validity of the tax bill is that section 9260 is impliedly repealed by the act of June 14, 1909, found in Laws of Missouri of 1909, pages 312 to 318, both inclusive, and which now appears in the Revised Statutes of 1909 as sections 9647 to 9663, both inclusive. The objection is that section 9260 provides one method by which a sidewalk can be built by the city when there are no bids received, and section 9652 (being section 6 of the above act of 1909) provides an entirely different method, and, since the latter section is a later enactment, the former section has been repealed by implication, and therefore the section under which the city proceeded to build the sidewalk was no longer in force. Repeals by implication are not favored. For a later enactment to repeal a former by implication, the two must be "irreconcilably inconsistent, or it must clearly appear that the Legislature intended by the latter act to prescribe the only rule that should govern in the case provided for." *Manker v. Faulhaber*, 94 Mo. 430, loc. cit. 440, 6 S. W. 372, 375; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663.

[2] Section 9260 applies only to cities of the third class. Originally it was section 113 of an act solely in reference to such

cities, approved April 19, 1893 (Laws of Missouri of 1893, p. 93), and therefore properly it appears in article 4, chapter 84, of the Revised Statutes of 1909, referring only to cities of the third class. Section 9652 was originally section 6 of the act of June 14, 1909, which act was for the purpose of giving to every city having a population of less than 30,000 inhabitants (whether incorporated under the general statutes or by special charter), the power therein specified to build sidewalks. Said section 9652, therefore, was placed, in the revision of 1909, in article 10 of chapter 84, as laws applicable to cities of 30,000 inhabitants or less. So that section 9260 applies specifically to cities of the third class, while section 9652 is general in its application. By the terms of section 1 of the act of 1909 (Laws 1909, p. 313,) it will be seen that the object of the Legislature, in enacting section 9652, was to give to all cities of less than 30,000 the power therein specified to build sidewalks in the manner therein set out. Evidently the purpose of the act was to give such power to cities of any kind which came within that description, but which did not have the power to build in that manner, or which did not possess such power fully and adequately. If this be the correct view, then both sections can be upheld, and neither treated as invalid, which we are required to do if it is at all possible. The subsequent enactment nowhere uses language showing that it is exclusive, or that it is a *substitute* for any method or power theretofore enjoyed or granted specially to cities of a particular class. It is a general grant giving a power therein designated. Under section 7, art. 9, of the Constitution, the Legislature was authorized to divide cities into not more than four classes and to define the power of each by general laws. Therefore the Legislature, in enacting section 9260 and the sections preceding and connected with it, was providing a general law for cities of the third class in obedience to the constitutional direction; and it may be presumed that, in afterwards enacting section 9652 and its associate sections, the Legislature did not intend to disturb what it had done for cities of the third class in that regard, but only to give the power therein specified to cities coming within the description contained in the act, but which did not have such powers, or did not have them so fully and adequately. For said section 7 of the Constitution provides that:

"Municipal corporations of the same class shall possess the same powers and be subject to the same restrictions."

And therefore this is good reason for supposing that the Legislature did not intend the subsequent legislation of 1909 to supplant the former, or to apply to cities of the third class, since, if such is not the correct interpretation to be placed on it, then this would or could result in giving different powers to

different cities of the same class. For instance, a city which had more than 30,000, but which had not elected to become a city of the second class, and was still a city of the third class, would not have the powers conferred by the legislation of 1909, while another city of the third class having a population of less than 30,000 would have such powers. The presumption is that, in enacting the two different sections, 9260 and 9652, the Legislature was intending to obey the constitutional provision requiring the power of each class to be defined by general law, and for all cities of one class to have the same laws, and that the Legislature, in passing the 1909 legislation, did not intend to enact a law that might violate this last constitutional provision. This it would do, at least in the instances cited, if section 9260 is impliedly repealed by section 9652. Wherefore there is no warrant for saying the Legislature must be deemed to have intended to supplant the law expressly applicable only to cities of the third class merely because the language of the subsequent legislation, describing the cities to be affected, is broad enough to include many cities of the third class. Consequently it cannot be maintained that the subsequent legislation of 1909 inevitably resulted in the repeal by implication of section 9260. No such result should follow, unless that is the imperative conclusion to be drawn from the subsequent act itself.

That no such imperative conclusion follows can be seen, both in an examination of the two modes of building sidewalks provided by the two sections and in the course afterwards pursued by the Legislature itself. When we compare the two modes of building sidewalks, it will be seen that there is no substantial difference in the general method pursued. The differences are not in the power to have the work done, nor in the course to be taken, but relate to the rate of interest charged and the name of the party in whose favor the tax bill shall be issued. In section 9260 the tax bill is made out in the name of the city, and the council may fix the interest on the tax bill at not to exceed 10 per cent. from 30 days after date of issue until paid, and if not paid within 6 months then it may bear 15 per cent. In section 9652 the tax bill is made out in the name of the city engineer, or other person for the city, and may bear interest at 8 per cent. from 30 days after date of issue. Section 9260 is a complete and valid grant of power to cities of the third class to build sidewalks in a certain way. And as the subsequent amendment is not expressly made applicable to cities of the third class, but to cities generally having less than 30,000, and gives them the same power with a plan of execution similar in general outline and differing only in minor details, it is not to be considered as a substitute for the power and

plan of execution already conferred on cities of the third class, but was merely a grant of power to cities which did not have such power as fully or as adequately as therein conferred.

[3] Looking, now, at the course thereafter pursued by the Legislature, it will be perceived that it did not regard the former law as repealed. Sections 9254, 9255, and 9256, R. S. Mo. 1909, are inseparably connected with section 9260. They contain directions for the course the city must take up to the time it is found that no bids are received, as mentioned in section 9260. The fact that the Legislature in 1911 amended these sections as if section 9260 was still in force (Laws 1911, p. 337), and said nothing to indicate a contrary view, is persuasive at least that it did not consider section 9260 had been impliedly repealed. The Legislature expressly said at the 1909 session that:

"All acts or parts of acts of a general nature in force at the commencement of the present session of the General Assembly, and not repealed, shall be and the same are hereby continued in full force and effect unless the same be repugnant to the acts passed or revised at the present session." Section 8, Laws of 1909, p. 645; section 8087, R. S. Mo. 1909.

It is claimed that, if the former law was not repealed, nevertheless it was not followed, and hence the tax bill is void. The first objection on this point is that there was no estimate filed. But the statute makes the tax bill *prima facie* evidence of the regularity of the proceedings. The tax bill recites that an estimate was made and filed. It then devolved upon defendant to show that none was filed. The evidence, however, shows that one was filed and acted upon, but had been lost and could not be produced at the trial. Neither does the evidence show that it was not sufficient to constitute an estimate. We think it was. *City of Independence v. Briggs*, 58 Mo. App. 241; *City of Springfield v. Knott*, 49 Mo. App. 612.

[4, 5] Neither do we think the ordinance is indefinite as to the location of the sidewalk. It provided that the walk should be laid "along and in front of" certain property, describing it, and giving the number of front feet on a specified street, and that the property "fronting or abutting" on the sidewalk should be liable for the cost. The description of the property was so definite that a surveyor could follow the lines. There was no evidence that the sidewalk was not built at the proper place or on the proper sidewalk line. Neither was the ordinance indefinite in saying the work of building was "left to the street and alley committee." The personnel of that committee was matter of record, and the ordinance did not mean that the walk was to be built in any manner the committee saw fit, but only that the work of doing it in accordance with the requirements theretofore enacted should be left to them.

[6] Defendants, in order to show that cer-

tain steps were taken by persons other than those the city had designated for that purpose, offered evidence of finding a document which had been signed as an enacted ordinance, but which was lost. There was no record of the passage of any such ordinance appearing on the journal of the city council proceedings, and the court struck out the copy of the alleged lost ordinance and also the evidence relating to the finding of such a document purporting to be an ordinance and signed as such. This was not error. To permit a party to create a record by parol evidence, in order to have it substituted for the record as it is written, is vastly different from allowing a party who is being proceeded against, and his property taken, in invitum, from disputing a record by showing with parol evidence that the facts it recites are not true. Even if it could be shown by parol evidence that an Ordinance No. 70½ was passed, yet the evidence offered and stricken out related chiefly to the finding of what purported to be a signed ordinance. If there was any other evidence of the passage of such ordinance, it was merely a conclusion to that effect, and not the statement of facts showing that it was passed.

There may be other objections raised to the tax bill, but we think we have answered all those of merit. Hence the judgment of the learned trial court is affirmed. All concur.

INTERNATIONAL TEXT-BOOK CO. v. BRENNAN. (No. 11897.)

(Kansas City Court of Appeals. Missouri. Feb. 7, 1916.)

CONTRACTS §=303—BREACH—EXCUSES.

Where plaintiff sold defendant a correspondence course, to be paid for in installments, lessons to be sent from time to time, plaintiff's failure to send the lessons according to agreement excuses defendant from further payments on the course, notwithstanding the contract provided for payment of all installments before the course should be completed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. §=303.]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

"Not to be officially published."

Action by the International Text-Book Company against Frank T. Brennan, begun in justice court and appealed to the circuit court. From a judgment for defendant, plaintiff appeals. Affirmed.

Stubenrauch & Hartz, of Kansas City, D. C. Harrington, of Scranton, Pa., and W. C. Walker, of Kansas City, for appellant. George Horn, of Kansas City, for respondent.

JOHNSON, J. The appeal taken by plaintiff was allowed to this court. We transferred the case to the Supreme Court because of a constitutional question raised by appellant,

but that court decided that no such question was properly raised, and retransferred the case.

The suit was begun in a justice court in September, 1909, for the contract price of a course of instruction in a correspondence school conducted by plaintiff, for which defendant (the pupil) agreed to pay \$78.40 in monthly installments of \$5 each, the first payment to be made at the signing of the contract. He paid four installments and then ceased paying. Afterward plaintiff declared the whole of the contract price to be due and payable, under a stipulation in the written contract authorizing such action, and brought this suit to recover the entire remainder of such price. The facts are conceded that the parties entered into a written contract, introduced in evidence, which bound plaintiff, a corporation conducting a correspondence school in Pennsylvania, to give defendant, who lives in Kansas City, a course of instruction by mail in the master builder's science. The terms of the contract contemplated and provided for the payment of the entire consideration for the instruction long before the completion of the course. The only issue contested in the circuit court, where the cause was tried on appeal, was whether the breach of the contract was by plaintiff or defendant. The plan of instruction required plaintiff to mail to defendant "a part," consisting of books of instruction, examination questions, etc., which defendant was to study and then mail to plaintiff his answers to the questions. Plaintiff then "graded" his paper and sent him the second part, and so on.

There is no controversy over the facts that this method was pursued by both parties in accordance with the terms of the contract, and that defendant paid the installments which matured until the end of the fourth "part." Plaintiff claims that it graded defendant's examination paper on this part and mailed the fifth part to him, after which he failed to continue the course and defaulted in his payments. Defendant denies this, and insists that plaintiff did not send him the fifth part; that he reported the omission to plaintiff's agency in Kansas City, and was told that the matter would be investigated, but that nothing thereafter was done by plaintiff in the way of continuing the instruction. This issue—both sides of which were supported by substantial evidence—was submitted to the jury in instructions which precluded a recovery if the jury accepted defendant's version of the facts relating to the interruption and abandonment of the course.

The jury returned a verdict for defendant, upon which the court rendered judgment. Plaintiff appealed, and complains of the rulings on the instructions; its principal contention being that the agreement of plaintiff in the written contract to send the different "parts" of the course and the agreement of

defendant to pay the consideration for the whole course were independent covenants, and that the failure of plaintiff, if such occurred, to send the fifth part, would not preclude a recovery for the whole consideration, since it could be nothing more than the breach of an independent covenant, for which defendant, if damaged, might have a set-off for his damages. This view is a misconception of the law applicable to this case, which belongs to the class controlled by the rule that a breach by the promisor of a contract to render a particular service, which consists of an abandonment of the service, will preclude a recovery by him upon the contract. *Blanton v. King*, 73 Mo. App. loc. cit. 150; *Dempsey v. Dorrance*, 151 Mo. App. loc. cit. 431, 132 S. W. 33; *Lathrop v. Mayer*, 86 Mo. App. 355. The parties and the court properly tried the case on the theory that plaintiff's right to recover anything depended on the solution of the question of whether or not it failed or refused to send the fifth and subsequent parts of the course, and thereby abandoned the service.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

DELANO et al. v. ROBERTS. (No. 11917.)
(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. MASTER AND SERVANT ⇨287—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—QUESTION FOR JURY.

Where a fireman on an engine was injured by being jarred from the tender to the floor of the engine while it was being coupled to the train, *held* that, under the evidence, the engineer's negligence in making the coupling was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. ⇨287.]

2. MASTER AND SERVANT ⇨285—INJURY TO SERVANT—CAUSE OF INJURY—QUESTION FOR JURY.

In an engine fireman's action for injuries by being jarred from the tender while the engine was being coupled to the train, *held* that, under the evidence, whether the fireman was jarred from the tender and whether his injuries resulted therefrom was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ⇨285.]

3. MASTER AND SERVANT ⇨228—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATUTES.

In an action under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), contributory negligence, to be a bar to recovery, must be the sole cause of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. ⇨228.]

4. APPEAL AND ERROR ⇨171—THEORY OF CAUSE—CHANGE OF THEORY ON APPEAL.

In a servant's action under the federal Employers' Liability Act, where the case was tried on the theory of defendant's freedom from negligence, and no question of contributory negli-

gence was presented in the pleadings or evidence, questions raised on appeal on the theory of contributory negligence were not considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1060, 1067, 1161-1166; Dec. Dig. ⇨171.]

5. MASTER AND SERVANT ⇨281—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In a servant's action under the federal Employers' Liability Act for injuries by being jarred from the engine while it was being coupled to a train, evidence *held* not to present an issue of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 967-996; Dec. Dig. ⇨281.]

6. MASTER AND SERVANT ⇨264—INJURY TO SERVANT—SPECIFIC ACTS—PLEADING AND PROOF.

In an engine fireman's action for injuries by being jarred from the engine through the engineer's violent coupling to the train, evidence *held* not a departure from the specific negligence alleged in the petition, in that it merely presented an application of the doctrine *res ipsa loquitur*.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. ⇨264.]

7. TRIAL ⇨255—INSTRUCTIONS—NECESSITY OF REQUEST.

In an action for personal injuries, if defendant claims reduction of damages because of plaintiff's failure to properly care for himself, it is not error to fail to give an instruction in the matter unless requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. ⇨255.]

8. MASTER AND SERVANT ⇨278—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an engine fireman's action for injuries by being jarred from the engine while it was being coupled to the train, evidence *held* sufficient to support a finding of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

Error to Circuit Court, Randolph County; Nat M. Shelton, Special Judge.

"Not to be officially published."

Action by Henry Roberts against Frederick A. Delano and others, receivers of the Wabash Railroad. From a judgment for plaintiff, defendants bring error. Affirmed.

J. L. Minnis, of St. Louis, D. G. Phillips, of Moberly, J. A. Collet, of Salisbury, and David H. Robertson, of Mexico, Mo., for plaintiffs in error. Aubrey R. Hammett, of Moberly, and B. E. Cowherd, of Huntsville, for defendant in error.

TRIMBLE, J. This case is before us on a writ of error to review a judgment obtained by Henry Roberts against the receivers of the Wabash Railroad for alleged personal injuries received by him while employed as a fireman on a Wabash locomotive pulling a freight train from Moberly, Mo., to Moulton, Iowa. He was at the time engaged in interstate commerce, and his suit was brought under the federal Employers' Liability Act.

At Millard, Mo., the train stopped to do some switching, and, after that was done, the

body of the train was left standing on the track while the engine moved north some 400 feet to the coal chute to be replenished with fuel. This was accomplished by stopping the tender under the chute, and then the fireman climbed up on the tender and opened the chute, allowing the coal to flow down into and fill the tender. When it was full the fireman had to close the chute by raising the lid, and then it was his duty to rake back the coal from the front edge to prevent it from falling down into the cab of the engine and injuring the fireman or engineer. After the fireman had closed the chute he asked the engineer to hand him up the shovel with which to rake back the coal. The engineer did so, and after the fireman had raked back the coal the engineer asked the fireman if he was ready, and upon receiving an affirmative answer the engineer started the engine back south to couple onto the train, and the fireman started down the coal gate. This consisted of slats much like a ladder, placed in the vertical opening in the front end of the tender to keep the coal from falling down and out into the cab. The top of the cab was about eighteen inches higher than the coal at the top of the tender, and extended back about two feet over the coal. It was about seven feet from the top of the ladder or gate down to the gangway or cab floor. The fireman started down this gate as one does in descending a ladder; that is, he had his back to the engine and engineer, and his face to the south and to the tender. His feet were on the slats of the gate, his shovel was in his right hand, and he was holding onto the top slat with his left. He had gotten his feet about two steps down the ladder and was leaning over the top thereof with his stomach and face to the coal (in order to get under the projecting roof of the cab) when the engine, moving south in the direction he was facing, reached the train and struck it violently, coupling thereto by means of the automatic coupler.

According to plaintiff's evidence this was an unnecessarily violent and unusual coupling, harder than any he had ever seen. The violence of the blow broke the hold of his left hand and precipitated him to the floor of the cab. In falling the end of his shovel handle struck him in the abdomen and ruptured him. When he struck the floor, he immediately sprang to his feet, and the rebound of the cars to which the engine had coupled threw him with his hand against the fire box, injuring it in some particular, though his rupture seems to be the principal injury complained of.

The charge in the petition, and on which the case was submitted to the jury, was that, while plaintiff was climbing down said gate of the tender in the usual and customary way, the engineer, knowing that he was thus descending from the top of the tender, recklessly and negligently backed his engine with great, unusual, and unnecessary force and

violence against said cars, thereby directly causing the fireman to be thrown down and injured in the manner hereinbefore stated.

The answer was a general denial, and the principal contention of the defense was that there was no unusual or violent coupling, and that plaintiff was not injured at the time at all. The engineer testified that the coupling was made as usual with no great or unnecessary force or violence, and that the fireman was not thrown down by it, but that before the coupling was made the fireman jumped down from the tender, and, landing upon a lump of coal, fell, but was uninjured; at least he made no complaint, and continued to fire his engine till they got to Moulton. The fireman says the engineer was looking back in the direction the engine was moving, and that he was directly in the line of the engineer's vision, and the latter saw and knew of his position at the time the engine was moved toward and against the cars, and that, when the engine struck the cars, it was going eight or ten miles an hour; that they had lost much time that night, and the engineer was "sore" because of the delay. The engine and cars were provided with automatic couplers as required by law, and they couple automatically by impact. The fireman testified that just enough force to push the couplers together was all that was necessary to use in making a coupling; that it was not at all necessary to strike the car sought to be coupled. The engineer's evidence was that the engine was going three or four miles an hour, and that some engines made couplings easier than others, but that a coupling could be made at a speed of four or five miles an hour without hurting anything. There was other evidence showing that ordinarily a coupling was made at about the speed a man would ordinarily walk.

[1, 2] Clearly the question of whether the engineer negligently made a violent coupling or merely made one that was usual and ordinary was for the jury to determine. So also was the question whether plaintiff was thrown down by such negligent coupling and was ruptured by his fall. Defendant offered certain evidence tending to show that plaintiff was suffering from rupture prior to this when he was working at a chicken packing plant. But there was evidence in plaintiff's behalf that he was not ruptured prior to the time of the accident; also evidence of a physician whom plaintiff consulted at Moulton, Iowa, upon his arrival there, that from his examination and the appearance of the rupture it was of very recent origin and unquestionably not one of long standing. A physician at Moberly was also consulted by plaintiff upon his return, and he gave it as his opinion that the injury was of recent origin.

It is urged that a demurrer to the evidence should have been sustained because the plaintiff's version of how he was thrown down

is contrary to the physical facts. No doubt, when a plaintiff's version of how an accident occurred and the way he fell is clearly contrary to natural law, his testimony will not be treated as credible. *Daniels v. Kansas City Elevated Ry. Co.*, 177 Mo. App. 280, 184 S. W. 154. But we cannot apply that rule to the facts of this case. The engine going back against a long string of cars at eight or ten miles an hour would cause a terrific jar to plaintiff sufficient to throw his feet from the ladder and break his handhold. The cars coupled automatically by impact, and the moment after the jar and the stopping of the engine, the rebound of the long string of cars when the slack was consumed would give the engine a jerk almost as violent as the first jar. The feature in plaintiff's testimony, which defendant says is contrary to natural law, is that the force of the impact threw him out from the tender in the direction opposite to that in which the engine was going. But, taking plaintiff's testimony as a whole, it shows that his footing and hold on the ladder were broken, and that he fell down to the floor of the cab. Although he at first said it threw him in an opposite direction to that in which the engine was going, yet he says that it all happened so quickly that he is not absolutely certain just how it occurred, and that it threw him against the tender first and broke his hold causing him to swing around and fall. It is not clear how far he was thrown from the tender. Nor can we say that an occurrence of the kind in question would not result in pretty much the way plaintiff's evidence, when taken as a whole, says it did. We cannot say his testimony concerning the way he was thrown from the ladder is devoid of evidentiary value. Because it is not so contrary to plain physical facts or so at variance with the common experience of men as that its acceptance would be shocking to reason. It is only when it is thus that we are authorized to reject it. *Scroggins v. Metropolitan St. Ry.*, 138 Mo. App. 215, 120 S. W. 731.

[3, 4] It is next urged that plaintiff's contributory negligence caused his fall. Of course, in an action under the federal act, his negligence, to be a bar to recovery, must be the sole cause thereof. The defendant did not plead contributory negligence, but made its defense on the theory that nothing of the kind charged by plaintiff occurred. In fact, the defendant's counsel in the opening statement, in speaking of the plaintiff, said:

"There is no claim in this case that he was hurt in the way he claimed, but, if he was hurt, it was his own fault. We are not making any such claim as that."

During the trial defendant's counsel asked plaintiff a question which had a tendency to bear on the question of plaintiff's contributory negligence, namely:

"Q. You knew if the engine went back against those cars ten miles an hour it would make a hard coupling?"

An objection was here interposed on the ground that contributory negligence was not in the case, not having been pleaded. Thereupon defendant's counsel, in effect, disclaimed any intention of trying to show contributory negligence, saying:

"We are trying to get at the facts; we don't think he was hurt there at all as a matter of fact."

And that line of inquiry was at once abandoned without objection or exception. It would seem that all this sufficiently and clearly shows that the case was tried on the theory that there was no contributory negligence involved in the case. If the case was tried on that theory, it would seem that a different theory should not be permitted to be taken on appeal. The only issues submitted were whether the conduct of the engineer was negligent, whether such negligence, if any, resulted in plaintiff's injury, and whether it was the proximate cause thereof. And the jury were instructed that, unless the conduct of the engineer was negligent, and was the proximate cause of the alleged injury, plaintiff could not recover, and that, if the plaintiff was injured in any other way or by any other means than the negligence of the engineer in moving his engine against the cars with unusual and unnecessary force, the verdict should be for defendant. Both parties having tried the case upon the theory that contributory negligence was not an issue, it would seem they should be held to that theory on appeal. *Jones v. Pulitzer Pub. Co.*, 240 Mo. 200, 144 S. W. 441; *O'Hara v. Laclede Gas Light Co.*, 244 Mo. 395, 148 S. W. 884.

[5] What has been said has some application also to the objection made to plaintiff's instruction on the measure of damages because it fails to tell the jury of the effect of contributory negligence in diminishing the damages recoverable under the federal act. In addition to the failure of the pleadings to present an issue of contributory negligence and the obvious disclaimer of any claim of that kind in the case, it may be observed that we are unable to see wherein the element of contributory negligence is presented either by the pleadings or by the evidence. Plaintiff was upon the coal at the top of the tender where he was required to be, and his affirmative answer to the engineer that he was ready was not a consent that the engineer should recklessly strike the cars in making the coupling. If he had remained upon his unsteady footing upon the coal until the engine violently struck the cars, he would have been in equal or greater danger of being thrown down from that position. His start down the ladder was in the direct line of his duties, and was necessary in order to regain his place in the engine. And when he started down he could not foresee that the coupling would be a violent one. Even if the start was rapid, he had a right to suppose that the engineer would observe care before the engine

reached the coupling point. The evidence is that it was the unusual violence of the coupling that broke his hold and caused him to fall, and there is none whatever that an ordinary coupling would have broken his hold, or did cause him to fall. Hence we see no necessity for going into the question whether a plaintiff is required to instruct upon the effect of contributory negligence in a suit under the federal act, even though no defense of that kind is pleaded or raised by defendant. It is urged that the federal act changes the substantive law in regard to contributory negligence, and makes it a matter of diminution of damages rather than a partial defense, and, since matters in diminution of damages need not be specially pleaded, the plaintiff should have covered the effect of contributory negligence in his instruction on the measure of damages regardless of defendant's failure to plead it. But assuming, without deciding, that this is true, nevertheless it should have no application where neither the pleading nor the evidence discloses contributory negligence, and the case is tried on the theory that there is none, and with the express disclaimer by the defendant of any claim that there is any such negligence. Thornton on Federal Employers' Liability and Safety Appliance Acts (2d Ed.) § 94, says:

"This federal statute has not changed the rule with reference to the presentation of contributory negligence as a defense, except it is now only a partial defense. In the federal courts the burden of presenting contributory negligence of the plaintiff as a defense has always been upon the defendant, and this burden still continues in a suit brought under this statute."

The author then goes on to state that, when the plaintiff has shown facts from which the jury can estimate his damages, if the defendant desires to reduce them by showing plaintiff's contributory negligence, he has the burden of doing so, and that, even if the rule of the state be that the plaintiff must show himself free of fault, still such rule is changed by the federal act, and does not apply in a suit thereunder. In the present case the state rule and the federal rule are the same. Roberts on Injuries to Interstate Employes, § 119, says whether contributory negligence must be pleaded, in order to be available to the defendant, depends upon the law of the state where the action is pending, though he also raises the question now urged by defendant herein. But, as we have said, owing to the absence of contributory negligence, either as a matter of law or as a matter of fact for the jury, in the pleadings, evidence, and theory upon which the case was tried, we see no reason for determining in this case the interesting question defendant now raises for the first time herein.

[6] Point is made that, since the negligent act is charged against a particular servant, the engineer, the negligence is to be regarded

as specific; and it is urged that plaintiff had no evidence showing precisely what the engineer did, or failed to do, constituting negligence. But the plaintiff is not relying upon any mere presumption of negligence arising from the fact of the violent coupling. His case does not in any manner rest upon the doctrine of *res ipsa loquitur*. The charge is that the engineer, knowing that plaintiff was coming down the ladder, recklessly and negligently backed his engine with great, unusual, and unnecessary force and violence against the cars. The proof—that is, plaintiff's proof, which we must accept as true in view of the verdict—was that the engineer did know plaintiff's position, and, notwithstanding his knowledge thereof, the engineer, being "sore" because his train was behind time, recklessly and negligently backed his train at the rate of 10 miles per hour against the cars when the usual and proper way was to back them at the rate of a man's ordinary walk. The engineer knew the cars were on the track 400 feet away, and that the mere backing of the engine at the high rate of speed would inevitably bring on a violent and unusual collision. Hence the act of backing at that rate of speed was an act of negligence, and the proof of such backing was positive, affirmative proof thereof in strict accord with the allegation. Plaintiff's case therefore did not rest upon a presumption that the engineer was negligent simply because an unusually violent coupling was made.

[7] No doubt it was plaintiff's duty to use ordinary care and incur reasonable expense to cure his injuries and reduce the damages as much as possible. Plaintiff did consult doctors about his rupture, and secured a truss. He has not yet gone to a hospital and submitted to an operation, on account of the expense incident thereto. The evidence does not show that his present condition is a result of his neglect. If the defendant desired to have the damages reduced on account of plaintiff's failure to properly care for himself, it should have asked an instruction to that effect. Having failed to do so, it cannot claim error because no instruction was given on that point.

[8] Accepting plaintiff's evidence as true, which we are required to do in the light of the verdict, there was a case of actionable negligence made out against the defendant. *Vaughan v. St. Louis & San Francisco Ry.*, 177 Mo. App. 155, 164 S. W. 144; *Fort Worth, etc., R. Co. v. Stalcup* (Tex. Civ. App.) 167 S. W. 279; *Owens v. Chicago, etc., R. Co.*, 113 Minn. 49, 128 N. W. 1011; *LaMere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667.

There was no error in the trial of the case authorizing our interference, and it is accordingly affirmed. The other Judges concur.

STATE ex rel. PROSECUTING ATTORNEY
OF JACKSON COUNTY v. CHAMBERS.
(No. 11879.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

INJUNCTION \S 229 — CONTEMPT — JURISDICTION — "PUBLIC NUISANCE."

The keeping of a bawdyhouse is not a "public nuisance," but an ordinary crime for punishment of which the criminal law should be applied so though the keeper of a bawdyhouse consented to the issuance of an injunction, the court was without jurisdiction, and a violation of the order cannot be punished as a contempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 496-501; Dec. Dig. \S 229.]

For other definitions, see Words and Phrases, First and Second Series, Public Nuisance.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Proceedings by the State of Missouri, on the relation of the Prosecuting Attorney of Jackson County against Annie Chambers, in which an injunction was issued. From a judgment sustaining a demurrer to an information charging violation of the injunction order and asking punishment for contempt, relator appeals. Affirmed.

W. B. Brown, of Kansas City, for appellant. Casey & Wright, of Kansas City, for respondent.

ELLISON, P. J. The prosecuting attorney of Jackson county, in which Kansas City is situated, filed a bill in equity in the circuit court of that county against defendant in which he, in appropriate terms, charged her with keeping a bawdyhouse, which he alleged was a public nuisance, working great harm and danger to the morals, the health, and the peace of the city. He prayed for an injunction suppressing and abating such nuisance. The defendant appeared in court on the 14th of October, 1914, and took this action, viz.:

"Comes now the defendant and enters her appearance herein and consents that a permanent injunction shall be issued against her as of this date, as prayed for in the petition herein."

Whereupon the court entered a proper judgment for the suppression and abatement of the bawdyhouse as being a public nuisance.

Afterwards an information was filed alleging that defendant had violated the injunction order and asking that she be cited for contempt. This was done, and defendant filed a demurrer to the information on the ground that the court had no jurisdiction over the subject-matter of the proceedings. The demurrer was sustained, and the informant appealed.

It was decided in Ex parte Laymaster, 260 Mo. 613, 168 S. W. 754, that while a court of equity could enjoin a public nuisance, although it was also a crime, yet that the keeping of a bawdyhouse was not a public nuisance, but rather an ordinary crime for

the punishment of which the criminal law should be applied; that such law furnished ample remedy, and a trial by jury secured; and that a court of equity, having no jurisdiction in the premises, was without authority to punish for contempt of its process in attempting to abate a nuisance. The opinion in that case by Judge Woodson is concurred in by a majority of the court.

There is this further particular in this case, out of which a question has been made; that is, as shown above, the defendant appeared to the original bill, confessed its charges, and consented to the decree. But we think that cannot influence our conclusion. Her consent could not give the court jurisdiction of a matter over which the law has not conferred jurisdiction.

We must affirm the judgment. All concur.

WHITE v. ENNIS COFFEE CO. (No. 11885.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. MASTER AND SERVANT \S 153—INJURY TO SERVANT—FAILURE OF MASTER TO INSTRUCT SERVANT—SIMPLE APPLIANCES.

A truck with two wheels near one end and two handles at the other, with three or four feet between them, is not, as a matter of law, a simple appliance when furnished an inexperienced employé 16½ years old, and the employer may be found liable for failure to instruct the employé as to how to use the truck safely in hauling goods thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 314-317; Dec. Dig. \S 153.]

2. EVIDENCE \S 507 — OPINION EVIDENCE — EXPERTS.

In an action for injuries to the operator of a truck while hauling goods, it is improper to permit experts to testify as to the effect of the use of the truck in certain ways, and of the safest ways to use it, and of the result to the operator if used in certain ways.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2310; Dec. Dig. \S 507.]

3. INFANTS \S 72 — PERSONAL INJURIES — MEASURE OF DAMAGES.

An infant suing for a personal injury may not recover for the loss of earning capacity during his minority, since that is a loss to his parent.

[Ed. Note.—For other cases, see Infants, Cent. Dig. \S 180-185; Dec. Dig. \S 72.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by Manuel White against the Ennis Coffee Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. L. Berger, of Kansas City, Kan., and Morrison, Nugent & Wylder and Homer H. Berger, all of Kansas City, Mo., for appellant. Pierre R. Porter and E. A. Scholer, both of Kansas City, Mo., for respondent.

ELLISON, P. J. Plaintiff's action, by his mother as next friend, was brought to recover damages for an injury received while in de-

defendant's employ, in wheeling a loaded truck from the sidewalk into plaintiff's business house. He recovered judgment in the trial court.

Plaintiff, at the time he was hurt, was a boy 16 years and 6 months old. He was sent by defendant's foreman to take a truck and remove some boxes of goods from the sidewalk into the building. The truck was the ordinary kind used in stores, warehouses, and other places, with two wheels near one end and two handles at the other, with three or four feet length between. The floor of the building was four inches higher than the sidewalk, there being a cement incline from the walk. Plaintiff began the work, and had taken in several boxes with the help of another employé who volunteered to assist him. This employé left and went into the building, when plaintiff loaded on a box weighing at least 200 pounds. He attempted to wheel it up the incline by pushing it before him, and found that it was beyond his strength. He then turned the truck around and attempted to pull it up by facing the truck and walking backward. When the wheels struck the incline, the box tipped backward, and he caught it with one hand, holding onto the handle of the truck with the other. He pulled it back, but did it with such force as to cause it to tip forward and fall toward the handles, thus throwing such weight on the upper part of the truck as to knock from his hand the handle he was holding, causing it to strike his knee and bear him down to the floor.

The negligence charged is that, plaintiff being young and inexperienced, defendant negligently failed to inform him that there was danger in handling a truck and to instruct him how to use it safely. It is claimed by defendant that the petition does not state a cause of action, and that the evidence failed to make a case for the jury. We have been cited to several cases from other states in support of this view.

[1] But, considering the peculiar mechanism of a truck, it being so constructed that it is operated by placing the load so near to a balance on the wheels as that it will not fall over the back, and yet not so far towards the handles as that the weight of the load will overcome the strength of the operator, and in view of the inexperience and youth of plaintiff, we have concluded that it is a question for a jury. We think that, considering plaintiff's age and inexperience, the simple tool or simple appliance rule should not be applied to him as a matter of law. The rule applied by the courts is this: The master is liable for failure to instruct the minor, unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant. *Bulson v. Int. Shoe Co.*, 191 Mo. App. 128, 177 S. W. 1084; *Timmerman v. Frankel Co.*, 172 Mo. App. 174, 157 S. W. 1051. In *3 Labatt on Master and Servant*, § 1154, it is said that:

"The considerations which actually determine the nature and extent of the obligation to instruct a minor are sufficiently obvious. When a master takes such a person into his service, he is bound to take notice of the probability that both the natural and the acquired capacity of the employé for appreciating the dangers of the work and the proper means of avoiding them will be smaller than in the case of an adult."

Defendant cites a case (*McCampbell v. Cunard Co.*, 13 N. Y. Supp. 288) where a truck is said not to be an intricate implement or piece of machinery, which would need explanation. But the injured party in that case was an adult with long experience on the dock, and had seen such trucks used for years (though he claimed not to have used one himself), and the truck itself was of the platform style with four wheels and pulled by a tongue or pole in one end.

[2] Plaintiff was permitted to introduce testimony of experts as to the effect of the use of a truck in certain ways and of the safest ways to use it and of the result to the operator if used in certain ways. These experts were allowed to say that in certain positions of the operators "nothing at all can happen to him," and in a certain other position "he is in danger; if he is under the truck, his legs back under the truck, and the truck comes down on him, he has no chance at all." They were further permitted to testify the exact part of his body (viz., his legs) which would be hurt if the truck fell. In our opinion, the case, as shown in the record, does not need the aid of expert testimony. There are, perhaps, few appliances of labor or amusement which could not be made an instrument of injury, if handled in certain ways. These experts were asked many questions which any person of ordinary intelligence would understand as well as they. Many of the questions and answers put the witness in the place of the jury. *King v. Railway Co.*, 98 Mo. 235, 11 S. W. 563; *Gutridge v. Railway Co.*, 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392; *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458; *Chicago v. McGiven*, 78 Ill. 347; *Georgia Ry. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613.

The principal questions for the jury are: Is an ordinary truck such an instrument as made it the master's duty to explain the danger in its use to an inexperienced youth of 16½ years? And, if it were the master's duty, was plaintiff, considering his age, guilty of contributory negligence in handling the truck?

[3] Plaintiff's instruction No. 4 is on the measure of damages and is a misdirection. Among a number of proper items of damage it affirmatively directed the jury that, if the verdict was for him, damages should be allowed for the effect of his injury upon his earning capacity or ability to earn a livelihood in the future. The loss of earning capacity in a minor during his minority is a loss to the parent, and should not be included as damages to the minor. *Railway v. Evansich*, 63 Tex. 54; *Cotton Co. v. Shaffery*,

58 N. J. Law, 229, 38 Atl. 284; *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855. The decisions in this state announcing the same rule are numerous.

On a retrial plaintiff may as well avoid the criticism made on his instructions 2 and 3.

The judgment is reversed, and the cause is remanded. All concur.

S. S. ALLEN GROCERY CO. v. BANK OF BUCHANAN COUNTY. (No. 11509.)

(Kansas City Court of Appeals. Missouri. Jan. 17, 1916. Rehearing Denied Feb. 7, 1916.)

1. BILLS AND NOTES §63 — NECESSITY OF DELIVERY.

The delivery of an incomplete negotiable instrument by the maker, who signs it, is indispensable to the creation of a contractual obligation on the part of the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 95-108; Dec. Dig. §63.]

2. ESTOPPEL §52—NATURE.

Estoppels are odious, and will not be lightly invoked.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. §52.]

3. BILLS AND NOTES §377—BONA FIDE PURCHASER—STOLEN PAPER—NEGLIGENCE.

Mere negligence in the keeping of a signed blank negotiable instrument which was afterwards stolen, filled out, and put in circulation by the thief should not be regarded as the proximate cause of the loss.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 952; Dec. Dig. §377.]

4. BILLS AND NOTES §377—BONA FIDE PURCHASER—FORGERY—ESTOPPEL.

Although Negotiable Instruments Law (Rev. St. 1906, § 9986) provides that, where an incomplete instrument has been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery, the maker or acceptor may be guilty of conduct in the care of the paper which would estop him from disputing the title of an innocent holder on the ground that he had not delivered the paper or voluntarily put it into circulation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 952; Dec. Dig. §377.]

5. BANKS AND BANKING §148—PAYMENT OF FORGED PAPER—OVERDRAWING ACCOUNT—GROSS NEGLIGENCE.

The officers of a corporation were in a mezzanine room reached by a stairway and occupied by the president, secretary, and general manager and the stenographer and telephone operator. When the president was to be away, he signed blank checks and left the check book with the manager, who permitted the book to remain on the top of his desk, as was customary, without instructions respecting its safe-keeping. A traveling salesman in the habit of selling goods to the corporation, in the noon hour, with only the stenographer present, wrote a letter, with permission, at the desk, and he stole checks and put them into circulation. *Held*, that a bank paying the checks, which overdraw the account, was not liable, if considered as a bona fide purchaser of the checks, for the loss, as the corporation was estopped by gross negligence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. §148.]

6. BANKS AND BANKING §148—PAYMENT OF FORGED CHECKS—OVERDRAWING ACCOUNT—“BONA FIDE PURCHASER.”

A bank paying forged paper when there are no funds to the credit of the maker, who signed the check in blank, is to be treated as a bona fide purchaser, and not in the relation of bank to depositor, since a bank is under no legal obligation to permit the overdraw of an account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. §148.]

For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

7. BANKS AND BANKING §138 — RELATION OF BANK TO DEPOSITOR.

The relation of a bank and depositor is that of debtor and creditor, and as to checking accounts the contractual obligation assumed by the bank is to pay on presentation the checks drawn by the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 398-406; Dec. Dig. §138.]

8. BANKS AND BANKING §148—PAYMENT OF FORGED PAPER—SIGNING BLANK CHECKS—NEGLIGENCE.

The result of signing and keeping a blank check, whether the keeping be negligent or careful, is assumed by the maker, and not the bank who pays it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. §148.]

9. BANKS AND BANKING §148 — DUTY IN PAYING CHECK.

A bank is bound to know the signature of a depositor, but is not bound to draw a suspicious inference from the discovery that the body of the check is in unfamiliar handwriting.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. §148.]

10. BANKS AND BANKING §148—DUTY IN PAYING CHECKS.

A bank is not put on guard in paying a check, genuinely signed by a depositor, by the fact that it is larger in amount than the maker had previously drawn, and that the depositor overdraw the account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. §148.]

Appeal from Circuit Court, Buchanan County; Thos. B. Allen, Judge.

Action by the S. S. Allen Grocery Company against the Bank of Buchanan County. From a judgment for defendant, plaintiff appeals. Affirmed.

Culver & Phillip, of St. Joseph, for appellant. C. F. Strop and Graham & Silverman, all of St. Joseph, for respondent.

JOHNSON, J. This is an action against defendant bank by the depositor of a checking account to recover a deposit of \$2,938.70. On August 27, 1914, plaintiff, the depositor, presented a check for that amount to the bank, but payment was refused on the ground that plaintiff had no funds on deposit, and this suit followed. The answer alleges that defendant “has paid to plaintiff or upon its order all sums of money that have been deposited by plaintiff with de-

fendant." A jury was waived, and after hearing the evidence the court rendered judgment for defendant. Plaintiff appealed.

At the beginning of the trial the parties agreed that on August 27, 1914, plaintiff had a deposit of \$2,938.70 with defendant which was payable on demand unless it should be found that defendant was justified in charging against the deposit, as it did, three checks dated August 15, 1914, which bore the signature of plaintiff, and purported to have been drawn to the order of O. J. Rose. These checks, which were for the respective amounts of \$2,700.95, \$395.60, and \$195.15, were paid by defendant on presentation and charged to the account of plaintiff. They had been signed in blank by plaintiff, but had been stolen from its office by Rose, who, by forgery, had converted the signed blanks into checks for the respective sums stated.

Plaintiff, a corporation operating a large retail grocery in St. Joseph, has a president, secretary, general manager, six or seven chiefs of departments, and about fifty employes. Its office is in a mezzanine room six or seven feet above the first floor of the store, and is reached by a narrow stairway from that floor. It is occupied by the officers, i. e., president, secretary, and general manager, and the stenographer and telephone operator. Persons having business with these officers have access to the office, which may be designated as the general office of the company and of the business it conducts. The president, S. S. Allen, alone has authority to sign checks on behalf of the company, and such authority never has been conferred upon any other officer. When Allen found it necessary to be absent from the city, it was his custom to sign a number of blank checks and leave the check book in the custody of the manager, with authority to fill out the blanks and issue checks for use in carrying on the business until his return. He was absent on his summer vacation when the events under consideration occurred, and, as usual, had signed plaintiff's name to a number of checks, and had left the book with Mr. Morrow, the manager. Following his usual practice, Morrow had allowed this book to remain on the top of his desk in the office without instructions to any one respecting its safe-keeping, and, when he had occasion to issue a check, sometimes would draw it himself, and sometimes would have the secretary or stenographer draw it.

On August 15, 1914, Rose, a traveling salesman who had been selling merchandise to plaintiff and was well acquainted with its officers and office employes, especially with the manager, visited the office during the luncheon hour, and found no one there but the stenographer. On being informed that Morrow, for whom he inquired, was out for lunch, he asked and was accorded the privilege of writing some letters, and seated himself at Morrow's desk, on which the check book was lying in full view and, of course,

within easy reach. When the telephone operator returned from lunch, the stenographer left the office in her charge, and shortly thereafter Rose, apparently having finished his writing, asked for and was given an envelope, into which he placed some papers. Then he departed without waiting for Morrow to return. Some time while at the desk he surreptitiously cut out a sheet from the check book which contained three signed blanks and their stubs. After filling out the blanks Rose went first to defendant bank, where he was known to the paying teller, and presented the check for \$395.50, which the teller paid, finding the signature genuine. Next he went to the Empire Trust Company, where he was also known, and presented the check for \$2,700.95, and, at his request, was given a cashier's check, which subsequently he cashed at a bank in Atchison. Then he went to a jewelry store and passed off the third check in payment of a diamond he purchased. After this he disappeared, and thus far has eluded capture. The check for \$2,700.95 came to defendant through the clearing house bearing the indorsement of the Empire Trust Company, and was honored by defendant though its payment overdraw plaintiff's account by more than \$600. The third check for \$195.15 also passed through the clearing house with the indorsements of the jeweler and the Tootle-Lemon National Bank, and was paid by defendant, further increasing the overdraft.

From all the facts and circumstances in evidence the inference is strong that Rose, who two or three days before had received a check from Morrow in payment of an account for potatoes he had sold plaintiff, had obtained knowledge through that transaction of the fact that the check book contained signed blanks and was allowed to remain on top of the manager's desk without any special watch being kept over it. Doubtless his visit to the office at the noon hour was prompted by a criminal motive and his theft of the sheet was not the result of a mere accidental opportunity which arose while he was waiting for Morrow to return.

After paying the last-mentioned check defendant notified plaintiff of the overdraft, and the discovery of the forgeries was a quick result of this notice. The good faith of defendant in paying the checks is not and cannot be questioned, but an effort was made by plaintiff at the trial to show that defendant had been negligent, especially in view of the facts that plaintiff, during the long period of its relation to defendant of depositor, which had continued a number of years, had never before overdrawn its account nor issued a check for so large a sum as \$2,700. We shall treat these facts as proved for the purposes of the present discussion, but the inference of negligence drawn from them by plaintiff will be considered in the course of our opinion.

The principal argument of counsel for

plaintiff in support of their contention that the loss caused by the crime of Rose should fall upon defendant assumes the good faith and reasonable care of defendant in the transaction, but would charge it with liability on the ground that its title to the checks was that of an innocent holder for value within the technical definition of that term, and that the checks, never having been delivered by plaintiff, did not become valid negotiable instruments, nor acquire any contractual status or obligatory character by the mere affixing of plaintiff's signature to blanks which thereafter plaintiff retained in its own possession until deprived thereof not by or through its own voluntary act, but by theft. Counsel insist that their position has the support of the weight of authority as it stood at the time of the passage of the Negotiable Instruments Act, and is completely and irrefutably sustained by that act, which provides (section 9986, R. S. 1909):

"Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

Especially is this argument urged against the validity of the checks of \$2,700.95 and \$195.15, the payment of which, not being made out of funds of plaintiff on deposit, was voluntary on the part of defendant, and should be regarded as the act of a purchaser, rather than that of a debtor bound by law to honor the demand of his creditor.

The position of defendant is that the relation between the parties, being that of banker and depositor, involved reciprocal duties peculiar to such relationship which lie outside the scope of rules pertaining to holders for value of negotiable instruments, and that one of the duties of plaintiff towards defendant forbade the latter from signing blank checks, except for the sole purpose of directing defendant to pay them, and that in signing such blanks, and then negligently exposing them to theft, plaintiff was guilty of such a breach of duty as to estop it from claiming the checks were not delivered or were not binding contractual orders to pay money which defendant, as banker and debtor, was bound to honor on presentation.

On the theory of plaintiff that the position of defendant is that of a mere purchaser or innocent holder for value, the questions to arise are interesting and difficult of solution. If this were a case where an agent to whom the drawer had delivered a signed blank check had exceeded his authority with reference to filling out the blanks, the drawer would be held liable for such unauthorized acts of his agent under the maxim that, where one of two innocent persons must suffer, the one must be the sufferer who gave occasion for the commission of the wrong (Bank v. Armstrong, 62 Mo. 59), and the delivery of the check to the agent would pre-

clude the application of the provisions of section 9986, R. S. 1909, since they relate only to cases where there has been no delivery of the instrument by the person signing it.

[1] In the present case, though Morrow, the manager, was invested with special authority to fill out and deliver the signed blanks, they remained in the possession of plaintiff, the drawer, and had not been delivered to any person at the time of the theft. The custody of the manager, who was the ranking executive officer of the corporation in the absence of the president, was the custody of the corporation, and, when the blanks were stolen, they were in the condition of being signed, but still in the possession of the corporation which signed them. As a general rule, the delivery of an incomplete negotiable instrument by the maker who signs it is indispensable to the creation of a contractual obligation on the part of such maker. Until delivery the instrument is but so much waste paper. The provisions of section 9986 are merely a legislative enactment of this rule, which had the support of the great weight of authority when the Negotiable Instruments Act was adopted in this state. We think this section was not intended to abrogate or impair other well-recognized rules by which in certain instances delivery by the maker would be implied, either from authority actually conferred by him upon an agent, or from conduct which should estop him from claiming that he had not delivered or authorized the delivery of the signed instrument. If Morrow, who had authority to fill out blank checks and deliver them for the uses of plaintiff's business, had, in excess of that authority, converted funds of plaintiff to his own use through the pretended exercise of such authority, plaintiff could not have escaped liability to an innocent holder of such paper, since, under the maxim we have noted, authority to do the excessive act would be implied from the authority actually given.

[2] While estoppels are odious and will not be lightly invoked, they do obtain in instances where it would be manifestly unfair and unjust to suffer a party to gain an advantage by taking inconsistent positions, and they may be based upon conduct which is so careless and grossly negligent as to amount to a willful indifference to the rights of others. In the leading case of *Burson v. Huntington*, 21 Mich. 416, 4 Am. Rep. 497, it is pertinently observed:

"We do not assert that the general rule we are discussing—that 'where one of two innocent persons must suffer,' etc.—must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up nondelivery, as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances

when he might reasonably apprehend that it would be likely to be taken."

[3] It may be conceded for argument, as was held by Bramwell, L. J., in *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525, that mere negligence in the keeping of a signed blank negotiable instrument which afterward was stolen, filled out, and put into circulation by a thief should not be regarded as the proximate cause of the loss, since the negligent person was not bound to anticipate that a crime would be committed in consequence of his negligence, but obviously it should be held that such a grossly careless act as leaving money exposed and within easy reach of thieves should be regarded as the proximate cause of a loss by theft; and in the supposititious case of a man signing a check in blank and tossing it into a public street, an act evincing such an extreme and reckless departure from the field of ordinary care and prudence, and such a wanton indifference to the rights of subsequent purchasers, or others who might innocently come into possession of it, would call for the application of the rule of estoppel and preclude the actor from claiming that he had not delivered the instrument.

The opinion of Lord Bramwell in the *Baxendale Case*, supra, much relied upon by plaintiff, instead of being an authority against the distinction just pointed out, is found to give it express sanction. In that case a bill of exchange which the defendant had signed in blank as an indorser had been returned to him unused, and he had put it in a drawer in his desk in his private chambers, from which a thief took it, filled out the blanks, and put it into circulation. Lord Bramwell thought defendant had been negligent in the care of the paper if judged by the standard of care a bailee should have followed, but in reaching the conclusion that not such negligence, but the crime of the thief, was the proximate cause of the loss, he distinguished the case from the earlier English cases of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Primrose*, 7 C. B. (N. S.) 82, where the negligence was so gross as to amount to recklessness, on the ground that they were treated as instances where the alleged maker or acceptor was held liable as one who had voluntarily parted with the instrument. Lord Brett would not concur in the view that the defendant had been negligent at all, and predicated his decision for defendant on the ruling that he was not liable, since he had not delivered the paper. The third judge, Lord Baggallay, merely "concurred that the judgment ought to be entered for the defendant." The court therefore did not concur in finding that the defendant had been negligent, and certainly did not overrule the earlier cases which recognized the doctrine that gross negligence in the care of such paper should be treated as a voluntary delivery by the maker or acceptor.

Other authorities dealing with the subject

in hand to which our attention is called by counsel for plaintiff do not challenge the view that the conduct of the maker or acceptor of a negotiable instrument signed in blank may be sufficient to create an estoppel, though they do agree that the mere signing and withholding from delivery of such paper is not enough to constitute negligence, and that liability as upon paper delivered by the maker or acceptor will not be imputed from a mere lack of ordinary care in the custody of the paper after it is signed. *Linick v. Nutting*, 140 App. Div. 265, 125 N. Y. Supp. 93; *Crawford*, Neg. Inst. Laws, §§ 25, 34, and note; *Caulkins v. Whisler*, 29 Iowa, 496, 4 Am. Rep. 236; *Nance v. Lary*, 5 Ala. 370; *Sailey v. Terrill*, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730, 85 Am. St. Rep. 433; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 1 N. W. loc. cit. 496, 33 Am. Rep. 129; 7 Cyc. 619, 620; *Daniel*, Neg. Inst. (6th Ed.) §§ 839-841.

In *Linick v. Nutting*, supra, the rules were recognized that "one can only part with title to personal property by his voluntary act or by conduct sufficient to create an estoppel"; that the delivery of a negotiable instrument is necessary to a valid inception of the contract; that possession of such instrument by an innocent holder for value is prima facie evidence of delivery (see section 9087, R. S. 1909); and that, if it appears that such instrument "has never been actually delivered, and that without any confidence, or negligence, or fault of the maker [italics ours], but by force or fraud, it was put into circulation, there can be no recovery upon it even when in the hands of an innocent holder."

[4, 5] Certainly this case is an authority sustaining the conclusion that under the rules of the Negotiable Instruments Act which are considered and discussed the maker or acceptor may be guilty of conduct in the care of the paper which would estop him from disputing the title of an innocent holder on the ground that he had not delivered the paper or voluntarily put it into circulation. Was plaintiff in the instant case guilty of conduct sufficient to raise an estoppel against the claim that it did not deliver the checks nor voluntarily put them into circulation? Allen, the president and principal stockholder of the plaintiff corporation, controlled its policies and business affairs. He was an able, experienced, and careful merchant who had succeeded in building up a large and successful business, and it is with much reluctance that we give expression to the conviction that in adopting and pursuing the course of business under consideration he and the manager, who acted under his orders, were grossly negligent in keeping the book of signed blank checks in such an exposed place without taking any precautions to guard against its spoliation. In the manager's use of the book knowledge was imparted not only to the employés, but to others who visited the office on business, that it contained signed blank checks. That fact

may be said to have been publicly proclaimed, and by offering such easy opportunities for the commission of a crime plaintiff was as much a tempter of the criminally minded and morally weak to whom such opportunity might come as it would have been had it left money lying unwatched and exposed in the office, or, as in one of the English cases, had signed a blank check and tossed it into the street. Certainly plaintiff, when it signed the checks, must be held to have anticipated that in the usual course of business they would be issued, and that some of them would pass into the hands of innocent holders for value before presentation to defendant for payment, and it owed a duty to such holders, despite the fact that they were under no legal obligation to acquire title or ownership of such paper, to exercise some care in its custody during the interim between the signing and delivery thereof.

Regarding defendant merely in the light of an innocent holder for value, we think the facts of the case, upon the plainest principles of fairness and justice, estop plaintiff from taking the position that, as to such holder, it did not voluntarily part with the possession of the checks, and therefore in law deliver them.

[6] We have gone thus extensively into this aspect of the case for the reason that we think the position of defendant with respect to the two checks of \$2,700.95 and \$195.15 should be regarded as that of an innocent holder for value, and not that of a debtor bank to a depositor. We are aware that in some of the cases cited by defendant, e. g., *Trust Co. v. Conklin*, 65 Misc. Rep. 1, 119 N. Y. Supp. 367, and *Snodgrass v. Sweetser*, 15 Ind. App. 682, 44 N. E. 648, no distinction appears to be observed between the status of a bank which pays a forged check signed by the depositor out of funds on deposit to his credit and of a bank which pays such check, thereby creating an overdraft.

[7] The relation of banker and depositor is that of debtor and creditor, and as to a checking account the contractual obligation assumed by the banker is to pay on presentation the checks drawn by the customer against the deposit. But the banker is under no legal or contractual duty to allow a customer to overdraw his account, and as to checks he pays which cause an overdraft may be regarded, not as a debtor who has discharged a legal duty to a creditor, but as a voluntary purchaser or holder for value of negotiable paper.

As to the check for \$395.60, which was paid when plaintiff had a larger sum than that on deposit, the relationship between the parties was purely that of depositor and banker—creditor and debtor—and plaintiff owed a duty of care to the bank greater than that which the maker of a negotiable instrument owes to subsequent holders for value. Any negligent breach of that duty which di-

rectly results in loss would charge the depositor with liability for such loss. As, for example, it is well settled in this state that, where after delivery of a completed check it is raised by forgery, the loss must fall on the maker if he negligently inserted the amount in a way to admit of the easy addition by forgery of other words and figures. *Bank v. Armstrong*, 62 Mo. loc. cit. 87.

[8] Considering the facts that a bank must honor the checks of its depositor, and cannot by the exercise of any degree of skillful inspection detect a forgery of a check signed and delivered in blank, we think every consideration of justice and common sense sustains the conclusion that a depositor should affix his signature to a blank check only for the purpose of directing the bank to pay out the money, and that the risk of signing and then keeping a blank check, whether the keeping be careful or negligent, should be considered a risk the maker voluntarily assumed. *Trust Co. v. Conklin*, supra; *Snodgrass v. Sweetser*, supra; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206. If the exigencies of the depositor's situation create a necessity for the signing of checks in blank, and then keeping them a time before putting them into circulation, why should he not bear the risk made by his own necessities, rather than the banker, who is a stranger to them, and is under the contractual duty to honor his written orders for the payment of money? He is the one who, in the service of his own interest, has given occasion for the commission of the wrong, and, under the familiar maxim, is the one who should bear the consequences.

[9] It follows from the foregoing considerations that, whether defendant be treated as an innocent purchaser of the checks for value or as a banker who paid them in discharge of a contractual obligation to a depositor, the loss of the forgeries should fall upon plaintiff. Defendant cannot be charged with negligence from the fact that the body of the checks was not in the handwriting of Morrow or any of plaintiff's officers or office employes. A bank is bound to know the signature of a depositor, but is not bound to draw a suspicious inference from the discovery that the body of the check is in unfamiliar handwriting. As is said in 2 *Daniel on Neg. Inst.* (8th Ed.) § 1654a:

"A bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer. If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions."

[10] Nor was it a thing to excite suspicion that one of these checks was larger in

amount than any plaintiff previously had drawn, and that it overdrew the account.

The judgment is for the right party, and is affirmed. All concur.

STATE v. RICHARDSON. (No. 11767.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916. Rehearing Denied
Feb. 21, 1916.)

INTOXICATING LIQUORS — 139—LOCAL OPTION LAW—VIOLATIONS — ACTS CONSTITUTING.

Rev. St. 1909, § 7227, declaring that no person shall keep, store, or deliver for or to another person, in any county that has adopted or may adopt the local option law, any intoxicating liquor, does not prohibit a manufacturer of intoxicating liquor from maintaining a branch house in a local option county for the storage of liquor and delivery thereof only to consumers residing in a sister state, and one in charge of the branch house receiving and filling orders sent through the mails from post offices in the sister state does not violate the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. —139.]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

J. P. Richardson was convicted of violating the local option law, and he appeals. Reversed.

Arthur A. O'Brien and Cowherd, Ingraham, Durham & Morse, all of Kansas City, for appellant. J. Rusk Blevans, for the State.

JOHNSON, J. Defendant was tried and convicted in the circuit court of Vernon county under an information alleging that, in violation of the local option law which was adopted in Vernon county:

Defendant, "on the — day of September, 1914, and ever since the said 16th day of September, 1913, and at all times hereinafter mentioned, * * * did then and there willfully and unlawfully keep, store for, and deliver to another person * * * to wit, for and to diverse and sundry persons to the prosecuting attorney unknown, certain intoxicating liquors, to wit, one carload of beer," etc.

It was agreed at the trial that what is known as local option—i. e., prohibition—was in force in Vernon county during the period alleged in the information, and it is conceded that, as an employé of Fred Bersnok, defendant was in charge of a warehouse owned and occupied by a Kansas City brewing company as a depot for the storage of beer deposited there by the company to fill orders it received by mail from consumers in Bourbon county, Kan., which lies immediately west of Vernon county. The warehouse was on the Missouri side of the state line, and deliveries therefrom into Bourbon county were made by wagon. This depot for the storage and distribution of beer was operated under the terms of a written contract between the brewery and Bersnok which provided that, in consideration of a commission of 50 cents per dozen bottles and

25 cents per dozen half bottles "of all beer delivered through him," Bersnok would "take charge of and provide suitable custodians for such storage depot," would "unload cars shipped by the breweries company, and store contents in said building, and upon receipt of delivery orders from the breweries company make from day to day delivery upon such orders to the customers of the brewery in Bourbon county, Kan."

The contract forbade Bersnok selling or permitting the sale of beer in Missouri or violating or permitting the violation of any law in or about the premises. The evidence shows that defendant, who was the custodian of the depot employed by Bersnok pursuant to this contract, performed the duties of receiving and storing the beer shipped to that depot by the brewery, and of receiving and filling orders sent through the mails from post offices in Bourbon county, either to the company at Kansas City, or addressed to "Fred Bersnok, Agent, The Kansas City Breweries Company, Eve, Vernon County, Missouri." Defendant did not accept or fill any other orders than those coming through such channels, and made no deliveries at the warehouse or in any other way than by delivery wagon which hauled the beer from the warehouse over the line into Kansas. There was a carload or more of beer in storage when defendant was arrested, and the business we have described was in full operation at that time.

It is apparent that this depot was, in fact, a branch business house maintained by the company for the purpose of facilitating the transaction of its mail order business with residents of Bourbon county, Kan. It was intended to be, and in fact was, headquarters for the transaction of all such business, and no beer was sent and stored there that was not intended for sale and delivery to Bourbon county consumers. Defendant was the agent of the company, the proprietor of the business, and his duties were not only those of a custodian in possession of the stock, but also those of a superintendent of the business carried on there. It was not intended that any of the beer stored there should be returned to the brewery, but all was to be delivered in Kansas, and, so far as the evidence discloses, or even intimates, the business, in fact, was conducted in good faith to serve this single purpose, and not in part as secret headquarters for carrying on an unlawful business of making sales and deliveries to consumers in Vernon county. Of course, there is always a possibility, and, we might safely add, an ever present danger, that beer kept in storage in local option territory for distribution to foreign consumers may leak and flow through forbidden channels, and it is argued by counsel for the state that, regardless of whether or not such mishaps occurred during the management of

the depot and business by defendant, the likelihood of the perversion of such places to unlawful uses was anticipated and effectually guarded against in the act passed by the Legislature in 1907 (Laws 1907, p. 231 et seq.), entitled:

"An act to prohibit persons running order houses from delivering intoxicating liquors to persons having no license to deal in same, and to prohibit the keeping, storing for, or delivering to another person intoxicating liquors in local option counties," etc.

The precise offense charged against defendant thus is defined in section 2 of that act (now section 7227, R. S. 1909):

"No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the local option law, any intoxicating liquors of any kind whatsoever."

This language is plain and unambiguous, and should be interpreted according to its natural, reasonable meaning, and, as far as rational interpretation will permit, to give effect to the principles and objects of the policy of our local option statutes. *State v. Robinson*, 163 Mo. App. loc. cit. 227, 146 S. W. 456. But it is a penal statute, and no offense may be read into it by intendment or implication. If its language does not clearly prohibit acts of the character of that under consideration, the courts should not attempt to rectify any deficiency, real or supposed, by judicial legislation.

The case before us may be resolved into this question: Does the statute prohibit a manufacturer of beer or other intoxicating liquors from maintaining a branch house in a local option county for the storage of its product and the delivery thereof only to consumers residing in Kansas; such deliveries being made only in the latter state?

The authority of the Legislature to regulate or prohibit that sort of traffic in intoxicants will be conceded as a part of the police power of the state, the exercise of which in no wise would infringe upon the jurisdiction of Congress over the subject of interstate commerce. *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. 767. But we fail to find in the statute any intent to exercise such authority. Of course, if defendant kept, stored or delivered beer in Vernon county in violation of the local option law, the fact that he acted as the agent of his company, his employer, would not excuse him from liability as a lawbreaker. In the recent case of *State v. Brown*, 188 Mo. App. loc. cit. 251, 175 S. W. 131, following *State v. Burns*, 237 Mo. 216, 140 S. W. 871, and *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530, we held that a teamster hauling beer in a local option county to his employer, the purchaser, who was importing it into the county for the purpose of selling it in violation of the local option law, would be guilty of "keeping it" within the prohibition of the statute if he had knowledge that he was hauling beer intended for

such distribution. But in the present case the beer was not kept or stored in Vernon county for sale or delivery in that county. The statute does not denounce any and all keeping and storing of intoxicants in prohibition counties, but only keeping and storing for another person, nor does it denounce all deliveries of intoxicants, but only those to another person "in any county that has adopted * * * the local option law." There is nothing in its language or in the interpretation thereof to be found in the reported cases expressing the legislative intention to prohibit a manufacturer of intoxicants, such as a brewer or distiller, from merely keeping or storing his product in local option territory. If the Legislature had meant that it would have said so in the statute, and not have restricted the scope of the proscribed offense to the act of storing "for another person," which, translated, must mean keeping or storing with intent to deliver to another person or persons in local option territory in violation of the local option laws. Keeping or storing for the sole purpose of making deliveries to consumers in other territory is not referred to in the statute, which, as shown, in relation to deliveries, expressly restricts its operation to deliveries "in any county that has adopted or may hereafter adopt the local option law." Bourbon county, Kan., though in a prohibition state, not being a local option county in this state, does not fall within the territorial area in which the statute prohibits deliveries to consumers of intoxicating liquors kept or stored in a local option county.

The statute no more applies to such keeping, storing, and delivering than it would to keeping and storing solely for the export trade of the manufacturer with foreign countries, or to the "keeping" of a common carrier transporting a shipment of liquor across a local option county. As far as the present inquiry is concerned, defendant was merely the servant of the brewer, performing duties the latter was lawfully entitled to have performed, and, since the master was not breaking the law by the hand of his servant, neither was the servant breaking it.

The judgment is reversed. All concur.

FORSEE v. JACKSON. (No. 11867.)
(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916. Rehearing Denied
Feb. 21, 1916.)

1. EQUITY — 34 — TRIVIAL MATTERS.

Violations of a building line covenant by an inch or two are too trivial for aid in equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 98; Dec. Dig. — 34.]

2. COVENANTS — 103 — CONSTRUCTION — BREACHES.

A deed provided that the building on the granted premises should be at least 2 feet from the north line, and should not be longer than

68 feet, the surface of the lot not to be raised more than 2½ feet. The space of 2 feet from the line was concreted, an areaway being put in to light the basement, while a wall built from the house to the rear of the lot was intended to protect the property. Held, that the covenants were not violated.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. ¶103.]

3. COVENANTS ¶103 — BREACH—VIOLATION.

Where a deed and contract for the conveyance of land provided that the building on the granted premises should not extend nearer the street than the grantor's house, and that the building should not be over 68 feet in depth, including back porches and sleeping porches, such covenants, in view of the rule favoring untrammelled use of property, do not apply to a front porch which extended beyond the grantor's premises.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. ¶103.]

4. COVENANTS ¶103 — RESTRICTIVE COVENANTS—BUILDING LINE AGREEMENTS.

Where a deed established a building line, the erection of a dwelling with bay windows extending 8 or 9 inches over the line is a violation of the covenant; the windows being a part of the building.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. ¶103.]

5. INJUNCTION ¶62—SUBJECTS OF PROTECTION—GROUNDS FOR RELIEF.

While a grantor is entitled to the aid of equity to prevent his grantee from violating restrictive covenants, yet after completion of the building a mandatory injunction will not be issued to compel removal of bay windows extending less than a foot beyond a building line; for such remedy would be too drastic.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127, 129; Dec. Dig. ¶62.]

6. APPEAL AND ERROR ¶1033 — REVIEW — GROUND OF REVERSAL.

In a suit to enforce restrictive covenants, where plaintiff was denied injunction, an award of one cent damages for plaintiff and costs is harmless and no ground for reversal; defendant not objecting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. ¶1033.]

Appeal from Circuit Court, Jackson County; Wm. O. Thomas, Judge.

Action by Margaret Forsee against Alice G. Jackson. From the judgment denying an injunction, plaintiff appeals. Affirmed.

I. J. Ringolsky and S. P. Forsee, both of Kansas City, for appellant. Grant I. Rosenzweig and C. E. McCoy, both of Kansas City, for respondent.

ELLISON, P. J. Plaintiff sold to defendant a lot situated on the northwest corner of Thirty-Eighth street and the Paseo in Kansas City. First, there was a written contract of sale, followed two weeks afterwards by a warranty deed. The contract and deed each contained the following restrictions: First, that the grantee should not erect any other than a two-story duplex building, the deed adding "or dwelling"; second, the attic of said building may be finished and either used in connection with the second floor apartment, or as a separate apartment;

third, it should face east; fourth, it should be "set at least two feet from the north line" of the lot; fifth, the grantee to have privilege of building a garage on the west 10 feet of lot, the space between that and the dwelling to remain open. The contract contained the following restrictions not in the deed: Back porches and entrances to be on west and south; the surface of lot not raised more than 2½ feet; the building shall be on a line with the grantor's house on the adjoining lot north; and it shall not be over 68 feet in depth, "including back porches."

Defendant built on the lot purchased, and plaintiff, claiming that these restrictions had been violated, filed her bill, after the house had been in great part constructed, whereby she seeks to have the building removed from forbidden ground. No bond was given, and therefore no temporary restraining order was issued, and the building proceeded to completion according to the desires and plans of defendant. The trial court found for plaintiff in the sum of one cent and refused an injunction.

It will be noticed that the contract contains four restrictions not found in the deed. Defendant insists that the whole contract was merged in the deed, and that the latter measured the entire rights of the parties. Our conclusion will be based on a concession to plaintiff (without decision) that the restrictions in the contract are in force notwithstanding their omission from the deed.

[1] We find from the evidence that many of plaintiff's complaints are unsubstantial. It seems that the building was nearer than 2 feet of the north line by five-eighths of an inch at one corner and 1¼ inches at the other (slightly increased at places by unevenness of stone), and that it was discovered by survey after completion of the house that it was about 3 inches nearer the street than plaintiff's building. These discrepancies may be classed as too small for aid in equity.

[2] Objection is made to areaway encroaching on this 2 feet, for light to basement, but in the reason of the contract that was not an improper thing. So a wall was built from the house to the rear of the lot. This was done to protect the property, and in no sense violated the object sought to be accomplished by the contract, as to grade or otherwise. *Nowell v. Boston*, 130 Mass. 209. The fact that this space of 2 feet was covered by concrete is of no consequence.

We are fully satisfied from the evidence, including the contract and deed, that plaintiff has no cause to complain of the shape of the roof, or that an apartment was made out of the attic, or that a basement was under the house inhabited by janitors or other servants.

[3] But, notwithstanding trivial objections to defendant's acts, we find two that are not so easily disposed of. Defendant built a

porch on the east end of the house proper, probably extending 7 feet nearer the street than plaintiff's house, and, if that is to be regarded as a part of the east wall of the house, there is a violation of that part of the contract forbidding the erection of a building not on a line with plaintiff's house on the north, and the further restriction that the building "should not be over 68 feet in depth, including back porches and sleeping porches." The rule is in favor of untrammelled use of one's property, and therefore restrictions which are ambiguous or doubtful should be construed against the grantor. *Land Co. v. Investment Co.*, 169 Mo. App. 715, 155 S. W. 861; *Kitcher v. Hawley*, 150 Mo. App. 497, 131 S. W. 142. The contract enters into detail of restriction, and omits to include a front porch in the length of the building, or in fixing the line on which the house should be built. One restriction on its face includes back porches, and it is but reasonable that omitting a front porch was to say that it was excluded.

[4, 5] Coming again to the provision that the building should not be constructed nearer than 2 feet of the north line, we find from the evidence that bay windows running the height of two stories and extending 8 and 9 inches over the forbidden space were a part of the house and constitute a substantial violation of that part of the contract. *Bank v. Kennet*, 101 Mo. App. 370, 74 S. W. 474. In the opinion in the latter case by Judge Goode there is a full and able discussion of the entire question now before us. It is there satisfactorily demonstrated that the injured party may invoke equity to compel a grantee to live up to, and carry out, restrictions embodied in the deed as the solemn contract of the parties; that it is not allowable for the violator of the contract to say that his change of the agreement is better than would be a compliance. *Land Co. v. Investment Co.*, 169 Mo. App. 715, 155 S. W. 861. He alone will not be permitted to refuse to carry out or to substitute something for the agreement that both have made. He could just as reasonably impose his will on the other party at the outset as to have his way in the end.

But in *Bank v. Kennet* the learned judge states, at page 395 of 101 Mo. App., 74 S. W. 474, that in determining the question of relief conditions may be presented which should prevent so drastic a remedy through the equity power of the court as the destruction of valuable permanent property to relieve against a wrong wholly out of proportion, especially if the mischief can "be remedied by more conservative action." The judge continues:

"If the damages are trivial, or if they can be made good by a legal judgment, or if the loss to the defendant by granting mandatory relief will be far more than the attendant benefit to the plaintiff, the writ will commonly be denied, and the plaintiff left to his action at law."

This view in a general way is approved in *Hemsley v. Marlborough House*, 68 N. J. Eq. 506, 601, 61 Atl. 455, and *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158. The subject was again considered by the St. Louis Court of Appeals in *Schopp v. Schopp*, 162 Mo. App. 558, 142 S. W. 740, and *Kitchen v. Hawley* supra, where, through opinions by Judges Reynolds and Norton, the views herein stated are considered and approved.

Now, a mandatory injunction which would require the tearing out in great part of the north end of defendant's house would be far too drastic in the circumstances of this case, and the trial court wisely exercised its discretion in refusing such writ. *Bailey v. Culver*, 84 Mo. 531, 540.

[6] We have not considered that part of the record mentioned by plaintiff showing a judgment for her for one cent and the costs, since, if it should be more than she should have had, no harm is done, and defendant is not complaining.

The judgment is affirmed. All concur.

ASBURY v. EVANS et al. (No. 11821.)

(Kansas City Court of Appeals. Missouri.
Feb. 6, 1916. Rehearing Denied
Feb. 21, 1916.)

1. SALES \S 52—ACTION FOR PRICE—EVIDENCE.

In an action for the price of potatoes, evidence held to authorize the jury to find an absolute and unqualified acceptance of plaintiff's offer of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 118-144, 1045; Dec. Dig. \S 52.]

2. SALES \S 53—ACTIONS FOR PRICE—QUESTION FOR JURY.

On an issue in an action for the price of potatoes whether the transaction was a sale or a consignment for sale on commission, a payment by check to plaintiff, having written on its face, "Advance on Potatoes," does not determine the case as a matter of law in favor of defendant, the rule as to conditional tender and acceptance not being applicable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 145-151; Dec. Dig. \S 53.]

3. APPEAL AND ERROR \S 882—ESTOPPEL TO ALLEGE ERROR.

On an issue in an action for the price of potatoes as to the quantity of potatoes ordered, where the term used in negotiation was "carloads," which defendants claimed to mean the minimum quantity while plaintiff insisted that it meant the maximum quantity, and where evidence of custom was heard and each side was granted instructions on what it took to constitute a binding custom, defendants cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

4. CUSTOMS AND USAGES \S 19—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for the price of potatoes, evidence that there was not a custom of minimum car shipments was admissible on an issue as to the quantity of potatoes ordered where the term used in negotiation was "carloads."

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. \S 41-43, 45, 46; Dec. Dig. \S 19.]

5. EVIDENCE ¶285—STATEMENT OF COUNSEL—ADMISSIONS.

In an action for the price of potatoes, the contention that there was no proof of the number of bushels shipped is not sustained where the number of carloads was shown, and it was admitted by counsel in stating the case that there were over 1,200 bushels to the car.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. ¶285.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by V. R. Asbury against O. C. Evans and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hal R. Lebrecht and Brewster, Kelly, Brewster & Buchholz, all of Kansas City, for appellants. E. F. Halstead and J. T. Jennings, both of Kansas City, for respondent.

ELLISON, P. J. Plaintiff resides and does business as a grocer in Williston, N. D., and defendants are commission men residing in Kansas City, Mo. Each dealt in farm produce. Plaintiff claims to have sold defendants five carloads of potatoes containing about 6,000 bushels at 25 cents per bushel. Defendants denied the purchase and claimed to have received the potatoes on consignment to be sold for plaintiff, and that in whatever capacity they received them, they were unmarketable on account of heating and sprouting as a result from being improperly loaded by plaintiff. Plaintiff's action is for the purchase price, and he recovered judgment.

[1] The transaction between the parties was by telegraph. The telegrams were singularly indefinite for business men. First, on the 20th of May, 1913, defendant wired: "Quote best price few cars potatoes. Name variety. Quick shipment."

To this plaintiff answered next day as follows:

"Name price f. o. b. Williston. Can furnish Ohio White, Red, Burbank, Cobblers, Triumphas, Mixed table. Can furnish at your own price if not too low."

On same day defendant answered:

"Wire received will honor your draft twenty five cents per bushel five cars good clean potatoes this week's shipment if possible do not want wilted or sprouted stock. If can give us mostly whites and good quality can possibly use ten cars, answer."

Plaintiff answered this on same day as follows:

"Will load two or three cars this week. Do you want potatoes loaded mixed, or separate?"

Next day defendant answered to keep them separate. Then on May 24th, defendant asked:

"Have you shipped potatoes. Wire numbers. Answer."

Plaintiff answered on next day saying a car (giving number) was shipped May 24th and "another car loaded." And on next day (the 26th) wired that the other car (giving number) was shipped that day. So as each

of a total of five cars was shipped, defendant was notified, the last notice being May 30th; when, on same day, defendant answered as follows:

"Don't think it advisable to ship more potatoes. Weather hot. Much lower."

There had been some correspondence between the parties by letter, and the question whether there was a sale to defendants or merely a consignment for sale by them on a commission, for plaintiff, was submitted to the jury by each party, and we think the verdict well sustained by this evidence, in connection with verbal testimony introduced. Defendants ordered the potatoes and were advised of the five carload shipments, when, as they had intimated that they might take ten, they ordered that they be discontinued. The cases like *Scott v. Davis*, 141 Mo. 213, 42 S. W. 714, on the necessity for an absolute and unqualified acceptance of an offer of sale do not affect this case adversely to plaintiff. For here, the transaction between the parties, taking it from beginning to end, affords ample ground for a jury to say there was such acceptance.

[2] There was a payment by check made by defendant to plaintiff of \$150. The latter claims it was a part payment of the purchase price, while the former insists it was on account, in his capacity as a commission agent. The check had written on its face the words: "Advance on Potatoes." Neither side mentioned this in the instructions as an issue, or as affecting an issue in the case, and we, of course, cannot say that it determined the case as a matter of law. But, aside from this, defendants did not plead or mention the check in its answer. The answer contained a general denial, but that was merely a denial that a payment of a part of the purchase price had been made as alleged by plaintiff. There is no room for application of the rule as to conditional tender and acceptance as announced in *St. Joseph School Board v. Hull*, 72 Mo. App. 403, and *Universal Talking Mach. Co. v. Rosenfield*, 141 Mo. App. 621, 125 S. W. 524.

The instructions given for the parties are not justly subject to substantial criticism. The issues between the parties were clearly submitted, and we must be content with the verdict.

[3] During the course of the trial it became a serious question as to what quantity of potatoes defendant ordered or purchased. The terms used in negotiation were "carloads," and defendants claim that such term meant the minimum quantity which could be said to be a "carload," which he fixed at 500 bushels, while plaintiff insisted it was the maximum quantity. The quantity in each car as shipped by plaintiff was about 1,200 bushels. On this subject evidence of custom was heard by the court, and each side submitted and were granted instructions on

what it took to constitute a binding custom, and we therefore find that defendants have no cause of complaint on that score.

[4] In this connection we notice an objection to evidence in behalf of plaintiff. We think the evidence competent as tending to show that there was not a custom of "minimum car" shipments.

[5] Among objections to the judgment is one that there was no proof by plaintiff of the number of bushels shipped. The face of the entire record shows clearly enough the number of bushels. Besides it was admitted by counsel in stating the case that there were over 1,200 bushels to the car.

The issues have been elaborately briefed by the respective counsel, but in state of case, as presented by the record, it has not been found necessary to go into a discussion of them.

The respective theories of the parties have been fairly submitted, and the judgment will be affirmed. All concur.

NOEL v. QUINCY, O. & K. C. R. CO.
(No. 11054.)

(Kansas City Court of Appeals. Missouri.
Dec. 7, 1914. Rehearing Denied
Jan. 11, 1915.)†

1. COMMERCE §27—"INTERSTATE COMMERCE"
—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT.

Where a railroad employe's service on a train was between points within the state, but the train ran and carried shipments from a point without the state to one within, the employe was engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT §111—INJURIES TO
SERVANT—APPLIANCES—SAFETY APPLIANCE ACTS.

Under the federal Safety Appliance Acts (Act March 2, 1893, c. 196, 27 Stat. 531; Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. 1913, §§ 8605-8615]), requiring railway carriers to provide such automatic couplers to be used in their trains engaged in interstate traffic as will couple from impact, the couplers must be so attached and kept attached that they will couple by impact, and a failure to work at any time sustains a charge of negligence, though the carrier provides couplers proper in material and construction, of standard make, and molded and constructed so as to be capable of coupling by impact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. §111.]

3. MASTER AND SERVANT §228—INJURIES TO
SERVANT—CONTRIBUTORY NEGLIGENCE—APPLIANCES—SAFETY APPLIANCE ACTS.

Rules of an interstate railway carrier, of which an employe has notice, but which would in practical effect nullify the federal Safety Appliance Acts, do not affect the employe's right to recover under the acts for injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. §228.]

4. MASTER AND SERVANT §278—INJURIES TO
SERVANT—APPLIANCES—SAFETY APPLIANCE ACTS.

In an action by an employe under the federal Safety Appliance Acts, where the train couplers failed to operate by impact, and there was evidence that such failure was not due to a fault in their construction, but to the fact that the hole in the wood of the crossbeam of the cars had become enlarged, leaving too much play, permitting the couplers to pass, instead of causing them to clasp, a case was made against the carrier, and it is not sufficient that the couplers will couple automatically when in line, and can be adjusted without the men going between the cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. §278.]

5. MASTER AND SERVANT §264—INJURIES TO
SERVANT—ACTIONS—PLEADING—CONTRIBUTORY NEGLIGENCE.

Where contributory negligence was not pleaded, the question whether it would be a defense under the federal Safety Appliance Acts was not involved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. §264.]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by Shelby P. Noel against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. G. Trimble and Willard P. Hall, both of Kansas City, for appellant. Stivers & Morris and Bruce Barnett, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff was an employe of the defendant railway as a brakeman, and while engaged in that service in this state had his left hand so severely crushed between cars that it was necessary afterwards to amputate it. He recovered judgment in the circuit court.

[1] Plaintiff's service on the train was between two points in Missouri, but the train ran between Quincy, Ill., on the east bank of the Mississippi river, to Kansas City, on the western border of the former state, and when plaintiff was injured there were cars in the train loaded with stoves from Quincy and with whisky from Peoria, Ill. In these circumstances plaintiff was engaged in interstate commerce. *McAdow v. K. C. Western Ry. Co.*, 164 S. W. 188; *Moliter v. Wabash Ry. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Southern Ry. Co. v. U. S.*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; *Pedersen v. Railway Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *N. Carolina Ry. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. And his petition is framed under the Employers' Liability Act of Congress (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). The charge is that the automatic coupling between a car in the train and the tender to the engine which

plaintiff was endeavoring to couple was in such condition that the coupling would not "make" from impact. The charge in the petition is in these words:

"That on and prior to the 15th day of September, 1911, there was attached to one of defendant's locomotive engines, in use, the number of which is to plaintiff unknown, on said line of railroad, a certain drawbar, to the end of which drawbar was attached a certain coupler, used for the purpose of being joined or coupled to a like or similar coupler upon any car in use on said railroad to which the defendant might have occasion to attach or couple said engine, and that on and prior to said date said drawbar on said engine was in a bad, defective, and worn condition, and unsafe and dangerous to the life and limb of any freight brakeman engaged in the work of coupling any car to said engine with or by means of said drawbar and said coupler thereto attached in this: That said drawbar extended through an opening or hole in a certain beam which constituted a part of said engine, to wit, the beam upon the rear end of the tender of said engine, and on and prior to said date the said hole or opening through which said drawbar extended, as aforesaid, had by long wear and use become so enlarged, and said drawbar had become so worn, that it was caused to and did move from side to side, and was not, nor would it remain, steady or secure in its place, and that accordingly, and as a result of said worn condition of said hole and opening, as well as of the worn condition of said drawbar, and of its being insecure and unsteady in its place, and of its moving from side to side as aforesaid, the said coupler on the end of said drawbar would not strike evenly and squarely into the knuckle upon the coupler upon any car to which said engine was being attached or coupled, and would not, therefore, couple automatically by impact. That said conditions were unsafe and dangerous to any freight brakeman engaged in the work of coupling or attaching said engine to any car in this: That because thereof it became and was necessary for such brakeman to move and adjust, with his hands, the coupler upon any such car being attached to said engine in order to bring the knuckle of such coupler in line with the coupler on the end of said drawbar, so that the same might be coupled or attached by impact."

No one saw plaintiff at the moment he was injured. His description of the way it happened was told substantially as follows:

"It had been raining, and after having done some switching at Plattsburg it became necessary to couple the engine to the cars on the main line, and he threw the switch so as to let the engine onto the main line. That the engine went against the head of the train to couple with it, but did not make the coupling. That when he arrived at the train he found both knuckles closed. That the engine slacked ahead three or four feet on his signal, and he opened the knuckle on the car, and gave the signal to back up. That this was done, and again the coupling would not make. He then observed that the coupler of the engine was out of line; that it had slewed something like four or five inches. That again the engine slacked ahead on his signal, and again he opened the knuckle of the car, and took his left hand and put it against the drawhead of the car, which was then wet from the rain, to shove it over in line with the coupler of the engine, so as to make the coupling. That one of his feet was on the wet rail. That while he was pushing against the coupler of the car he gave the signal to back the engine, which was only three or four feet away. That he was holding onto nothing with his right hand to steady him, but was trying to push the drawhead over, and his foot on the rail slipped as the engine backed up, and that

his left hand went down as the cars came together, and was caught between the couplers and was crushed." He had "opened the knuckles, but the coupling wouldn't make. The drawbar crossed by the other one without coupling, because it wouldn't stay in line. There was too much play—side motion. On most engines there is a metal plate over the hole in the wood to keep it from wearing, but there was no metal over this one and this coupler was out of line. It had slewed something like four or five inches and they passed each other."

[2, 3] This and other evidence showed that the couplers were in such defective condition that they would not perform their function by impact, making it necessary for plaintiff to go between the ends of the cars. The federal Safety Appliance Acts (Act March 2, 1896, c. 196, 27 Stat. 531; Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1906, c. 976, 32 Stat. 943), in declaring that such automatic couplers as will couple from impact should be provided by railway carriers and used in their trains which are engaged in interstate traffic, changed the common-law duty of reasonable care into an absolute duty, and a "failure of a coupler to work at any time sustains a charge of negligence." *Chicago, R. I. & Pac. Ry. Co. v. Brown*, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204; *C. B. & Q. Ry. Co. v. U. S.*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; *St. L. I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

Defendant refers us to rules of the company of which plaintiff had notice. The effect of defendant's suggestions on this head in practical effect would nullify the federal statute, and we will therefore not regard them as affecting plaintiff's case.

The mere fact that the carrier provides couplers proper in their material and construction, which are of standard make and are molded and constructed so as to be certainly capable of coupling by impact, will not alone be an entire performance of the duty which the Congress has imposed upon the carrier. Necessarily the couplers must be so attached to the cars, and kept attached, that they will perform the function required by the statute, viz. couple by impact.

[4] In this case the couplers failed to perform by impact of the cars, and there was evidence tending to show that such failure was not due to a fault in their construction, but from the fact that the hole in the wood of the crossbeam of the car, through which the metal "neck" extended, had become worn and enlarged, so that it left too much room or "play," and permitted the couplers to pass by, instead of permitting the knuckles of the coupler to pass over each other and clasp, thus perfecting the coupling. We think a case was made against defendant. But defendant says that this view is a step beyond the requirement of the federal statute, and insists that the Safety Appliance Act does not require all couplers in use in a train to be in position at all times to couple with each other. Counsel say that:

"If all the couplers will couple automatically when in line, and they can be adjusted without the men going between the cars, that is sufficient."

We think that would restrain the meaning of the statute to such narrow limit as to destroy much of its usefulness. We have conceded the couplers here involved were properly made, and that, if properly attached to the car, they would couple by impact; yet if the defendant has so attached them to the car that they will not meet, they fail to accomplish the purpose of the statute as fully as if they would not couple by impact, if they did meet. In either instance, the defect is such that a necessity is created for "men going between the ends of the cars" in order to couple them. As expressed by Justice Van Devanter, while on the federal Circuit Court of Appeals, the couplers should be kept in an operative condition. That case was an instance where one of the couplers was broken. *U. S. v. A., T. & S. F. Ry.*, 163 Fed. 517, 90 C. C. A. 327.

In another part of the same statute (section 5 [U. S. Comp. St. 1913, § 8609]) it is provided that there shall be certain drawbars of standard height for freight cars, measured perpendicularly from the top of the rail. These naturally would wear so as not to meet the statutory requirement, and the railway company provided "shims," which are metallic wedges of different thickness, and may be used to raise the drawbar; it being the duty of the conductor or brakeman to use them as needed. The Supreme Court of the United States held that it was the absolute duty of the railways, on pain of liability if neglected, to both equip and operate their cars with the standard drawheads, and that it was better the burden be upon them than upon the helpless and suffering employé. *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. loc. cit. 294-296, 28 Sup. Ct. 616, 52 L. Ed. 1061; affirmed in *C., B. & Q. Ry. v. United States*, 220 U. S. loc. cit. 573, 31 Sup. Ct. 612, 55 L. Ed. 532. The rule, as stated in these three decisions, like our statement above, is that the absolute duty of the railway does not end with the mere installation of the appliance. In the first of these cases, Justice Van Devanter said the duty of the railway "in maintaining the prescribed safety appliance in operative condition" was absolute. The operative condition of the couplers here involved was not maintained, so that they would couple by impact without the necessity of men going between the ends of the cars, and hence the statute was violated. The statute now excepts cars from the operation of the act which are being hauled in for repairs. Act Cong. April 14, 1910, c. 180, § 6 Stat. p. 299, § 4 (U. S. Comp. St. 1913, § 8621).

[5] Contributory negligence was not pleaded, and hence we need not say whether, if

it had been pleaded, it would have been a question in the case under the federal statute and the decision in *Chicago, R. I. & Pac. Ry. Co. v. Brown*, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204.

We have concluded that we ought not to disturb the verdict on the ground of being excessive.

There being no error in the record, the judgment is affirmed. All concur.

J. F. MEYER MFG. CO. v. SELLERS et al. (No. 11780.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. MECHANICS' LIENS §132—TIME FOR FILING LIEN—EXTENSION OF TIME.

A materialman who, after the termination of the account for materials furnished a building contractor, supplied without charge a new door in place of one proved defective, does not thereby extend the time for filing a lien for material; the owner having prior to the furnishing of the new door accepted and paid for the building as complete.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. §132.]

2. TRIAL §234—INSTRUCTIONS.

An instruction which does not require the jury to find the facts predicated, but which merely recites them, is erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. §234.]

3. TRIAL §252—INSTRUCTIONS—EVIDENCE.

An instruction which predicates the facts in direct contradiction to all the evidence is erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. §252.]

4. MECHANICS' LIENS §280—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action on a materialman's lien for materials furnished a building contractor, defended on the ground that the lien had not been filed in time, evidence that the owner had paid for the building was admissible to show that he regarded the building as finished and unqualifiedly accepted.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 557-563; Dec. Dig. §280.]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

"To be officially published."

Action by the J. F. Meyer Manufacturing Company against R. F. Sellers and others. From a judgment for defendant Jacob C. Bloch, plaintiff appeals. Affirmed.

H. T. Williams, of Sedalia, for appellant. George F. Longan, of Sedalia, for respondents.

TRIMBLE, J. This is a suit upon a materialman's lien for materials furnished by plaintiff to Sellers, Rickets & Co., original contractors with defendant Jacob C. Bloch for the erection of the latter's residence. Originally the claim was for \$685, but, pending the suit, the contracting firm failed, and

its assets were distributed among creditors, plaintiff receiving \$123.30 on the claim herein sued on, leaving a balance due plaintiff of \$561.75. All the members of said firm except Sellers went into voluntary bankruptcy and were discharged from their debts, whereupon this suit was dismissed as to all except Sellers, as the only remaining original contractor, and Bloch, as owner of the property. The latter raised the only defense made in the case. That was that the lien claim was not filed within four months of the accruing of plaintiff's account as required by section 8217, R. S. Mo. 1909. The case was tried by jury, resulting in a general judgment against Sellers in plaintiff's favor for the balance due, but on the question of lien the judgment was in favor of defendant Bloch. Thereupon plaintiff appealed.

The erection of the dwelling was commenced in July, 1912. Both Shaw, the foreman of Sellers, Rickets & Co., and defendant Bloch testified that the house was completed in October, 1912, and the owner moved into and occupied it on the 18th of that month. The last item on plaintiff's account for materials furnished and used in the house at the time the owner accepted and moved into it was furnished on September 21, 1912. The lien claim was not filed until July 10, 1913. This, of course, was more than four months after the accruing of plaintiff's account, and would defeat the lien, unless plaintiff is right in its claim that by reason of it having furnished, on March 12, 1913, a door to replace one formerly supplied by it which had proved defective, the account was extended to that date and was thus brought within the four months prior to July 10, 1913. The contract price for building the house was \$5,410, and on the 30th of November, 1912, Mr. Bloch made the last payment thereon amounting to \$950 which, with what he had theretofore paid, amounted to more than the contract price.

[1] As stated, the evidence is that the house was finished and made complete in every respect in October, 1912, and the owner moved into it October 18th, and accepted it as a completed house, and shortly thereafter paid for it as such. Everything about the house was all right so far as the owner could see. Shortly after Christmas, however, an outside door commenced to crack. The owner, some time in January, 1913, mentioned the fact to Sellers, and said he thought he ought to have a new door to replace it. Sellers laughingly put him off, and Bloch, knowing that the firm was in financial straits, did not expect him to do anything in regard thereto. However, in April, 1913, about six months after Bloch had accepted and moved into the house, Sellers, Rickets & Co. replaced the cracked door with a new one. Bloch says he was surprised to get it. It seems that Sellers, Rickets & Co. wrote plaintiff that the door they had theretofore

furnished had proved defective, and asked plaintiff to supply another one in its place. Thereafter plaintiff put another door through the drying process necessary to prevent it from warping, and sent it to take the place of the one it had previously furnished. No extra charge was made for this. The new door was merely substituted for the old one. The old door was an item entering into the original account created some time prior to September 21, 1912, and plaintiff admits that no charge was made for the new door; yet in the account sued on the new door is put in as an item of date March 12, 1913. It is in this manner that the account is sought to be brought down to within four months of the filing of the lien claim.

We are of the opinion that, under the circumstances, the lien claim was not filed within the statutory time; that the replacing of the defective door by the new one in March, 1913, did not have the effect of extending the account so as to enable plaintiffs to hold a lien on defendant Bloch's property filed within four months of that date, but not filed within four months of the time the account terminated.

The evidence shows that the materials were furnished, the house was finished, accepted, and paid for, and plaintiff's account was complete and had no further continuity as a business transaction after September 21, 1912. After the termination of an account, the supplying of new articles, without charge, to replace articles furnished under the account, but which have proved to be defective, does not have the effect of extending the time for filing the lien. *Homeopathic Ass'n v. Harrison*, 120 Pa. 28, 13 Atl. 501; *Harrison v. Homeopathic Ass'n*, 134 Pa. 558, 19 Atl. 804, 19 Am. St. Rep. 714.

The case is not like that of *Fire Extinguisher Co. v. Farmers' Elevator Co.*, 165 Mo. 171, 65 S. W. 318; for there the work had not been completed, as certain requirements of the contract had been overlooked, and the owner of the property, the elevator company, had not approved of nor accepted the work, and was not precluded "from demanding further work of construction called for in the contract." See 165 Mo. 183, 65 S. W. 322. In the case at bar the evidence shows that the contract had been completed and accepted as complete, and there was, in fact, no evidence to the contrary. The question of whether the contract was complete, and the house was accepted at the time defendant Bloch says it was, was submitted to the jury, and by their verdict they found that it was. The owner had accepted the property as satisfactory, and, while he afterwards said to the contractor that he thought he ought to have a new door in place of the one that was defective, there is no evidence that he demanded it as a matter of contract right. The evidence shows rather the voluntary and gratuitous furnishing of a new door

to replace the old one, and thereby make good the defect and cure plaintiff's fault in supplying the first door. We do not think a materialman can, after the termination of an account, extend the time allowed by statute for filing a lien therefor merely by rectifying some fault of his in performing the contract. When the new door was supplied in March, 1913, it was not the addition of a new item to the account so as to bring it down to said date. It was merely the correction of a defective item furnished during the running of the account, and the correction related back to the date when the defective item was furnished. The case is not like one where the owner stands upon the contract and refuses to accept the property until the contract has been complied with by the supplying of something not yet furnished, nor is it at all analogous to one where the owner desires a change made, and succeeds in having something else supplied that is different from that agreed upon in the original contract.

[2, 3] Plaintiff complains of the court's refusal of its instructions 1, 2, and 6. But both instructions 1 and 2 are, in effect, peremptory instructions to find for plaintiff. No. 1 tells the jury that, if the last door was furnished and delivered on or after March 12, 1913, or within four months prior to July 10, 1913, then the finding should be for plaintiff. No. 2 said, if the lien claim was filed within four months from the date of the delivery of the last item of materials in the account, ten days' notice in writing having been previously given to the owner, then the verdict should be for plaintiff. No. 6 told the jury that, although the entire amount of materials contracted by plaintiff to be furnished were furnished or installed or built into the house, and that thereafter more than four months elapsed during which there was no settlement between Bloch and the contractors, and the house was not accepted as fully completed by the owner, and that on or after March 12, 1913, and more than four months from the delivery of all materials, a defect was discovered in one of the doors furnished by the plaintiff, and the owner required the contractors to take it out and put in a good door, etc., then plaintiff had four months after the delivery of said last-named door in which to file the lien claim, and, if ten days' notice in writing had been given, etc., then the lien was filed in time, and the verdict would be for plaintiff for the enforcement of the lien. The first trouble to be noticed with this instruction is that it does not require the jury to find the facts predicated, but merely recites them, and then says:

"If said door was put in on or after March 12, 1913, then the plaintiff's mechanic's lien, filed on the 10th day of July, 1913, he having given ten days' previous notice thereof in writing, was filed within the time required by law, and you will find for the enforcement of said lien."

The next objection is that the facts predicated are in direct contradiction to the evidence, because all of it, that for plaintiff as well as that for defendant, shows that the house was completed and accepted as a completed house, and settlement therefor made.

In lieu of these refused instructions, the court on its own motion gave three instructions for plaintiff submitting the question whether or not the last door was furnished by plaintiff and required by defendant as a part of and in fulfillment of the contract, or whether it was supplied after the termination of the account and contract, and after the defendant had accepted the house as finished under the contract. These instructions are more favorable to defendant than the evidence justified, since there is no doubt but that the door was not furnished until long after the house had been completed and accepted as a finished house meeting the requirements of the contract. The words "so that the contract could have been recovered upon by the contractors," in this instruction, do nothing more than emphasize or explain what the court meant as to the contract being completed or incomplete. Taken by themselves, doubtless they would submit a question of law to the jury, but they are saved from that by the rest of the instruction, which sets forth the facts which the jury are to settle and determine in arriving at the question whether the last item was furnished as a part of an unfinished contract, or was merely supplied after the completion and acceptance of the work under the contract.

[4] Plaintiff objected to the admission of evidence showing that the owner paid for the house at the time it was finished. Of course, the mere fact that the owner had paid the contract price would be no defense against a lien for material, and the trial court ruled at the time of the admission of the testimony that it could not be so considered, but that it was admitted solely as a circumstance tending to show that the owner regarded the house as finished and the work completed and the house unqualifiedly accepted. In addition to this, the court instructed the jury that the fact that the owner had paid the contract price constituted no defense to the lien, but was only admitted as a circumstance bearing upon the question whether the contract had been fully completed and the house accepted. Under these facts we do not see how this evidence could have misled or prejudiced the jury. The fact of payment was certainly a very vital circumstance to throw light on whether defendant considered the house finished according to contract and whether the door was supplied in fulfillment thereof, or was merely afterwards put in to rectify something defective in plaintiff's performance of a contract already executed and completed.

We think the judgment should be affirmed. All concur.

NUFER v. METROPOLITAN ST. RY. CO.
et al. (No. 11908.)(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)**1. STREET RAILROADS §84 — OPERATION — RATE OF SPEED—CITY ORDINANCE.**

To run a street car over a public street in excess of the maximum speed allowed by ordinance is negligence per se, and testimony that a car was running at 25 to 30 miles an hour, and therefore in excess of ordinance speed, makes out a prima facie case for plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. §84.]

2. NEGLIGENCE §136—TRIAL—QUESTIONS OF FACT—DETERMINATION IN GENERAL.

It being presumed that plaintiff in an action for injuries exercised reasonable care, the court cannot say, as a matter of law, that he was negligent, unless the evidence most favorable to him and all reasonable inferences therefrom indisputably contradict that presumption.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. §136.]

3. TRIAL §156—QUESTIONS OF LAW AND FACT—DEMURRER TO EVIDENCE—DETERMINATION.

In considering a demurrer to the evidence, while the court is bound to draw every inference in favor of plaintiff, it is not bound to accept testimony which could not possibly be true, being opposed to plain physical facts and laws, as, where plaintiff testified that, while he drove 30 feet at 6 miles an hour, a car advancing at 25 miles an hour traversed 300 feet and collided with his wagon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. §156.]

4. STREET RAILROADS §90—OPERATION—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the driver of a wagon within 30 feet of a street car line looked and saw a car approaching at a distance of not over 150 feet at a rate of 25 miles per hour, and proceeded to cross the track without looking again, and the speed of the car was a usual one with which he was familiar, he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. §90.]

5. STREET RAILROADS §117 — OPERATION — ACCIDENT AT CROSSINGS—NEGLIGENCE PER SE—LAST CHANCE RULE.

In an action for injuries from collision with a street car, where the motorman admitted that he became aware on his first sight of plaintiff that the latter was proceeding negligently towards the track, and his further testimony that he immediately attempted to stop the car was contradicted by testimony on behalf of plaintiff, the refusal to submit the case on the issue of negligence under the last chance rule was error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. §117.]

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by William Nufer, by next friend, Otto Schmidt, against the Metropolitan Street Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Kyle & Coon, of Kansas City, for appellant. John H. Lucas and Charles N. Sadler, both of Kansas City, for respondents.

JOHNSON, J. Plaintiff, a minor, sued by next friend to recover damages for personal injuries he received in a collision at a street crossing in Kansas City between a Brooklyn avenue street car operated by defendants and a two-horse milk wagon plaintiff was driving. The petition alleges that the car was running at a speed in excess of the rate allowed by laws and ordinances of Kansas City, that plaintiff would have crossed the track in safety if its speed had been moderate and lawful, and that the motorman could have seen plaintiff in a perilous situation and avoided the collision if he had been in the exercise of reasonable care. The averment of negligence is that:

The injury was the direct result of "negligence of defendants in operating said street car at a rapid, unlawful, and dangerous rate of speed and in failing to stop or slow up said car, although the perilous condition of plaintiff was seen, or by the exercise of reasonable care could have been seen, by the servants and agents of defendants, in time to have avoided said injuries."

The defenses are a general denial and contributory negligence.

The allegations of the petition embraced negligence in running the car at excessive speed, to which contributory negligence would be a defense, and negligence under the humanitarian rule, to which it would be no defense. In the rulings on the instructions the court refused to submit the latter negligence and sent the case to the jury on the issues of excessive speed and contributory negligence. The jury found for plaintiff on these issues, and assessed his damages at \$5,000. Afterwards a motion for a new trial filed by defendants was sustained, and a new trial was granted. Plaintiff appealed.

The court overruled the peremptory instruction asked by defendants, and, since the questions it raises are pressed upon us and lie at the threshold of the case on appeal, we shall give them our first attention.

The injury occurred near midday March 10, 1913, at the intersection of Tenth and Holmes streets. Plaintiff, then 18 years old, was driving south on Holmes street at a trot, and had almost cleared the north street car track on Tenth street when a west-bound car running thereon struck the rear end of his wagon, which was a covered milk wagon, and caused the injury. Holmes street is 28 feet 5 inches wide between curb lines. There is an apartment house at the northeast corner of Holmes and Tenth streets which faces west on Holmes, 20 feet back from the north line of Tenth street. When plaintiff, who states he was driving on the west side of Holmes street, emerged from behind the obstruction of the apartment house, he first looked eastward along Tenth street and observed the car coming on the north track. He states that it was at the next street intersection, 300 feet away, and, so far as he could observe, was running at usual speed. At that moment, the heads of the horses were

about 6 feet from the track, and the horses were traveling about 6 miles per hour "at a slow steady trot." Plaintiff permitted them to continue at this gait over the crossing, and immediately after looking eastward and seeing the car at the next street he looked in the opposite direction, and, seeing no car approaching on the south track, proceeded without looking again towards the on-coming car. In delivering milk plaintiff had driven daily over this route for eight months, had often seen cars approaching on that track, and on cross-examination admitted that he did not notice any difference "in the way this car was coming and the ones he had seen." An ordinance admitted in evidence limited the speed of cars in that section of the city to 15 miles an hour. A witness introduced by plaintiff testified that this car was running from 25 to 30 miles per hour—the track was downgrade—and that such speed was a usual, or, at least, a frequent occurrence on that stretch of track. The evidence of plaintiff shows that no effort was put forth by the motorman to stop or check speed before the collision.

The evidence of defendant tends to show that the car was running at 10 or 12 miles an hour; that, when the motorman, who was looking in that direction, first saw the wagon, it was about as far from the crossing as the car; that the team was traveling at a very fast trot, and kept that gait over the crossing; that plaintiff did not look towards the car; and that the motorman, on the first appearance of danger, applied the brakes and reduced speed, but could not bring the car to a stop until after the collision.

[1] It has long been the rule in this state, applied in a multitude of cases, that to run a street car over a public street of a city in excess of the maximum speed allowed by ordinance is negligence per se. *Troll v. Railway Co.*, 169 Mo. App. 260, 158 S. W. 504; *Strauchon v. Railway*, 282 Mo. 587, 135 S. W. 14; *Gratiot v. Railway*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Hutchinson v. Railway*, 161 Mo. loc. cit. 253, 61 S. W. 635, 852, 84 Am. St. Rep. 710. The testimony that the car was running at 25 to 30 miles an hour, and therefore in excess of ordinance speed, being reasonable, made out a prima facie case for plaintiff which entitled him to go to the jury on the first-pleaded charge of negligence, unless we find that he was guilty in law of negligence which directly contributed to his injury.

[2] On this branch of the case we must approach the subject with the presumption that plaintiff was in the exercise of reasonable care, and, unless the evidence most favorable to him, and all reasonable inferences to be drawn therefrom, indisputably contradict that presumption, we could not say, as a matter of law, that he was negligent, and the defense of contributory negligence would be resolved by conflicting evidence into an issue of fact for the jury to determine.

[3] A close analysis of plaintiff's evidence compels the conclusion that his version of the situation he says was revealed by his observation of the car on emerging from behind the obstructing building cannot be accurate. While, in considering the demurrer to the evidence, we are bound to draw every reasonable inference in favor of plaintiff which the evidence will permit, we are not bound to accept as true testimony which could not possibly be true, being opposed to plain and indisputable physical facts and laws. Plaintiff would have us believe that, while he was traveling not to exceed 30 feet at 6 miles an hour, a car advancing at 25 miles an hour traversed 300 feet and collided with the end of his wagon as it was clearing the crossing. This could not be true, and the conclusion is indisputable that at the moment when plaintiff says he first looked and saw the car it could not have been further away than the middle of the block—not over 150 feet from the place of collision.

[4] In instances where the traveler on the street has no knowledge of the practice of running cars in excess of ordinance speed, and is therefore in a situation where he is justified in relying to an extent on the presumption that cars will not be operated in violation of law, and where he, because of his closeness to the track, when the car becomes visible, is not able to receive accurate impressions relative to its speed, the courts of this state have refused to declare him guilty in law of contributory negligence. See *Gratiot v. Railway*, supra; *Strauchon v. Railway*, supra; *Troll v. Railway*, supra.

The question of plaintiff's negligence includes none of these excusatory elements. He admits knowing that cars habitually were run over this crossing in the manner this car was being run, and was in a position to know that the car was close enough to the crossing to threaten him with injury if he did not stop. Manifestly he pursued his course with indifference, and, without looking again toward the car which he knew was so close, relied implicitly on the motorman to avoid the collision by reducing speed. Such conduct was negligence which will preclude a recovery upon the first charge of the petition. *Grout v. Railway*, 125 Mo. App. 552, 102 S. W. 1026; *Cole v. Railway*, 121 Mo. App. 605, 97 S. W. 553; *Smeltzer v. Railway*, 166 Mo. App. 204, 148 S. W. 192; *Ross v. Railway*, 113 Mo. App. 600, 88 S. W. 144; *Kinlen v. Railway*, 216 Mo. 145, 115 S. W. 523; *McCreery v. Railway*, 221 Mo. 18, 120 S. W. 24; *Moore v. Railway*, 176 Mo. 528, 75 S. W. 672; *Warner v. Railway*, 178 Mo. 125, 77 S. W. 67. And the court erred in submitting that branch of the case to the jury.

[5] But the court erred against plaintiff in not submitting the case on the issue of negligence under the last chance rule. The admission of the motorman that he became aware on his first sight of plaintiff that the latter was proceeding negligently towards the

crossing, and therefore was in a position of peril, is an admission of facts which imposed the duty on him to put forth every reasonable effort to prevent the injury by reducing the speed of the car. A slight checking of speed would have prevented the injury, as the wagon was almost across the track when struck.

The motorman says he immediately applied the brakes and reduced speed, but he is contradicted by witnesses for plaintiff who say the car did not begin to slow down until the collision. This raised an issue of fact which the court should have sent to the jury. The demurrer to the evidence was properly overruled, and the court was right in ordering a new trial, since the verdict was the result of a submission of the case upon an improper and prejudicial view of the law applicable to the facts disclosed.

The judgment is affirmed. All concur.

KOLKMEYER v. CHICAGO & A. R. CO. (No. 11296.)

(Kansas City Court of Appeals. Missouri.
Nov. 2, 1914. Rehearing Denied Jan. 11,
1915. Motion to Transfer to Supreme Court
Denied Jan. 7, 1916.)

1. COMMERCE §33—INTRASTATE COMMERCE.

A shipment by one carrier between two points in a state, and by another carrier between a point in the state and a point in another state, is, while transported by the first carrier, an intrastate shipment, where the shipment was made under local bills of lading, and where the second carrier transported the shipment free of charge by virtue of a contract between it and the shipper, and the rights and liabilities of the first carrier are governed by state law, and not by federal law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. §33.]

2. CARRIERS §159—INTRASTATE SHIPMENT—CONTRACTS—NOTICE OF DAMAGES.

A carrier of an intrastate shipment may incorporate in the contract of shipment a stipulation for written notice of damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. §159.]

3. CARRIERS §159—INTRASTATE SHIPMENT—CONTRACTS—WAIVER.

A carrier of an intrastate shipment may waive the stipulation in the contract of shipment for written notice of damage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. §159.]

4. CARRIERS §165—INTRASTATE SHIPMENT—CONTRACTS—WAIVER.

A carrier of live stock was notified of injury to the stock, and its agents notified entered on an examination of the claim, without intimating that a claim in writing was desired. The agents secured the services of a veterinary, and also asked the shipper's consent to kill one of the injured animals, and the shipper replied that, if done, it must be done on the responsibility of the carrier. It was agreed that the question of damage should be taken up for adjustment when the stock reached destination. Held to justify a finding that the carrier waived the

stipulation in the contract for written notice of damage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 729, 730; Dec. Dig. §165.]

5. CARRIERS §218 — LIMITED LIABILITY—CONTRACTS—VALIDITY.

A stipulation of limited liability in a contract for the transportation of live stock will not be enforced, where the carrier exacted more than the rate allowed by law, though the contract on its face shows an agreement to transport it at a reduced rate in consideration of the agreement for limited liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. §218.]

6. CARRIERS §228 — CARRIAGE OF LIVE STOCK—LIABILITY—BURDEN OF PROOF.

A shipper, accompanying a shipment of live stock, has the burden of proving that injury to the stock was occasioned by the carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. §228.]

7. TRIAL §296—INSTRUCTIONS—CURE OF ERROR.

Where, in an action against a carrier for injuries to live stock, the court required the jury, in order to find for the shipper, to find that the stock was properly loaded, and that the carrier negligently injured it, and that, if injury happened by reason of neglect of the shipper's servant accompanying the stock, there could be no recovery, a charge erroneously imposing on the carrier the burden of showing that the injury was not caused by its negligence in handling the car was not prejudicial to the carrier.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. §206.]

8. APPEAL AND ERROR §1053 — HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

Where, in an action against a carrier for injuries to live stock during transportation, the court correctly charged on the measure of damages, the carrier's objection to evidence as to what two or more of the animals were worth per day for work was not material.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. §1053.]

Appeal from Circuit Court, Cole County; Jack G. Slate, Judge.

Action by Henry W. Kolkmeier against the Chicago & Alton Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. Perry S. Rader, of Jefferson City, for respondent.

ELLISON, P. J. Plaintiff was a general contractor in grading for railroads and also in revetment work for the federal government. In 1910 he was engaged, under a contract with the government, in the construction of a levee on the Missouri river at "White Bend," Howard county, Mo. He also had a contract with a railroad known as the Kansas City Southern, which was operated through the states of Missouri and Arkansas, to construct a part of its track in the latter state. When he completed his contract in Howard county he desired to take

his employes and his work animals (horses and mules) to Horatio, Ark., and there carry out his contract with the Kansas City Southern.

Defendant's road runs through Glasgow, Howard county, to Kansas City, Mo., and plaintiff delivered his animals to defendant at Glasgow, to be carried by it to Kansas City at a rate of freight of $13\frac{1}{2}$ cents per 100 pounds, and received defendant's written bill or agreement to carry to that place for that price, together with free passage for one attendant; plaintiff and his other men going by passenger train and paying fare. After loading the animals, defendant so negligently handled its train between Glasgow and Kansas City as to kill some of them and cripple others.

On arriving at Kansas City the animals not killed were placed in stockyards, and on the next day plaintiff shipped them to Horatio, Ark., over the Kansas City Southern. On account of plaintiff's intending to work for the latter road no charge for freight or passage was made by it. Defendant claimed there was a mistake in the freight rate stated in the written agreement for shipment from Glasgow, saying that it should have been 16 cents, instead of $13\frac{1}{2}$ per hundred-weight. Plaintiff would not agree to this, and defendant turned over its claim to the Kansas City Southern for collection. Plaintiff was refused permission to unload at Horatio unless he paid the freight claimed by defendant of 16 cents per hundred. There was some question as to other charges which need not concern us now. Suffice it to say plaintiff finally paid a total bill of \$50.70. He brought this action against defendant for damages suffered by him in consequence of defendant's negligence between Glasgow and Kansas City and recovered judgment in the trial court.

[1] Plaintiff's petition bases his action on an intrastate shipment, under the state law, from Glasgow to Kansas City, both points in Missouri. Defendant insists that it was an interstate shipment, governed exclusively by the federal law as interpreted by the Supreme Court of the United States. Its basis for this contention is that the ultimate destination of the property was Horatio, Ark., and that the mere fact of a separate bill or shipping contract to Kansas City only would not prevent its being a through shipment. In the words of defendant's brief, its claim is that:

"The billing is immaterial, for the intention of the parties as to the actual destination must govern as to whether or not the shipment was an interstate shipment. If it was the intention of the shipper at the time he delivered the shipment to the defendant at Glasgow, Mo., to have it transported to Horatio, Ark., this would govern over any form of billing."

It is contended that this proposition is directly supported by the Supreme Court of the United States in *Railroad Com. of La. v. Texas & Pac. Ry. Co.*, 229 U. S. 336, 33 Sup.

Ct. 837, 57 L. Ed. 1215, and *Railroad Com. of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004.

In the first case proper tribunals of the state of Louisiana were seeking to recover penalties from the railroad for violation of the state law concerning the shipment of certain logs and staves. A proceeding was begun in the federal court to enjoin the action on the ground that the shipment was interstate, and the decision of the Supreme Court sustained that view. It appears that there was delivered to another railroad in Louisiana 18 carloads of logs and staves under a bill of lading naming New Orleans in the same state as the destination. That road hauled them to Alexandria in that state and delivered them to the Texas & Pacific Railroad Company; and the latter took them to New Orleans, where the consignees ordered them delivered to certain steamships plying between the latter city and European points, to which they were transported by the ships under bills of lading issued by the latter. There was another shipment which we need not notice. The ground of the decision in that case is that, notwithstanding local bills of lading only showing a shipment to New Orleans, it was manifest the *intention* was to make a foreign shipment. The court stated that the character and continuity of a shipment of foreign commerce did not terminate at the seaboard, nor was it terminated or affected by being transported on local bills of lading, and that the shipment "takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country."

Defendant insists that in view of this ruling plaintiff's local bill of lading from Glasgow to Kansas City, and a reshipment on another road from that point to Horatio, Ark., did not prevent the shipment being one of interstate commerce from the moment it was received at the starting point. But we think this case lacks the controlling fact of that case. Here there was no intention to ship to Horatio when the freight was delivered to defendant at Glasgow. The manifest intention was to ship only to Kansas City, at which point plaintiff was to have free transportation to Horatio. Rates of freight and rules of commerce did not concern plaintiff further than Kansas City. The object of his delivery of the stock to defendant at Glasgow was not for a through shipment to Horatio. The object was to get it to a point where commerce was at an end and plaintiff could have free transportation. The face of the case wholly negatives the idea that a through or continuous shipment was intended to start at Glasgow and end at Horatio. We fail to see any legal objection to one making a shipment locally from place to place, though he may intend ultimately to make a final stop at a point outside the

state. Suppose this shipment had been a family carriage and team, or a motor car, and that the shipper, for pleasure, or business, had shipped it from place to place within the state, maybe in opposite directions, intending ultimately or finally (say in a week, a month, or a year) to make his last shipment to some place in another state; would each of these points in the itinerary be a part of an interstate shipment? Would the original shipment be considered the starting of an interstate shipment?

We think the case is within the decision of *Gulf, Colo. & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. There corn, originally brought from North Dakota to Kansas City, Mo., was taken on from the latter point to Texarkana, Tex., and there reshipped to Goldthwaite, Tex., the point intended from the start as the ultimate point of delivery. The shipper kept informed as to interstate freight rates and state rates, and he was thereby aware that he could get cheaper transportation by shipping first to Texarkana and then reshipping to Goldthwaite than by a direct shipment to the latter place. See divs. 11, 12, and 13 (204 U. S. 406, 27 Sup. Ct. 360, 51 L. Ed. 540) of statement of facts. The controversy was whether the shipment to Goldthwaite was a part of the shipment from North Dakota, and therefore interstate, or was it local and intrastate? The decision was that it was the latter. Judge Brewer, in delivering the opinion of the court, likened the shipment to a passenger. He said:

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made."

The question is important and difficult, and if defendant is of the opinion that we have misconstrued the federal statute it will have the opportunity of taking the opinion of the Supreme Court of the United States.

[2, 3] The contract of shipment provided that plaintiff should give written notice of any claim for damages (not to any particular officer, but to the defendant) within five days after unloading. It is conceded by plaintiff that this was not done; but he insists that the notice was waived. Here again defendant takes the position that the shipment was interstate commerce, and governed by the federal law and the decision of the federal courts thereunder. We so decided in *Hamilton v. Railway Co.*, 177 Mo. App. 145,

164 S. W. 248. If we are correct in the view that this was not an interstate shipment, then defendant's argument fails, and the question of notice and waiver must be determined by authoritative rulings of the state courts. Those rulings are that a carrier may properly incorporate a provision for written notice of damage in its contract of shipment, but that such character of notice may be waived. *Rice v. Railway Co.*, 63 Mo. 314; *Richardson v. Railway Co.*, 149 Mo. 311, 50 S. W. 782; *Ward v. Railway Co.*, 158 Mo. 236, 58 S. W. 28; *Bellows v. Railway Co.*, 118 Mo. App. 500, 94 S. W. 557.

[4] In this case there was evidence tending to show that defendant was notified of the injury and damage to the stock, and that the different agents notified entered upon an examination and investigation of the claim without intimating a specific claim in writing was desired. These agents secured the service of a veterinary surgeon, and also asked plaintiff's consent to kill one of the injured mules, and his answer was that, if done, it must be done on the responsibility of defendant. Finally it was agreed that the question of damage should be deferred, and be taken up for adjustment when the animals should reach Horatio. It is clear that the jury was warranted in finding there was a waiver of the written notice.

[5] There was a provision in the contract of shipment containing a stipulation that the value of each animal did not exceed \$100 and that the rates were proportioned to valuations. Accepting the shipment as local and intrastate, and therefore governed by the rulings of the state courts, we find this provision is without consideration. On its face it agrees to make the shipment at a reduced rate of freight in consideration of the maximum liability of \$100 for each animal. But the evidence showed that in fact the sum actually exacted of plaintiff was not a reduced rate; it being insisted that that charge was an increased rate over that allowed by law. Under the regulation of the statute (sections 3231, 3240, 3241, R. S. 1909), no greater charge than \$20.34 for the car containing the stock could have been charged, and yet defendant required plaintiff to pay \$50.70. It is true that a part of this was said to be made up for feed and for expense of a veterinary. But, after deducting whatever should be properly allowed for items other than freight, there remained an excess charge over a lawful rate. It being clear that there was no reduced rate, the contract must fall for want of consideration to support it. *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Richardson v. Railway Co.*, 149 Mo. 312, 50 S. W. 782; *Paddock v. Railway Co.*, 60 Mo. App. 328; *Wilson v. Railway Co.*, 66 Mo. App. 388; *Duvenick v. Railway Co.*, 57 Mo. App. 550.

[6] The following is a part of an instruction which was given to the jury at plaintiff's request:

"The law imposes on a railroad company which has received and accepted a carload of live stock for shipment to safely carry said stock and deliver them to the consignee in a safe condition at the usual place of unloading such cars at point of destination. * * * And if the mules and horses mentioned in plaintiff's petition were found to be killed or injured upon the arrival of said car at Kansas City, the burden rests upon defendant to show that the injury to said stock was not caused by defendant's negligence in handling said car."

This placed the burden on the wrong party. At common law the carrier was an insurer of the safe delivery of freight unless it was prevented by the act of God or the public enemy, and therefore proof of delivery to the carrier in good condition and non-delivery at destination, or, if it was delivered, proof that it was damaged, made a prima facie case for the plaintiff, and cast the onus on the carrier to exculpate himself by showing an act of God or the public enemy. But there was a class of freight which in course of transportation could become wasted or lost from its inherent nature, as, for instance, by evaporation, or by decay and the like, and common sense and justice suggested that a carrier did not insure the shipper against that kind of loss, and so in that class of cases a third exception was added to the carrier's liability. Then in the course of time and the development of conditions, the duty devolved upon the carrier to transport live animals. This was a business said, by some writers, not to have existed in the early days when the common law had its origin. But whenever it did have its origin, and it became a duty and a business, there came with it the further exception to the carrier's obligation closely resembling the one just mentioned; that is, there was no insurance against loss occasioned by the inherent propensities of the animals carried. *Georgia Railroad v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 15 Am. Rep. 19; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *L. N. O. & T. Ry. v. Bigger*, 66 Miss. 319, 6 South. 234.

While it has nothing to do with the question or the decision which we are coming to (and therefore speaking for the writer only), we may admit without casting doubt on our decision that, with an exception we shall presently mention, the burden of showing how or why the loss or damage to live animals occurred remained with the carrier the same as in inanimate freight. *Railway Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Swiney v. Express Co.*, 144 Iowa, 842, 115 N. W. 212, 122 N. W. 967; *T. W. & W. R. Co. v. Hamilton*, 76 Ill. 393; *Dow v. Steam Packet Co.*, 84 Me. 490, 24 Atl. 945; *St. L. Southwestern Ry. Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894; *Hinkle v. Ry. Co.*,

126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *Chicago Ry. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; *Lindsley v. Chicago, M. & St. P. Ry. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; *Stiles v. Railway Co.*, 129 Ky. 175, 110 S. W. 820, 18 L. R. A. (N. S.) 86, 130 Am. St. Rep. 429. There are decisions of the Courts of Appeals that at first sight might be said to be opposed to this statement (*Winslow v. Railroad*, 170 Mo. App. 617, 157 S. W. 96, *Cunningham v. Railway Co.*, 167 Mo. App. 273, 149 S. W. 1151, and perhaps others); but in each of these there was an agreement by the shipper that he would accompany and care for the stock, and hence, as we will now proceed to show, they properly stated the law in saying that the burden was on the shipper.

In the present case the contract of shipment provided that the shipper or his agent should have free passage and should accompany the stock to take care of it, and that fact forms the exception of which we have just spoken. The chief reason for casting the burden of proof upon the carrier is that, ordinarily, freight is delivered over to him exclusively, and the shipper cannot well know anything of it, or the cause of anything which may happen to it. Such information is peculiarly within the knowledge of the carrier, and hence he is required to produce the proof of whatever will excuse him. But this reason falls in the shipment of live animals, if the shipper accompanies them; hence the burden is on him to prove that the loss was occasioned by the carrier's negligence. *Clark v. St. L., K. C. & Northwestern Ry. Co.*, 64 Mo. 440, 448; *McBeath v. W. St. L. & P. Ry. Co.*, 20 Mo. App. 445; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Louisville Ry. Co. v. Hedger*, 9 Bush (Ky.) 645, 15 Am. Rep. 740; *Penn. R. Co. v. Ralordon*, 119 Pa. 577, 584, 13 Atl. 324, 4 Am. St. Rep. 626; *Norfolk Ry. Co. v. Reeves*, 97 Va. 284, 290, 33 S. E. 606; *St. L., I. M. & So. Ry. Co. v. Weakly*, 50 Ark. 397, 415, 8 S. W. 134, 7 Am. St. Rep. 104. Standard text-books state the same rule. 4 *Elliott on Railroads*, § 1549; 3 *Hutchinson on Carriers*, § 1357; 5 *Am. & Eng. Enc. of Law* (2d Ed.) 439, 446, 453.

[7] But in the circumstances of the record we think the jury could not have been misled, and consequently no harm was done. The part of the instruction preceding that to which we have referred required the jury to find that the animals were properly loaded at Glasgow in a car furnished by defendant, and that the car was accepted and sealed by defendant, and that afterwards, before leaving Glasgow, while placing the car in the train, ran it into and against other cars with such unusual violence and speed as to throw down and greatly injure the animals. Instruction No. 6 for plaintiff also required

the jury to find that the defendant negligently injured the animals by the act of its employes and servants. Again, instruction No. 1 for defendant put the burden of proof on the plaintiff, and No. 2 stated the hypothesis that if the injury happened to the animals by reason of neglect of plaintiff's servant accompanying them there could be no recovery. And at no place did defendant ask an instruction explanatory of the difference in burden of proof when the action is based on a shipment of animals accompanied by the owner. We do not say a litigant is compelled to ask an instruction to cure error in those of his opponent; but we are satisfied that in the state of the record before us no misunderstanding could have been had by the jury on account of the unfortunate wording of that part of the instruction quoted.

[8] It is conceded that plaintiff's instruction on the measure of damages was correct, and hence we think there is nothing substantial in defendant's objection to evidence as to what two or more of the animals were worth per day for work.

We have not discovered any error justifying a disturbance of the judgment, and it is consequently affirmed. All concur.

KEETON et al. v. NATIONAL UNION.
(No. 11849.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. INSURANCE — 687 — FRATERNAL INSURANCE — ACTIONS — DEFENSES.

In an action on an insurance contract, the defendant, to avail itself of defenses founded on laws applicable to beneficiary contracts of fraternal associations, has the burden of showing that it was such an association authorized to do business in the state, and that the certificate in question is a contract of fraternal beneficiary insurance, and these facts cannot be proved by the terms of the contract itself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. — 687.]

2. INSURANCE — 687 — ACTIONS ON CONTRACTS — EVIDENCE.

In an action on an insurance contract, defendant's offer of its articles of incorporation in evidence, showing that defendant was incorporated in Ohio as a fraternal beneficiary association, but not that it was licensed and was doing business within the state as such association when the certificate was issued, was properly refused.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. — 687.]

3. INSURANCE — 687 — ASSESSMENT INSURANCE — NATURE OF CONTRACT.

A certificate expressing the absolute and unconditional undertaking of defendant to pay the beneficiaries a certain amount out of its benefit fund without making the obligation dependent on the collection of an assessment upon persons holding similar contracts cannot be classed as assessment insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. — 687.]

4. INSURANCE — 340 — FORFEITURE — NONPAYMENT OF ASSESSMENTS.

Where neither an insurance contract nor the by-laws, rules or regulations of the insurer contained any provision authorizing the declaration of a forfeiture for nonpayment of assessments and no forfeiture was declared, though the application for the insurance says that the suspension of the insured for nonpayment of assessments shall forfeit the rights of himself and beneficiaries, the insurance continues in force, the only recourse being to deduct unpaid assessments from the amount of the benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. — 349.]

5. INSURANCE — 640 — ACTIONS ON CONTRACTS — ISSUES.

Abandonment of a contract of insurance is an affirmative defense which is waived if not pleaded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. — 640.]

6. INSURANCE — 245 — ACTIONS ON POLICY — DEFENSE — ABANDONMENT.

Abandonment of a contract of insurance is not a defense in the absence of proof that insured failed to pay or offer to pay subsequent assessments after his default.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 523; Dec. Dig. — 245.]

7. INSURANCE — 559 — PROOF OF LOSS — WAIVER.

An insurer's denial of liability dispenses with proofs of loss or surrender of the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. — 559.]

8. INSURANCE — 598 — AMOUNT OF LIABILITY — INTEREST.

Under Rev. St. 1909, § 7179, authorizing interest on written contracts after they become due and payable, interest is recoverable on a beneficiary certificate from the date of denial of liability by the insurer, though proofs of death and surrender of the certificate, required by its terms, were never made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1494; Dec. Dig. — 598.]

9. APPEAL AND ERROR — 1151 — DISPOSITION OF CAUSE — REVERSAL.

Error in authorizing recovery of interest only from commencement of trial instead of the date of denial of liability by insurer does not require a new trial, but the court will direct judgment for interest from the correct date.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. — 1151.]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by Cecil G. Keeton, administrator of the estate of Mary E. Keeton, and others, against the National Union, a corporation. From the judgment for plaintiffs, both parties appeal. Affirmed on appeal of defendant, and reversed on appeal of plaintiffs, with instructions.

See, also, 178 Mo. App. 301, 165 S. W. 1107.

Haff, Meservey, German & Michaels, of Kansas City, for appellants. Sparrow & Page, of Kansas City, for respondent.

JOHNSON, J. This suit was begun February 20, 1911, by the widow and children of Cornelius Keeton, deceased, upon a policy or certificate of insurance issued by defendant to Keeton January 14, 1892, in which the plaintiffs were designated as beneficiaries. The certificate is sued upon as a policy of old line insurance, but it is alleged in the answer that defendant was a fraternal beneficiary association incorporated in Ohio and authorized to do business as such in this state, that the certificate was a fraternal beneficiary contract and was forfeited for nonpayment of dues, and that plaintiffs failed to furnish proofs of loss. The reply was a general denial.

At a former trial the court at the close of plaintiffs' evidence gave a peremptory instruction for defendant, whereupon plaintiffs took an involuntary nonsuit with leave, and in due course of procedure appealed to this court. We reversed the judgment, and remanded the cause on the ground that plaintiffs had made a prima facie case, which put defendant to proof of its affirmative defenses, and in view of a possible retrial we enunciated the law applicable to the case as it then stood. *Keeton v. National Union*, 178 Mo. App. 301, 165 S. W. 1107. Afterward plaintiff Mary Keeton died, and the cause was revived in the name of her administrator. Another trial resulted in a directed verdict for plaintiffs for the amount of the policy and interest from February 20, 1911, and judgment was rendered accordingly, but both parties appealed—defendant on the ground that under the pleadings and evidence plaintiffs are not entitled to recover anything, and plaintiffs for alleged error in the peremptory instruction which allowed interest to be computed only from the date of the suit (February 20, 1911), instead of authorizing interest from March 13, 1908, the date plaintiff claims the insurance became due and payable.

The cause was tried on the same pleadings we reviewed on the former appeal, and we find the evidence introduced at the last trial has not altered the general aspect of the case and presents but few questions of law not considered and determined in the reported opinion. Aside from any consideration of the doctrine invoked by plaintiffs that the law of the case as declared therein must be accepted as a final adjudication of all questions actually determined (*May v. Crawford*, 150 Mo. loc. cit. 524, 51 S. W. 693; *Taussig v. Railroad*, 186 Mo. loc. cit. 281, 85 S. W. 378; *Mill Co. v. Sugg*, 206 Mo. loc. cit. 153, 104 S. W. 45; *Railroad v. Bridges*, 215 Mo. loc. cit. 294, 114 S. W. 1084), we are convinced of the soundness of that decision, and for that reason shall treat it as authoritative.

[1] We hold the burden devolved upon defendant if it would avail itself of defenses founded on laws applicable to beneficiary contracts of fraternal associations, to show that it was such association, authorized to

do business in this state, and that the certificate in question was a contract of fraternal beneficiary insurance. These facts cannot be proved by the mere form or terms of the contract itself. *Gruwell v. Knights*, etc., 126 Mo. App. 496, 104 S. W. 884; *Baltzell v. Modern Woodmen*, 98 Mo. App. 153, 71 S. W. 1071; *Aloe v. Fidelity Mutual Ass'n*, 164 Mo. 675, 55 S. W. 993; *Logan v. Insurance Co.*, 146 Mo. 114, 47 S. W. 948.

[2, 3] Defendant did not prove, or offer to prove, these essential facts. It did offer its articles of incorporation in evidence, and complains of the refusal of the court to admit them, but they bore upon no other fact than that defendant was incorporated in Ohio as a fraternal beneficiary association, and did not tend to prove that it was licensed and was doing business in this state as such association at the time the certificate was issued. We infer from the argument of counsel for defendant that they rely more upon their position that the certificate should be treated as a contract of assessment insurance than upon the idea that it was a fraternal beneficiary contract. For the reasons stated it must be construed as insurance of another class than fraternal beneficiary (*Gruwell v. Knights*, etc., *supra*), and we do not share the view that it should be classed as assessment insurance. In *Easter v. Brotherhood*, 172 Mo. App. 292, 157 S. W. 992, a case cited in support of defendant's position, we held as we do here that the absence of proof that the defendant was authorized to transact business in this state as a fraternal society precluded it from taking advantage of the laws relating to the beneficiary contracts of such societies, and on finding that the contract then under consideration had all the features of insurance on the assessment plan, we construed it as one of assessment insurance governed by the laws relating to that class of contracts. But in the present case the contract cannot be so classified for the reason that its essential features are inconsistent with the distinguishing characteristics of insurance on the assessment plan. The certificate expresses the absolute and unconditional undertaking of defendant to pay the beneficiaries \$2,000 out of its benefit fund without making the obligation in any wise dependent upon the collection of an assessment upon persons holding similar contracts. Such condition, our Supreme Court have decided, is the test under our statutes, whether or not a company is an assessment company. *McDonald v. Life Ass'n*, 154 Mo. 618, 55 S. W. 999, and other cases cited; *Gruwell v. Knights and Ladies of Security*, *supra*. But whether the contract be construed as assessment or old line insurance the affirmative defenses must be held to have failed, and the judgment for plaintiff was proper for the following reasons.

[4] Keeton carried the insurance ten years and then, in February, 1902, was suspended for nonpayment of an assessment. He ap-

plied for reinstatement as a member, but was refused on an adverse report on the state of his health after examination by defendant's medical examiner. After that defendant did not treat him as a member and gave him no notice of subsequent assessments. He lived two years without anything further being done with reference to his status with defendant. His insurance was not declared forfeited, nor does any provision appear in the by-laws, rules, or regulations of defendant introduced or offered in evidence authorizing the declaration of a forfeiture of a beneficiary certificate for nonpayment of assessments.

The application of Keeton does say that his suspension for such cause shall forfeit the rights of himself and beneficiaries; but, as we held in the former opinion, this was not a declaration or stipulation that suspension automatically would work a forfeiture. Regarding the application as an integral part of the contract, it falls short of sustaining defendant's contention that the suspension of and refusal to reinstate Keeton ipso facto operated as a forfeiture of his insurance, and since the by-laws, rules, and regulations, if also regarded as a part of the contract, contains no express provisions for a forfeiture, none may be predicated of a failure to pay assessments or installments of premiums. As we held in *Gruwell v. Knights, etc.*, supra, in the absence of any stipulation in the contract for forfeiture for nonpayment of assessments, the policy will remain in force during the lifetime of the assured, however delinquent he may have become with respect to agreed payments. Without such stipulation or provision the failure to pay premiums or assessments allows no other recourse to the insurer in the event the assured dies delinquent than to deduct the unpaid premiums from the amount of the insurance.

[5, 6] We are not intimating that the assured may not abandon the contract, but no such question is before us, since abandonment is an affirmative defense which defendant waived by not pleading it in its answer. If pleaded it would have been unavailing in the absence of proof that Keeton failed to pay or offer to pay subsequent assessments which he was bound to pay to keep his insurance alive. *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. loc. cit. 107, 74 S. W. 486. The facts constitutive of plaintiffs' prima facie case being conceded and the affirmative defenses having wholly failed, the court properly gave a peremptory instruction for plaintiffs.

[7, 8] As requested by counsel for plaintiffs, that instruction directed the jury to return a verdict for plaintiffs "for the face of the policy in suit, namely, \$2,000, together with interest thereon at the rate of 6 per cent. per annum from March 13, 1908." The court struck out this date and substituted February 20, 1911, the date the suit was

brought, and in the verdict the jury computed interest from the substituted date. The obligation of defendant, as stated in the policy, was to pay the beneficiaries \$2,000 "upon sufficient proof of the death of the said friend (Keeton) and upon the surrender of this certificate." Keeton died February 17, 1904, and no proofs of loss were furnished defendant nor was the certificate surrendered and no effort was made to collect the indemnity until March 11, 1908, when plaintiffs' attorney at Kansas City addressed a letter to defendant at Toledo, Ohio, stating that plaintiffs had found the policy and desired to be informed if it was in force at the time of Keeton's death. Under date of March 13, 1908, defendant replied that Keeton "severed his connection with the National Union on February 10, 1902."

The policy contained no provision limiting the time in which proofs of loss should be furnished and the certificate surrendered. Defendant's denial of liability dispensed with proofs of loss or tender of the certificate which, of course, was intended to be surrendered only in pursuance of defendant's recognition of liability. The rule is well settled that a denial by the insurer of all responsibility and its refusal to pay anything constitutes a waiver of notice and proof of death (*McComas v. Insurance Co.*, 56 Mo. 573), and where, as in the present case, the contract contains no agreement prescribing a period for payment after the reception by the insurer of proofs of loss, we do not perceive any good reason against the view that the denial of all liability matures the obligation and makes it due and payable.

The statute provides (section 7179, R. S. 1909):

"Creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts."

Construing this statute with reference to insurance contracts, the Supreme Court, through Wagner, J., say in *Brown v. Assurance Co.*, 45 Mo. 221:

"When the contingency occurred, the obligation was binding and absolute, and the sum presently due. The rights of the parties were then fixed, and it was the duty of the defendant to pay on notification of the death of Brown; and on its refusal to comply, interest was thenceforth payable."

[9] The suggestion that plaintiffs are entitled to interest from the date of Keeton's death will be passed with the observation that the only question before us is the right to interest from the denial of liability, and that question is ruled in favor of plaintiffs. The court committed error in modifying the instruction, but we think such error does not require another trial of the cause. *Berthold v. Gruner*, 12 Mo. App. 575; *Murdock v. Ganahl*, 47 Mo. 135; *Henry County v. Salmon*, 201 Mo. 136, 100 S. W. 20; *Gilsonite Co. v. Fair Association*, 231 Mo. 539, 132 S.

W. 657; *Armentrout v. Railway*, 1 Mo. App. 158.

The judgment is reversed, and the cause remanded, with directions to enter judgment for plaintiffs for the face of the policy and interest at 6 per cent. per annum from March 13, 1908. All concur.

PAYTON v. WOOLFOLK. (No. 11825.)

(Kansas City Court of Appeals. Missouri. October Term, 1915.)

LANDLORD AND TENANT \Leftrightarrow 170—**DEBAUCHERY OF WIFE—LIABILITY OF LESSOR OF ASSIGNATION HOUSE.**

Where a wife voluntarily goes to an assignation house with another than her husband and is debauched, no action for damages by the husband lies against the lessor of the premises on which the house was conducted.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 685-690; Dec. Dig. \Leftrightarrow 170.]

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by Charles F. Payton against John L. Woolfolk. From a judgment sustaining a motion in arrest of judgment, plaintiff appeals. Affirmed.

Langsdale & Howell, of Kansas City, for appellant. Johnson & Lucas, of Kansas City, for respondent.

TRIMBLE, J. The petition in this case charged that the defendant owned certain premises in Kansas City and rented the same to a tenant who conducted an assignation house therein with defendant's knowledge and permission; that on the 19th day of April, 1913, plaintiff's wife "visited and patronized said assignation or bawdyhouse in company with one James G. Hoover, where she was by the said James G. Hoover at said time debauched"; wherefore a judgment for damages against defendant was prayed. No charge is made that the defendant had anything to do with the debauchery of plaintiff's wife. The only thing alleged against defendant is leasing the premises to his tenant and thereafter knowingly permitting her to run a bawdyhouse therein. There is no averment or statement showing how or in what manner the house being of such a character caused the debauchment complained of.

After a trial, at which the defendant made the point that the petition stated no cause of action against him, the jury returned a verdict for plaintiff in the sum of \$2,000. The trial court sustained the motion in arrest of judgment on the ground that "plaintiff's petition does not state facts sufficient to constitute a cause of action against defendant." Plaintiff has appealed.

The judgment of the court sustaining the motion in arrest must be affirmed. There is

no causal connection alleged or shown to exist between the defendant's act in renting the house and the debauchery of plaintiff's wife. Taking the allegations of the petition, which is all that is before us, the wife and Hoover were the concurring causes of her defilement. She went to the house voluntarily with Hoover, and could have gone anywhere with him for the same purpose. Unless the damages are the natural and also the proximate consequences of the wrongful act alleged, there can be no recovery; and "proximate, as here used, means closeness of causal connection, and not nearness in time or distance." *Moon v. St. Louis Transit Co.*, 247 Mo. 227, loc. cit. 236, 152 S. W. 303, 306, and cases cited. Even if, under some conceivable state of facts, a connection of some sort might be said to exist between the ownership and renting of the house and the debauchment, still, in the case before us, if a causal connection between the alleged wrongful act and the damage had been alleged, it has been broken by the intervention of another distinct, independent, responsible, human agency, which directly produced the damage. This being so, the defendant cannot be held liable. *Wharton on Negligence*, § 134; *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, loc. cit. 475, 24 L. Ed. 256; *Bishop on Non Contract Law*, § 42.

Wherefore the judgment of the trial court must be affirmed. It is so ordered. All concur.

C. A. BURTON MACHINERY CO. v. NATIONAL SURETY CO. (No. 11820.)

(Kansas City Court of Appeals. Missouri. Feb. 7, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS \Leftrightarrow 81 — **CONTRACTS—BONDS OF CONTRACTOR—LIABILITY TO MATERIALMAN.**

Kirby's Dig. Ark. § 4981, provides that it shall be the duty of every person who wishes to avail himself of the Mechanic's Lien Act to file with the circuit court within 90 days an account of the demand due after allowing all credits and containing a correct description of the property to be charged with the lien. Sess. Acts Ark. 1911, p. 462, amends chapter 101 of Kirby's Digest by adding the provision that, whenever any public officer shall enter into a contract in any sum exceeding \$100 for any public improvement, or constructing any public building, he shall take from the party contracted with a bond to the state of Arkansas conditioned that such contractor shall pay all indebtedness for labor and material furnished. *Held* that, even though this becomes a part of the original statute, the requirement that a true account and a description of the property shall be filed in the circuit clerk's office refers only to those who would avail themselves of the lien, and not to those suing on the bond, where the improvement is a public building on which no lien can be had, and hence one furnishing materials for a school building was not required to file such account in order to hold the surety liable on the bond.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 195, 196, 340; Dec. Dig. \Leftrightarrow 81.]

**2. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

That one furnishing materials to a contractor for use in the construction of a school building took the contractor's notes therefor did not discharge the surety on the contractor's bond given to secure payment of labor and materials, where the notes were merely unsecured collateral, and were not accepted as payment.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**3. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

A contract for the construction of a school building specified no time when the contractor should pay bills for labor and material, and the contractor and the surety on its bond agreed unconditionally to pay the bills without any stipulation or condition that the surety would do so only if the contractor failed to pay them when they became due. All through the contract and bond were provisions that no variation from the manner and time of making payments of the contract price to the contractor should impair the rights of any one for whose benefit the bond was given, and that the failure of the board of education to pay materialmen out of money held back from the contractor as it was authorized to do should not impair such rights; the only limitation as to time being that suit could not be brought against the surety more than 90 days after the completion of the building. Held, that the slight extension of time granted the contractor by a materialman involved in the taking of notes and the renewal thereof did not release the surety, where such extension of time resulted in no damage to it.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**4. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

In an action on a contractor's bond for the value of materials furnished for use in the construction of a school building, if damage resulted to the surety from the implied extension of time to the contractor involved in the taking of notes, this was a matter of affirmative defense, to be pleaded and established by proof.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**5. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

In such action the fact that the contractor was declared a bankrupt did not of itself show that it could have been made to pay the materialman's account at any time between the date it was declared a bankrupt and the time the materials were purchased.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**6. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

Where though one furnishing materials to a contractor for use in the construction of a school building also sold the contractor materials for use on other jobs and kept all of the items of the account with the contractor on the same page of the ledger, each item was individually designated so that it was known to which job each item belonged, and the items for materials used for the school building were few and easily picked out, and the court was

able to easily and definitely pick them out as well as the payments by the contractor, which should be and were applied towards the payment thereof, there was no such commingling of the accounts as prevented a recovery against the surety on a bond given by the contractor in connection with the school building contract.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**7. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

In an action for the value of materials furnished a contractor for use in the construction of a school building against the contractor's surety, the failure of the materialman to offer to cancel notes taken from the contractor did not defeat a recovery, where the notes were overdue, and were not taken in payment, and neither the contractor nor the surety asked to have them canceled, as the materialman could not assign them to an innocent holder nor recover a second satisfaction thereon, and they were mere worthless paper.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

**8. SCHOOLS AND SCHOOL DISTRICTS — 81 —
CONTRACTS — BONDS — LIABILITY TO MATERIALMAN.**

In a materialman's action against the surety on a contractor's bond, it would not be presumed that the contractor's notes were taken by the materialman as payment for the materials, and whether they were so taken was a question for the jury.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. 81.]

9. TRIAL — 386 — TRIAL BY COURT — DECLARATIONS OF LAW — SUFFICIENCY.

Where defendant did not ask or present any specific declarations for the court to pass upon, a general declaration of law drawn by the court from the facts was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. 386.]

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

"Not to be officially published."

Action by the C. A. Burton Machinery Company against the National Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Hagerman, Clyde Taylor, and Samuel R. Freet, all of Kansas City, for appellant. Griffin & Orr, of Kansas City, for respondent.

TRIMBLE, J. The firm of Lewis & Kitchen, of Kansas City, was the contractor for the heating and ventilating apparatus to be furnished and installed in the reconstructed and enlarged high school building of Ft. Smith, Ark., at the contract price of \$41,720. The contract was made by the board of education, as party of the first part, with the contractor, as party of the second part, and the defendant herein signed said contract, as party of the third part. In addition to the various stipulations relative to the furnishing and installing of said plant, the contractor agreed with the school board to pay all par-

ties furnishing labor or materials used in the work. And for the faithful performance of all the terms, agreements, stipulations, conditions, and covenants in said contract the contractor, as principal, and the defendant, as surety, in consideration of all the premises, jointly and severally bound themselves in the sum of \$10,430. The instrument contained a further provision that this bond feature of the contract should inure to the benefit of those who had supplied material for, or performed labor on, said work, whether by subcontract or otherwise.

Plaintiffs, with knowledge of said contract and bond, sold to the contractor material which was used on and went into the plant contracted for, to the amount of \$3,328.88, after all proper credits had been given. The contractor failed to pay for said material, and in December, 1918, went into bankruptcy before the completion of their job. Within the time provided in the contract and bond the plaintiff brought this suit on same to recover for said material so furnished.

The answer was: First, a general denial; second, that the contractor had fully paid plaintiff for said material; and, third, that plaintiff did not keep a separate account of material sold to the contractor for said school building, but commingled said account with other accounts for materials sold the contractor and furnished other buildings to which the contract and bond in suit had no application, that plaintiff took notes from the contractor aggregating the grand total of all said accounts, and that the contractor made indiscriminate payments thereon, and gave renewal notes for the balance due, so that it was impossible to tell on which of said accounts the payments made should be applied. These two affirmative defenses were denied by the reply.

A jury being waived, the case was tried by the court, and special findings of fact were made. The judgment was for plaintiff in the full amount sued for. The court found that defendant signed the contract and bond in consideration of certain premiums paid to it, and that it was a surety for hire. The court also found that the materials described and sued for in plaintiff's petition were furnished to the contractor for, and they actually went into, the said high school heating and ventilating system, and that they had not been paid for. The evidence unquestionably established these facts, and there was nothing to the contrary as the defendant introduced no evidence; so that, if the defendant can escape liability, it can do so only upon one of the defenses raised in its answer.

[1] Defendant cannot escape liability because the plaintiff did not file with the circuit clerk of the county in which the high school building is located a "just and true account" of its indebtedness and "a correct description of the property to be charged with said lien." Section 4981 of article 2 of chapter 101, Arkansas Statutes 1904, demands this

requirement of one who seeks to obtain a lien upon the property improved. But in this case plaintiff is not seeking to secure a lien. The act of 1911 of the Arkansas Legislature (Session Acts Ark. 1911, p. 462) adding three sections to said article 2 which provide for a bond in favor of those furnishing labor or materials upon a public building (to which no lien can attach) does not require the account to be filed with the clerk. And, even if the addition to said article in 1911 does become such a part of the laws of 1904 as to make the whole the same as if it had been originally enacted that way, still the requirement that a true account and a description of the property shall be filed in the circuit clerk's office has reference to those who would avail themselves of the lien given by said article, and not to those suing on a bond given in lieu of a lien where the improvement is a public building on which no lien can be had. Besides, the contract and bond in this case does not have to depend upon any statute to give either validity to defendant's engagement or a right of action thereunder to the plaintiff. The contract and bond itself is sufficient for that purpose as a common-law contractual obligation. And it would seem that this is what the instrument sued on herein really is, since it differs from the bond prescribed in the statute in a number of particulars as to amount and otherwise.

[2, 3] The mere fact that plaintiff took notes from the contractor will not discharge the defendant from liability. The court found that the notes were merely unsecured collateral, and were not accepted as payment of said account. And, unless they were, the mere taking of the notes would not discharge the defendant. *First Nat. Bank v. Leavitt*, 65 Mo. 562, loc. cit. 566; *United States ex rel. v. Axman* (C. C.) 153 Fed. 982. Even in a case where a materialman's lien is sought, the taking of a note merely as security does not of itself release the lien. *Kauffman Lumber Co. v. Christopel*, 62 Mo. App. 98. The slight extension of time impliedly involved in the taking of the notes and the renewal thereof would not release the defendant in this case, where the defendant is jointly and severally bound with the principal. *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Shaw v. McFarlane*, 23 N. C. 216; *Baglin v. Title Guaranty & Surety Co.* (C. C.) 166 Fed. 356. The reason an extension of time granted a principal without the consent of the surety releases the latter is because the surety is bound only by the terms of his written contract, and, if those are varied without his consent, it is no longer his contract. 1 *Brandt on Suretyship & Guaranty*, § 376, p. 720. But in the case at bar the contract specified no time when the contractor should pay the bills. As to the school board and as to the plaintiff, the contractor and defendant agreed that

they would pay the bills unconditionally; that is, without any stipulation or condition therein that the defendant would do so if the contractor did not pay them when they became due. It cannot be said that this would be implied, because the implication is the other way, since all through the contract and bond are provisions saying that no variation from the manner and time of making payments of the contract price by the board to the contractor shall impair the rights of any one for whose benefit the bond is given, and neither shall the failure of the board to itself pay the materialmen out of money held back from the contractor, although it is given the right to hold back a part of such price. The defendant therefore did not limit its liability by a condition that the materialmen must insist upon their money from the contractor the moment it was due, nor did defendant require any notice of failure on the part of the contractor to pay when due. The only limitation as to time was that suit could not be brought against defendant after the expiration of 90 days from the completion of the building, which, of course, would be long after an open account for materials would become due. The suit, however, was brought within that time.

[4, 5] We need not go into the question of whether an unreasonable extension of time to a contractor, which results in damage, will release even a compensated surety. Where such are the facts, that may be the rule, especially in cases where the surety is entitled to notice of anything on the contractor's part likely to increase the loss, as in *Henry v. Flynn*, 36 Wash. 553, 79 Pac. 42. But surely, if damage to the defendant has resulted from the implied extension of time in this case, it was a matter of affirmative defense to be pleaded and established by proof. This was not done. The defendant's answer says nothing about damage from extension of time. Indeed, it says nothing whatever about extension of time, except as it may be involved by implication in the statement that notes were taken and renewed. The defendant offered no evidence showing that it was damaged, as it introduced no evidence whatever. The fact that the contractor was declared a bankrupt in December, 1913, does not of itself show that it could have been made to pay plaintiff's account at any time between that date and the time the materials were purchased. In addition to this, the trial court found that there was no proof that defendant was damaged and says: "No presumption of injury can be indulged and no proof thereof is furnished."

[6] As to the defense of commingling of accounts, the facts are that, while the items of the account for the high school building were on the same page on the ledger with items sold the contractor for other jobs, yet each item was individually designated, so that it was known to which job each item be-

longed. The account sued on was for boilers costing \$4,150 and \$22.51, for sundry small extra items, less freight charges and payments made by the contractor. These various items were few and easily picked out, and the court was able to easily and definitely pick them out, as well as the amount of the payments made by the contractor which should be, and were, applied toward the payment of said account. The accounts therefore were not commingled, so that it could not be determined what materials went into the school building, or so that defendant might lose the benefit of any payment made on that particular job. The case of *Schulenberg v. Robison*, 5 Mo. App. 561, is cited by defendant in support of its contention in this regard, but the facts are so different as to make that case inapplicable here. In that case it could not be determined what items should go against defendant therein, as no account thereof was kept as the statute required. The court refused to go into a long investigation of the plaintiff's books to unravel the puzzle, and the appellate court sustained the court in such refusal. And this was all that was decided. *Compound Lumber Co. v. Fehlhammer Planing Mill Co.*, 59 Mo. App. 661, loc. cit. 664. The placing of the separate items of a sale of material for one improvement in an account on a materialman's ledger along with other items for another improvement will not defeat even a lien, where the separate items are properly identified by the separate entries; that is, so put down on each entry as to show to what particular job they belong. *Kaufman, etc., Lumber Co. v. Christophel*, 59 Mo. App. 80, loc. cit. 83; *Kauffman, etc., Lumber Co. v. Christophel*, 62 Mo. App. 99. On this feature of the case the trial court, in its special findings of fact, says:

"On the issue of commingling of accounts, it is sufficient to say that the book account was not only capable of easy separation but that the same was actually done."

As said in *Baglin v. Title Guaranty & Surety Co. (C. C.)* 166 Fed. 356, loc. cit. 363, there is no

"Reason to be astute in looking about for flaws that may invalidate the transaction. The defendant is not entitled to the tender consideration that is accorded to an individual surety who is a mere volunteer. Surety companies are not to be so described; they are insurers, paid for their services, bound by contracts which are usually carefully drawn by themselves, and, as a general rule, satisfactorily secured by counter indemnity. They perform a most useful, and indeed, according to modern custom, an indispensable, function in the business and legal world, but they differ so much from an individual surety of the ordinary type as to render inapplicable some of the reasons that have led the courts to guard the rights of the individual surety with jealous care."

See, also, *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358.

[7] It is further contended that, as plaintiff did not offer to cancel the notes, there can be no recovery against the defendant.

When the notes were renewed, the originals were delivered to the contractor, and the renewal notes were produced by plaintiff at the trial, and were offered in evidence by defendant. They were long since past due and unpaid. Plaintiff cannot assign them to an innocent holder, nor can plaintiff, after recovering satisfaction of the account herein, obtain a second satisfaction on the notes. Neither the contractor nor the defendant asked to have them canceled. They were not taken in payment of the account; and, so far as can be seen, they are mere worthless paper, and in no event are enforceable against the maker. 27 Cyc. 271.

[8] It is not to be presumed that the notes were taken as payment of the account; for even in the states where the acceptance of a promissory note is presumed to be a payment of the account this presumption is overcome by the fact that the taking of the note as payment would deprive the creditor taking the note of the substantial benefit of some security. 27 Cyc. 272. The question of whether the notes were taken as payment is one for the jury. 27 Cyc. 272. And the trial court found they were not so taken. We are unable to see how the rights of the defendant are affected by the mere failure to cancel the notes, since, in reality, the cause of action on which plaintiff is suing in this case is one arising on the contract and bond for the failure of the contractor to pay for the materials furnished, no matter how that indebtedness may be evidenced.

[9] Lastly, it is contended that the court did not make findings upon all controlling issues of fact, and did not state its conclusions of law separate from the findings of fact. We think the court did make a finding of fact upon every issue raised by the pleadings and necessary to a complete determination of the case. The defendant did not ask or present any specific declarations for the court to pass upon. In the absence of such, the general declaration of law drawn by the court from the facts is sufficient. *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6; *Nichols v. Carter*, 49 Mo. App. 401, loc. cit. 406.

We are of the opinion that the judgment should be affirmed; and it is so ordered. The other Judges concur.

FIRST NAT. BANK OF APPLETON CITY
v. GRIFFITH et al. (No. 11104.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916. Rehearing Denied
Feb. 7, 1916.)

1. ATTACHMENT ¶122—PROCEEDINGS—AFFIDAVIT.

Where the original affidavit for an attachment was a nullity, it cannot be amended so as to justify the issuance of the attachment, though Rev. St. 1909, § 2341, authorizes the amendment of affidavits for attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 823-837; Dec. Dig. ¶122.]

2. ATTACHMENT ¶73—ISSUANCE OF WRIT—JURISDICTION.

Jurisdiction over the subject-matter of an attachment is obtained by levy thereon of a writ properly issued.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 200, 201; Dec. Dig. ¶73.]

3. APPEARANCE ¶24—ATTACHMENT.

In a suit where defendant's property was attached, defendant's appearance and filing of a plea to abate the attachment will not give the court jurisdiction over the attachment, where the affidavit was insufficient.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. ¶24.]

4. ACTION ¶64—COMMENCEMENT—SERVICE OF SUMMONS.

Where there was no direction to the clerk to delay issuance of summons in an action, suit was commenced the moment the petition was filed.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 725-734; Dec. Dig. ¶64.]

5. ATTACHMENT ¶20—ISSUANCE OF WRIT—VALIDITY.

Rev. St. 1909, § 2294, defines the grounds for an attachment, while section 2298 requires the filing of an affidavit and bond for the issuance of the writ; section 2306 declaring plaintiff in any civil action which shall have been commenced by summons and without original attachment may before final judgment sue out an attachment upon filing an affidavit and bond. In an action on a note there was no direction that summons should not be served at the time the petition was filed, though the affidavit for attachment was not signed. Several days after the filing of the petition, and after defendant had filed a motion to dismiss the attachment because no affidavit had been filed, an affidavit for attachment in proper form duly signed was filed, and the court made an entry issuing the writ. *Held* that, though a writ had been issued when the petition was filed, yet, as it did not appear to have been served, and as a plaintiff might after the commencement of the action sue out a writ of attachment, the second writ is valid, and will be considered as the first attachment; the second affidavit not being considered as an amendment of the one unsigned.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 52, 53; Dec. Dig. ¶20.]

6. ATTACHMENT ¶134—WRIT—APPROVAL OF BOND.

Where the court, after the filing of an affidavit and bond, ordered a writ of attachment to issue, it impliedly approved the bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 377; Dec. Dig. ¶134.]

7. APPEAL AND ERROR ¶920—REVIEW—PRESUMPTIONS.

Where the court ordered an attachment to issue, it will be presumed that it approved the attachment bond, though approval is not shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. ¶920.]

8. ATTACHMENT ¶138—OBJECTIONS—WAIVER.

By filing a plea in abatement to a writ of attachment defendant waived any defect arising out of the court's failure to approve the bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 385-387; Dec. Dig. ¶138.]

9. APPEARANCE ¶24—ATTACHMENT—SERVICE OF WRIT—WAIVER.

While the filing of a plea in abatement to an attachment and an answer to the merits to the principal suit will not confer jurisdiction

over the property attached, yet, in view of Rev. St. 1909, § 2329, declaring that, when defendant appears, the judgment and execution shall hold not only the property attached, but all other property of defendant, defendant's appearance and filing of a plea in abatement is a waiver of nonservice of the writ upon him.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.]

10. GARNISHMENT — 235 — CLAIMANTS — DUTY OF.

Where land of the principal debtor which was attached was sold under deed of trust, and the surplus in the hands of the trustee was garnished, it was the duty of one claiming the surplus as grantee of the principal debtor to appear and set up her claim, and, if not done, judgment disposing of the surplus is conclusive.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 423-427, 443, 444, 447, 450-452; Dec. Dig. § 235.]

11. GARNISHMENT — 235 — PROCEEDINGS — RIGHTS OF GARNISHEE.

Rev. St. 1909, §§ 2439, 2440, authorize a garnishee to set up in his answer that there are rival claimants to the fund, and to have them interplead but if the claimants be notified and do not appear and interplead, averments in the answer concerning the rights of such claimants will be disregarded, and the judgment will be a complete protection to the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 423-427, 443, 444, 447, 450-452; Dec. Dig. § 235.]

12. ATTACHMENT — 91 — AFFIDAVITS — SUFFICIENCY.

An affidavit for attachment was valid, though the caption named the county of the principal case, and the jurat of the affidavit showed that it was taken in another county where the notary was authorized to administer oaths.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 231-237; Dec. Dig. § 91.]

Johnson, J., dissenting.

Error to Circuit Court, Bates County; C. A. Calvird, Judge.

Action by the First National Bank of Appleton City against E. P. Griffith, in which Catherine Griffith interpleaded. There was a judgment for plaintiff, and defendant and interpleader bring error. Affirmed.

Clarence I. Spellman, of Kansas City, for plaintiffs in error. Parks & Son, of Clinton, and Silvers & Silvers, of Butler, for defendant in error.

TRIMBLE, J. This was a suit brought by the First National Bank of Appleton City against E. P. Griffith on two promissory notes aggregating about \$6,000. A writ of attachment was issued in aid thereof and levied upon certain real estate and personal property belonging to Griffith; and one J. M. Burns was summoned as garnishee. Griffith appeared and filed a plea in abatement denying the alleged grounds of the attachment, and also filed answer to the merits. The bank filed a reply to the answer on the merits. Upon a trial of the issue raised by the plea in abatement the bank obtained a verdict and judgment sustaining the attachment. Afterwards the suit was tried on the merits, and the bank obtained judgment on both notes.

No motion for new trial was made nor was any bill of exceptions filed. The defendant, Griffith, and his wife, as interpleader, thereupon sued out a writ of error in this court, and brought the case here on the record proper, and on a stipulation entered into between the parties in this court. The sole contention of the parties who sued out the writ of error is that the trial court obtained no jurisdiction to proceed in the case, and that, for that reason, all steps taken therein were coram non iudice and void. This view is bottomed upon the theory that the writ of attachment was issued upon an affidavit amendatory of a former affidavit which was an absolute nullity, and therefore could not be amended.

[1-3] It may be conceded at once that, if the plaintiffs in error are right in their premise, then their conclusion is right; for a thing which is nothing cannot be amended so as to be something. If the writ of attachment levied upon the property and by which it was seized was issued upon an affidavit which sought to amend something which had no existence, then the writ itself was a nullity, and the court obtained no jurisdiction over the res, the property attached. Jurisdiction over the subject-matter of an attachment is obtained by the levy thereon of a writ properly issued. *Hardin v. Lee*, 51 Mo. 241. A valid writ cannot be issued unless the statutory affidavit has been filed. Such an affidavit is an indispensable prerequisite to the issuance of a valid attachment writ. *Norman v. Pennsylvania Fire Ins. Co.*, 237 Mo. 576, 141 S. W. 618. If the affidavit filed is indeed an affidavit, but is merely insufficient in some one or more features thereof, the statute provides that it may be amended. Section 2341, R. S. Mo. 1909; *Avery v. Good*, 114 Mo. 290, 21 S. W. 815; *Maurer v. Phillips*, 182 Mo. 440, 168 S. W. 669. But, where a writ of attachment is issued and levied without an affidavit, or (which is the same thing) upon a paper purporting to be an affidavit, but which in fact is not, the writ is void, and cannot be galvanised into life by the filing of an affidavit amending an affidavit which never existed. And the levying of such a writ cannot confer jurisdiction over the subject-matter of the attachment—I. e., the property seized. *Third National Bank v. Garton*, 40 Mo. App. 113; *Hargardine v. Van Horn*, 72 Mo. 870. The principle that the failure to comply with the statutory prerequisites is fatal to the jurisdiction is also announced in *Purcell v. Merrick*, 172 Mo. App. 412, 158 S. W. 478. Nor does the appearance of the attachment defendant confer jurisdiction over the property seized. *Third National Bank v. Garton*, supra. Such appearance would give jurisdiction over the person of the defendant, but this would have no effect in giving validity to the attachment part of the suit. We therefore readily concede that, if plaintiffs in error are right in their premise that the

attachment writ by which the property was seized was issued upon an affidavit amendatory of a paper purporting to be an affidavit, but which, neither in fact nor in law, was an affidavit, then all proceedings in the attachment feature of the suit were coram non iudice and void. But are the plaintiffs in error right in their premise? This requires here a statement of the facts.

On May 23, 1911, the bank filed its petition against Griffith in the circuit court of Bates county asking for judgment on the two promissory notes aforesaid. On the same day plaintiff filed a bond in attachment, and also filed a paper which was in the form of an affidavit, but neither the affidavit nor the jurat thereto was signed. Now, although on the same day a writ of attachment was issued, yet, so far as the record discloses, nothing was done with this writ of attachment. No return was made on it by the sheriff, and this fact is affirmatively shown by the record.

On May 27, 1911, within four days after the filing of the petition, defendant, Griffith, appeared and filed a motion to dismiss the attachment because no affidavit had been filed. This motion was never acted upon in any way. Three days later, to wit, May 30, 1911, the bank filed in court an affidavit for attachment in proper form, duly signed and sworn to by its cashier, who swore that he was such officer, and that he made the affidavit for and on behalf of the bank. Neither the affidavit nor the order in reference to its filing said anything about a former affidavit, nor that it was made or filed as an amendment. The record entry of the court is as follows:

"Now on this day comes plaintiff herein by attorney and files his affidavit in attachment. Whereupon it is ordered by the court that writ of attachment issue to Bates county, Mo., against the defendant."

The writ was thereupon issued. In addition to its direction to attach the defendant, Griffith, by his lands and tenements, goods, chattels, moneys, credits, evidences of debt, and effects, or so much thereof as would be sufficient to secure the amount of plaintiff's demand, it directed the sheriff to summon E. P. Griffith to appear and answer at the next term to be begun and held on the first Monday of October following, and also to summon every person as garnishee in whose hands any evidences of debt were found. This writ was duly levied upon certain personal property, and also upon two tracts of real estate in Bates county, all as the property of said E. P. Griffith, as shown by the return of the sheriff thereon. The return further recites that on the 28th of July, 1911, the sheriff summoned J. M. Burns as garnishee, attaching in his hands all surplus money arising from the foreclosure of a deed of trust on the first-described tract of real estate attached. This first-described tract consisted of 40 acres, and was owned by E. P. Griffith, but during the lifetime of his first wife he had incumbered it with a deed of

trust to Burns as trustee for one Baskerville to secure a note for \$1,000. The first wife died, and Griffith married again. The deed of trust was foreclosed by Burns, as trustee, on July 28, 1911, and the land brought \$1,450 cash. It was this surplus above the note that Burns held and for which he was garnisheed. There can be no question that Burns was duly summoned as garnishee, and that he did not volunteer as a stranger as claimed by the plaintiffs in error; for, in addition to the recitals in the writ and return thereon, the stipulation filed by the parties in this court recites that:

"On the same day, to wit, July 28, 1911, the plaintiff bank caused a summons in garnishment in said cause to be issued and duly served upon the said J. M. Burns, trustee, who in due time entered his appearance, and filed his answer as garnishee."

It seems that shortly before the bringing of the suit herein by the bank Griffith and his second wife, Catherine Griffith, made a deed without consideration to one James T. Mahoney, purporting to convey said 40-acre tract subject to said deed of trust. Thereafter Mahoney, also without consideration, made a quitclaim deed to it to Catherine Griffith. Consequently Burns, in his answer as garnishee filed at the October term, 1911, set up the foreclosure of the deed of trust and that he held a surplus of \$304.11 above the note and costs of foreclosure, and that this surplus was claimed by Mahoney, by Catherine Griffith, by the defendant, E. P. Griffith, and by the plaintiff bank. The answer then prayed that all of said parties be ordered to appear and interplead or present their respective claims to said fund. Pursuant to this prayer in Burns' answer, the court made an order directing him to pay the money into court, which he did, and he was thereupon discharged. The court also made an order and caused summons to be issued to Catherine Griffith, James T. Mahoney, and E. P. Griffith ordering them to come into court and interplead for said \$304.11, the surplus proceeds of the foreclosure. A copy of this order and summons was duly served upon each of them. Mahoney filed a disclaimer. Catherine Griffith and E. P. Griffith refused to interplead, and made default.

At the October term, 1911, E. P. Griffith appeared in the original case and filed a plea in abatement denying the facts alleged as grounds for attachment. At the February term, 1912, the plea in abatement was tried, resulting in a verdict and judgment sustaining the attachment. Thereafter E. P. Griffith filed a second amended answer to the suit on the merits, and that issue was also tried, resulting in a judgment for the bank as hereinbefore stated.

After these issues on the plea in abatement and on the merits had been determined in favor of the bank, the court then proceeded to hear and determine the question raised by its order of interplea, namely, as to who was entitled to the money which had been gar-

nished in the hands of Burns and which he had paid into court. The bank appeared, but Catherine Griffith and E. P. Griffith, although duly served with the order and summons as hereinbefore stated, did not appear, while Mahoney filed a disclaimer. The court found that the deed from E. P. Griffith to Mahoney and the deed from Mahoney to Catherine Griffith were both fraudulent and void, that they were made without consideration and for the purpose of hindering and delaying the creditors of said E. P. Griffith, and that, as the bank had obtained judgment on the attachment, and also on the merits, for the sum of \$6,485.25, it was entitled to the money garnished in Burns' hands, and awarded it to the bank to be applied upon its judgment.

With these facts stated, we are now in a position to take up the contention of the plaintiffs in error that the proceedings were coram non judge and void. Of course, such contention could be applicable, if at all, only to the attachment proceedings and matters dependent thereon. It could not possibly apply to the judgment on the merits, since jurisdiction over the person of the defendant, E. P. Griffith, was conferred when he filed an answer and contested that issue. It will be understood, therefore, that in speaking of the question whether or not jurisdiction was obtained, we have reference to jurisdiction over the res in the attachment proceedings and in all proceedings dependent thereon.

The trouble with the contention of the plaintiffs in error, the Griffiths, is that it assumes that the jurisdiction of the court over the attached property depends somewhat upon the first writ issued, and that the affidavit filed by plaintiff was an attempted amendment of a step necessary to be taken to obtain the first writ, but which, in fact, was not taken. It also proceeds on the assumption that the filing of the petition was not the commencement of a suit by summons, and that the subsequent filing of an affidavit would not authorize the issuance of a valid writ. But it must be borne constantly in mind that no levy was made under the first writ, nor did the levy that was made have anything to do with said first writ. The levy that was made was under the second writ and that was issued upon an affidavit filed, not as an amendment of anything, but as a separate and distinct step, sufficient in itself, and independent of any former step attempted or intended to be made. There is no effort to have the second writ relate back to the date of the first, nor does the court's jurisdiction over the res depend in any way on said first writ.

The bank, by filing its petition on the two notes, had instituted its suit. There was a suit then pending. Section 2306, R. S. Mo. 1909, provides that:

"The plaintiff in any civil action which shall have been commenced by summons, and without original attachment, may, at any time pending the suit and before final judgment, sue out an attachment in such action, on filing an affidavit

and bond, as required in cases of original attachment."

[4, 5] There was no direction to the clerk to withhold or delay the issuance of summons. Hence a suit on the note was commenced the moment the petition was filed. *Matthews v. Stephenson*, 172 Mo. App. 220, loc. cit. 228, 157 S. W. 887. But, if the issuance of summons was necessary in order to constitute the suit one "commenced by summons," within the meaning of section 2306, then there was such a suit pending, since the first writ, issued by the clerk immediately on the filing of the petition was a writ of summons, and was valid as such, though the attachment feature thereof was wholly invalid. Consequently, under section 2306, the bank was entitled to a writ of attachment when it filed its affidavit therefor. This was the final step required by the attachment statutes. Sections 2294, 2298, 2306, R. S. Mo. 1909. The suit had been commenced by summons, a bond had been filed, and now the final step had been taken by the filing of the affidavit. The fact that the bank intended to bring an attachment suit at first makes no difference. As a matter of fact and of law, it did not bring an attachment suit. Nothing was actually commenced more than an ordinary suit by summons. Everything beyond that was only so much waste paper. Consequently the court had authority to order the second writ to issue. It was a valid writ, and, since the levy was made and the property was seized under this writ, the court obtained jurisdiction over the property attached.

[6-8] The court, in ordering the writ to issue, thereby impliedly approved the bond. It has been held that, where the clerk receives the bond and issues the writ, the bond is thereby approved. *Whitman Agricultural Ass'n v. National Railway, etc., Ass'n*, 45 Mo. App. 90. Much more reason is there for presuming that the court, since it ordered the writ to issue, must have approved the bond, although the record does not disclose the entry of a formal order of approval. But, if the absence of a formal order of approval constituted a technical defect in the proceedings leading up to the issuance of the writ, still such objections to the writ are waived by the filing of the plea in abatement. *Henderson v. Drace*, 30 Mo. 358; *Scully v. Cox*, 75 Mo. App. 563; *Ellis v. Lamme*, 42 Mo. 153; *Hubbard v. Slavens*, 218 Mo. 598, loc. cit. 616, 117 S. W. 1104; *Hudson v. Cahoon*, 193 Mo. 547, loc. cit. 557, 91 S. W. 72. Besides, even if the bond was insufficient in that it was not formally approved, it is too late after judgment on a plea in abatement filed to raise such objection. *Englehart, etc., Co. v. Burrell Sisters*, 66 Mo. App. 117.

[9] Nor can E. P. Griffith claim lack of jurisdiction over his person because the return of the sheriff says nothing about the

service of summons or of attachment upon him. Section 2329, R. S. Mo. 1909, says:

"When the defendant * * *, appears to the action * * * the judgment and execution shall hold, not only the property attached, but the other property of the defendant."

So that, although the filing of a plea in abatement and of an answer to the merits will not confer jurisdiction over the property attached, yet the appearance of defendant and the filing of such matters will cure the omission to serve the writ personally on the defendant. Such appearance will not cure the omission to make a valid levy and seizure of property, but it will cure the failure to obtain personal service on the defendant. Being *sui juris*, he could waive the service of the summons on him, and he did so when he appeared and filed his plea and answers. *State ex rel. v. Spencer*, 164 Mo. 48, loc. cit. 55, 63 S. W. 1118; *Davison v. Hough*, 165 Mo. 561, 65 S. W. 731; *Curry v. Trinity Zinc & Lead, etc., Co.*, 157 Mo. App. 423, 139 S. W. 212; *Evans v. King*, 7 Mo. 411; *Whiting v. Budd*, 5 Mo. 443.

[10, 11] If the property was levied upon and seized under a valid writ, then the court obtained jurisdiction over the property not only as to E. P. Griffith, but also as to the interpleader, Catherine Griffith. The parties have stipulated, in addition to what is shown by the sheriff's return, that a summons and garnishment was issued and duly served on Burns; that he entered his appearance, filed his answer, paid the money into court, and was discharged. The stipulation also shows that summons was issued and duly served upon all the parties to come in and interplead for said fund, and that the bank did so. Catherine Griffith, however, made default. As the court had obtained jurisdiction over the fund by the levy of the writ upon the land as the property of E. P. Griffith, said land being the source of said fund, it was her duty to appear and set up her claim, and, having failed to do so, she is concluded by the judgment. 20 Cyc. 1133. The garnishee had the right to set up in his answer that there were rival claimants to the fund in his hand, and have them brought into court and required to interplead therefor. Sections 2439 and 2440, R. S. Mo. 1909. And, if the claimants be notified and do not appear and interplead, the averment in the garnishee's answer of an assignment or sale to any of such claimants must be disregarded, and a judgment after such notice will be a complete protection to such garnishee. *McKittrick v. Clemmens*, 52 Mo. 160, loc. cit. 163; *Swartz v. Riner*, 66 Mo. App. 476, loc. cit. 480; *Evans v. Norman*, 14 Ala. 662. In this case, however, the court heard the testimony as if the allegations of the garnishee's answer presented the claim of Catherine Griffith to the fund, but found that the two deeds on which her claim was based

were fraudulent and void, and awarded the fund to the bank.

[12] It is urged that the affidavit is fatally defective because it starts off with the usual caption "State of Missouri, County of Bates—ss.," and the officer taking the affidavit is a notary public of St. Clair county. But the bank is located in St. Clair county, the one making the affidavit was the cashier of said bank, and the jurat of the officer taking the affidavit says it was "subscribed and sworn to before me at Appleton City, Mo., this May 29, 1911." Thus it appears that the affidavit was made in St. Clair county, where the officer had jurisdiction to administer oaths. Consequently the above-named recital of the venue in Bates county, written above the style of the case in which the affidavit was made, had no effect to destroy the affidavit.

Under all the foregoing facts, we think the claim of the plaintiffs in error that the court was without jurisdiction and that its orders were *coram non judice* and void is untenable.

Wherefore the judgment should be affirmed, since there is no other ground upon which the court's right to render judgment has been attacked.

ELLISON, P. J., concurs. JOHNSON, J., dissents.

KELLEY v. PEEPLES et al. (No. 11795.)

(Kansas City Court of Appeals. Missouri.

Jan. 17, 1916. Rehearing Denied
Feb. 7, 1916.)

1. FRAUD §9—FRAUDULENT REPRESENTATIONS—RELIANCE ON.

A broker employed to sell land by the acre, who falsely represents the acreage materially in excess of the real acreage, ascertainable by the purchaser by a survey only, is guilty of actionable fraud, where the representations are relied on by the purchaser, who had no reason to believe that the representations were false.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. §9.]

2. FRAUD §24—ACTIONABLE FRAUD—ELEMENTS.

A fraudulent representation, to be treated as the proximate cause of a loss, must have been acted on by the party to whom addressed, and he must have exercised the care to be expected from an ordinarily careful and prudent person.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. §24.]

3. FRAUD §22—FRAUDULENT REPRESENTATIONS—DUTY TO INVESTIGATE.

Where representations made by a vendor relate to facts peculiarly within his knowledge, and he knows that the purchaser is without reasonable opportunity to consult independent sources of information, the vendor cannot escape liability on the pretext that the purchaser could have discovered the falsity, and neglect of the purchaser to deprive him of the right to recover for the representations must amount to a violation of the positive legal duty and be the proximate cause of the loss.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19-23; Dec. Dig. §22.]

4. PRINCIPAL AND AGENT \Leftrightarrow 178 — KNOWLEDGE OF AGENT.

A prospective purchaser of land represented by the vendor to contain a specified number of acres was not chargeable with the knowledge obtained by a third person employed to examine an abstract of title by recitals of the abstract as to exact quantity of the land; for the knowledge so obtained related to a subject foreign to the employment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680-684; Dec. Dig. \Leftrightarrow 178.]

5. APPEAL AND ERROR \Leftrightarrow 882 — ESTOPPEL TO ALLEGE ERROR.

Where defendant and codefendants joined in procuring instructions which conceded the joint liability of defendants with codefendants, the point made for the first time after verdict that the evidence disclosed a cause of action only against codefendants came too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. \Leftrightarrow 882.]

6. NEW TRIAL \Leftrightarrow 77 — GROUNDS — MISCONDUCT OF JURY — EVIDENCE — INSTRUCTIONS.

Where a purchaser of land by the acre sought a recovery for a shortage and showed a shortage of about 53 acres, and that the rate per acre was \$29.16% per acre, and the court authorized the jury to find for plaintiff in such sum as they might believe from the evidence he had been damaged, a verdict for \$1,200 would not be set aside on the motion of defendant, on the ground that it was the result of passion and prejudice, because it was for a less amount than the amount recoverable under the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157-161; Dec. Dig. \Leftrightarrow 77.]

7. NEW TRIAL \Leftrightarrow 77 — GROUNDS — VERDICT — PASSION.

Where in an action ex delicto the damages recoverable by plaintiff may be ascertained with certainty, and the only reasonable conclusion the verdict for a less amount warrants is that the jury were actuated by passion or prejudice, or mistake or misapprehension, defendant may complain, as well as plaintiff; but, where the jury, applying the law as given by the court in an indefinite instruction to which defendant did not object, returned an inadequate verdict, defendant cannot complain.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157-161; Dec. Dig. \Leftrightarrow 77.]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

Action by E. M. Kelley against L. N. Peeples and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Davis & Son and Arthand & Arthand, all of Chillicothe, for appellants. Scott J. Miller, of Chillicothe, for respondent.

JOHNSON, J. This is an action to recover damages for fraud and deceit in the sale to plaintiff on January 27, 1906 of three quarter sections of land in Livingston county. The defendants L. N. Peeples, Lula Peeples, and A. L. Anderson were the owners of the record title, and the defendants Faltinson, Deardorff, and McCaskey were real estate agents in Chillicothe who had the land listed for sale, and conducted all the negotiations that culminated in its conveyance to plaintiff by warranty deed executed by the owners of the record title. There is evidence

tending to show that the three defendants who conducted the transactions with plaintiff were acting for themselves, having secured an option on the property, but from all the facts and circumstances in evidence the inference is strong that their actual relationship to the owners of the record title was that of real estate agents or brokers. The cause of action alleged in the petition is grounded upon false and fraudulent representations concerning the acreage of the land made by the brokers, and relied upon by plaintiff, who did not discover their falsity until four years later, when he sold the land and the true acreage was disclosed by a survey the purchaser caused to be made. Plaintiff alleged, and adduced evidence tending to show, that he purchased the land, which was represented as containing 480 acres, the area of three full quarter sections, at \$29.16% per acre, amounting in all to \$14,000, while, in fact, as the survey disclosed, the total acreage was 426.69, or 53.31 acres less than represented. The defendants allege in their answer that the farm was sold in gross for \$14,000, and not by the acre; that no representations were made concerning quantity, and that, if misled, plaintiff, who personally inspected the land during the negotiations and was furnished an abstract of title which stated the area, was the victim of his own negligence. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiff against all of the defendants for \$1,200, and, following the overruling of their motions for a new trial and in arrest of judgment, defendants appealed.

Plaintiff lived in Iowa and was the owner of a farm of 160 acres in that state which he valued at \$75 per acre, and also of a farm of 160 acres in Kansas valued at \$2,000. In the fall of 1905 he sent a real estate agent of Clarinda, Iowa, to Livingston county with a view to procuring a suitable exchange of his farms for Missouri land. This agent fell in with defendant brokers, who showed him lands they had for sale or exchange, including the tract in question, which plaintiff's agent testified they represented as containing 480 acres, and priced to him at \$30 per acre. After receiving his agent's report, plaintiff went to Chillicothe, and, accompanied by one of the defendant brokers, visited the tract and made as thorough an investigation as possible under the circumstances. He could not accurately estimate the area, and in answer to his inquiries was told the whole tract contained 480 acres, and that the price was \$30 per acre. Negotiations ensued which continued several months, and finally culminated in an exchange of properties, but not until defendants reduced the price of their land \$400, and plaintiff the price of his two farms \$500. Before the exchange was made defendants

sent an abstract of title to plaintiff which disclosed that the three quarter sections were not full quarters, and recited facts from which it inaccurately appeared that their gross area was only 407 acres. Without attempting to examine it, plaintiff handed the abstract to an examiner of titles in Clarinda, who advised that it be sent to an examiner in Chillicothe, as he did not deem himself competent to pass on titles in Missouri. Plaintiff consented, and the abstract was forwarded to an examiner of titles in Chillicothe, who in the letters he subsequently wrote to the Clarinda examiner and to the plaintiff about the title made no reference to the quantity of the land, and he evidently understood that his employment was confined to an examination of the title "to the east $\frac{3}{4}$ of section 33, township 57, range 22, Livingston county, as shown by the abstract," and did not include the duty of ascertaining the quantity of land embraced by that description. During the four years plaintiff owned and was in possession of the land before he discovered the fraud the abstract was in the custody of the holder of a deed of trust, and was not inspected by plaintiff.

[1] The condition of the tract was such that nothing short of a survey would have informed plaintiff of its actual, or even approximate, area, and, in the state of facts presented by the evidence of plaintiff, the defendant brokers were guilty of an actionable fraud in falsely representing the acreage to be so materially in excess of its real quantity. Whether willfully made, with knowledge of the true fact, or recklessly, with pretended knowledge, such representations were a fraud upon and an injury to plaintiff who, obviously, was compelled to rely upon them. Under the doctrine of the decision of the Supreme Court in *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979, there can be no question of the liability of the defendant brokers to respond in damages to plaintiff, unless it should be held that his own neglect to observe ordinary care and prudence for his own protection was the proximate cause of his loss. Of the subject of the legal effect of negligence of a vendee in such case the court say in *Judd v. Walker*, supra, loc. cit. 337 of 215 Mo., page 980 of 114 S. W.:

"The word 'negligence,' used in that connection, as we understand its meaning in the law of negligence, is an unhappy expression. Fraud is a willful, malevolent act directed to perpetrating a wrong to the rights of another. That such an act in a vendor should not be actionable because of the mere negligence or inadvertence of the vendee in preventing the fraud ought to be neither good ethics nor good law."

The very end and aim of fraud is to deceive its victim, to lull him into a false sense of security, to induce him to neglect some precaution which, if taken, would protect him against the contemplated injury, and to hold that mere negligence on his part thus

induced should give sanctuary to the wrongdoer would be to put a premium on rascality, and to say that justice is powerless to give relief when the fraudulent purpose is achieved. The modern saying "nothing succeeds like success," if not entirely immoral, has no place in jurisprudence, especially not in fraud cases where the success of the fraudulent practices is the very fact that gives a cause of action.

[2, 3] Of course, for fraudulent representations to be regarded as the proximate cause of the loss the party to whom they were addressed must have acted with the care to be expected of an ordinarily careful and prudent person in his situation, and he will not be heard to say that he relied on representations concerning matters about which he was under no necessity to depend upon the vendor's representations for his information. But, where the representations relate to facts peculiarly within the knowledge of the vendor, and he knows that the vendee is without reasonable opportunity to consult independent sources of information, the vendor cannot be allowed to escape liability on the specious pretext that the vendee might have discovered their falsity if he had not been so trustful and had taken the pains to consult more reliable sources of information. Neglect on the part of the vendee, to deprive him of the right of redress, must not only amount to the violation of a positive legal duty (*Green v. Ins. Co.*, 159 Mo. App. loc. cit. 289, 140 S. W. 325), but must be the proximate cause of the loss.

We fail to perceive any good ground for the argument that plaintiff did not observe ordinary care and prudence in the transactions in question. He did as men who buy land and are unskilled in the examination of titles usually do—employed a competent examiner of titles to examine and report upon the abstract. He had no reason to think he had been deceived, and therefore was no more remiss in omitting to request the examiner to report on the area of the land than in failing to have a survey made.

[4] The argument that the knowledge of the examiner which he derived from the recitals of the abstract must be imputed to plaintiff, his principal, would be well taken if the information related to a matter within the scope of his employment. In such cases notice to the agent is notice to the principal. *Hickman v. Green*, 123 Mo. loc. cit. 182, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *Meier v. Blume*, 80 Mo. 184; *Chouteau v. Allen*, 70 Mo. 290; *Smith v. Boyd*, 162 Mo. loc. cit. 157, 62 S. W. 439; *Hedrick v. Beeler*, 110 Mo. loc. cit. 100, 19 S. W. 492. But here the knowledge the examiner derived from the abstract related to a subject foreign to his employment, which, as stated, was to examine the title to certain described lands, and not to ascertain their quantity. The examiner was not at fault in not referring to the acreage of the tract in his reports on

the title, and plaintiff should not be held bound by the information his agent received about a matter which did not pertain to the service the agent was employed to perform, and which was not communicated to plaintiff.

The court did not err in refusing the peremptory instruction asked by defendants.

[5] As we have stated, an inference properly may be drawn from all the evidence that the defendant brokers were not acting for themselves in the transaction, but as the agents of the owners of the record title, in which case their principals would be jointly and severally liable with them for the injurious consequences of their false and fraudulent representations. But, on the theory that the brokers were the owners of an option to purchase the land and were representing only themselves, the judgment cannot be pronounced erroneous on the ground that (following the verdict) it was rendered against the record owners as well as the brokers. These owners did not ask a separate instruction in the nature of a demurrer to the evidence, but made common cause with their codefendants, and joined them in procuring instructions which in legal substance conceded their joint liability with their codefendants. We refer especially to defendant's first instruction. The point made for the first time after verdict that the defendants should be divided into two groups i. e., the owners and the brokers, and that the evidence does not disclose a cause of action against one of such groups, comes too late.

[6] We do not agree with defendants that we should declare, as a matter of law, that the verdict was the result of passion and prejudice, for the reason that it was for a less amount than the conceded value of the fictitious acreage. To return a verdict for plaintiff the jury necessarily found that plaintiff was induced by the fraudulent representations to purchase, as he believed, 480 acres of land for \$14,000, which was at the rate of \$29.16% per acre. His proof, consisting of the results of the survey his vendee caused to be taken, shows a shortage of 53.31, acres for which he paid defendants \$1,554.87. The answer of defendants, instead of raising an issue over the real quantity of the land, alleges that it was less than plaintiff asserted. The measure of damages was not a subject of dispute, either in the pleadings or evidence, and, if plaintiff was entitled to recover, the measure was the sum he had paid defendants for land which did not exist. The verdict for \$1,200 was inadequate by the sum of \$354.87, but, under all the circumstances before us, we think this discrepancy should not be regarded as compelling the reversal of the judgment at the instance of defendants, who are in the position of complaining that the verdict against them was too small. Defendants asked no instruction on the meas-

ure of damages, and the instructions given at the request of plaintiff contained no more definite direction relating to that subject than "to find for the plaintiff in such sum as you may believe from the evidence he has been damaged."

[7] In actions *ex contractu* the plaintiff may complain of the inadequacy of a verdict returned for him where it "is obviously the result of a mistaken view of the rule of law applicable to the facts in the evidence." *Todd v. Boone Co.*, 8 Mo. 431; *Fulkerson v. Bollinger*, 9 Mo. 838; *Wheringer v. Ahlemeyer*, 23 Mo. App. loc. cit. 281; *Morris v. Railroad*, 136 Mo. App. 393, 117 S. W. 687. And in actions *ex delicto*, where the damages may be measured by a definite rule and ascertained with certainty, the same rule prevails (*Morris v. Railroad*, *supra*), and, where the only reasonable conclusion the verdict will warrant is that the jury turned from the evidence and the law as declared by the court, and were actuated by passion or prejudice, or by mistake or misapprehension, the defendant against whom the inadequate verdict was rendered is as much entitled to complain as the plaintiff, since both parties have the right to demand that their case be tried according to the law and the evidence. But the authorities reviewed in *Morris v. Railroad*, *supra*, do not regard inadequacy, whether it be relatively great or small, as an indubitable indication that the verdict was not responsive to the law and the evidence, but was the product of mistake or misconduct on the part of the jury. The presumption of right acting is so strong that it may be overcome only by such a glaring deficiency in the verdict as to leave room for no other reasonable inference than that the jury was remiss in the performance of its duty. The defeated defendant can have no cause to complain if the jury, in an honest effort to apply the law, as disclosed in the instructions, returned an inadequate assessment of damages against him.

The jury in the present instance did not disobey the instructions on the measure of damages which by nondirection omitted to give them a more definite rule than "to find for the plaintiff in such sum as you may believe from the evidence he has been damaged." Defendants would have been entitled to a more definite instruction, and in failing to ask it were manifestly not averse to going to the jury under a rule which appeared to give the jury some latitude in measuring the damages. The size of the verdict lends no countenance to the thought that the jury were actuated by any improper motive, or did not honestly endeavor to apply the law given to them to the facts and circumstances in evidence.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

McGRATH v. FOGEL et al. (No. 11813.)
(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916. Rehearing Denied
Feb. 21, 1916.)

1. APPEAL AND ERROR ¶984 — **QUESTIONS REVIEWABLE—EVIDENCE.**

The court on appeal from a judgment on a verdict for plaintiff must accept the evidence in the aspect most favorable to him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3782; Dec. Dig. ¶934.]

2. MASTER AND SERVANT ¶103—**OBLIGATION OF MASTER—SAFE PLACE TO WORK.**

The duty of furnishing an employé a safe place and appliance, rests on the employer, and he cannot delegate it to another.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. ¶103.]

3. MASTER AND SERVANT ¶196—**INJURY TO SERVANT — NEGLIGENCE — "FELLOW SERVANTS."**

An employé directed by the foreman in charge of a building in process of erection to erect a scaffold for use by a plasterer is not, while erecting the scaffold, a fellow servant of the plasterer, and the employer is liable for the employé's negligence, though he becomes a fellow servant immediately after erecting the scaffold by assisting the plasterer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. ¶196.]

For other definitions, see *Words and Phrases*, First and Second Series, *Fellow Servant*.]

4. MASTER AND SERVANT ¶205—**INJURY TO SERVANT—SAFE PLACE TO WORK—NEGLIGENCE.**

Where boards in a pile had been selected and used as scaffolding, an employé could assume that any of the boards were proper for a scaffold, and he was not negligent in making a selection of the boards for a scaffold, unless there was something about a board selected to show him by observation that it was not fit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 547-549; Dec. Dig. ¶205.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by John McGrath against M. L. Fogel and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Battle McCardle and Francis L. Barry, both of Kansas City, Mo., for appellants. Edw. E. Naber, of Kansas City, Mo., John W. Perry, of Kansas City, Kan., and R. J. Smith, of Kansas City, Mo., for respondent.

TRIMBLE, J. Plaintiff, a plasterer and cement finisher, employed by defendants to plaster and point up a building erected by them, was required by the nature of his work to stand upon a scaffold constructed for him by defendants. The scaffold thus prepared for him by his employers consisted of a board 12 feet long 1 foot wide and 2 inches thick, laid upon two trestles or wooden horses 7 feet high. While plaintiff was standing upon this scaffold, engaged in pointing up the ceiling of one of the rooms, the board broke, and threw him to the floor

seriously injuring him. The break occurred at a point where there was a large knot in the board; and at this same place, on the underneath side, at the edge, a cut had been made by a saw, and the board was "brash" and "crossgrained" at the knot. These defects, however, were not observable to plaintiff when he got upon the scaffold, for the reason that they were concealed by cement, lime mortar, plaster, and dirt, with which the board was covered. Plaintiff recovered judgment in the sum of \$1,675, and defendants have appealed.

[1] As the verdict was for plaintiff, the evidence must be accepted in the aspect most favorable to him. Viewing the evidence in that light, it appears that it was no part of plaintiff's duties, or of his work, to furnish or construct the scaffolds upon which, as a plasterer and cement finisher, the plaintiff would do his work. Nor did plaintiff do anything toward constructing the scaffold or putting it together.

[2, 3] The defendants were contractors engaged in erecting the building. Oakes was their foreman, who directed the men where and when to work, and also how it should be done. He looked after the carpenters, laborers, and plasterers, gave them orders and directions as to the work, and told the men what materials to use. Naylor was a general or common day-laborer who worked about the building, carrying lumber, wheeling sand, and rock, cleaning, sweeping, and carrying out trash, wheeling dirt, and doing such other general labor he was told to do by the foreman.

At the time of plaintiff's injury the building, a creamery, was practically completed, but the ceiling of that portion of the basement known as the "churn room" had to be "pointed up." One of the defendants directed plaintiff to do this work. The ceiling of this room was 13 feet high, and the work required a scaffold about 7 feet high on which the plaintiff would stand in doing his work. Shortly before plaintiff began this work he told Oakes, the foreman, that he would be working in the basement, and would need a scaffold. Oakes replied, "All right; I will have a scaffold built for you," or words to that effect.

When the defendants first came to the job, they brought certain planks or lumber for scaffolding purposes; they were planks selected and brought to the job by defendants for that specific purpose. They were used in that way throughout the building. A few days before plaintiff's injury, about 12 or 15 of these scaffolding boards were put in a pile in the basement. They were put there for use in such further scaffolding as might be needed in giving the finishing touches to the building, and so that they would not be taken away from the building along with the contractor's other paraphernalia.

Agreeable to the promise he had made plaintiff, Oakes told Naylor, the laborer, to go down and fix up the scaffold for McGrath to work on, and directed him to get the board therefor out of the pile of scaffolding boards which had been placed and left in the basement as above stated. The trusses or wooden horses were also in the basement, having been made by the carpenters and used in the scaffolding necessary in the prior work on the building. Naylor did as he was told, and, obtaining one of the scaffolding boards piled in the basement as aforesaid, made a scaffold as stated in the commencement of this opinion. The defendants' evidence shows that the usual, ordinary way and custom of making a scaffold for the kind of work plaintiff was going to do was to place one board of the dimensions hereinbefore given across two trestles; that only one plank was generally used and was sufficient. After said scaffold was arranged, plaintiff went to work thereon, and Naylor became his "helper" to mix plaster and bring it to plaintiff as needed, etc. During the progress of the work the plank suddenly broke, and let plaintiff fall to the hard cement floor, resulting in his injury.

The theory on which plaintiff's case was submitted to the jury was in strict accord with the facts as outlined above. The contention that plaintiff is not entitled to recover is based upon the view that it was a part of plaintiff's duty to construct the scaffold; that Naylor was his fellow servant, who, either in conjunction with him or under his direction, put the scaffold together out of a supply of materials, some good, some bad, furnished by the master, but that the latter left it to the judgment and discretion of the servant to select the material that was suitable and proper; and that, if there was any negligence in the matter, it was the negligence of the servant in choice of the materials, and not the violation of any primary duty the master owed to plaintiff. We say at once that, if the case came within these limits, we would be in duty bound to hold that plaintiff had no case. The authorities are undoubtedly that way. *Williams v. Ransom*, 234 Mo. 55, 136 S. W. 349; *Forbes v. Dunnivant*, 198 Mo. 193, 95 S. W. 934; *Modlagl v. Kaysing Iron & Foundry Co.*, 243 Mo. 587, 154 S. W. 752; *Herbert v. Wiggins Ferry Co.*, 107 Mo. App. 287, 80 S. W. 978; *Steffenson v. Roehr Co.*, 186 Mo. App. 225, 116 S. W. 431.

But the case is not to be brought within these limits. There was evidence from which the jury could find that the construction of the scaffold was not plaintiff's work, but defendants', and that they did the work of furnishing a place for plaintiff to work by directing their servant Naylor to construct it for them. The duty of furnishing a place and appliances which are reasonably safe is a primary obligation resting upon the master,

and he cannot escape it by delegating it to another. Of course, if the preparation of the place or the appliance is a thing in line with the work and a simple matter incidental thereto, the master has the right to hire the servant to prepare these in addition to the duties he is ultimately to do, and in that event, if the thing prepared proves defective, the master is not liable. *Modlagl v. Kaysing Iron & Foundry Co.*, supra. But, as we have said, the evidence most favorable to plaintiff does not bring the case within this category. Defendants therefore cannot delegate the duty of providing a reasonably safe place or appliances to Naylor and escape on the ground that he was a fellow servant.

Naylor, in preparing the scaffold, was not a fellow servant with plaintiff, though he may have become a fellow servant immediately thereafter, when he began to mix plaster and assist plaintiff in his work. *White v. Montgomery Ward & Co.*, 191 Mo. App. 268, 177 S. W. 1039. Any servant to whom the master delegates the primary duty of fixing a safe place is *pro hac vice* a vice principal for whose negligence the master is responsible. *Lang v. Bailes*, 19 N. D. 582, loc. cit. 588, 125 N. W. 891.

[4] It will also be observed from the statement hereinbefore made that the 12 or 15 boards placed in the basement were boards which the master had selected for scaffolding purposes, and were left in the basement to be used for that purpose. The master directed Naylor to get the board from that pile. As the boards in the pile had been selected and used as scaffolding boards, the servant would have a right to assume that any of them would be proper for that purpose unless there was something about it apparent to his observation to show him that it was not fit. The lime and mortar on the board, however, concealed the defect from the observation of both the servant when he got it and plaintiff when he got upon it to work. Under such circumstances, how can it be said that room was left for the servant's judgment in the selection of a board, or that the servant was negligent in making such selection? On the theory upon which the case was submitted to the jury, the master cannot be absolved from liability where there is substantial evidence to support such theory, and the jury have found their verdict in accordance therewith. The following authorities support this view. *Lee v. Leighton Co.*, 113 Minn. 373, 129 N. W. 767; *Griffin v. Parker*, 129 Tenn. 446, loc. cit. 452, 164 S. W. 1142; *Rihmann v. Grant*, 114 Minn. 494, loc. cit. 488, 131 N. W. 478; *Farrell v. Machinery Co.*, 77 Conn. 494, 59 Atl. 611, 68 L. R. A. 239, 107 Am. St. Rep. 45; *Donahue v. Buck & Co.*, 197 Mass. 550, loc. cit. 551, 83 N. E. 1090, 18 L. R. A. (N. S.) 476; *Hoveland v. National Blower Works*, 184 Wis. 342, loc. cit. 348, 114 N. W. 795, 14 L. R. A. (N. S.) 1254; *Caddy v. Interborough, etc., Co.*, 195 N. Y. 415, 88 N.

E. 747, 30 L. R. A. (N. S.) 30. An excellent note on the master's duty and consequent liability in circumstances like the case at bar is to be found appended to the case of *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. (N. S.) 220.

The judgment is affirmed. All concur.

SECURITY NAT. BANK v. FIELD.
(No. 11809.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. INSURANCE — 38 — CAPITAL STOCK — NOTES IN PAYMENT — STATUTES.

Where a note payable to a bank was given in payment of an insurance stock subscription, a certificate of stock issued therefor, and the proceeds of the note paid into the corporate treasury before the incorporation was applied for, *held* that the note was not given in violation of Rev. St. 1909, § 7063, prohibiting a note from being considered as payment for capital stock of insurance companies, since the note was not so considered by the company as the money represented by it was actually paid in cash before the incorporation was effected.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 88; Dec. Dig. — 38.]

2. BILLS AND NOTES — 430 — DISCHARGE — SETTLEMENT WITH THIRD PARTIES — PRESUMPTIONS.

Where a note payable to a bank was given in payment of an insurance stock subscription and an organizer of the company negotiated a loan from the bank on the note and his own as security, a settlement of the organizer's liability to the bank on the loan by the payment of his own note did not divest the bank of its interest in the other note, since the bank retained it and was presumed to have treated it as so much money in the settlement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1245-1250, 1262, 1263; Dec. Dig. — 430.]

3. CONTRACTS — 330 — RIGHTS OF THIRD PERSONS — TRUSTEE OF EXPRESS TRUST.

In such case the bank could maintain an action on the note in its own name, for the benefit of the organizer, as a trustee of an express trust under Rev. St. 1899, § 541, authorizing such action and declaring any person in whose name the contract is made for the benefit of another to be a trustee of an express trust.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589, 1591-1594, 1596, 1597, 1602-1604; Dec. Dig. — 330.]

4. JUDGMENT — 691 — CONCLUSIVENESS — PARTIES.

Judgment for a payee in possession of a note precludes recovery thereon by the party for whose benefit it was made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1214; Dec. Dig. — 691.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by the Security National Bank against W. S. Field. From a judgment for plaintiff, defendant appeals. Affirmed.

George Horn, of Kansas City, for appellant. William J. Morse and Milton Schwind, both of Kansas City, for respondent.

TRIMBLE, J. This suit is on a promissory note executed by defendant and payable to the plaintiff. The answer raised a number of defenses, only two of which are now relied upon. The first of these is that the note was given in lieu of a former note that defendant claims was an absolute nullity; the second is that the plaintiff has no beneficial interest or ownership in the note sued on sufficient to enable it to maintain the action. Plaintiff recovered judgment in the trial court.

It seems that in 1911 a number of gentlemen were organizing an insurance company to be known as the Central Union Fire Insurance Company. The defendant subscribed for 50 shares of stock therein, and executed a note therefor due in 90 days. A certificate for the 50 shares was issued in the defendant's name and attached to the note. A Mr. T. T. Kelly, who was active in the organization of the company, took this note, with the certificate of stock attached, to the plaintiff bank and there put it up, along with his individual note to the bank, and obtained a loan of some \$15,000, which was paid into the treasury of the prospective company in full payment of a number of subscriptions to stock made by a number of persons. The stock of the company having been subscribed and the company having in its coffers the actual cash called for by the subscriptions to its capital stock, then applied to the state for its certificate of incorporation and authority to do business. These were in due time granted, and the company entered upon the business for which it was organized. When defendant's note became due the bank asked him to pay it, but the latter, with the consent of the bank and Kelly, obtained an extension of time by executing a new note (the one sued on), payable to the plaintiff bank, in lieu of the old one, which was canceled and returned to him. The certificate of stock for 50 shares attached to the old note was, for some reason, returned to the office of the company, and a new certificate for 50 shares issued in defendant's name and sent to him. He returned it to the company, and it was then sent to the bank and attached to the new note.

[1] As stated, the defendant claims that the original note was a nullity. This view rests upon the ground that section 7063, R. S. Mo. 1909, in relation to insurance companies, says:

"No note or obligation given by any stockholder, whether secured by deed of trust, mortgage or otherwise, shall be considered as payment of any part of the capital stock."

We do not think this provision makes the original note a nullity, under the circumstances of this case. The provision of the statute above quoted prevents an insurance company, being organized, from treating a note, no matter how good, or how well se-

cured, as a part of its capital stock. And the insurance company did not do this in this case, either directly or indirectly. The money which defendant's note represented was actually paid in cash into the company's treasury before the incorporation was applied for. And the insurance company was not liable in any way to be called upon to pay it back because it had nothing to do with the obtaining of the money on defendant's note. It received the money into its coffers with no obligation whatever to pay it back, or lose its equivalent, if defendant did not pay his note. It was wholly unknown in Kelly's transaction with the bank whereby he obtained the money which went into the company's treasury in payment for the stock. Hence the original note was not void. And if the original note was not void, certainly the one sued on, given to the bank in lieu of the old note, is not void.

[2] Defendant's other objection, mentioned above, arises out of the fact that Kelly testified that he subsequently settled his obligation to the bank, and the bank admitted that Kelly owed it nothing further by reason thereof. Defendant, therefore, says that the bank has no further interest in the note sued on. But when Kelly settled his note, the defendant's note had been made payable to the bank direct, and, in the settlement with Kelly, the bank retained defendant's note. This was agreeable to Kelly. He testified in this case and makes no objection thereto. The presumption is that in Kelly's settlement with the bank defendant's note was treated as so much money, which the bank could do, since the note was payable to it.

[3, 4] Besides, as the plaintiff bank was the payee and in possession of the note, it could sue in its own name whether it was the real owner or not, since, if Kelly were the beneficial owner of the proceeds, the law would impress a trust on the fund in his favor. *Nicolay v. Fritschle*, 40 Mo. 67; *Simons v. Wittmann*, 113 Mo. App. 357, loc. cit. 374, 88 S. W. 791; *Snyder v. Adams Express Co.*, 77 Mo. 523, loc. cit. 526; *Gunnell v. Emerson*, 73 Mo. App. 291. The judgment in this case would, as a matter of law, preclude Kelly from obtaining a recovery on his part; but, in addition to this, he would be clearly estopped under the circumstances of this case.

The judgment is correct, and the same must be affirmed. It is so ordered. The other Judges concur.

STATE v. EDWARDS. (No. 11916.)
(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916. Rehearing Denied
Feb. 7, 1916.)

1. INTOXICATING LIQUORS —32—LOCAL OPTION ELECTION — ACTS AND RECORDS OF COUNTY COURT.

The acts of the county court in entertaining a petition for a local option election, in determining the qualification of the petitioners and

the sufficiency thereof, and in calling a local option election are judicial in their nature, and the court's record therein partakes of the nature of a judgment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 38, 39; Dec. Dig. —32.]

2. INTOXICATING LIQUORS —32—ORDERS OF COUNTY COURT—COLLATERAL ATTACK.

Such orders or judgment are not open to collateral attack.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 38, 39; Dec. Dig. —32.]

3. INTOXICATING LIQUORS —32—LOCAL OPTION ELECTION—JURISDICTION—STATUTE.

Under Rev. St. 1909, § 7283, providing an election to determine whether liquors shall be sold in a county and a procedure thereon, the presentation of a petition properly signed calls the court's jurisdiction in the particular case into exercise.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 38, 39; Dec. Dig. —32.]

4. INTOXICATING LIQUORS —31—LOCAL OPTION ELECTION—JURISDICTION OF COUNTY COURT—STATUTE.

Under Rev. St. 1909, § 7244, providing that, whenever a local option election has been held with decision for or against the sale of intoxicating liquors, the question shall not be again submitted within four years in the same county, and then only on a new petition, etc., the county court, on presentation of a petition for an election within four years from a valid election, should decline to call the election, but its jurisdiction over the subject-matter was not destroyed, and hence its action in calling the subsequent election was only voidable, in case the former election was valid.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. —31.]

5. JUDGMENT —489—COLLATERAL ATTACK—JURISDICTION.

There is a distinction between jurisdiction over the subject-matter and the exercise of jurisdiction in a particular proceeding turning upon the difference between a wrongful execution of power to hear and determine, which renders the judgment merely voidable, and a lack of power to hear the matter at all, which renders it absolutely void.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 924, 925; Dec. Dig. —489.]

6. INTOXICATING LIQUORS —39—LOCAL OPTION ELECTION — PRESUMPTION — JURISDICTION—COUNTY COURT.

Where the county court on presentation of a petition for a local option election exercised its jurisdiction over the subject-matter, the presumption is that the court acted and made its order in accordance with the law, and that since the former election something must have happened which allowed the court to grant the second petition without violating Rev. St. 1909, § 7244, providing that, when a local option election is held in a county, the question shall not be again submitted within four years.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 33; Dec. Dig. —39.]

7. INTOXICATING LIQUORS —37—LOCAL OPTION ELECTION—ATTACK—STATUTE.

Rev. St. 1909, § 7242, providing that a local option election may be contested as provided for the contest of elections of county officers by any qualified voter of the county, etc., in which the election was held by an action to contest brought against the county, etc., affords the exclusive statutory remedy by contest.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. —37.]

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Jack Edwards was convicted of the sale of intoxicating liquors in violation of the local option law, and he appeals. Affirmed.

Roy W. Rucker, of Keytesville, for appellant. Roy McKittrick, of Salisbury (Jno. D. Taylor, of Keytesville, of counsel), for the State.

TRIMBLE, J. This is a prosecution for a sale of intoxicating liquor in violation of the local option law which the state claims is in force in Chariton county. The indictment was returned on the 8th day of February, 1915. The offense is charged to have been committed on the 1st day of August, 1914. The sole defense was that the local option law was not in force in Chariton county when the sale was made. Defendant was convicted and fined \$300. The only question presented by his appeal is whether or not the election at which Chariton county is said to have adopted local option was valid.

The state introduced a record of the county court of that county showing that on the 7th day of May, 1913, a lawful petition, in regular form and bearing the requisite number of signers, was presented to the court. Said county court record further showed all the necessary orders directing the holding of a due and regular local option election in said county on the 7th day of June, 1913. It also showed that said election was held in due and regular form on said date, resulting in a vote "against the sale of intoxicating liquor" by a majority of 184; that all the necessary steps required by the statute pertaining to the counting, returning, and canvassing of the vote, the declaration of results, and the publication of notice were taken and duly entered of record. There is no flaw in the record, nor any defect or infirmity in the proceedings so far as the record itself is concerned or in the proceedings disclosed thereby. On its face, and considered by itself, it shows that a valid election was held in said county on June 7, 1913, at which the county declared for prohibition, and that the same was duly put in force by proper notice.

The defendant objected to the introduction of this record, and, in connection with his objection, offered in evidence a record of the county court pertaining to an alleged local option election held on March 18, 1912, resulting in the defeat of prohibition by a majority of 99. The trial court refused to admit this record in evidence, and, overruling defendant's objection to the record offered by the state, admitted it in evidence. The defendant's contention is that, since the record offered in evidence by him shows on its face a valid election, in which the county went "wet," on March 18, 1912, the election held on June 7, 1913, wherein the county went "dry," was and is a nullity, since it was held within four years after the first election, in

violation of section 7244, R. S. Mo. 1909, which reads as follows:

"Whenever the election in this article provided for has been held, and decided either for or against the sale of intoxicating liquors, then the question shall not be again submitted within four years next thereafter in the same county or city, as the case may be, and then only on a new petition and in every respect conforming to the provisions of this article."

In reference to the first election the defendant offered nothing except the county court record, and made no attempt to show that the validity of said first election, as established by said record, had remained unimpeached down to the time of the ordering of the second. There is a statement, in respondent's brief that shortly after this first election it was declared invalid by the circuit court of that county in an action therein instituted, from which judgment an appeal was taken which was soon after dismissed. We have carefully searched the record, but are unable to find therein any reference to such fact, and for this reason we will not take it into consideration in determining this case, as it is our duty to consider it solely upon the record as presented, especially in view of what the attorney for the other side has said concerning the propriety of making such unsupported statement. We refer to it only in order to show that we have not attached any importance to it.

[1] The acts of the county court in entertaining a petition for a local option election, in determining the qualification of the petitioners and the sufficiency thereof, and in calling a local option election are judicial in their nature, and the record of the county court made therein partakes of the nature of a judgment. *State v. Gamma*, 149 Mo. App. 694, loc. cit. 704, 129 S. W. 734.

[2] And the orders or judgment so made are not open to collateral attack. *State ex rel. v. Wilson*, 216 Mo. 215, 115 S. W. 549; *Desloge v. Tucker*, 196 Mo. 587, loc. cit. 601, 94 S. W. 283; *School District v. Chappel*, 155 Mo. App. 498, 135 S. W. 75; *State ex rel. v. County Court of Cass County*, 137 Mo. App. 698, 119 S. W. 1010; 17 Am. & Eng. Ency. of Law (2d Ed.) 1055.

[3] The jurisdiction or power of the county court over the subject-matter of local option elections is conferred by section 7238, R. S. Mo. 1909. The presentation of a petition properly signed calls the court's jurisdiction in the particular case into action or exercise. *State v. McCord*, 207 Mo. 519, loc. cit. 526, 106 S. W. 27, 123 Am. St. Rep. 410; *State ex rel. v. Bird*, 108 Mo. App. 163, 83 S. W. 284.

[4, 5] Now, when the petition calling for the election of June 7, 1913, was presented, if, as a matter of fact, a valid election on that subject had been held within four years prior thereto, the county court was required by section 7244, R. S. Mo. 1909, to decline to call the election, but the jurisdiction of the county court over the subject-matter was not

destroyed. Its power to call the election was merely dependent upon the fact whether a valid election had been held within four years. Section 7244 evidently means a *valid* election, for a *void* election is no election, and cannot prevent a subsequent one. State ex rel. v. Rinke, 140 Mo. App. 645, loc. cit. 663, 121 S. W. 159; Taylor v. Cook, 147 Ky. 215, 143 S. W. 1055. Hence the act of the county court in calling the election of June, 1913, was not void for want of jurisdiction, but only voidable, in case the former election was valid. Smith v. Black, 231 Mo. 681, loc. cit. 693, 132 S. W. 1129. There is a distinction, which should always be observed, between jurisdiction over the subject-matter and the exercise of jurisdiction in a particular proceeding. 17 Am. & Eng. Ency. of Law (2d Ed.) 1042. This distinction turns upon the difference between a wrongful execution of power to hear and determine, which renders the judgment merely voidable, and a lack of power to hear the matter at all, which renders it absolutely void. 17 Am. & Eng. Ency. of Law (2d Ed.) 1048. The act of the county court in calling the election of June, 1913, was an exercise of the jurisdiction it had over the subject-matter of local option elections, and therefore its act was not absolutely void, a mere nullity, to be disregarded and called in question by any one upon any and every occasion or by the collateral attack the defendant now makes upon it.

[6] The existence of the first judgment of the county court, which on its face establishes an election held in March, 1912, does not change the situation. The presumption is that the county court heard and acted upon the petition in entire accordance with law, and made the second order in obedience thereto and in accordance with its duty, and that since the first election something must have happened which allowed the court to grant the second petition without violating section 7244; for, while the rule is that there is no presumption in favor of the jurisdiction of courts of special and limited jurisdiction, that rule applies only to their jurisdiction over the subject-matter. If the court has such jurisdiction, and the record discloses the facts necessary to call the court's jurisdiction over the particular case into action, then the same presumption exists that the court acted properly as in the case of courts of general jurisdiction. The judgment establishing the second election was therefore only voidable upon a certain contingency, and, being valid on its face, was good

until set aside or questioned in the manner provided by law.

[7] Now, the Legislature in 1909 provided a method by which the validity of the election authorized and established by this judgment could be questioned, by adding to section 7242, R. S. Mo. 1909, the following:

"The election in this article provided for, and the result thereof, may be contested in the same manner as is now provided by law for the contest of the elections of county officers in this state by any qualified voter of the municipal body or of the county in which said local option election shall be held by an action to contest as herein provided, and which shall be brought against the municipal body or the county holding said election."

In the case of State ex rel. v. Ross, 161 Mo. App. 671, loc. cit. 682, 143 S. W. 510, it was held by the Springfield Court of Appeals that, where a specific remedy for contesting elections has been provided by statute, that mode alone can be resorted to, and, where a direct method for impeaching a local option election has been provided by law, its validity is not open to impeachment or attack in collateral matters. This case went to the Supreme Court and is reported in 245 Mo. 36, 149 S. W. 451, Ann. Cas. 1913E, 978. The ruling of the Springfield Court of Appeals was upheld, the Supreme Court saying that the statutory remedy by contest was exclusive, and did so in language so broad and emphatic that we are not disposed to hold the ruling inapplicable to the case at bar. The language used at page 45 is, in our opinion, susceptible of no other interpretation. This is especially so in view of the fact that the reasoning of the court proceeds upon the theory that the right to sell intoxicating liquor is not a natural, vested, or a constitutional right. It is purely statutory. The Legislature, having the power to authorize an election to determine whether or not intoxicating liquor shall be sold, has also the power to provide a means for contesting such election. The whole matter being statutory, the statutory remedy is exclusive. Our view as to the breadth and scope of the ruling in the Ross Case is strengthened by what is said in State ex rel. v. Carter, 257 Mo. 52, loc. cit. 82, 165 S. W. 773. To the same effect see Miller v. State, 72 Tex. Cr. R. 151, 161 S. W. 128; Longmire v. State (Tex. Cr. App.) 171 S. W. 1165; Rhodes v. State (Tex. Cr. App.) 172 S. W. 252; Moffitt v. People (Colo.) 149 Pac. 104; Woodard v. State, 103 Ga. 496, 30 S. E. 522.

The judgment is therefore affirmed. All concur.

ANDERSON v. AMERICAN SASH & DOOR CO. (No. 11838.)

(Kansas City Court of Appeals. Missouri.
Feb. 6, 1916. Rehearing Denied
Feb. 21, 1916.)

1. APPEAL AND ERROR 934—REVIEW—EVIDENCE.

The court on appeal from a verdict for plaintiff will accept as the facts in the case the evidence for plaintiff and all reasonable inferences therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. 934.]

2. CARRIERS 314—PASSENGER IN ELEVATOR—INJURIES—ACTIONS—PLEADING—RES IPSA LOQUITUR.

A petition by a customer of defendant, injured upon entering an elevator, which averred that just as she entered the elevator as a passenger pursuant to invitation a gate connected with the elevator fell, striking her, is general in its averments, and depends for recovery on the doctrine of res ipsa loquitur.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. 314.]

3. CARRIERS 316—PASSENGER IN ELEVATOR—INJURIES—ACTIONS—PRESUMPTIONS—RES IPSA LOQUITUR.

One invited to take passage in an elevator, injured by the falling of the door, cannot be deprived of the presumption of res ipsa loquitur in her favor as a matter of law by reason of evidence introduced by defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. 316.]

4. TRIAL 296—INSTRUCTIONS—CURE BY OTHERS.

In an action for injuries received by plaintiff in entering defendant's elevator, error in instructions which omitted a consideration of plaintiff's contributory negligence is cured by defendant's instructions presenting that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 706-713, 715, 716, 718; Dec. Dig. 296.]

5. CARRIERS 247—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.

A customer in a store, invited to use the elevator to visit the desired floor, is a passenger upon stepping forward to enter the cage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. 247.]

6. TRIAL 219—INSTRUCTIONS—DEFINITION OF TERMS.

In an action for negligently allowing the gate of an elevator to fall on plaintiff, the use of the word "negligence" in an instruction merely to characterize the act is not improper, though it was not defined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. 219.]

7. APPEAL AND ERROR 882—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR.

Where defendant's own instructions repeatedly used the word "negligence" without definition, it cannot complain of plaintiff's instructions similarly using the word.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. 882.]

8. DAMAGES 132—PERSONAL INJURIES—MEASURE.

Where injury to plaintiff school teacher caused headaches, from which she continuously suffered and which necessitated her having as-

sistance to discharge her duties, an award of \$2,000 is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. 132.]

Appeal from Circuit Court, Jackson County; Jos. A. Guthrie, Judge.

"Not to be officially published."

Action by Lucy Anderson against the American Sash & Door Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Griffin & Orr, of Kansas City, for appellant. J. C. Rosenberger, William F. Woodruff and R. E. Talbert, all of Kansas City, for respondent.

ELLISON, P. J. Defendant owns a sash and door manufacturing establishment and a sales department. In that department plaintiff was injured while attempting to enter an elevator used for the convenience of its customers. She brought this action for damages, and recovered \$2,000.

[1] The fact that defendant has based much of its defense, as well as argument relating thereto, on the evidence in its own behalf, makes necessary to repeat what has been so often said that we are but little concerned with the evidence in favor of the losing party. We must accept as the facts of the case the evidence in plaintiff's behalf, and all reasonable inferences to be drawn therefrom must also be set down in her favor.

From the case, as made for plaintiff, it appears that she and her mother went to defendant's place of business to purchase some doors. On entering, they were received by one of defendant's clerks who, on learning what they wanted, asked them to follow him down the hall, which they did until they came to the front of a freight elevator, also used for passengers. The opening in the front of this elevator was closed or secured with a wooden open work gate which moved in response to the movement of the elevator. That is, just before or as the elevator reached a floor, the gate would raise and just after it started on, the gate would drop back and close the opening. The speed of movement of the gate was kept in control by weights attached to pulleys. The clerk who thus invited plaintiff and her mother to follow him, called to an employé to operate the elevator which was then standing there, the gate up, ready, to all appearances, for persons to step in. Plaintiff went up to the elevator (her mother and the clerk just behind her), and the man who was to operate it stepped in just ahead of her and said to her, "Wait a minute," and she stopped immediately at the entrance, when the gate fell from above and struck her on the head, inflicting the injury of which she complains.

[2] There is a question between the parties

whether the petition charges general or specific negligence. The charge is as follows:

"* * * That just as she entered said elevator as a passenger pursuant to said invitation, a large and heavy object which served as a gate or door to said elevator shaft, through the carelessness and negligence of defendant, its agents and servants, was allowed to fall from above, and strike plaintiff a severe blow on the top of her head, causing plaintiff to be injured as follows."

A question of this nature is sometimes confusing from the different meaning which may be given to the word, "general," as distinguished from "specific." It is rare that a pleader alleges merely that the plaintiff was injured by the negligence of the defendant. He may, and usually does, limit the negligence in some very general way, and still will plead a case of general negligence. For instance, he will allege that he was a passenger and was injured by a derailment of the train. That would be a general charge, though limited to a derailment and evidence of an injury by falling in the aisle or in attempting to leave a standing car would not be admissible.

If he pleads the immediate cause of the injury, such as a wreck of the train, but does not plead the negligence that caused it (as for instance, defective ties, broken wheel, collision, or the like), his charge will be general negligence, and, while he must prove a wreck, he need not prove what caused it and it will be presumed that it was some act of negligence, *res ipsa loquitur*. So in this case the allegation is that plaintiff was injured by the fall of an elevator gate when she was in the act of entering. But, while she alleges that its falling was negligence, she does not specify what the negligence was, and so stands on her charge of negligence, generally and depending on the rule *res ipsa loquitur*. *Stauffer v. Railroad*, 243 Mo. 305, 147 S. W. 1032.

[3] Plaintiff cannot be deprived of this presumption in her favor, as a matter of law, by the evidence introduced by defendant. *Brown v. Railroad*, 256 Mo. 522, 535, 165 S. W. 1060.

There was no failure of proof. The allegation was that "just as she entered said elevator as a passenger," the gate fell upon her. This was literally proven. The fact that the operator told her to wait a minute, and she stopped as the gate fell, does not disprove that it was done just as she entered;

that is, in the connection used, just as she was entering. The conceded fact is that she was so far along in entering, or had entered far enough, to be struck by the gate.

[4] The instructions for plaintiff were justified by the evidence and are properly worded. They do not assume that an invitation was given to plaintiff to enter the elevator. Nor do they broaden the issues. They do not omit the question of plaintiff's contributory negligence. But if they did it was cured by defendant's. *Riegel v. Biscuit Co.*, 169 Mo. App. 513, 155 S. W. 59; *Holman v. City of Macon*, 177 S. W. 1078.

[5] The evidence showed plaintiff was a passenger under our decision in *Chambers v. Kupper Hotel*, 154 Mo. App. 249, 134 S. W. 45, where Judge Johnson made this statement of the law:

"Where an elevator is stopped at a floor and the door is opened for the reception of passengers, the relation of carrier and passenger begins the moment the latter starts to enter the car and brings himself within range of its possible activities."

[6, 7] Objection is made that the court made use of the word "negligence" in plaintiff's instructions without defining its meaning. But, as used, the word merely characterizes the act, and was not improper. *Mather v. Railroad*, 166 Mo. App. 142, 149, 148 S. W. 383; *Burns v. Railroad*, 176 Mo. App. 330, 342, 158 S. W. 394. More than this, if an error, it was condoned by defendant's repeated use of the word in the same way.

We think that there was evidence from which the jury could properly find that plaintiff's injury was permanent.

[8] Finally, defendant claims the verdict of \$2,000 is excessive. That depends altogether upon the question whether she and witnesses in her favor have exaggerated the result of the injury to her head. No immediate effect was felt, but before she left the building she became sick. Her head has affected her ever since, and she has suffered practically continuously since. Her occupation is school teaching, and she has to have assistance at times when her suffering is intense. The jury has decided that her complaint is not feigned, and on that basis the verdict is not so large as to justify us in interfering.

The judgment must be affirmed. All concur.

COATES v. DUNNIVANT. (No. 1874.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. EXECUTORS AND ADMINISTRATORS \S 245—CLAIMS AGAINST ESTATE—NOTICE—WAIVER.

Where an administrator went to trial on the merits without plea or objection aimed at the want of notice to him of the filing of an amended statement of claim, this objection was waived.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 867-869; Dec. Dig. \S 245.]

2. EXECUTORS AND ADMINISTRATORS \S 245 — CLAIMS AGAINST ESTATE — OBJECTIONS—WAIVER.

An administrator by going to trial on the merits waived the objection that the original claim was not sufficient on which to base an amendment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 867-869; Dec. Dig. \S 245.]

3. EXECUTORS AND ADMINISTRATORS \S 221—CLAIMS AGAINST ESTATE—SERVICES TO DECEDENT—EVIDENCE.

In a proceeding against an administrator on a claim for services to the deceased, the mother-in-law of plaintiff, evidence on behalf of plaintiff held to sustain the burden of showing that the decedent intended to pay, and the plaintiff intended to charge, for the services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-908½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. \S 221.]

4. APPEAL AND ERROR \S 1057 — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

On a claim for services to deceased for five years, the exclusion of an admission of plaintiff that deceased did not make her home with him after 1907 was harmless, where the 5 years for which plaintiff was charging extended over a period from 1902 to 1910, and the testimony amply showed that 5 years was a reasonable period for which he might charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. \S 1057.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by Charles Coates against M. E. Dunnivant, administrator of the estate of Sarah Campbell. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Oliver, of St. Louis, A. Sloan Oliver, and Everett Reeves, both of Caruthersville, for appellant. R. L. Ward, of Caruthersville, for respondent.

ROBERTSON, P. J. Plaintiff filed his claim against the estate of Sarah Campbell in the probate court of Pemiscot county, the administrator having theretofore waived notice. Shortly thereafter plaintiff amended his claim, including therein some items and accounts not mentioned in the original claim. The administrator filed an answer, and a trial was had on the merits, resulting in an allowance of plaintiff's claim in full. The administrator appealed to the circuit court, where upon a trial anew the plaintiff again

prevailed, and the administrator has appealed to this court.

[1] The first insistence on the part of the appellant is that the original statement was insufficient to confer jurisdiction on the probate court, that the amendment constituted the original filing of the claim therein contained, and that it was therefore essential that notice of its presentation for allowance be served on the administrator. Section 203, R. S. 1909. It is held that in the same answer may be joined pleas to the jurisdiction of the person and subject-matter and to the merits. *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481, 487, 83 S. W. 479. In the case at bar there was no plea or objection aimed at the want of notice of the filing of the amended statement, and as the defendant went to trial on the merits, this objection has been waived. *Waltemar v. Schnick's Estate*, 102 Mo. App. 133, 138, 76 S. W. 1053.

[2] As to the objection based on the idea that the original claim was not sufficient on which to base an amendment, this was waived by going to trial on the merits. *Williams v. Sanders*, 69 Mo. App. 608, 613.

[3] The plaintiff was a son-in-law of the deceased, for whom he cared for 5 years of the latter part of her life and paid her funeral expenses and the bill of the doctor who attended her during her last illness. She was 73 years of age when she died, and had been an invalid some time. The defendant earnestly insists that before plaintiff can recover he must show that deceased intended to pay him, and that plaintiff intended to charge for his services. Plaintiff may readily concede that he had that burden, as the record clearly discloses that he discharged it. Numerous witnesses testified that while deceased was being cared for in the home of plaintiff, she remarked that she intended to pay him. A witness, without objection, testified that plaintiff said he intended to charge. It has been held that, from the fact that one states that he expects to pay for what his relative had done and is doing for him, the inference may be drawn that the party rendering the services was doing so with the expectation of pecuniary compensation. *Burt v. Gabbert*, 174 Mo. App. 521, 525, 160 S. W. 838. Certainly where one makes a declaration that indicates a purpose to pay another person for services, the inference is justified that the person making that statement is legally bound to do what is stated will be done, and this presupposes, in a case of this kind, an arrangement between the parties which includes the intent of that other person to charge. The claim filed included \$1,200 for maintaining, boarding, and caring for deceased for five years, \$40 paid another party for caring for her during her last illness, \$6 doctor's bill, and \$55, funeral expenses. A jury trial without instructions resulted in a verdict for plaintiff

for the full amount. All the requirements insisted upon by defendant were met by the evidence; hence no further discussion on this point is necessary.

[4] The defendant undertook to prove an admission of plaintiff to the effect that the deceased did not make her home with him after 1907, but paid him only short visits thereafter. The court sustained plaintiff's objection to the testimony. The 5 years for which plaintiff was charging extended over a period of time from 1902 to the date of the death of deceased in 1910. If defendant's theory is correct that the court erred, it must be held to be harmless, as the testimony amply shows that five years was a reasonable period for which plaintiff might charge. One witness testified that deceased lived with plaintiff 17 or 18 years. The defendant offered no testimony.

The judgment is so manifestly just that it should be, and is, affirmed.

FARRINGTON and STURGIS, JJ., concur.

YOUNG v. MILLER. (No. 11794.)

(Kansas City Court of Appeals. Missouri.
Jan. 17, 1916. Rehearing Denied
Feb. 7, 1916.)

1. INTERPLEADER ¶10 — GROUNDS — PARTY CLAIMING INTEREST IN FUND.

An attorney employed to contest a will, on a contingent basis, brought suit making all the heirs, including contestant's brother, interested in having the will annulled, parties defendant, in which the contestant's brother filed an answer admitting the facts of plaintiff's petition, joined the contest, and received an offer of settlement of \$900, to which both contestants consented, and further agreed that the \$900 should be divided into two parts of \$550 and \$350, the larger sum to be given to the original contestant, and the attorney signed agreements to that effect and afterwards received the money. *Held*, in a suit by the assignee of the smaller share, brought after the contestant receiving the larger sum was threatening to sue defendant attorney for his share, that the defendant was not entitled to interplead the two contestants, as he was himself claiming an interest in the fund in his hands, and in the \$350, so that he was not in the position of a mere disinterested stakeholder or party holding a fund to be wholly divided between others.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 12; Dec. Dig. ¶10.]

2. INTERPLEADER ¶10 — GROUNDS — INCONSISTENT OBLIGATIONS.

Such defendant was not entitled to interplead if he had assumed different and inconsistent obligations, so as to be liable to two judgments.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 12; Dec. Dig. ¶10.]

3. ATTORNEY AND CLIENT ¶128—LIABILITY OF ATTORNEY TO THIRD PERSON.

In such suit, the original contestant was in no position to claim that a division of the proceeds was unauthorized, nor could defendant as his attorney refuse to pay the interest assigned by the other contestant on the ground that he had no authority from his client to make any division, so that, regardless of the

original contestant's mistake in thinking he was receiving the entire proceeds, the assignee could recover without being compelled to have the question opened and litigated with the original contestant.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 274-283; Dec. Dig. ¶128.]

4. ATTORNEY AND CLIENT ¶128—SETTLEMENT — FUNDS RECEIVED BY ATTORNEY — PARTIES.

In such case, the attorney was the proper party to be sued by the plaintiff assignee, as he was the one designated by all the parties to receive the proceeds of the settlement, and did receive and had it in his possession, and agreed to the division and to pay to the assignor the sum sued for.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 274-283; Dec. Dig. ¶128.]

Error to Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Seth M. Young against Scott J. Miller. Judgment for plaintiff, and defendant brings error. Affirmed.

Paul D. Kitt, of Chillicothe, for plaintiff in error. Wm. McAfee, of Hamilton, and J. M. Davis & Son, of Chillicothe, for defendant in error.

TRIMBLE, J. Edwin Hosman employed an attorney, Scott J. Miller, to contest the will of the former's uncle, Charles Hosman, deceased. Mr. Miller took the case on a contingent basis, Hosman's contract being that he would allow Miller one-half of the amount which the plaintiff in the suit should recover either by settlement or by judgment setting aside the will. Miller brought the suit, making all of the decedent's heirs and devisees parties thereto as defendants. Among these was Lyda Hosman, a brother of Edwin, who like him had received nothing under his uncle's will, and who was therefore also interested in having the will annulled.

Before suit was brought, it seems that Edwin tried to get his brother Lyda to also employ Miller, but this brother refused to do so, having consulted and employed other attorneys, among them the defendant in error herein, Mr. Young, and they had prepared a petition to contest the will, but had not filed it. After Col. Miller had brought suit for Edwin, in which Lyda was made a party defendant as hereinbefore stated, Lyda, through his attorneys, prepared and filed an application to be made a party plaintiff instead of defendant. For some reason this was not agreeable to the plaintiff's side of the case, and it was proposed to Lyda's counsel that they should withdraw his application to be made a party plaintiff, and file instead an answer admitting the facts in Edwin's petition and praying the court to declare the contested instrument to be not the will of the decedent. This was done. It is not exactly clear from the record herein

whether such answer was filed or not, but it was prepared, and, if not actually filed, was on the point of being filed, when the whole contest proceeding was halted by an offer of settlement made by the other heirs and devisees. It would seem that said answer was filed, as all the evidence shows the offer of settlement came just as everything was ready and the case was on the point of going to trial. The offer of settlement, when first made, was for \$800. This was submitted to Edwin and Lyda, who were present in person and with their respective attorneys. Lyda objected to the amount of the settlement, saying it ought to be \$1,000. Thereupon Edwin's counsel conferred with the parties offering the settlement, and the offer was raised to \$900. When this was submitted to Edwin and Lyda, they consented to it. Thereupon a contract was entered into between the executor of the estate on one side, acting for the proponents of the will, and Col. Miller on the other, whereby it was stipulated that the case should stand continued until the time for contesting the will had expired, and then the \$900 was to be paid into Col. Miller's hands, and the proponents of the will were to be allowed to establish the will. Both Edwin and Lyda were present and knew of and consented to the making of this contract.

On the same day the contract and agreement to settle was made, but possibly a few minutes thereafter, the question came up as to what division of the \$900 should be made between the two brothers, Edwin and Lyda, when the money was received by Col. Miller. It was suggested that, inasmuch as Col. Miller had done the work of preparing the petition and getting ready for trial and Edwin had advanced some \$25 or more as expenses in taking depositions, the \$900 should not be divided equally, but that a larger portion thereof should go to Edwin. It was finally agreed that when the \$900 was received by Col. Miller he was to divide it into two parts of \$550 and \$350 and give the smaller sum to Lyda. Thereupon Mr. Miller signed an agreement agreeing to divide the \$900 in that way and to give Lyda Hosman \$350 as his part. This was delivered to Lyda. Afterwards the money was duly paid to Mr. Miller, and the contract settling the will contest case was duly carried out.

In the meantime, Lyda had assigned his claim for the \$350 to Mr. Seth M. Young, and, after the \$900 was received by Col. Miller, Young demanded of him the part going to Lyda. It seems, however, that Edwin, being imbued with the idea that he was getting all of the \$900 under the settlement, had refused to settle with Col. Miller on the basis that Edwin's share was only \$550, and that under his contract employing Miller the latter was entitled to retain half of that as his fee, and had demanded one-half of the \$900 or \$450 as the net amount due him, and was threat-

ening to sue Miller for said sum; he (Edwin Hosman) claiming that he was not present when the division of the \$900 was agreed to, and that the agreement to divide same was made without his knowledge or consent. Mr. Miller therefore refused to pay Mr. Young the \$350 agreed to be paid Lyda as his share, whereupon Mr. Young brought suit against Miller to recover that amount. Miller filed an answer setting up most of the facts hereinbefore detailed and stating the predicament he was in, namely, that his former client, Edwin Hosman, was claiming that the agreement to allow Lyda \$350 of the \$900 was made without his knowledge or consent, and was threatening to sue him. The answer further set up that, as there were conflicting claims to the fund in his hands, he should not be compelled to decide as to whom the money should be paid, and he therefore paid \$165.55 into court and prayed the court to make an order requiring Edwin Hosman and Lyda Hosman to interplead therefor. The case coming on for trial, a jury was waived and the evidence heard. The court refused to order an interplea to be made and rendered judgment in favor of Young for \$350. Mr. Miller thereupon sued out a writ of error to review the judgment. He complains that the court erred in not compelling the two Hosmans to interplead. The facts as to his having received the money, and that it was received in the way above explained, and that the contract was made whereby Lyda Hosman was to receive \$350, are admitted.

[1, 2] We are of the opinion that under the facts there is no ground for an order of interpleader. The applicant for an order of interpleader, the person holding the money or property, must be a disinterested party having no personal interest in the fund, and his position must be such that he shall have good reason to believe that he may be liable to be vexed by a suit by either party in case he should pay the money to the other. *Commerce Trust Co. v. Bank of Willow Springs*, 161 Mo. App. 431, loc. cit. 435, 143 S. W. 531. In order for one to be in a position to demand that an interpleader be had, he must not have any claim whatever upon the subject-matter of the action, and he must have incurred no independent liability to any of the claimants. *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 847, loc. cit. 350, 166 S. W. 345. Neither can he demand an interpleader if he has assumed inconsistent obligations. *United Rys. Co. v. O'Connor*, 153 Mo. App. 128, loc. cit. 136, 132 S. W. 262; *Supreme Council Legion of Honor v. Palmer*, 107 Mo. App. 157, 80 S. W. 699.

Plaintiff in error is clearly claiming an interest in the fund in his hands. Undoubtedly he has an interest in the \$900 by virtue of the fee due him from his client, and he is claiming an interest in the \$350 sued for since he deposited in court not this sum, but

only \$165.55. Apparently he is retaining the balance of the \$350 in this way, that is to say, one-half thereof as due him on his fee and a small sum in addition thereto as a portion of the expenses incurred. But he had no contract with Lyda Hosman, whereby he could retain any portion thereof as his fee or for expenses. When Edwin Hosman agreed to pay as fee one-half of what was obtained, that agreement bound no one except himself, and did not affect any sum other than the amount going to him. It did not bind his brother Lyda to pay Col. Miller one-half of the amount he should receive. But even if Mr. Miller is not entitled to any part of the \$350, the fact remains that he claims and is retaining a portion thereof, and is therefore not in the position of a mere disinterested stakeholder or party holding a fund to be wholly divided between others.

The mere fact that he is liable to be sued by Edwin Hosman does not entitle him to demand an interplea. He cannot be liable to two judgments unless he has assumed two different and inconsistent obligations. And if he has done the latter, then interpleader will not lie.

[3] What we here say as to his liability to two judgments may not be binding upon any one not a party to the suit in which the judgment before us was rendered, but we may perhaps consider the nature of the liability incurred by Miller. The suit to set aside the will was in the nature of a suit in equity, proceeding, of course, according to the method laid down in the statute. When that suit was brought, it was the duty of the court to adjudicate it and determine whether the will should be set aside or established in solemn form. Every litigant in the case had a right to the judgment of the court therein. That is to say, Lyda Hosman, although nominally a defendant, but in reality asking that the will be annulled, had a right to invoke the judgment of the court therein. Hence the will contest could not be abandoned without his consent. Edwin Hosman was therefore not in a position to do as he pleased about settling the contest suit. His brother Lyda had to be consulted and his consent obtained. Now, Edwin was present when the agreement to settle for \$900 was made. He knew that Lyda's consent thereto was necessary, and both he and Lyda agreed to it. Lyda, having a voice in the disposition to be made of the case and being entitled to share in the benefits if the will was set aside, was of course entitled to receive some share of the proceeds of the case's settlement; and Edwin was bound to

know this. Hence, when he agreed with Lyda that they would allow the case to be settled and the will established upon the payment of \$900 by the others interested, he necessarily, and in law, agreed that Lyda should receive some part of it, and Lyda was in fact entitled to a share therein. After having sought and obtained Lyda's consent to a settlement upon a payment of \$900, and agreeing to it himself with full knowledge of all the circumstances, then, even if Edwin was not present when his attorney made the agreement to allow Lyda \$350 as his share, nevertheless he is not in a position to claim that a division of the \$900 was unauthorized; nor can his attorney refuse to pay the \$350 on the ground that he had no authority from Edwin to make any division. Of course, if his attorney made an improvident division and allowed Lyda an unreasonably large share, Edwin might perhaps be entitled to recover from the attorney the excess above a reasonable amount; but that is another question. However, whether Col. Miller's client is likely to sue him for making any division, or to sue him merely for the excess allowed Lyda above what was reasonable, makes no difference. Lyda, or rather Lyda's assignee, Mr. Young, is entitled to the \$350, since he gave up his right to attack the will and it was agreed he should receive \$350 therefor. The mere fact that Edwin may have mistakenly supposed in his own mind that he was getting the entire \$900 would not affect Lyda's right. Nor can the latter be compelled to open up the question and litigate the matter with Edwin, which he would have to do if an interpleader were ordered.

[4] Since the briefs were filed and the case submitted to us, a brief has been filed termed a "Reply Brief," in which is raised, for the first time, the question whether Miller was the proper party to be sued. Waiving, or rather without interposing, any point as to the time in which such objection must be made, we see no reason why he was not the one to sue. He was the one designated and agreed upon by all parties to receive the money. He did receive it, and has it yet, and he made the agreement for the division and signed the contract giving to Lyda the sum sued for. As he is the one holding the money, it would seem that he is the proper party against whom the suit should be brought.

We are of the opinion that the judgment should be affirmed. It is so ordered. The other Judges concur.

CREWS v. LOMBARD. (No. 1524.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. MORTGAGES \S 25—VALIDITY—CONSIDERATION.

Where plaintiff executed a note and deed of trust for a loan, and an additional note and second deed of trust for commission to the broker who procured the loan, but the transaction for procuring the loan was never completed, if plaintiff complied with his part of the contract, the second deed of trust was without consideration, which related back to the making thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29-42, 1364; Dec. Dig. \S 25.]

2. MORTGAGES \S 25—VALIDITY—CONSIDERATION.

Where notes and deed of trust were without consideration at all, they never had any validity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29-42, 1364; Dec. Dig. \S 25.]

3. COURTS \S 231—TRANSFER OF CAUSES—TITLE TO REAL ESTATE.

An action to cancel notes and a deed of trust for commission to a broker for procuring a loan, which in fact was never procured, involved the title to real estate, and appellate jurisdiction is vested exclusively in the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. \S 231.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by Gideon Crews against J. P. Lombard. From a judgment for plaintiff, defendant appeals. Cause transferred to Supreme Court.

E. R. Rombauer and Jos. T. Davis, both of St. Louis, for appellant. R. L. Ward, of Caruthersville, for respondent.

FARRINGTON, J. This is a suit in equity to cancel a note and deed of trust on 140 acres of land in Pemiscot county, both executed by plaintiff, Crews, to defendant, Lombard, upon the ground of no consideration. The circuit court entered a decree in plaintiff's favor, and defendant has appealed.

Plaintiff's petition avers that he desired to borrow money on his land; that defendant Lombard was advertising that he would loan money on real estate in Pemiscot county; that application for a loan was duly made and abstract of title submitted; that plaintiff then executed a note, secured by a deed of trust, to the Union Central Life Insurance Company, for said loan; that on the said date plaintiff executed his note for \$750 to defendant, Lombard, secured by a second deed of trust, and that this last-mentioned note was given as commission to defendant to secure the loan for plaintiff from the Union Central Life Insurance Company; that defendant kept the papers for several months and failed to secure the loan and get the money for plaintiff, but that defendant recorded both deeds of trust; that plaintiff

was finally forced to get the money elsewhere, whereupon the Union Central Life Insurance Company canceled its note and satisfied the record as to its deed of trust, but that defendant failed and refused to deliver up the note for \$750 or to satisfy the record as to said second deed of trust; so that the same is a cloud upon plaintiff's title; that plaintiff has recently sold the land and contracted to remove this cloud; and that said note for \$750 and second deed of trust are wholly without consideration and should be satisfied of record. The prayer of the petition is as follows:

"Wherefore, premises considered, plaintiff prays the court that said note be ordered delivered into court and canceled, and that said note and deed of trust be declared null and void and of no effect, and that said deed of trust be released and for naught held, and that the record thereof be canceled and satisfied, and for general relief."

The answer avers that on or about October 19, 1912, plaintiff employed defendant as agent and attorney in fact to negotiate and procure a loan of \$5,000 for 10 years on his land, and agreed in his application to furnish, as a condition precedent to the making of said loan, an abstract of title, showing an unincumbered fee-simple title in him, subject to the approval of the lender, and that he would secure an easement or right of way upon or adjoining his land, as a condition precedent to said loan; that defendant, acting as such agent and attorney in fact for plaintiff, secured the Union Central Life Insurance Company as lender, which corporation agreed to loan \$5,000 to plaintiff upon the conditions set forth in the application; that said company was at all times ready, able, and willing to make said loan; that plaintiff failed to comply with said agreements and undertakings; that though frequently requested by the insurance company and this defendant to furnish an abstract showing a perfect and unincumbered fee-simple title in plaintiff, satisfactory to said company, and to comply with the agreement as to the public road, the plaintiff failed and refused to do so; that plaintiff later procured his loan elsewhere; that plaintiff had agreed to pay defendant the sum of \$750 as his commission, for which plaintiff executed the note and second deed of trust in question. As stated, the trial resulted in a finding and decree in favor of the plaintiff and against the defendant, the court decreeing that:

"The notes in question and second deed of trust be declared null and void, be released and for naught held, and are hereby released and for naught held, and the record thereof canceled."

[1] The contest in this case centered about two questions, one of which was whether the plaintiff by his contract with Lombard was to connect the land with a public road as a condition precedent to the making of the loan, and the other was whether plaintiff presented an abstract showing a good title to

the land in himself. As to the latter proposition, the plaintiff, on the one hand, contends that the abstract furnished showed a perfect title, and this is controverted by the defendant. As to the road proposition, it is contended by Lombard that plaintiff agreed to connect his property with a public road, whereas plaintiff denies that that was part of his contract as contained in the application for the loan which was the instrument in which he appointed Lombard to procure the loan. If the plaintiff complied with his part of the contract, the defendant, Lombard, failed to procure a lender under the terms of his employment, and the notes and second deed of trust held by him were wholly without consideration, and this relates back to the making thereof. While it may be admitted that the validity of the second deed of trust as it originally was executed between the parties was not questioned, yet the validity of the defendant's title to it and right to acquire and hold it is the main issue in the case, and, as said in *Loewenstein v. Insurance Co.*, 227 Mo. loc. cit. 128, 127 S. W. 72:

"Plaintiff's petition does not use the word 'fraud' to characterize the transaction between the defendant companies and the holder of the deed of trust, but it states facts that show the transaction was unlawful, and done knowingly and willfully, and placed a cloud on the plaintiff's title, and this court so held, and its judgment was that the deed of trust and notes be canceled."

The case before us is distinguishable from that of *Christopher v. People's Home & Sav. Ass'n*, 180 Mo. 568, 79 S. W. 899, on exactly the same ground as that given by the court in the case of *Loewenstein v. Insurance Co.*, 227 Mo. loc. cit. 131, 127 S. W. 72.

[2] If the notes and deed of trust were without consideration at all, then they were never imbued with validity as is a deed of trust which is given for a valid consideration, but has been paid off or discharged.

[3] It is held in *Conrey v. Pratt*, 248 Mo. loc. cit. 582, 154 S. W. 749, that where a deed of trust is alleged to have been procured by fraud and is sought to be annulled for that reason, the title to real estate is put in issue directly, and the appellate jurisdiction is exclusively vested in the Supreme Court. We can see no distinction or difference between that character of case and where the notes and deed of trust are procured under circumstances in which the holder thereof parts with no consideration. While it may not amount to actual fraud, so far as the owner of the land and the reason for removing the cloud from the title are concerned, the result is the same. See, also, *Vandeventer v. Bank*, 232 Mo. 618, 135 S. W. 23.

For the reason herein appearing the cause is transferred to the Supreme Court.

ROBERTSON, P. J., and STURGIS, J., concur.

DAVIS v. CHICAGO, R. I. & P. RY. CO.
(No. 11848.)

(Kansas City Court of Appeals. Missouri.
Feb. 6, 1916. On Motion for Rehearing,
Feb. 21, 1916.)

1. APPEAL AND ERROR ¶1002—REVIEW.

A verdict resolves conflicts in the evidence in favor of the successful party.

[For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ¶1002.]

2. CARRIERS ¶277—CARRIAGE OF PASSENGERS—ACTIONS—PUNITIVE DAMAGES.

Where the servants of a carrier excluded plaintiff from the train in good faith believing him to be intoxicated, though he was not, the carrier is not liable for punitive damages.

[For other cases, see Carriers, Cent. Dig. §§ 1083-1084; Dec. Dig. ¶277.]

3. TRIAL ¶296—INSTRUCTIONS.

Where defendant's own instructions presented a defensive theory improperly omitted from plaintiff's instructions, the error is cured.

[For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ¶296.]

4. FALSE IMPRISONMENT ¶15—CARRIAGE OF PASSENGERS—LIABILITY FOR ACTS OF AGENT.

A railroad company is liable for the act of a station agent in procuring the arrest of a prospective passenger on the ground that he was intoxicated, though he was not.

[For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. ¶15.]

5. FALSE IMPRISONMENT ¶7—DEFENSES.

Where the servants of a railroad company wrongfully excluded plaintiff from a train and had him arrested, the fact that he was arrested on a warrant is no defense to an action for false imprisonment; the charge being unfounded.

[For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. ¶7.]

6. FALSE IMPRISONMENT ¶7—ACTIONS—ABANDONMENT OF PROCEEDINGS.

Plaintiff may recover for false imprisonment without showing an acquittal, where the prosecution was abandoned.

[For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. ¶7.]

7. FALSE IMPRISONMENT ¶31—ACTIONS—ABANDONMENT—PROSECUTION—EVIDENCE.

In an action for damages from imprisonment on a false charge, evidence held to show an abandonment of the prosecution.

[For other cases, see False Imprisonment, Cent. Dig. § 108; Dec. Dig. ¶31.]

8. DAMAGES ¶157—PLEADING—FALSE IMPRISONMENT.

Damages resulting from loss of time and interference with business, cannot be shown, where not pleaded.

[For other cases, see Damages, Cent. Dig. §§ 429-438, 440, 447, 449-453; Dec. Dig. ¶157.]

9. APPEAL AND ERROR ¶1140—DETERMINATION—REMITTITUR.

A remittitur waiving the award of actual damages cures any error in wrongfully admitting evidence of damage not pleaded.

[For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. ¶1140.]

10. CARRIERS ¶277—FALSE IMPRISONMENT ¶4—"MALICE."

In an action for wrongfully excluding plaintiff from a train and securing his arrest on a false charge, "malice" means the intentional doing of a wrongful act in a wanton or oppres-

sive manner with a reckless disregard of the rights of the person affected.

[For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. ¶¶ 277; False Imprisonment, Cent. Dig. § 18; Dec. Dig. ¶ 4.]

For other definitions, see Words and Phrases, First and Second Series, Mallice.]

11. CARRIERS ¶277 — FALSE IMPRISONMENT ¶36 — MEASURE—EXCESSIVE DAMAGE.

Where the defendant carrier wrongfully excluded plaintiff from its train and secured his arrest under a false charge of intoxication, so that he was incarcerated for almost a Jay, when the prosecution was dropped, an award of \$1,520 punitive damages is not excessive.

[For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. ¶¶ 277; False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. ¶¶ 36.]

On Motion for Rehearing.

12. FALSE IMPRISONMENT ¶36 — NOMINAL DAMAGES.

Where plaintiff was wrongfully arrested, plaintiff, though no actual damages were pleaded other than the wrongful arrest, etc., is entitled to nominal damages.

[For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. ¶¶ 36.]

13. DAMAGES ¶87 — PUNITIVE DAMAGES.

In an action for actual and punitive damages, judgment for punitive damages may be upheld, though plaintiff was, as a condition to denial of a new trial, required to remit all actual damages but a nominal sum because of the receipt of evidence not pleaded; nominal compensatory damages being sufficient to support the verdict for punitive damages.

[For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. ¶¶ 87.]

Appeal from Circuit Court, Jackson County; L. T. Dryden, Special Judge.

Action by John Davis against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed, on condition.

Paul E. Walker, of Topeka, Kan., and Seebree, Conrad & Wendorff, of Kansas City, Mo., for appellant. Robinson & Goodrich, of Kansas City, Mo., for respondent.

ELLISON, P. J. Plaintiff's petition is in three counts. The first is for damages on account of defendant's servants refusing to permit plaintiff, with a proper ticket, to enter its cars as a passenger. The second is for damages resulting from defendant arresting plaintiff unlawfully, wrongfully, and maliciously, without any lawful warrant or authority, and putting him in jail for several hours in the nighttime. The third count dropped out of the case through a demurrer to the evidence thereon. There was a verdict and judgment for plaintiff on each of the other counts for both compensatory and punitive damages.

It appears that on October 30, 1913, plaintiff, intending to take passage on defendant's railroad at Lincoln, Neb., to his home at Belleville, on a train due to leave Lincoln at about 6 o'clock p. m., went to defendant's station in company with one Murphy, his brother-in-law, at about half past 5 o'clock, and purchased a ticket from defendant's station agent. The train was perhaps an hour late, but, when it came in, plaintiff attempted to get aboard one of the cars, when the porter in charge refused to let him enter, and told him to see the conductor. The conductor made no reply to his ques-

tion. He went inside the station building to the ticket window and asked the agent why he was not allowed to get on the train. He wanted to know if there was anything the matter with his ticket. The agent told him there was not, and went with him out to the car where the porter was standing, and asked what was the reason plaintiff was not allowed to enter the car. The porter answered "to see the conductor." It seems that for some reason the train did not pull out of the station for an hour or more. During this time plaintiff made several calls at the ticket window, stating to the agent that it was necessary that he go home on that train, and insisting on knowing what was the reason he could not. At one of his calls the agent telephoned the police. In a few moments two came and passed by plaintiff on the platform. They went into the station and came out with the station agent, who pointed plaintiff out to them, and they seized him and hauled him to the police station, where he was locked in a cell and remained for several hours, when at about 1 o'clock in the night he was released, but directed to appear next morning at 9 o'clock. He appeared and demanded a trial, but he was told the matter was adjourned until 1 o'clock. He returned at that time, and, finding no one there, left, and the same day purchased another ticket and went home. It seems that on plaintiff being locked up Murphy immediately set to work in an effort to get him out of jail. He got some friends and a lawyer, roused the chief of police, and finally secured an order that he be released.

[1] If the evidence in behalf of plaintiff is to be believed (and since the verdict it must be accepted as the facts in the case), plaintiff had purchased a ticket for Belleville, and was entitled to board the car which he attempted to enter, unless he was intoxicated; that being defendant's excuse for its servants not allowing him to do so. It was conceded at the trial by plaintiff that defendant's servants had a right to exclude an intoxicated person from the train, and instructions for each party submitted the question of plaintiff's condition in that respect, to the jury. There was abundant evidence to sustain the finding that he was not intoxicated.

[2, 3] The first complaint by defendant is directed at plaintiff's instruction No. 4, on the first count relating to the refusal to allow plaintiff to get upon the car and to carry him home. It stated that plaintiff was entitled to a finding in his favor on that count, if defendant, "without any fault on plaintiff's part," refused to let him on the train. Defendant insists that, even though plaintiff was not intoxicated, yet, if its servants "in good faith believed he was," they were to be excused for refusing to carry him, and that the instruction omitted that defense. As to punitive damages that is correct. But, conceding that the instruction should have embodied such defensive theory, it was cured by defendant's instruction D, which stated such good-faith belief to be a defense, and directed that, if the jury found that to be a fact, to return a verdict for defendant on the first count. The decisions of the Supreme Court to this effect are collated and discussed in *Holman v. City of Macon*, 177 S. W. 1078. Again, in the case of *Bettoki v. Coal & Mining Co.*, 180 S. W. 1021, announced December 6, 1915, and not yet officially reported, the same point is decided and further authorities cited.

[4] Defendant next insists that no case was made under the second count based on the arrest and imprisonment of plaintiff. This insistence is founded upon the assertion that defendant's station agent had no authority to bind defendant in procuring plaintiff's arrest; in other words, that defendant was not liable for the wrong of the agent in procuring plaintiff's arrest and imprisonment. The law is that the master is liable for those acts of the servant which are performed while engaged within the scope of his employment. *Haehl v. Railroad*, 119 Mo. 325, 339, 24 S. W. 737; *Meade v. Railroad*, 68 Mo. App. 92; *Grayson v. Railroad*, 100 Mo. App. 60, 72, 71 S. W. 730; *Dwyer v. Railroad*, 108 Mo. App. 152, 159, 83 S. W. 303; *Wood on Master and Servant*, § 307. It is not necessary to the master's liability that the immediate wrongful act of the servant be done in the master's business; for that would imply that the master was prosecuting a wrongful business. If the act by the servant, though wrongful, misjudged, and unnecessary, is done in carrying out or prosecuting the duties which have been devolved upon the servant, the master is liable. Now, all know that it is the duty of a railway station agent to protect the station property falling under his immediate observation, where he reasonably may, and to protect those invitees rightfully assembled there, from unlawful disturbance. Suppose he should brutally assault a small child at the station who with its parents was awaiting a train, because he thought it was making a noisy disturbance. Would not the railway company be liable for his act? In the instance involved in this case, if plaintiff was intoxicated and making a disturbance by loud and profane language and other offensive deportment, or conduct, it was the agent's duty to call in the aid of an officer to remove or suppress him, and to that end to ask his arrest. But, if in the performance of his employment he pounced upon plaintiff who was sober and only making natural and rightful inquiries concerning his being refused entrance to the train for which he had bought the ticket but a few moments before, he committed a gross wrong for which his employer is liable. The case of *Milton v. Railroad*, 193 Mo. 46, 91 S. W. 949, 4 L. R. A. (N. S.) 282, and *Gibson v. Ducker*, 170 Mo. App. 135, 155 S. W. 462, are not like cases to this, and are not applicable.

[5] The next objection is based on the proposition advanced by defendant that "one is not guilty of false arrest if a warrant is sued out within a reasonable time." In support of this there appears in the case some evidence that a warrant was issued for plaintiff on the next day. We can dispose of this point in this particular by the fact that the petition is not founded on a wrongful arrest without a warrant. His action is for a wrongful arrest and imprisonment. The manner of his arrest nor the technical observation of the forms necessary to legally justify an arrest do not concern him. His action is based on the theory that he, an innocent man, at the request of defendant's agent, was wrongfully apprehended and incarcerated.

[6, 7] But defendant's argument under this point comprehends a broader proposition than the statement made of it. The idea advanced is that plaintiff was arrested without a warrant, but within a reasonable time a complaint was filed and a warrant duly issued; that the case was docketed for trial, but plaintiff quit the ju-

risdiction of the court, and the case is yet pending. And it is claimed that a case for either malicious prosecution or false imprisonment does not lie until the proceeding is disposed of, since, if the defendant is found guilty, there is no false imprisonment.

This is not an action for malicious prosecution. It is for false imprisonment. But, conceding that in all cases of false imprisonment, where there has been no delay in the prosecution under a proper complaint and warrant, it would be necessary for the plaintiff to show that the prosecution resulted in his acquittal, we think, if it appears that the prosecution has been abandoned by the state or city without trial, it is tantamount to an acquittal. In such case the fact that the judge or court has not entered a formal entry of discharge or dismissal ought not to bar the action of the injured party. In this case the record shows a complaint and warrant made and issued on the next day after plaintiff was said to have been intoxicated. As has been said, the case was set for 9 o'clock a. m. October 31, 1913, when plaintiff appeared and pleaded not guilty. The case on motion of state, over plaintiff's objection, was continued until 1:30 p. m. Plaintiff entered into his personal recognizance for \$100 for his appearance at that hour. Nothing further appears. No further steps were taken and no further effort made by the prosecution. There the matter dropped, and plaintiff testified that, when he returned at the hour named, no one was present, and he afterwards, on that day, went on to his home at Belleville, a town not far away. The magistrate testified that plaintiff objected to putting the case over to 1:30 o'clock, as he was anxious to get home that afternoon. He therefore set the case at 1:30 p. m. for that reason. He admitted he did not return at that time, nor until some time late in the afternoon. The magistrate would not deny on cross-examination that this record was not written until perhaps six months after the date named therein. Considering that it was his record, we think his testimony practically conceded that no record was made until several months afterwards. We think that in such circumstances the case should be considered as abandoned by the prosecution, and that plaintiff, for the purposes of maintaining this action, was as effectually discharged as if an entry of record to that effect had been made.

Defendant made an attempt to submit this question to the jury by offering refused instruction J. The instruction was rightfully refused, for the reason that it omitted the essential hypothesis whether the case was, in fact, yet pending, or the prosecution had been abandoned. It is not necessary to say whether, considering the fact, along with the other evidence, that for more than two years nothing has been done towards the prosecution, the plaintiff living all the while in a nearby town, the trial court would have been justifiable in declaring an abandonment, as a matter of law.

[8, 9] It was charged in the second count of the petition that plaintiff was unlawfully arrested and "cast into jail and detained from 6 o'clock p. m. until the next day, to his damage in the sum of \$5,000 actual and \$10,000 punitive damages." Under this charge an instruction authorized the jury to consider among other things plaintiff's loss of time, and interference with his business. The petition does not

charge damage from these things, and evidence should not have been admitted to prove such damage. But we think the verdict shows that no substantial injury resulted which may not be cured by a remittitur. Such damages are recognized in this state as compensatory, and the verdict assessing compensation was only \$50. We are assuming that defendant saved the point in its motion for new trial, though it is doubtful if it did. Subdivision 9 is the only one referring to the matter of admitting improper testimony, and that is not specific. It does not state that the evidence broadened the petition, or that the matters thus proven were not pleaded. That particular part of the case is not briefed.

Defendant's point 4, concerning plaintiff's instruction, and also his objections to Nos. 5 and 6, are unsubstantial.

[10] The trial court gave the following definition of malice: "Malice" as here used, does not mean ill will or spite, but the intentional and willful doing of a wrongful act in a wanton or oppressive manner and with a reckless disregard of the rights of the person affected thereby."

In *Goetz v. Ambs*, 27 Mo. 28, it is said that malice means the intentional doing of a wrongful act without just cause or excuse. That case has been cited with great frequency by the Supreme and appellate courts. We discussed the meaning of such definition in *Trauerman v. Lippincott*, 39 Mo. App. 478. The Supreme Court did so in *McNamara v. Transit Co.*, 182 Mo. 676, 81 S. W. 880, 66 L. R. A. 486, and *Ferguson v. Railroad* (Sup.) 177 S. W. 616, and so did the Springfield Court of Appeals in *Summers v. Keller*, 152 Mo. App. 626, 188 S. W. 1180. It seems to be agreed in these cases that the thing done must not only have been wrongful, but it must have been known to be wrongful; and, though it must be conceded that one may intentionally do a wrongful act without just cause or excuse, and not know it to be wrongful, yet the expression as used in *Goetz v. Ambs* is understood to mean that the accused party knew the act was wrong when he did it. This view of our courts does not meet with the approval of some decisions in other states (*Kelner v. Collins*, 161 Ky. 696, 171 S. W. 390, and authorities therein cited), nor of *Bishop and Cooley*, but under our decisions the instruction must be held to be correct.

[11] To the complaint of excessive damages we answer that accepting the case as made for plaintiff, the sum allowed (\$1,520) is quite moderate.

If plaintiff will remit \$50, the compensatory damages allowed on the second count, within 15 days, the judgment will be affirmed, the cost of the appeal to be taxed against him; otherwise it will be reversed, and the cause remanded. All concur.

PER CURIAM. The order to remit \$50 was subsequently changed to an order to remit \$49.99, leaving a judgment for nominal damages in the sum of one cent.

On Motion for Rehearing.

ELLISON, P. J. Defendant insists that, instead of permitting plaintiff to cure the error in his instruction on the measure of compensatory damages under the second count by a re-

mittitur, we should remand the cause for another trial. Defendant says:

"That it is not within the province of this court to state that if the damage instruction had been proper the jury would necessarily have found any actual damage." "In other words," says defendant, "had the jury been properly instructed upon the issue of actual damages on the second count, the finding of the jury might have been in the negative. Hence this court is not justified in assuming that the jury would have found under a proper instruction any actual damages whatsoever, and that, in the absence of a finding of actual damages, punitive damages cannot be allowed."

[12, 13] The answer to this is that under the second count in the petition, in connection with the finding of the jury, there was bound to be a finding of at least nominal damages, regardless of the unpleaded matter in the instruction. It is pleaded in the petition that plaintiff was wrongfully, unlawfully, and maliciously, and without lawful authority, arrested and cast into jail and detained several hours. There was no dispute about the arrest and imprisonment, and the jury have found that it was wrongful; hence a verdict for some amount of actual damages was imperative, even though it be no more than for a nominal sum, the wrong "being of that character from which the law implies such damages." *Courtney v. Blackwell*, 150 Mo. 245, 277, 51 S. W. 668; *Hoagland v. Amusement Co.*, 170 Mo. 335, 345, 70 S. W. 878, 94 Am. St. Rep. 740. And nominal compensatory damages will support a verdict for punitive damages. *Lampert v. Drug Co.*, 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351.

We are satisfied that, under the evidence, we have properly disposed of defendant's complaint as to the issuance of a warrant and an abandonment. The motion for rehearing is overruled. All concur.

STOCKWELL CO. v. UNION PAC. RY. CO. (No. 11910.)

(Kansas City Court of Appeals. Missouri.
Feb. 7, 1916.)

1. EVIDENCE ⚡317—HEARSAY EVIDENCE.

In an action for damages for negligent delay in shipments of live stock, witnesses cannot testify to matters of which they have no knowledge, save from written statements by others.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. ⚡317.]

2. TRIAL ⚡194—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In an action for delay in shipment of cattle, instructions that, if the jury found for plaintiff on the different counts, to find for stated amounts, are erroneous, as invading the jury's province.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ⚡194.]

3. APPEAL AND ERROR ⚡1078—REVIEW—OBJECTIONS WAIVED.

A question not briefed by either party will not be determined on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. ⚡1078.]

Appeal from Circuit Court, Jackson County; D. E. Bird, Judge.

"Not to be officially published."

Action by the Stockwell Company against the Union Pacific Railway Company. From

a judgment for plaintiff, defendant appeals. Reversed and remanded.

Watson, Gage & Watson, of Kansas City, for appellant. Stewart Taylor and Percy A. Budd, both of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for damages alleged to have resulted in the negligent delay of shipments of live stock from one point in Kansas to another point in the same state. The petition was in four counts, and there was a judgment for plaintiff on each.

[1] In making proof of damages witnesses for plaintiff were repeatedly allowed to state matters of which they had no knowledge, except what they learned from written statements made by others. In this respect the evidence was no more than hearsay, and should have been excluded. This evidence made up the very foundation of plaintiff's case, and should not have been admitted.

The reasons assigned for this are various, some that the statements were taken from books of original entries, and some that the witness, in using statements, was merely refreshing his memory. In *Hess v. Railroad*, 40 Mo. App. 202, the court said:

"The plaintiff offered, and the court admitted, over defendant's objection, the account of sales rendered to plaintiff by Mulhall & Co., commission men at St. Louis. This action of the court was clearly erroneous. It was the most obvious hearsay. It amounted to nothing more than a report, in writing, from plaintiff's agents, Mulhall & Co., to the effect that they sold the damaged cattle on the St. Louis market at the prices there named; that said cattle weighed as there stated, etc. Such a paper was incompetent as proof of such facts, and should have been rejected."

The case of *Moore v. Railroad*, 143 Mo. App. 675, 127 S. W. 921, was to same effect. See, also, *Fountain v. Railroad*, 114 Mo. App. 676, 90 S. W. 393.

Accounts of sales of cattle, their weight, etc., are frequently substantial and proper

evidence, but the proper foundation should be laid before they are received. In this case the necessary showing was not made that books or accounts were kept; that the entries used were in the usual course of business, and "concomitantly made with the happening of the facts recorded." *Lyons v. Corder*, 253 Mo. 539, 548, 162 S. W. 606, 608; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 572, 44 S. W. 754, 64 Am. St. Rep. 567.

[2] The court gave instructions which directed the jury that, if the verdict was for plaintiff on the different counts, then they should find a sum named in such instruction. This was an invasion of the province of the jury. It should have been left to the jury to say in what sum they found for plaintiff.

A point is made that the contract of shipment required that the shipper should within ten days after loss, etc., give written notice thereof to the carrier. There is some dispute between the parties whether this was shown to be a valid provision. The decisions in Kansas and in this state are so numerous on this question that the way ought to be clear for a correct presentation of it at the next trial.

[3] It seems that the delay was shown, but it was not made to appear by evidence that it was on account of defendant's negligence. Plaintiff relies on the recent statute in this state to the effect that, if unreasonable delay is shown, the burden is cast upon the carrier to show that it was not negligence. *Laws 1913, p. 579*. Defendant replies to this by the statement that the shipments in controversy were made before that law was enacted. But neither party has briefed the question made whether the subsequent statute will apply to such matter of evidence.

On retrial the number of points of objection will doubtless be materially reduced, and the number of instructions asked materially lessened.

The judgment is reversed, and the cause remanded. All concur.

HANGER v. APPERSON.

(Court of Appeals of Kentucky. Feb. 22, 1916.)

CORPORATIONS — 252 — STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—CONDITIONS PRECEDENT TO ENFORCEMENT.

A creditor of a corporation which had ceased to do business and had distributed most of its assets among its stockholders could not sue a stockholder for the amount of his debt without first procuring a judgment and a return of "no property found," where it appeared that the corporation had property sufficient to pay his debt, though it was in another state, as the only ground on which the stockholder could be held liable was that he had received assets from the corporation while it was insolvent and unable to pay its debts which should have been used in discharging its debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.]

Appeal from Circuit Court, Bell County.

Action by Lewis Apperson against Harry T. Hanger. Judgment for plaintiff, and defendant moves for an appeal. Reversed and remanded, with directions.

A. W. Babbage, of Pineville, for appellant. Patterson & Ingram, of Pineville, for appellee.

CLAY, C. The Wallsend Coal & Coke Company is a mining corporation organized under the laws of this state. While engaged in mining it went upon the adjacent property of Lewis Apperson and removed therefrom coal of the value of \$296.40. Subsequently the company disposed of its property to the Continental Coal Corporation and has ceased to do business in this state. With the exception of \$6,000 worth of bonds in the Continental Coal Corporation, it has distributed its assets among its stockholders. Harry T. Hanger, vice president of and a stockholder in the Wallsend Coal & Coke Company, received in the distribution assets amounting to \$282.50. The \$6,000 in bonds, which have a market value more than sufficient to discharge plaintiff's debt, are in the possession of the president of the Wallsend Coal & Coke Company as trustee, and are held by him for the purpose of meeting any unliquidated claims against the company. He lives in Virginia.

Without having previously taken any steps to recover of the corporation, plaintiff, Lewis Apperson, brought this suit against Hanger to recover of him individually, on the ground that he was personally liable to the extent of assets received, which should have been used in payment of plaintiff's claim. The case was submitted on the pleadings, and an agreed statement of facts and judgment rendered in favor of plaintiff. Defendant has moved for an appeal.

We have no statute in this state making an officer or a stockholder in a corporation primarily liable in a case like this for the debt of a corporation. The only ground, therefore, on which he can be held liable is

that, while the corporation was insolvent and unable to pay its debts, he received from the corporation assets which should have been used in discharging its debts. As a condition precedent to such a recovery, it is generally held that the creditor must procure a judgment against the company itself and a return of "no property found." This is regarded as necessary in order to show that the corporation is, in fact, insolvent and has no assets with which to pay its debts. Plaintiff insists that this rule does not apply where the corporation has no property in the state which could be subjected to the debts, for the reason that the law does not require a vain or futile thing. The difficulty with plaintiff's case, however, grows out of the admitted fact that the corporation, after distributing its assets and paying defendant \$282.50, has more than sufficient assets left to pay plaintiff's debt. So long as this condition of affairs exists, whether the property be in this or another state, it cannot be said that the corporation, when it did not have sufficient assets to pay its debts, distributed to the defendant assets which should have been used for that purpose. Since plaintiff did not recover a judgment and return of "no property found" against the corporation, and since the only ground on which defendant can be held liable is admitted not to exist, we conclude that plaintiff is not entitled to recover.

Wherefore the appeal is granted, and the judgment is reversed, and cause remanded, with directions to dismiss the petition.

JUSTICE'S ADM'R v. CATLETTSBURG TIMBER CO. et al.

(Court of Appeals of Kentucky. Feb. 23, 1916.)

1. CORPORATIONS — 590 — VOLUNTARY CONVEYANCES—LIABILITY OF PURCHASER.

Where a corporation without having paid its debts voluntarily conveys all its assets to another corporation, the latter, unless a purchaser in good faith and for value, or in satisfaction of valid prior liens, takes the property subject to an equitable lien of the creditors of the selling corporation who may follow the property or the proceeds into the hands of whomsoever they can trace them and subject them to the payment of the debts of the selling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354, 2361-2367; Dec. Dig. § 590.]

2. FRAUDULENT CONVEYANCES — 300 — EVIDENCE—FULL VALUE.

Evidence held to justify a finding that a corporation sold, without having paid its debts, its assets for full value, and the purchaser did not take the property subject to the equitable liens of creditors of the corporation.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. § 300.]

Appeal from Circuit Court, Pike County.

Action by David A. Justice's administrator against the Catlettsburg Timber Company

and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Sam C. Stowers, F. W. Stowers, and Roscoe Vanover, all of Pikeville, for appellant. George B. Martin, of Catlettsburg, and J. J. Moore and Butler & Moore, all of Pikeville, for appellees.

MILLER, C. J. This is a creditor's bill filed by David A. Justice's administrator to collect a judgment for \$10,000, which he recovered against the appellee, the Catlettsburg Timber Company, on January 7, 1914.

The Catlettsburg Timber Company (hereinafter called the Catlettsburg Company), was incorporated in 1908, with a capital stock of \$8,000, equally owned by the defendants W. H. Dawkins, H. M. Runyon, and M. B. Collinsworth. Dawkins, Runyon, and Collinsworth were also the only stockholders of the W. H. Dawkins Lumber Company (hereinafter called the Dawkins Company); Dawkins owning more than one-half of the stock in that corporation, and Runyon and Collinsworth owning the remainder.

On April 5, 1910, the Catlettsburg Company bought a large tract of land, known in the record as the "Big Creek" timber tract, for \$65,000. It was able to pay only a small part of the purchase price; and, in order to finance the trade, the Dawkins Company indorsed the purchase-money notes given by the Catlettsburg Company for the "Big Creek" timber tract. To secure the Dawkins Company against liability upon this indorsement, the Catlettsburg Company, on September 2, 1910, mortgaged the "Big Creek" timber tract to the Dawkins Company.

On November 22, 1910, Justice was killed while in the service of the Catlettsburg Company, and a suit by his administrator resulted in a verdict on January 7, 1914, for \$10,000, as above stated. An execution issued upon that judgment was returned "no property found." In the meantime, the Catlettsburg Company had made no money in its business; on the contrary, it had lost money from the very beginning of its business. As a consequence, the Dawkins Company was required to pay the notes upon which it was an indorser for the Catlettsburg Company, amounting in July, 1911, to \$75,000, counting interest.

In order to pay the Dawkins Company, and to save the expense of a foreclosure proceeding, the Catlettsburg Company, on July 5, 1911, conveyed the "Big Creek" timber tract to the Dawkins Company in satisfaction of its debt to that company.

After the return of plaintiff's execution unsatisfied, Justice's administrator brought this action in 1914, against the Catlettsburg Company, the Dawkins Company, and Dawkins, Runyon, and Collinsworth, the only stockholders of said companies, praying judgment against each of them for the amount of his debt, with the interest and costs thereon, up-

on the theory that the Catlettsburg Company had fraudulently conveyed the "Big Creek" timber tract to the Dawkins Company without full consideration and for the purpose of concealing its property in order to defeat the plaintiff in the collection of his debt.

The issues having been made and proof taken thereon, the circuit court dismissed the petition; and from that ruling Justice's administrator prosecuted this appeal.

Appellant contends that the "Big Creek" timber tract was worth more than \$75,000, and that to the extent of the excess over that amount the defendants are volunteer takers, and hold the property as a trust fund to be ratably distributed among the creditors of the Catlettsburg Timber Company, under the authority of *Camden Interstate Railway Co. v. Lee*, 84 S. W. 332, 27 Ky. Law Rep. 75, *Harbison-Walker Refractories Co. v. McFarland's Adm'r*, 156 Ky. 44, 160 S. W. 798, and *Martin v. Sulfrage*, 159 Ky. 363, 167 S. W. 399.

[1] The law is well settled that where one corporation voluntarily conveys all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, who may follow the corporation's assets, or the proceeds thereof, into the hands of whomsoever they can trace them, and subject them to the payment of the corporation's debts, except as against a bona fide purchaser for value. The rule does not operate, however, to disturb sales made in good faith, and for value, or in satisfaction of valid prior liens.

[2] The question for decision, therefor, is one of fact. If the "Big Creek" timber tract was worth more than the mortgage indebtedness of the Catlettsburg Company to the Dawkins Company, it might be reasonably argued that to the extent of the excess of the value of the land over the debt, the rule above stated would apply.

The only proof, however, that was taken in the case consisted of the depositions of Dawkins, Runyon, and Collinsworth. From their testimony it appears, without contradiction, that the Catlettsburg Company lost money from the start: that it never paid any dividends; that it quit business in 1911; that the corporation was dissolved in July, 1912; that it had tried for more than 18 months to sell the "Big Creek" timber tract for more than its indebtedness to the Dawkins Company, without getting a purchaser; that it then conveyed the land to the Dawkins Company in satisfaction of its mortgage debt to that company, which then aggregated \$75,000; that \$75,000 was the full value of the property; that the stockholders got nothing whatever out of the sale, and lost their stock entirely.

It is true Dawkins was president of both

companies; but he received no pay as president of the Catlettsburg Company, and his good faith is not questioned by any proof.

Under this proof the good faith of the officers of the two companies in making the sale to the Dawkins Company, and for full value, is thoroughly established. *Martin v. Sulfrage*, supra.

Judgment affirmed.

MILLER v. CHANDLER.

(Court of Appeals of Kentucky. Feb. 22, 1916.)

EXPLOSIVES — NEGLIGENCE — CHILDREN — LIABILITY.

A landlord who permitted his tenant to use a toolhouse outside the leased premises and who had actual knowledge that a son of the tenant, 8½ years old, was able to and frequently did go upon a loft in the toolhouse, did not exercise ordinary care in storing dynamite and dynamite caps in paper sacks on such loft, and was not relieved of liability for injuries sustained by the boy from the explosion of a dynamite cap taken by him from such sacks by the fact that he warned the boy of the danger and told him that the dynamite and the caps might kill him.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.]

Appeal from Circuit Court, Ballard County.

Action by Harrison Chandler, by guardian, against L. W. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Nichols and J. K. Hendrick, both of Paducah, and Ed. Reesor, of Bandana, for appellant. Eaton & Boyd, of Paducah, for appellee.

CLARKE, J. This case was here on appeal once before and in the opinion, which may be found in 163 Ky. 301, 173 S. W. 779, is a statement of the facts developed in the first trial of the case, which are practically the same as those shown by the evidence on the second trial, except that on the second trial evidence was introduced by appellee for the purpose of showing that at the time appellant stored the dynamite and caps in the loft of the toolhouse he knew that appellee and some other children were in the habit of playing around and in the toolhouse. This evidence for appellee, which was not introduced at the first trial, in substance, is as follows:

By the father of appellee, that appellee "played around there frequently every day in and about the loft, and went up to get eggs his hens would lay up there"; that appellant at least upon one occasion before the accident saw appellee in the loft, and told him not to bother some tobacco sprays that were stored therein; that appellant said in his presence just after the accident that he was sorry, but that he told appellee not to bother the dynamite when he put it up there; that the door of the building was down and the opening in the floor of the loft was there for some time before the accident

occurred, through which appellant knew appellee could get into the loft where the dynamite and caps were stored.

By appellee, that he frequently played in the building, and went into the loft to get eggs, and that appellant had seen him there in the loft on several occasions, and upon one occasion when he was in the loft had warned him not to bother the tobacco sprays stored therein.

By the mother of appellee, that he was in the habit of going to the loft after eggs, and that appellant had often been there upon such occasions and seen appellee in the loft.

By Mrs. Lucile Ragland, that she had frequently seen appellee and other children playing around the toolhouse and under it, and that she had often seen appellant there when appellee was playing about the building.

By Perry Bosley, that he had seen appellant at the toolhouse upon several occasions when appellee was about the building; that upon one occasion before the day of the accident he heard appellant warn appellee against bothering the tobacco sprays in the loft; that the building and the loft were open.

By appellant, that when he stored the dynamite and caps in this loft he warned appellee against bothering same, telling him that they were dangerous and might kill him.

In the former opinion in this case this court said:

"In this case the appellant took the precaution not only to tie up both the sacks, but to put them out of sight of the children, in a place which he not only knew to be unfrequented, but which he knew could only be reached after some way had been furnished or devised to climb to it."

—and in support of that opinion referred to the case of *Ball v. Middlesborough T. & L. Co.*, 24 Ky. Law Rep. 114, 68 S. W. 6, as follows:

"The case of *Ball v. Middlesborough T. & L. Co.*, 68 S. W. 6, 24 Ky. Law Rep. 114, was where an infant six years of age climbed into an unoccupied building through a window, and finding a dynamite cap therein, the same was in some way exploded, whereby he was injured. The evidence was that the owner did not know that children frequented the place, and did not know the dynamite caps were there, and it was held that a peremptory instruction was properly given. The court in that case, in referring to the rule laid down in *Thompson on Negligence*, said: 'The rule adopted by this learned author is that where the owner of the premises creates or brings thereon any dangerous thing, which, from its nature, has a tendency to attract the childish instincts of children to play with it, he is bound, as a matter of social duty, to take such reasonable precautions as the circumstances admit of to protect them from injury while playing with it, or in its vicinity. This rule was adopted by this court in *Bransom's Adm'r v. Labrot*, 81 Ky. 638, 50 Am. Rep. 196; but it cannot apply to this case for the reason that the Lands Company did not place the dynamite in the house, or even know it was there, and, the house being locked, and the only way to enter it being through a missing slat six feet from

city of Newport, in the same form and shape as that in which they had been shipped and carried; that said goods remained in unbroken packages, and in the same form and shape, at all times, from the point of shipment to the point of delivery, and none of said packages were ever sold, except as an entirety."

The appellees alleged further that the provisions of the ordinance, in so far as it attempted to apply to them and to their business in the city of Newport, was in contravention of article 1, § 8, par. 3, of the federal Constitution, in that their business was at all times interstate commerce, and that the provision of the ordinance was a restraint to and regulation of interstate commerce.

The appellant interposed a general demurrer to the petition, which was overruled by the court, and judgment rendered in favor of appellees for the recovery of the sums sued for, and perpetually enjoined the appellant from interfering with appellees or their agents because of their failure to procure a license and pay the tax in the future. The appellant saved proper exceptions to the judgment, and now appeals to this court.

[1] The appellant, by its demurrer, admitted as true the statement of facts, as set forth in the petition, and the question now presented for adjudication is: Is the ordinance, as applied to the business conducted by appellees, a regulation of, and restraint upon, interstate commerce so as to be in violation of the constitutional authority of the Congress of the United States to regulate commerce among the states? When the exact meaning of the allegations of the petition is extracted, it seems to set forth the following as the facts, as constituting the exact manner of conducting appellees' business: They are manufacturers of "soft drinks" in Cincinnati, Ohio. They sell some goods in Newport, Ky., upon orders to them from retail dealers in Newport, which are received by them through the mail and telephone and by means of solicitors for them, and through the drivers of their wagons, acting as solicitors, in Newport. When a retail dealer has theretofore purchased goods from them, they place a load of their goods upon their wagons and send it into Newport, and it is there exposed for sale to such dealer, and, if he desires to do so, he makes a purchase of such quantity as he desires, and the goods are then and there delivered to him. If any person, other than one having theretofore been a customer, desires to buy any of the goods while the wagons are in Newport, a sale is made to him and the goods then and there delivered. The goods are sold and delivered in the same bottles and vessels in which they were shipped, and packages containing a number of bottles are not broken before sale and delivery.

[2, 3] It has been held by the courts of the United States that a state has no authority to levy a tax upon the soliciting and taking of orders in one state for the sale of goods

which are in another state, and which are to be transported by a common carrier from the principal, for whom the contracts of sale were made, to the purchaser. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, and many others. Contracts for the sale of goods made by a citizen of one state with a citizen of another state, through the medium of the mails or by telephone, and which are delivered by the seller to the purchaser in "original packages," by means of vehicles, it seems, would be protected from taxation by the authorities of the state to which they are transported while in the "original packages" and in the hands of the seller. Goods delivered to a common carrier at a point without the state, consigned to a purchaser at his residence within the state, are exempt from state regulations during the course of transportation. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1038. It was held in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150, and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, that a state has no power over goods shipped from one state to another for sale in interstate commerce until the one receiving the goods has so acted upon them that they have become incorporated and mixed with the mass of property in the state, which happens when the original package is no longer such in his hands. In *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, and in *Emert v. Missouri*, 156 U. S. 319, 15 Sup. Ct. 367, 39 L. Ed. 430, it was held that property sent from one state to another for the purpose of sale became a part of its general property and amenable to its laws and subject to its taxing power, provided no discrimination be made against such property on account of its ownership or origin. In the case at bar some of the transactions were, without doubt, such transactions in interstate commerce as would not render the appellees liable for the license tax which was imposed upon a wholesale dealer in Newport by the ordinance; but the transactions, when appellees, without having received any order for the shipment of goods from their place of business in Cincinnati, and without any contract for their delivery, brought the goods into Kentucky and into Newport, and there exposed them for sale, and sold and delivered them, were transactions in Kentucky, the contract, sale, and delivery. The mere fact that appellees contemplated that some one who had previously purchased goods would purchase the goods when they should be exposed for sale in Newport could not be construed into a negotiation between citizens of different states for the sale of goods then in one state to be delivered in another; neither was there any contract of sale of such goods, except in Kentucky. So far as the sales made in Ken-

tucky were concerned, when made after the goods were brought into Newport, and without any previous negotiations for the purchase of the goods by the persons by whom they were purchased, and to whom they were delivered in Newport, the appellees were simply doing business as wholesale dealers in "soft drinks" wholly within the city of Newport, although the goods had their origin in Ohio. Whether the goods so sold by them are within the protecting clause of the Constitution of the United States relating to interstate commerce, or whether sold in the "original packages" or not, does not seem to be material. The tax imposed by the ordinance was not a direct tax upon the goods, but the license and tax was upon the privilege of selling goods in the city of Newport in the peculiar way of a wholesale dealer. Under such license and tax the appellees were authorized to sell goods manufactured in the state of Kentucky, or elsewhere, as well as goods manufactured in the state of Ohio. The mere fact that such license tax upon a wholesale dealer who carries on his business within a state may incidentally affect interstate commerce would not deprive the state of the authority to levy it, nor would it destroy the validity of the ordinance. *Kolb v. Boonton*, 64 N. J. Law, 163, 44 Atl. 873; *Stockard v. Morgan*, 105 Tenn. 412, 58 S. W. 1061; *Oliver Finney Grocery Co. v. Speed* (C. C.) 87 Fed. 408; *York v. Chicago, etc., R. Co.*, 56 Neb. 572, 76 N. W. 1065; *In re May* (C. C.) 82 Fed. 422; *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470; *Raguet v. Wade*, 4 Ohio, 107; *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869.

A state is authorized to levy a tax upon any business carried on within the state, as on the occupation of doing business as a merchant, if such tax is not levied in such a way as to discriminate against the persons residing in another state or the products or manufactures of another state, and the levying of such a tax and in such way is not a regulation of or restraint upon interstate commerce. In *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382, it was held that a uniform tax imposed by an ordinance of Mobile on all sales by auction in the city was valid, not as affecting interstate commerce, but because it was a simple tax on sales of merchandise imposed alike upon all sales made in the city, whether a sale was made by a citizen of Alabama or another state, or whether the goods sold were the produce of that state or another. In *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, it was held that a tax imposed by a state upon a business carried on within the state, and without any discrimination between its citizens and those of other states, was valid. The inhibition of the Constitution of the United States as regards interstate commerce against statutes of states and ordinances of cities which levy taxes upon a business which is car-

ried on wholly within the state or city making the ordinance is directed against such statutes and ordinances as discriminate injuriously in the manner of laying or collecting the taxes against the citizens or products of one state in favor of those of another, and such statutes and ordinances as these have been uniformly held to be unconstitutional. *Alexander v. Com.*, 90 Va. 809, 20 S. E. 782; *Osborne v. Mobile*, supra; *Emert v. Mo.*, 156 U. S. 319, 15 Sup. Ct. 367, 39 L. Ed. 430; *Walling v. Michigan*, 116 U. S. 448, 6 Sup. Ct. 454, 29 L. Ed. 691; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Webber v. Va.*, 103 U. S. 344, 26 L. Ed. 565; *Cook v. Penn.*, 97 U. S. 568, 24 L. Ed. 1015; *Welton v. Mo.*, 91 U. S. 275, 23 L. Ed. 347; *Ward v. Md.*, 12 Wall. 418, 20 L. Ed. 449; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387. The ordinance complained of in the case at bar does not discriminate between the citizens or products of the states, but the tax provided by it is levied upon any citizen who engages in the business of a wholesale dealer in "soft drinks," regardless of what state he may be a citizen, or what is the origin of the goods sold by him. To place any other construction upon the laws relating to interstate commerce would be to make an injurious discrimination in favor of the citizens and goods of other states against the citizens of Newport.

For the reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

WATKINS v. CITY OF HENDERSON.

(Court of Appeals of Kentucky. Feb. 22, 1916.)

1. MUNICIPAL CORPORATIONS — §822 — DEFECTIVE STREETS — INJURIES TO PEDESTRIANS — INSTRUCTIONS.

In an action against a city for injuries to a pedestrian on a defective sidewalk, an instruction on contributory negligence may be rested on circumstances shown by a reasonable inference to be drawn from the evidence, and where the jury might conclude, under the evidence, that if the pedestrian had exercised ordinary care he would not have been injured, a charge on contributory negligence is proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1758-1762; Dec. Dig. §822.]

2. APPEAL AND ERROR — §1066 — HARMLESS ERROR — ERRONEOUS INSTRUCTIONS.

Where, in an action for injuries to a pedestrian, the issue was whether the street was in a reasonably safe condition for public use, and under the evidence the jury could find either that the street was in a reasonably safe condition or that the pedestrian failed to exercise care for his own safety, error, if any, in a charge submitting the issue of contributory negligence, because not justified by the evidence, was not reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. §1066.]

Appeal from Circuit Court, Henderson County.

Action by J. A. Watkins against City of

Henderson. From a judgment for defendant, plaintiff appeals. Affirmed.

Vance & Hellbronner, of Henderson, for appellant. B. S. Morris, of Henderson, for appellee.

CARROLL, J. This suit was brought against the appellee, city of Henderson, to recover damages for personal injuries alleged to have been sustained by reason of the failure of the city to keep its streets in reasonably good repair.

It appears that in November, 1914, Watkins, at about half past 8 o'clock at night, while on his way from his residence to a point in the city, had occasion to walk on Holloway street to its intersection with Center street. It further appears that there is a sharp descent in Holloway street from a point about 30 feet from Center street to Center street, and while Watkins was walking on the brick pavement going down this descent he stepped, as he claims, into a hole in the pavement from 3 to 5 inches deep and about 3 feet in diameter, in which hole there was a lot of loose bricks, some of which were standing on edge. He testifies that when he reached this hole he was walking fast and not looking at the pavement, or giving any particular attention, when he stepped on a loose brick in the hole that caused him to fall. The evidence in his behalf by several witnesses also showed that the pavement at this place had been in the condition described by him for some weeks before he sustained the injuries complained of. The evidence for the city was to the effect that the pavement at the place where Holloway fell was in reasonably safe condition for travel, and that there was no hole in the pavement, nor any bricks standing on edge, such as were described by Watkins and the witnesses in his behalf. It also appears in the testimony that there was an electric light near by the pavement, that lighted up this place.

With the evidence in the condition stated, the court, after giving the usual instructions as to the duty of the city in respect to exercising ordinary care to keep its streets in reasonably safe condition, told the jury, in instruction No. 3:

"That although they might believe from the evidence that the city failed to use ordinary care in keeping the pavement in a reasonably safe condition for public use, yet if they also believe from the evidence that Watkins was careless or negligent at the time, and that, but for his own carelessness or negligence at the time, the accident would not have happened, they should find for the defendant."

They were further told that:

"Negligence was the failure to use such care as an ordinarily prudent person would usually exercise under the same or similar circumstances."

The jury returned a verdict for the city, and on this appeal counsel for Watkins argue that the weight of the evidence showed that the pavement was defective and unsafe

and in the condition described by Watkins and his witnesses; furthermore, that there was no evidence that the accident was attributable to the failure of Watkins to exercise ordinary care for his own safety, and, this being so, the court should not have given any instruction on the subject of contributory negligence, on account of which instruction it is said the jury were influenced to return a verdict in favor of the city. The giving of this instruction on the subject of contributory negligence is the only error assigned for reversal.

[1] It is, of course, elementary that instructions must be supported by evidence. But this does not mean that direct evidence is essential, or that negligence may not be inferred from circumstances developed in the trial of the case, although there may not be any fact directly imputing it. And the jury who heard the witnesses describe the locality where the accident happened, as well as the manner in which it occurred, might have concluded that, if Watkins had been exercising ordinary care for his own safety, he would not have stumbled and fallen. There might, of course, be a case presenting facts somewhat similar to this in which an instruction on the subject of contributory negligence would be out of place; but, generally speaking, an instruction on contributory negligence in this class of cases may be rested on circumstances shown by, and reasonable inferences to be drawn from, the evidence, and we cannot say that it was error to give such an instruction in this case.

But, aside from this, we have often written that, although an instruction might not have a place in the case, its presence would not constitute reversible error, unless it appeared to have been prejudicial to the substantial rights of the complaining party. If, therefore, Watkins was not guilty of contributory negligence, or any negligence, in using the pavement as he was using it at the time of the accident, we do not think the jury could have been misled by this instruction on the subject of contributory negligence.

[2] The principal issue in the case was whether the pavement was in reasonably safe condition for public use. On this issue the weight of the evidence showed that it was not; but the jury had a right to believe the witnesses for the city in preference to the witnesses for Watkins, and to reach the conclusion that the pavement was in reasonably safe condition for public travel, and, under the evidence, we may as well assume that the jury did reach this conclusion as to assume that they found Watkins failed to exercise care for his own safety.

Under these circumstances we cannot say that the instruction on the subject of contributory negligence, even if it should not have been given, affected the substantial rights of Watkins, and the judgment is affirmed.

MILLER v. DAVIS.

(Court of Appeals of Kentucky. Feb. 23, 1916.)

1. CONTRACTS \S 71—CONSIDERATION—SUFFICIENCY—REFRAINING FROM LEGAL PROCEEDINGS.

Where defendant purchased the interest in a partnership indebted to plaintiff of one of the partners and promised and agreed to pay plaintiff if plaintiff would refrain from suing the partnership and procuring an attachment of its property, and plaintiff agreed to and did refrain from instituting proceedings and attaching the property, a good consideration for the making of the promise passed to defendant, though the affairs of the partnership so turned out that defendant received nothing from his purchase of the interest in the partnership.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 295, 296, 298, 316-324; Dec. Dig. \S 71.]

2. FRAUDS, STATUTE OF \S 23—PROMISE TO PAY ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE.

A promise by a purchaser of an interest in a partnership to pay a creditor of the firm, if he would refrain from suing the firm and attaching its property, was an original undertaking made by him to serve his own purposes and bring about results which he desired, and not an oral promise to pay the debt of another within the statute of frauds, though performance of his promise would incidentally have the effect of extinguishing the firm's debt.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 18, 19; Dec. Dig. \S 23.]

Appeal from Circuit Court, Perry County.

Action by W. H. Miller against R. O. Davis. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Hogg & Johnson and P. T. Wheeler, all of Hazard, for appellant. Wootton & Morgan, Faulkner & Faulkner, and Willis W. Reeves, all of Hazard, for appellee.

TURNER, J. In 1911 Roberts & Colwell were subcontractors for the doing of certain work in the extension of the Lexington & Eastern Railroad in Perry county. They were unable to promptly pay their laborers, and issued to them time checks or duebills for their wages. Appellant became the owner of something over \$1,300 of such time checks or duebills assigned to him by the laborers. In this situation Roberts sold out to appellee, Davis, his interest in the firm of Roberts & Colwell for \$300, and appellee agreed in addition thereto to become liable for the payment of certain claims against the firm of Roberts & Colwell, which had been sued on, and Colwell and Davis entered into a written contract by which Davis was accepted by him as a partner in the place of Roberts.

Davis, however, before buying out the interest of Roberts had received information from his brother-in-law, an attorney in Hazard, that certain estimates amounting to between \$4,000 and \$5,000 were coming to the firm of Roberts & Colwell for work already done by them, and that the firm owned

certain machinery and personal property used by it in the conduct of its work. If this information had been accurate, appellee would have made a good trade in buying out Roberts. However that may be, he concluded the contract with Roberts and the very next morning went to appellant's office and there, together with him and Colwell, went over in detail the claims which appellant owned against the firm of Roberts & Colwell.

The only issue of fact in this case, as it turned out upon the trial, was whether at that interview appellee promised appellant that if he would desist in his expressed determination to sue Roberts & Colwell and attach their property so that it might be subjected to the payment of his claim, he (Davis) would pay the same.

Appellant and Colwell each stated that at that interview Miller said he must have his money, and that if it was not paid he intended at once to attach the property of Roberts & Colwell to secure his debt, and that Davis told him that if he would not do so he would pay the debt himself, and that he was good for it. This Davis denies, although he admits his presence at the interview, and that they went over the claims held by Miller against Roberts & Colwell and discussed them.

Upon the trial the jury found a verdict for the defendant, and the only question on this appeal is whether the instruction given on this issue was proper. That instruction is as follows:

"Gentlemen of the Jury: The court says to the jury that if you believe from the evidence in this case that the defendant, R. O. Davis, promised and agreed to pay to the plaintiff, W. H. Miller, the sum of \$1,315.62, or any part thereof, in consideration that he would desist and not sue out an attachment against the property of T. H. Roberts and S. C. Colwell, composing the firm of Roberts & Colwell, and that said Miller, relying upon said promise, did desist from suing out said attachment, and if you further believe from the evidence that said R. O. Davis received any consideration for the making of said promise, then in that event your finding will be for the plaintiff, but unless you shall so believe, your finding will be for the defendant, R. C. Davis."

Appellant offered an instruction substantially the same as the foregoing, except that it told the jury that if Miller, relying upon the promise of Davis to pay his debt, did desist and refrain from suing out an attachment upon the property of Roberts & Colwell, that said agreement was based upon a good consideration and was a binding contract.

[1] The evidence shows that although Davis made a written contract with Roberts and one with Colwell, as above indicated, that because of certain other attachments which were issued and levied upon the property of Roberts & Colwell, and because the original contractors under whom Roberts & Colwell were acting took over the work, that Davis

did not in fact get anything under his purchase from Roberts. It will be observed in the instruction given by the court no recovery could be had by the plaintiff, unless Davis had received some consideration for the making of said promise; in other words, the jury were practically told to find for the defendant because the uncontradicted evidence was that Davis received nothing from Roberts under his purchase.

But evidently such is not the rule; Davis was interested as purchaser in having the work progress, and the promise, if made, was made in furtherance of his own purposes, and with a view to seeing the work carried on and ultimately get therefrom the profit which he at that time expected. He knew that if Miller attached the property and machinery engaged in this work that it would probably result in an abandonment by Roberts & Colwell of the work and would thereby deprive him of the profit which he expected to make out of it. In this situation there can be no doubt that when Miller agreed to and did desist from instituting proceedings and attaching the property that there passed from him to Davis a good consideration for the making of such a promise, and it cannot matter that thereafter the affairs of Roberts & Colwell turned out so as that Davis received nothing from his purchase.

[2] The promise in this case was not violative of the statute of frauds in that it was an oral promise by Davis to pay the debt of another; the promise, if made, was an original undertaking upon the part of Davis made by him to serve his own purposes and bring about results which he himself desired, and it does not matter that it incidentally had the effect to extinguish the debt owing by Roberts & Colwell to Miller. As said by this court in the case of *Simpson v. Carr*, 76 S. W. 346, 25 Ky. Law Rep. 849:

It is a general rule of law "that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, although the performance of it may incidentally have the effect of extinguishing the liability of another."

The same rule is clearly and accurately stated in 20 Cyc. at page 163, as follows:

"Although the words 'original' and 'collateral,' as applied to promises, do not occur in the statute of frauds, they were asked at an early day, and their use has been sanctioned and approved by the courts and text-writers as convenient and accurate expressions to distinguish respectively between the cases in which the direct and leading object of the promisor is to further or promote some purpose or interest of his own, although the incidental effect thereof may be the payment of the debt of another, and those cases in which such object is to become the surety or guarantor of the subsisting debt of another for which the promisor was not previously liable."

It would seem to be unnecessary to cite further authorities to show that where one

with the design to further his own ends induces another to forego or desist from exercising his rights under the law to secure his debt against a third party, by promising to pay such debt in order to bring about results in which he himself is interested, is not protected by the statute of frauds. The instruction on this point, substantially in the form offered by appellant, should have been given.

The judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

STEVENS & ELKINS et al. v. LEWIS-WILSON-HICKS CO.

(Court of Appeals of Kentucky. Feb. 23, 1916.)

1. APPEAL AND ERROR ⇨877 — QUESTIONS REVIEWABLE—FINDINGS—RECORD.

Where the bill of exceptions complaining of the overruling of a motion to quash the summons and return thereon on the ground of fraud inducing a defendant to come into the county where the summons was served on him does not contain all the evidence, the ruling will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2877; Dec. Dig. ⇨877.]

2. CONTRACTS ⇨323 — PERFORMANCE — SUBMISSION OF ISSUE TO JURY.

Where, in an action for breach of contract to saw a specified quantity of lumber each year, defendant did not admit in any pleading a failure to saw the specified quantity, and the great weight of the evidence showed a failure, but there was some evidence excusing the failure as caused by acts of plaintiff, the question of failure must be submitted to the jury, and an instruction stating that defendant admitted failure to saw the specified quantity each year was erroneous.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. ⇨823.]

3. DAMAGES ⇨120—BREACH OF CONTRACT.

Where a contract is made under special circumstances communicated to one of the parties by the other, the damages resulting from a breach are the amount of the injury which would ordinarily flow from a breach under the special circumstances.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. ⇨120.]

4. DAMAGES ⇨120—BREACH OF CONTRACT.

Where lumber defendant undertook to manufacture for plaintiff would be for sale on the market as of the time the contract required delivery by defendant at a specified place, the market price at the place as of the time of delivery must be accepted as the market value of the lumber in determining the measure of damages for defendant's breach of contract, and, in the absence of any allegation and proof to the contrary, the market price elsewhere, or the profits that might have been realized by plaintiff elsewhere, could not be considered in estimating the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. ⇨120.]

5. DAMAGES ⇨68—BREACH OF CONTRACT—INTEREST.

Where a contract binding defendant to manufacture lumber for plaintiff did not provide a penalty for defendant's breach, nor fix liquidated damages, the damages for defendant's breach were uncertain until fixed by verdict or judg-

ment, and interest was not allowable by way of damages either in an action for breach of the contract or in tort, until the damages were so fixed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. ¶68.]

6. DAMAGES ¶121—BREACH OF CONTRACT—ELEMENTS—EVIDENCE.

Where plaintiff employing defendant to manufacture a specified quantity of lumber paid to third persons for services in the manufacture of the lumber actually manufactured by defendant and received by plaintiff, plaintiff, seeking a recovery for defendant's breach of contract, could not recover as damages the amount paid to the third persons.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 306-308; Dec. Dig. ¶121.]

7. DAMAGES ¶120—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The damages recoverable by plaintiff for defendant's breach of contract to manufacture for plaintiff a specified quantity of lumber annually for a certain number of years are the profits that would have accrued to plaintiff from defendant's performance of the contract ascertained by determining from the evidence what would have been the market value at the place fixed in the contract for delivery as of the time of delivery fixed by the contract of the part of the lumber which defendant failed to deliver in any year, as would, in addition to what was actually delivered in such year, have constituted the specified quantity called for, deducting therefrom the prices plaintiff would under the contract have paid for the manufacture and delivery of the same, if it had been delivered at the time and place specified, and the value of the timber, if any, either in trees or logs, left unsawed in such year, as would, if sawed, have supplied the deficiency.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. ¶120.]

8. TRIAL ¶203—EVIDENCE—INSTRUCTIONS.

Where the several grounds of defense interposed by defendant are sustained by his evidence and contradicted by plaintiff's evidence, the court must in its instructions state the law applicable to the several grounds of defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. ¶203.]

Appeal from Circuit Court, Barren County.

Action by the Lewis-Wilson-Hicks Company against Stevens & Elkins, partners, and another. From a judgment for plaintiff, defendants appeal. Reversed, and remanded for new trial.

W. L. Porter and O. H. Hatchett, both of Glasgow, and T. G. Stuart, of Winchester, for appellants. Baird & Richardson, of Glasgow, for appellee.

SETTLE, J. The appellee, Lewis-Wilson-Hicks Company, a corporation engaged in the lumber business, on the trial of this action in the court below recovered of the appellants, J. A. Stevens and H. T. Elkins, partners constituting the firm of Stevens & Elkins, and H. L. Stevens, their surety, a verdict and judgment for \$3,500, claimed by way of damages for the alleged breach by the principals of a written contract made by them with appellee January 9, 1909. The refusal of the circuit court to grant appellants a new trial led to the prosecution by the latter of this appeal.

The great length of the contract renders its insertion in the opinion impracticable. It was made in the city of Louisville, Jefferson county, and was to be performed in Rockcastle county. The appellants J. A. Stevens and H. T. Elkins were then and are now residents of Madison county, and the appellant H. L. Stevens of Clark county. Appellee's corporate domicile and chief office were then and are now in the city of Glasgow, Barren county.

The contract elaborately set forth the several undertakings of each of the parties, and required of each the execution to the other of a bond for its faithful performance; the appellant H. L. Stevens becoming surety in the bond executed by appellants. The contract, among other things, obligated the appellants Stevens & Elkins, in consideration of the sums therein stipulated to be paid them by appellee, to furnish and operate at their own expense a band and circular sawmill at some convenient place on the lands containing the timber to be sawed; to cut, haul to the mills, and saw into such grades as appellee might direct 7,500,000 feet of lumber contained in the timber on two surveys of land in Rockcastle county, known as the Gad and Susan Ann tracts, and such other timber as appellee might direct; to stack the lumber on the millyards, where it should remain on sticks 90 days, or a shorter time if desired by appellee; and, finally, to load the lumber on board cars to be procured by appellee at Wildie, Ky., not less than 2,500,000 feet during the year 1909, nor less than a like quantity each succeeding year, until all the timber on the land should be manufactured into lumber. It was also provided in the contract that appellee should have the right to remove from the chestnut oak timber on the land, tanbark, if desired, to be removed upon the cutting of the timber from the stump, after which the appellants were to saw the logs into lumber before any injury resulted to them from exposure to the sun or weather. The contract further provided that the cutting of the timber, its manufacture into lumber, measuring thereof, and loading on the cars, should be under the immediate supervision and direction of an officer, agent, or employé of appellee.

The breaches of the contract alleged in the original and two amended petitions are, in substance, as follows: (1) That the appellants Stevens & Elkins failed to manufacture into lumber from the timber in question during any of the years covered by the contract 2,500,000 feet of lumber, as required by the contract, and in fact only manufactured, in 1909, 1,291,126 feet, in 1910, 2,337,180 feet, in 1911, 2,114,356 feet, and in 1912, 1,447,288 feet of lumber, and that during these years the market declined, and lumber went down in value, whereby appellee lost the sale of and profit on the difference between the 2,500,000 feet of lumber which the contract obligated

appellants to manufacture in each of the years mentioned and what they did manufacture during each of these years, whereby appellee was damaged in the sum of \$5,000; (2) that appellee sustained special damages by way of interest on account of being deprived, during each of the years mentioned, of the money it had invested in so much of the timber as represented the difference between the quantity of lumber actually manufactured and the quantity the contract required to be manufactured during each of these years, and the use of which money it was prevented from enjoying by the failure of appellants Stevens & Elkins to manufacture the 2,500,000 feet of lumber therefrom during each of these years, as provided by the contract, this item of damages amounting to \$4,500; (3) that the appellants Stevens & Elkins, by unreasonably delaying to saw in lumber in 1909 750,000 feet of logs, and in 1911 500,000 feet of logs, from which appellee had removed tanbark, and by permitting the logs to lie in the woods until they were injured by exposure to the sun and weather, caused appellee to sustain \$2,000 damages; (4) that by reason of the appellants Stevens & Elkins' violation of the contract in the particulars above mentioned appellee was compelled to pay out large sums of money by way of salaries and wages to its agents having in charge the supervision of the cutting, manufacturing, grading, and measuring of the timber and lumber mentioned in the contract, none of which expenditures would have been necessary if there had been a performance of the contract on the part of appellants as required by its terms. The damages claimed on this account were \$3,000.

The answer of appellants, as amended, in addition to a traverse of the averments of the petition, as amended, interposed the following grounds of defense: (1) That the contract providing that the timber should be manufactured into lumber was fully performed as directed by the appellee, and whatever delay there may have been in its performance was caused by the act of God and the conduct of appellee; (2) that by the act of appellee in requiring them to saw 500,000 feet of small oak, poplar, chestnut, and pine timber on the bandmill instead of on the circular mill, which would have performed the work more rapidly, they lost three months' time in 1909, and by its further act in stopping appellants' circular sawmill 30 days to install the bandmill they lost the 30 days' time in the same year, during which they could have sawed 300,000 feet, in addition to the output of that year, and that for the foregoing reasons they failed to manufacture the first year the 2,500,000 feet of lumber required by the contract; (3) that the prevalence of ice and snow, permitted by the act of God, prevented them from operating their mills for 6 months of the time they were engaged in performing the contract; (4) that frequent and long delays were caused in the

loading and shipment of the lumber manufactured by them, by the failure of appellee to provide cars at Wildie for that purpose, and by reason thereof they failed to saw and deliver on the cars during the existence of the contract at least 500,000 feet of the lumber it required them to manufacture, and that one Hagan, employed by appellee to measure the lumber before the hauling of it by appellants to Wildie for loading on the cars, by his delay in getting to the places where the lumber was to be measured mornings and by quitting too early afternoons during the years appellants were doing the sawing required by the contract, prevented them from sawing and delivering 2,000,000 feet of the lumber; (5) that the injuries resulting to the chestnut oak logs from which the bark was stripped by appellee were caused by its act in stacking on the logs to dry, the bark removed therefrom, and requiring appellants not to remove or saw the logs until it removed the bark stacked thereon, which it did not do for more than 90 days; (6) that it was a part of the contract that appellants were to haul and deliver the lumber at Wildie after it was sawed, as and when directed by appellee, that appellants hauled and loaded the lumber on cars at Wildie as and when directed by appellee, the only delay in respect thereto being caused by appellee, as the lumber was all hauled and loaded as and when directed by it, and that this provision of the contract was, by the fraud or mistake of the draftsman thereof, omitted to be inserted therein; (7) that by fraud or mistake on the part of appellee's agent in charge of the measuring of the lumber manufactured by appellants, much of the lumber made by them was incorrectly measured or not measured at all.

The appellant H. L. Stevens, by a separate answer to the petition as amended, denied liability on the bond upon which his name appears as surety, because it was executed after the contract between appellee and the principals, and was without consideration as to him; moreover, that appellee and the principals, without his knowledge or consent, changed the contract by the former's requiring and the latter's sawing other timber than that required by the contract, and timber from other lands than that embraced in the contract, which acts constituted a novation of the instrument and discharged him from liability thereon. The answers were controverted of record or by reply.

[1] The first ground urged by appellants for the reversal of the judgment is that the trial court erred in overruling their motion to quash the summons served upon each of the defendants and the return thereon; it being their contention that the Barren circuit court did not have jurisdiction of the case or of their persons. The appellant J. A. Stevens was served with summons in Barren county, and the appellants H. T. Elkins and H. L. Stevens were served therewith in Clark

county. This motion was made before appellants answered or otherwise made defense to the action, and was based on the affidavit of J. A. Stevens, in which it was stated that appellee's general manager, W. T. Hicks, who was at the time in Rockcastle county and had charge of its business there, after having paid appellants for the work done by them under the contract as it progressed, except a balance of \$1,100 due him upon the conclusion of the work, requested him to go to Glasgow for the purpose of receiving the \$1,100, giving as a reason therefor that one of appellee's stockholders had died, and the presence of his personal representative was desired in making a final settlement between appellee and the appellants, and a settlement could only be made with the approval of the personal representative of the deceased stockholder by J. A. Stevens' going to Glasgow for that purpose, and that upon his arrival at Glasgow appellee refused to pay him the \$1,100, brought suit against appellants, and obtained the service of the summons on him before he left the city. The affidavit contained the further statements that by the means mentioned Hicks, appellee's agent, lured J. A. Stevens to Glasgow for the fraudulent purpose of giving the Barren circuit court jurisdiction of his person and those of his partner, Elkins, and their surety, H. L. Stevens, that appellee might obtain an unfair advantage over them in trying the case in Barren county, where its officers and stockholders resided and were well known, and the appellants were strangers. The statements in the affidavit of the appellant J. A. Stevens were controverted by the affidavits of W. T. Hicks and V. M. Baird, one of appellee's attorneys. In addition to the affidavits mentioned, which appear in the bill of exceptions, it is shown by the record that oral testimony was also introduced on the hearing of the motion, none of which, however, is contained in the bill of exceptions.

As said in *Sublett v. Gardner's Adm'r*, 164 Ky. 385, 175 S. W. 628:

"While the appellant is not required to bring up the entire record, the rule is well settled that one who prosecutes an appeal upon a partial transcript does so at his peril; and, if it appears that part of the testimony used upon the trial is not copied into the transcript, it will be presumed in support of the judgment that it would sustain the averments of the appellee's pleading. *McKee v. Stein*, 91 Ky. 240 [16 S. W. 583, 13 Ky. Law Rep. 491]; *Sanson v. Connolly*, 141 Ky. 120 [132 S. W. 159]."

In *Graves Committee et al. v. Lyons*, 166 Ky. 446, 179 S. W. 413, we held that:

"Where in a proceeding in equity oral testimony is given and heard and a party desires the benefit of it upon an appeal, it must be made a part of the record by a bill of exceptions, which must be prepared within the same time and in the same manner as a bill of exceptions is required to be prepared in actions in ordinary." *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 850; *Knecht v. Home Tel. Co.*, 121 Ky. 492, 89 S. W. 508, 28 Ky. Law Rep. 456; *Dn Poyster v. Ft. Jefferson Imp. Co.*, 121 Ky. 518, 89 S. W. 509, 28 Ky. Law Rep. 504.

In the absence of the oral evidence from the bill of exceptions, we are not authorized to hold that the trial court erred in overruling the motion to quash the summons and return.

We will not enter upon a discussion of the great mass of evidence introduced on the issues made by the pleadings. It is sufficient to say that there was a contrariety of evidence upon practically every issue of fact presented; that of appellee tending to prove the breaches of the contract in the particulars alleged in the petition, and that of appellant to establish the grounds of defense relied on in their answer. It is apparent from what has been said of the evidence that the issues of fact should have been submitted to the jury for decision, and it remains to be determined whether the complaint made by appellants of the instructions under which they were submitted is well founded.

As the instructions are so numerous and their insertion in the opinion would unduly increase its length, we will merely indicate the errors we find in them and indicate the form in which they might have been made applicable to the case.

[2] Instruction No. 1 should not have been given in the form appearing in the record, as it improperly advised the jury that the appellants J. A. Stevens and H. T. Elkins admitted failing in each of the years 1909, 1910, 1911, and 1912 to saw or deliver on board the cars at Wildie as much as 2,500,000 feet of lumber, whereas no such admission is contained in any pleading filed by them. The great weight of the evidence shows such failure, but, as some of the evidence introduced by the appellants tended to excuse such failure upon the ground that it was caused by certain acts and conduct of appellee, set out in the answer and predicated in other instructions of the court, the question whether there was a failure on the part of appellants to deliver as much as 2,500,000 feet of lumber in any of the said years and to what extent, if any, such failure was excused by the acts of appellee, should have been submitted to the decision of the jury.

[3,4] Instruction No. 2, whereby the trial court attempted to define the measure of damages, is radically wrong. It, in substance, told the jury that:

They should find for appellee "for any extra cost and expenses of its hands or employes, if any, you believe from the evidence that the plaintiff incurred by reason of the defendants J. A. Stevens and H. T. Elkins' failure to saw or deliver the lumber or any of it as set out in instruction No. 1, not exceeding the sum of \$5,000, and, if you believe from the evidence that at the time of the making of the contract read to you the defendants Stevens and Elkins were notified that the lumber was to be sawed or delivered by them for sale upon the market, and that it was in the contemplation of the parties to the contract to saw or deliver aboard the cars the lumber referred to in the contract, or any of it, for sale on the market by plaintiff, in any of said years, and that the sale of said lumber or any of it was delayed in any of said years by

said defendant's failure to saw more than it did saw or deliver aboard the cars 2,500,000 feet of said lumber in either of said years, and that the price of such lumber or any of it declined in the market in either of said years, and that the plaintiff could and would have sold said difference in each of said years, if the defendants had sawed or delivered as aforesaid in each of said years said difference, and that by reason of their failure the plaintiff had to sell any of the grades of said lumber of said difference at a lower price in the market, you will find for plaintiff such further damages, if any, it sustained by reason of the defendants' failure so to do, not exceeding on this account the sum of \$5,000. And, if you further believe from the evidence that said lumber did not decline in the market in any of said years, and that the plaintiff was delayed in selling in the market in either of said years the difference between the quantity of the lumber which the defendants did saw in each of said years and the 2,500,000 feet they agreed to saw in each of said years, and by reason of the defendants' delay in sawing or delivering aboard the cars aforesaid for sale by plaintiff a sufficient quantity of said lumber to make 2,500,000 feet in each of said years, then in that event you will find for plaintiff such further damages that it thereby sustained, if any, in any sum not exceeding the legal interest on the market price of the difference aforesaid, not to exceed on this account the sum of \$4,500."

The damages authorized by this instruction are wholly remote and speculative. Scarcely one of the elements it contains was proper to be considered by the jury in assessing the damages. There is no claim made in the petition that, when the contract in question was made, it was entered into in contemplation of other contracts then or thereafter made by appellee, whereby it was to sell and deliver at certain agreed and market prices to other parties the lumber appellants undertook by the contract to manufacture for it, or that such contracts were known to appellants when they contracted with appellee, or that appellants, in violating their contract with appellee, compelled it to violate the contracts it had made with others, thereby causing it to lose the profits it would have made by performing such contracts. As said in *Pulaski Stave Co., etc., v. Miller's Creek Lbr. Co., etc.*, 138 Ky. 372, 128 S. W. 96, quoting with approval the leading case of *Hadley v. Baxendale*, 9 Exch. 541:

"Where special circumstances have been communicated to a party at the time of the making of the contract which go to show that the breach will involve special damages, such damages may be recovered, although not the result of an ordinary breach. When a contract is made under special circumstances, and those circumstances are communicated to one of the contracting parties by the other, the damages resulting from the breach of the contract which they would reasonably contemplate are the amount of the injury which would ordinarily flow from a breach under those special circumstances. * * * When a party makes a contract, and at the time notifies the defendant that such contract is made with reference to a subcontract already entered into or contemplated, upon a breach he will not be confined to ordinary damages, but may recover such damages as necessarily result from the breach." *Feland v. Berry*, 180 Ky. 328 [113 S. W. 425]; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 588 [33 S. W. 835, 17 Ky. Law Rep. 1126]; *I. C. R. Co. v. Nel-*

son [139 Ky. 449] 97 S. W. 757, 30 Ky. Law Rep. 114. Perhaps the latest reaffirmance by this court of the rule in question is found in *American Bridge Co. v. Glenmore Distilleries Co.*, 107 S. W. 279, 32 Ky. Law Rep. 873, where, after citing many authorities, from the earliest down, it is said: "And this rule, so far as we know, has never been successfully questioned since."

It is apparent from the pleading and proof in the instant case that the lumber appellants undertook to manufacture for appellee was or would be for sale on the market as of the time or dates the contract required it to be delivered at Wildie, and, in the absence of allegation and proof to the contrary, its market price at Wildie as of the time or date of delivery fixed by the contract must be accepted as its market value; therefore the market price elsewhere or profits that might have been realized elsewhere had no place in estimating the damages sustained by appellee.

[5] It is difficult to understand the precise meaning of that part of instruction No. 2 contained in the following language:

"And, if you further believe from the evidence that said lumber did not decline in the market in any of said years, and that the plaintiff was delayed in selling in the market in either of said years the difference between the quantity of the lumber which the defendants did saw in each of said years and the 2,500,000 feet they agreed to saw in each of said years, and by reason of the defendants' delay in sawing and delivering aboard the cars aforesaid for sale by plaintiff of a sufficient quantity of said lumber to make 2,500,000 feet in each of said years, then in that event you will find for plaintiff such further damages that it thereby sustained, if any, in any sum not exceeding the legal interest on the market price of the difference aforesaid, not to exceed on this account the sum of \$4,500."

We are convinced, however, that to allow interest as thus contemplated would, in effect, permit the recovery of double damages, which is unauthorized. The contract between the parties does not provide a penalty payable under certain conditions, nor does it contain any stipulation fixing an amount to be recovered as liquidated damages. It may be stated as a general rule that interest is not allowed on unliquidated damages or demands, for the very obvious reason that the person liable does not know what sum he owes, and therefore can be in no default for not paying it. The damages in such cases are not only uncertain, but they remain so until fixed by a verdict or judgment; hence, where this is the condition, interest is not allowed by way of damages, either in actions arising from a breach of contract or in tort.

[6] It is equally manifest that instruction No. 2 is also incorrect in authorizing the jury to award appellee damages by way of compensation for salaries or wages claimed to have been paid by it to its employees charged with the duty of directing the sawing of the timber by appellants and inspecting and measuring same. Such expenditures were, as appears from the evidence, necessarily

made by appellee for the services performed by its manager, Hicks, and its employes, Hagan and Hayes, in the sawing and delivery of so much of the lumber as was actually manufactured by appellants and received by appellee. It is not apparent from the evidence that Hayes was paid for any time lost by appellants' delay in carrying out their contract with appellee, but was only paid for such work as was actually done by him. The foregoing facts are shown by the testimony of B. L. Wilson, appellee's president, as are the further facts that the work of Hicks and Hagan was not confined to directing the sawing and delivery of the lumber required of appellants under their contract with appellee, inspecting and measuring same, but that they were at the same time, and during the continuance of the contract, carrying on timber and lumber operations for appellee in Powell county, this state; and, in addition, Hicks spent much of his time in other states giving attention to appellee's timber and lumber interests and business therein. In view of the evidence mentioned, we are unable to say that Hicks and Hagan would not have received the salary and wages paid them, respectively, by appellee, regardless of the duties required of them arising out of the contract between appellee and appellants. The evidence is indefinite as to how much, if any, time they lost from other duties of their employment by the failure of appellants to saw and deliver in any year the quantity of lumber required by the contract, and silent as to what part, if any, of the salaries they received were paid for time during which they should have been serving appellee, but were prevented by appellants' delay from doing so.

[7] However, further consideration of this matter is unnecessary, as, in our view of the law, the damages recoverable here are the profits that would have accrued to appellee from appellants' performance of the contract, that is, the profits appellee would have made each year on the unsawed and undelivered portion of the 2,500,000 feet of lumber contracted to be delivered that year; such profits to be ascertained by first determining from the evidence what would have been the market value at Wildie, delivered on board the cars, as of the time of delivery fixed by the contract, of such part of the lumber failed to be delivered in any year as would, in addition to what was actually delivered in such year, have constituted 2,500,000 feet for such year, and deducting therefrom the prices appellee would under the contract have paid for the manufacture and delivery of same, if it had been delivered on board the cars at Wildie at that time, and the value of such of the timber, if any, whether in trees or logs, left unsawed in such year, as would, if sawed, have supplied the deficiency. The result thus obtained would constitute the damages, if any, suffered by appellee.

We have not been referred to any case decided in this jurisdiction that rests upon a state of facts like those here presented, but the rule as to the measure of damages stated above seems to have been approved in *Fall & Miles v. McRee*, 36 Ala. 61, and in *Northern et al. v. Tatum*, 164 Ala. 368, 51 South. 17, and, in our opinion, it is the only just one that can be applied to the facts of this case. As said in *Sedgwick on Damages*, vol. 2, § 609, under the title "General Principles of Recovery":

"A contract is conceived as a valuable right owned by the parties of it, and a breach of the contract is regarded as depriving the owner of his contract right. The damage caused by the breach is therefore the damage caused by the destruction of a right of property, and is measured by the value of the property. * * * A contract, as such, however, has no market value, and damages for its breach must therefore be measured by its actual value. This value is most readily found by showing what would be the benefit of having the contract performed; that is, what would have been received upon performance of the contract over and above what must be given to secure performance. If the performance of a contract would be profitable to the plaintiff, that is, if upon its performance by the defendant the plaintiff would have left in his hands more than it would have cost him to perform on his side, then the contract itself, entirely apart from the effect of the performance upon his other property, would have a certain pecuniary value, measured by the amount of such profit remaining in his hands. This is the direct profit of the contract. If by reason of nonperformance on the part of the defendant the plaintiff loses his contract, he is entitled on the general principles of recovery to its value, and this value, as has been seen, is the direct profit. Such direct profit of a contract is therefore always recoverable in an action for the breach."

[8] The remaining instructions, Nos. 3, 4, 5, 6, and 7, given at the instance of appellee, seem to be unobjectionable in form and meaning. Instructions A, B, C, D, E, F, and G, are predicated upon the several grounds of defense relied on in the appellants' answer. As there was evidence introduced in support of each of these grounds which tended to show that appellants' performance of the contract was prevented each year, in part by the conduct of appellee, and in part by extraordinary weather conditions, and such evidence, with that of appellee contradictory of it, compelled the submission of the case to the jury, the instructions last mentioned were necessary to advise them of the law applicable to the several grounds of defense interposed by appellants. Appellee's counsel make no objection to these instructions, and our reading of them convinces us that they are free of substantial error.

The evidence introduced in support of the defense interposed by the separate answer of the appellant H. L. Stevens, surety in the bond of the appellants Stevens and Elkins, though slight, authorized the submission of that question to the jury, and this was properly done by instruction F. The trial court's refusal of other instructions offered by appellants was not error.

On another trial of the case instructions 1

being primarily her duty to pay the taxes on the property which she held in fee simple and on the property in which she held a life estate and from which she received the rents, the lower court erred in allowing her credit for such payments and in allowing her claims against the estate for such payments made during his lifetime.

[3] The claims for repairs, however, present a somewhat different question; the evidence is that the material and labor used in such repairs were contracted for by him in his lifetime, and were by his directions charged to him personally, and evidently under these circumstances it was his purpose to that extent to become individually liable, and no one other than his creditors could question his right to, at his own expense, improve his wife's property if he saw fit.

Because of the different manner in which the title to the various pieces of property was held by the parties, and because of the fact that in most instances the taxes were paid on the whole property in a lump sum, we have been unable to tell exactly what sum should be charged against the estate; but upon the return of the case the court will sustain the exceptions of appellant to all taxes allowed the appellee in her settlement paid out of the estate upon property owned by her in fee simple or held by her for life, and will sustain the exceptions to her claim for such taxes paid during the lifetime of Rowe.

The judgment is reversed, with directions to enter a judgment as herein indicated.

BUCKNER v. GAINESBORO TELEPHONE CO.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

TELEGRAPHS AND TELEPHONES §66—OPERATION—DELAY—LIABILITY—EVIDENCE.

Evidence that plaintiff's brother tried to communicate by defendant's phone line with the plaintiff to inform him of his mother's death, that the address originally given was incorrect and the defendant immediately so informed the plaintiff's brother, who on the next day made another attempt to reach him at another point, when the defendant informed the sender that plaintiff would call that evening, but that plaintiff failed to get the connection on that evening, and when he did make it on the next day it was too late for him to attend the funeral, in the absence of evidence that he tried to have the funeral postponed, is insufficient to show liability of the defendant for delay in transmission of the message, there being no evidence of negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.]

Appeal from Circuit Court, Whitley County.

Action by J. H. Buckner against the Gainesboro Telephone Company and another. Judgment for plaintiff against the Gainesboro Telephone Company was reversed on appeal, and on reinstatement of the cause judgment was rendered for the defendant, and plaintiff appeals. Affirmed.

Rose & Pope, of Williamsburg, for appellant. H. C. Gillis, of Williamsburg, for appellee.

THOMAS, J. Appellee, Gainesboro Telephone Company, operates a telephone system in Pulaski county, this state, with its central office at Burnside, in that county. At the time of the matters complained of herein, it operated a line from Burnside to Somerset, at which latter place it had connection with the system of the Cumberland Telephone & Telegraph Company. There was also a telephone line owned by it running from Burnside to a village in the country called Sloan's Valley.

On Sunday, April 6, 1913, the mother of appellant, who resided in Sloan's Valley, died at that place at about 2 o'clock p. m. There was a merchant in the village by the name of George C. Lewis, who maintained a telephone in his store, which belonged to appellee and was a part of its local system. Directly after the death of appellant's mother, and between 2 and 3 o'clock on that day, the brother of appellant procured Mr. Lewis to try to communicate with the appellant so as to inform him of the death of his mother. Lewis did the talking and he does not state what place he told the central office at Burnside that appellant could be found, but the testimony of the operator shows that Mr. Lewis informed her that appellant could be found near Pineville, and that she endeavored to locate him at that place, but failed to do so for the manifest reason that he was not there. Mr. Lewis was promptly notified of this failure, and after this the matter seems to have been abandoned until the next afternoon, which was on Monday, the 7th of April. Between 2 and 3 o'clock on that afternoon another attempt was made by Mr. Lewis to communicate with the appellant, but at this time he seems to have discovered that appellant was located at a place called Wofford, or near there, working for the Peerless Coal Company in Whitley county. As a result of this effort on Monday, Mr. Lewis was notified that the appellant was at work in the mines and that he would talk with Sloan's Valley at 5 o'clock that afternoon. The record shows that from Somerset in order to reach appellant a message would have to be sent over the lines of the Cumberland Telephone & Telegraph Company to Danville, Ky., and from thence to Corbin, and from thence to Williamsburg, and from the latter place to Wofford, near which the mines were located. At 5 o'clock on the afternoon of Monday, the 7th day of April, the appellant endeavored to call Burnside by calling Williamsburg, then Corbin, then Danville, and then Somerset, and from that place over the lines of appellee to Burnside. He failed to make connection from some cause and abandoned all efforts to do so until the next morning, Tuesday, April 8th, when he succeeded in getting connection

over the lines with Sloan's Valley and learned that his mother was dead and that she would be buried at 8 o'clock that afternoon. There is nothing to show whether he made any request for her body to remain unburied until he could get there or not; however, at about 11 o'clock a. m. on that day, he started for the home of his mother, but failed to get there in time for the funeral.

On June 12, 1913, this suit was filed in the Whitley circuit court against both of the telephone companies, seeking to recover from them \$1,500 as damages; it being alleged in the petition that the defendants contracted and agreed with Mr. Lewis, or appellant's brother as his agent, to notify him of the death of his mother, or to notify him of the nature of the message which the parties at Sloan's Valley desired to deliver to him, and that they negligently failed to do either, by which he was prevented from attending the funeral of his mother and sustained the damages sued for. The defendants filed separate answers consisting of a denial of the allegations of the petition, and, upon a trial of the case, the court peremptorily instructed the jury to find for the defendant, Cumberland Telephone & Telegraph Company, but overruled the motion of appellee, Gainesboro Telephone Company, to direct the jury to find for it, and a verdict was returned in favor of appellant against it for the sum of \$500, upon which judgment was rendered, and which judgment, upon appeal to this court, was reversed on October 30, 1914; the opinion being reported in 160 Ky. 604. Upon the filing of the mandate from this court in the lower court, the appellant filed an amended petition against appellee in which the allegations of the petition were rehearsed, and further alleged that it was the duty of appellant to have and maintain a physical connection between its system and that of the Cumberland Telephone & Telegraph Company at Somerset and to make diligent efforts to get appellant to the phone at the Peerless mines so that he could communicate with his people at Sloan's Valley, and that the appellee had negligently failed to do these things, resulting in the injury and consequent damages sued for.

At this point it might be mentioned that an amended answer of substantially the same character was offered at the first trial, but the court refused to permit it to be filed, to which ruling the appellant excepted, but he does not seem to have pressed this point upon the first appeal. At any rate, the judgment was not reversed because of this ruling of the trial court. There does not seem to have been any reply to the amended petition filed upon a return of the case, either by a separate pleading or an order of court, and it is urged for reversal that the court should have entered a judgment in favor of the appellant notwithstanding the verdict of the jury.

Waiving the question as to the appellant's right to reoffer this amendment after the question had been determined against him on the first trial, and which ruling of the court was not molested on the first appeal, it fully appears that the case was tried the last time as though the allegations of the amendment were denied.

In the former opinion, after stating that the only undertaking on the part of the appellee, which the testimony tended to prove, was one to use reasonable diligence to get the appellee to the Cumberland Telephone & Telegraph Company's line at the office of the Peerless mine, and that this was a different undertaking than the one set out in the petition, this court said:

"Whether they [the facts which the testimony tended to show on the former trial] would have done so [authorize a recovery], if they had been alleged as constituting appellee's cause of action, is not now decided, as that question is not here presented."

The proof, in addition to the above, shows that the only message for which the appellant ever received any pay was the one between the parties on Tuesday morning, April 8th, which we have referred to above.

The amended petition filed after the return of the case contained nothing but substantially the averments in the original petition, together with those in the amendment refused to be filed on the first trial; and evidence was introduced by both sides upon the allegations made in them. Instruction No. 1 given upon the last trial fully submitted the issues contained in the pleadings as to the undertakings of appellee, together with the duties imposed upon it by law in endeavoring to discharge them. Under this instruction and other appropriate ones the jury returned the verdict complained of.

It may be further said that the evidence fails to show to our minds that the appellee neglected to comply with any duty which it can be fairly said from the testimony it assumed. As seen, on Sunday afternoon it promptly reported that appellant could not be found at the place where it was then directed to inquire for him, and on Monday afternoon it secured the phone of the Cumberland Telephone & Telegraph Company at the Peerless mines, near Wofford, at once, and was informed that the appellant would talk to parties at Sloan's Valley at 5 o'clock, which it promptly communicated to persons at the latter place, and there is nothing to show that it was in any wise negligent whereby appellant failed to get its office at Burnside on Monday night. The only message endeavored to be transmitted on Tuesday was promptly done.

Upon the whole case we are unable to find any error prejudicial to the substantial rights of appellant, and the judgment is accordingly affirmed.

**SOUTH COVINGTON & C. ST. RY. CO.
v. MARKEL.**

(Court of Appeals of Kentucky. Feb. 22, 1916.)

**1. TRIAL — 183 — ARGUMENT OF COUNSEL—
REVERSIBLE ERROR.**

The argument to the jury by counsel for plaintiff testifying by deposition, and not present at the trial, that if he had been at the trial the testimony would have been different, did not justify the reversal of a judgment for plaintiff, where the court on objection directed the jury to determine the case from the evidence heard in court, and not what the evidence might have been under other circumstances.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. —183.]

**2. CARRIERS — 292 — CARRIAGE OF PASSEN-
GERS—CARE REQUIRED.**

A street railway company must at all times and under all circumstances exercise the highest degree of care and skill which prudent persons engaged in the same business usually exercise to carry its passengers safely, and to provide them with safe means of boarding and alighting from cars, and it must exercise such care to keep car steps free from ice and snow that they may be as safe for the use of passengers in boarding and alighting from cars as such degree of care can make them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168-1170, 1175-1178; Dec. Dig. —292.]

**3. CARRIERS — 321 — CARRIAGE OF PASSEN-
GERS—CARE REQUIRED.**

Where, in an action for injuries to a street car passenger while alighting, the passenger testified that he slipped from the bottom step, which was covered with snow and ice, and that it had been snowing or sleeting off and on for a few days, and the conductor testified that the passenger slipped on the street, that the bottom step was perfectly clean, that he had brushed it off about 20 minutes before the accident, a charge requiring car men to exercise the utmost degree of care which prudent persons engaged in the same business usually exercise to carry its passengers safely, and authorizing a recovery if snow and ice had accumulated on the step so as to render it dangerous, and the same suffered to remain for such period of time that the car men should have known of its existence and had opportunity to remove it before the accident, but failed to do so, but that, if the step was in a reasonably safe condition, there could be no recovery, and referring to the duty of cleaning the steps at the end of every trip, was not objectionable as imposing on the company an unreasonable duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. —321.]

**4. TRIAL — 140—EVIDENCE—QUESTION FOR
JURY.**

Where the testimony of the witnesses is in conflict, the jury may believe the testimony of one witness, and disregard the testimony of the other witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. —140.]

**5. CARRIERS — 320 — CARRIAGE OF PASSEN-
GERS—STREET CARS—CARE REQUIRED.**

Whether during a storm of sleet and snow the steps of street cars should be cleaned at the end or beginning of every trip depends on weather conditions and the length of every trip, and the court, in defining the duty of a street railway company to provide a reasonably safe place for passengers to alight, should leave to the jury, under the facts, the question of determining whether the company exercised the

requisite care for the protection of its passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. —320.]

Appeal from Circuit Court, Campbell County.

Action by Lester E. Markel against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. J. Crawford, of Newport, for appellant. Healy & Hawkins, of Newport, for appellee.

CARROLL, J. The appellee, Markel, claiming that, while attempting to alight in the night from one of the cars of the appellant company, he was caused to slip and fall from the step of the car on account of snow and ice that had accumulated on the step, by reason of which he sustained personal injuries, brought this suit against the company, and had a verdict and judgment for \$500. The answer of the company was a denial and a plea of contributory negligence.

The appellee, the only witness in his behalf, after saying that he was on his way, as a passenger on one of the cars of the company from Cincinnati, Ohio, to Ft. Thomas, Ky., about 10:30 at night, was asked and said:

"Q. State whether or not on that evening you took one of the cars of the defendant on your way to the Post, and, if so, when and how did you leave said car? A. I did, and when I was about to leave the car I slipped on the bottom step and broke my leg. Q. State whether or not said accident happened after you had safely landed from the car. A. The accident happened while I was getting off of the car, by slipping from the bottom step. Q. State whether or not before such accident happened you had left the car of the defendant company safely after it had stopped, and was standing on the ground with one foot on the step of the car? A. The accident happened while I was alighting from the car by stepping on the bottom step and slipping. This happened before I had alighted on the ground. Q. Please state what kind of weather there was on the day and evening of February 19, 1914, whether or not it was snowing or sleeting at the time you met with an accident, or whether or not it had been snowing or sleeting on that day or evening prior to your meeting with such accident, and, if so, how long prior thereto. A. It was snowing and sleeting in the evening of the accident, and had been off and on for a few days prior. Q. Please state the condition of the step on the car next to the ground at the time you left said car. A. It was covered with snow and ice and very slippery. Q. Was this the step from which you slipped the time your leg was broke? A. Yes."

The conductor testified as follows:

"Q. Tell what happened on the occasion. A. Mr. Markel got off the car, the other passengers got out, and he got off and stood down on the street, and put his left foot on the step and was talking to me about some cigars he had given me, and, after standing there a little while, he said, 'I believe my car is coming,' and he put his left foot off and made a dash for the crossing to catch his car. As he made just one dash, he slipped on the street, and his right foot went under him, and he holloed: 'I have

broke my leg. * * * It is no fault of yours. It is my own fault. It was an accident." Q. What kind of a day was it? A. Why, it had been sleeting that day, that evening. Q. In what condition at the time he got off was the car step, the lower step? A. Perfectly clean. Q. How do you know that? A. Because I cleaned it. I always kept it clean, and put sand on it. Q. Was Markel the first off of the car, or not? A. He was the last one off. Q. Did anybody else have any accident? A. No, sir. Q. Did you have any complaint about the step from anybody? A. No, sir. Q. When did you brush it off last? A. The trip before. Q. When did you put sand on the step? A. The trip before; that's 20 minutes. Q. How long did it take that car to go from that point around to that point again? A. Twenty minutes. Q. Then you mean that, when you left point before, you put the sand on? A. Yes, sir."

On his cross-examination he was asked and said:

"Q. What did you say the weather conditions were? A. Sleeting. Q. How long had it been sleeting? A. Well, I judge it had been sleeting all afternoon, evening. Q. When did you take the run? A. 4:30. Q. Was it sleeting then? A. It was sleeting then. Q. After each trip did you put sand on the step? A. No; not each trip. Q. What trips did you put it on? A. Well, I couldn't exactly tell you what trips, but every time I thought it was necessary I put it down. Q. You can't tell exactly, but you can tell exactly that it was on this trip? A. On this trip, I do remember that positively. Q. What makes you remember that? A. Because I cleaned off the steps entirely, and then took my knife and scraped out the little holes in the grating. Q. When? A. The trip before; 20 minutes before this accident. Q. How often since half past 4 did you sand the step and get down with your knife and clean out the openings? A. About three or four times. Q. How many trips did you make in that time? A. 21."

On his redirect examination he was asked and answered:

"Q. How far from the car did Markel fall? A. From five to eight feet. Q. You mean he was that far from the car when he fell? A. Yes, sir."

On this evidence, which is all that was heard on the subject as to how the accident happened, the court told the jury, in instruction No. 1, that:

"It was the duty of the servants of defendant in charge of the car in question to exercise the utmost degree of care and skill which prudent persons engaged in that or the same business usually exercise to carry its passengers safely to their destination, and to provide for a reasonably safe means of alighting from the car, and, if the jury believe from the evidence that snow and ice had accumulated upon the step of said car so as to render it dangerous in alighting from said car, and that the same was so suffered to remain and exist for such period of time that the servants aforesaid, by the exercise of the care aforesaid, should have known of its existence, and had the time and opportunity to remove it before the accident in question, and failed to do so, and if, in addition, by reason of same, the plaintiff, using himself due care and caution, nevertheless slipped and fell, and so received the injuries complained of, the jury will find for plaintiff. Unless the jury so believe, they will find for the defendant."

In instruction No. 2 they were told:

"The jury are further instructed that, when plaintiff became a passenger on the defendant's car, it did not insure his safety, but only undertook to observe the utmost degree of care and

skill which prudent persons engaged in that or a similar business usually exercise to carry him safely to his destination, and provide him with a reasonably safe means of alighting from the car; and, unless the jury believe from the evidence that the defendant failed to use that degree of care and skill in providing that reasonably safe means of alighting from the car, and that plaintiff was injured by reason of such failure, then the law is for the defendant, and the jury should so find."

And in instruction No. 3 they were told:

"If the jury believe from the evidence that the step from which plaintiff fell, if he did so, was in a reasonably safe condition for use, and that the defendant and its servants in charge of said car used the degree of care which prudent persons in the same business usually observe to keep it in a safe condition from snow and ice, under the circumstances, then the law is for the defendant; or, if they shall believe from the evidence that the said step was in a reasonably safe condition for use, and that the snow and ice thereon, if any, was only such as would ordinarily gather there, the weather considered, while the car was in transit on one of its trips to the point where plaintiff fell, they should find for the defendant."

In instruction No. 4 they were told:

"It was the duty of the plaintiff to exercise for his own protection such care as ordinarily prudent persons ordinarily exercise under the same or similar circumstances, and, if the jury believe from the evidence that plaintiff on the occasion in question failed to exercise such care, and such failure on his part contributed to the injuries he received, and but for such failure on his part he would not have been injured, they will find for the defendant."

A reversal is asked on the grounds that the instructions did not properly submit the law of the case, and because the attorney for the appellee was guilty of misconduct in the argument of the case.

[1] It appears that the appellee was not present at the trial, but his deposition taken on interrogatories was read, and the alleged objectionable argument of the attorney for the appellee consists in the fact that he said:

"If the plaintiff had been here at the trial, the testimony would have been different."

Counsel for the company objected to this statement and moved the court to set aside the swearing of the jury and continue the case, which motion the court overruled, saying:

"The jury are to determine the case from the evidence heard on the witness stand, and, while the court cannot prevent counsel from commenting on the truth or falsity of evidence, the jury are not to consider, aside from that evidence, what the evidence might be under other circumstances."

We do not find in this ground any substantial error that would justify us in reversing the case.

[2-4] The duty of the company in respect to keeping its steps free from ice and snow was, we think, under the facts of this case, stated correctly in the instructions. Although the reference to cleaning the steps at the end of every trip might in some cases and under some weather conditions impose a higher degree of care than should be exacted, under other weather conditions, depending on the length of the trip, the duty to

clean the steps at the end of each trip might not be a sufficient compliance with the rules of law applicable in cases like this.

A carrier of passengers, such as a street railway company, is at all times and under all circumstances required to exercise the utmost or highest degree of care and skill which prudent persons engaged in that or the same business usually exercise in order to carry its passengers safely to their destination and to provide them with safe means of boarding and alighting from the car, and this was the measure of duty exacted by the instructions.

The jury were further told that, if they believed the snow and ice on the step, if any there was, was only such as would ordinarily gather there, considering the condition of the weather, while the car was in transit on one of its trips to the point where Markel fell, they should find for the defendant. This instruction was evidently given to present the defense for the company made in the evidence of the conductor who testified that the step was clean and free from snow at the time Markel alighted from the car, and that it was his practice on that day to clean the steps at the end of each trip of 20 minutes.

A street car company is not obliged to keep its steps constantly free from ice and snow, or either. This would impose on it an unreasonable duty, and one that would require either the employment of extra help or the stopping of the car at frequent intervals in order that the steps might be cleaned. But a street car company, as a carrier of passengers, is required to exercise the highest degree of care usually employed by prudent persons engaged in that business to keep its steps free from ice and snow, so that they may be as safe for the use of passengers in boarding and alighting from its cars as this degree of care can make them. How frequently during periods when sleet or snow is falling the steps should be cleaned is a question that must necessarily be determined by the facts of each case. Obviously no rigid rule could reasonably be set down as to the manner in which, or the times when, the steps should be cleaned.

But in the case we have it was not imposing too high a duty on the company to require it to clean its steps at the end of each trip, and this the conductor said he did, although it seems likely that the jury did not give full weight and effect to his evidence. They probably believed, as they might have done, that, if he had exercised this degree of care, the steps would not have become covered with ice and snow in the manner described by Markel; and the jury had a right to believe the evidence of Markel in preference to that of the conductor.

[5] But, however this may be, we do not think the instructions are open to the crit-

icism urged by counsel for the company. The degree of care they imposed was no higher than the measure usually exacted in cases like this. Clearly the company has no cause of complaint, because the jury were told that, if the snow and ice on the step was only such as would ordinarily gather there while the car was in transit on one of its trips, they should find for the defendant, although, as we have stated, it might not be proper in many cases to point out in an instruction the duty of cleaning the steps at the end of every trip. It is not so much the duty of the company to clean its steps at the end of every trip as it is to exercise at all times the degree of care heretofore set out, and this degree of care might require, under some conditions and on some trips, the steps to be cleaned before the trip had ended, while under other conditions and on other trips it might not be necessary to clean them at the end of every trip; in other words, whether the steps should be cleaned at the end or beginning of every trip depends on the weather conditions, as well as the length of every trip. So that, generally speaking, the safe rule is to omit any mention of the trips, and leave to the jury, under all the facts and circumstances developed in the case, the question of determining whether the company exercised the requisite care. Illustrative cases on this question are *Riley v. Rhode Island Co.*, 29 R. I. 143, 69 Atl. 338, 15 L. R. A. (N. S.) 523, 17 Ann. Cas. 50; *Murphy v. North Jersey St. Ry. Co.*, 81 N. J. Law, 706, 80 Atl. 331, 35 L. R. A. (N. S.) 592; *Louisville Ry. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Louisville & Nashville R. R. Co. v. O'Brien*, 163 Ky. 538, 174 S. W. 31.

The judgment is affirmed.

HARTFORD FIRE INS. CO. v. HENDERSON BREWING CO.

(Court of Appeals of Kentucky. Feb. 25, 1916.)

INSURANCE—§494.—TORNADO INSURANCE—LIABILITY—COINSURANCE CLAUSE.

A tornado policy contained a provision that assured should maintain insurance on each item of property not less than 50 per cent. of the actual cash value, and failing to do so the insured should be an insurer to the extent of such deficit and bear a proportion of any loss. Ky. St. § 700, declares that all insurance companies that take a storm risk shall be liable in case of total loss for the full estimated value of the property as fixed in the policy, and in case of partial loss the liability shall not exceed the actual loss of the property insured. Held that, as against the statute, the coinsurance clause is unavailing, and, though the value of the building damaged by cyclone was several times greater than the amount of the policy, yet, the partial loss being less than the amount of the policy, the insured is liable for the full amount.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1269; Dec. Dig. §494.]

Appeal from Circuit Court, Henderson County.

Action by the Henderson Brewing Company against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dorsey & Dorsey, of Henderson, for appellant. Yeaman & Yeaman, of Henderson, for appellee.

CLAY, C. On March 25, 1913, the Hartford Fire Insurance Company issued to the Henderson Brewing Company a policy whereby it insured in the sum of \$5,000 certain buildings belonging to the brewing company against tornado, windstorm, or cyclone. Pasted on and attached to the policy is the following:

"Fifty Per Cent. Coinsurance Clause.

"It is part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintained insurance on each item of property insured by this policy of not less than fifty per cent. (50 per cent.) of the actual cash value thereof, and that failing so to do the assured shall be an insurer to the extent of such deficit, and in that event shall bear his, her, or their proportion of any loss."

On July 16, 1914, a five-story building, including a brick smokestack, which was insured in the sum of \$3,500, was damaged to the extent of \$1,384.19. This suit was brought by the brewing company to recover on the policy. The insurance company pleaded the coinsurance clause and plaintiff's failure to take out other insurance, and alleged in substance that the loss on the damaged building was only partial; that its value was \$20,000, and 50 per cent. thereof was \$10,000; that by reason of plaintiff's failure to take out coinsurance to the extent of \$10,000 he was himself a coinsurer to the extent of \$6,500, and should be required to bear $\frac{6500}{10000}$ of the loss of \$1,384.69, or \$899.72; and that the defendant was only liable for $\frac{3500}{10000}$ of the loss, or \$484.46, which sum it tendered to the plaintiff. The defendant further pleaded that the rate charged for carrying tornado insurance is a classified rate fixed by the insurance commissioner; that it would cost to build the stack that was damaged at least the sum of \$4,500, and that, had plaintiff applied for a \$3,500 insurance policy on the stack alone, it would have cost \$70 to carry same for three years, whereas the premium for three years on the building as a whole was only \$20, as fixed by the policy; that said policy was issued to plaintiff only because he agreed to maintain tornado insurance to the extent of 50 per cent. of the value of the building, and had not plaintiff so agreed defendant would not have issued the policy.

The trial court held that the coinsurance provision was violative of section 700, Kentucky Statutes, and sustained a demurrer to the answer. Defendant having declined to plead further, judgment was rendered in favor of plaintiff. Defendant appeals.

Section 700 of the Kentucky Statutes is as follows:

"That [all] insurance companies that take fire or store risks * * * in this commonwealth shall, on all policies issued after this act takes effect (in case of total loss thereof by fire or storm), be liable for the full estimated value of the property insured, as the value thereof is fixed in the * * * policy; and in cases of partial loss of the property insured, the liability of the company shall not exceed the actual loss of the party insured: Provided, that the estimated value of the property insured may be diminished to the extent of any depreciation in the value of the property occurring between the dates of the policy and the loss: And provided further, that the insured shall be liable for any fraud he may practice in fixing the value of the property, if the company be misled thereby."

The precise question here involved was before this court in the case of *Sachs v. L. & L. Fire Insurance Company*, 113 Ky. 88, 67 S. W. 23, 23 Ky. Law Rep. 2397. There plaintiff's dwelling was insured in the sum of \$1,200. The actual loss was \$1,000. There was a coinsurance clause, whereby the insured agreed to maintain coinsurance to the extent of 80 per cent. of the cash value of the property, and, in the event of his failure, to bear his proportion of the loss. The company pleaded this clause, and alleged in substance that, by reason of his agreement to carry coinsurance to the extent required by the policy, the insured got the benefit of a reduced premium. After quoting section 700 of the Kentucky Statutes, supra, and referring to other decisions on the question, the court said:

"It seems to us that the manifest meaning and intent of section 700, Kentucky Statutes, supra, was to require the insurer to pay the full amount of the insurance upon which it collected the premium, and that expression in the statute which in cases of a partial loss required the insurer to pay an amount not exceeding the actual loss was inserted for the benefit of the insurer, and was not intended to lessen the liability already embraced in the first part of the section. In this case there is no dispute as to the extent of the damage sustained by the insured, to wit, \$1,000. It is likewise certain that the property insured was, perhaps, worth \$3,200. The defendant insured the plaintiff against loss to the extent of \$1,200; the insured sustained damage to the extent of \$1,000. If the entire property had been insured at \$3,200, and was destroyed, there could be no question but what, under the statute and the decisions supra, the defendant would have been bound to pay \$3,200, without regard to the real value of the property. The stipulation in the policy as to the plaintiff becoming a coinsurer should be treated with no more respect, or as having no more validity, than the old-time stipulation that in no event should the insurer pay more than three-fourths of the value of the property destroyed. Our conclusion is that the defendant was bound to pay to plaintiff the actual damage he sustained, which in this case is estimated to be \$1,000. [Cases cited.] After a careful consideration of the statute supra, and the decisions of this court and other authorities relied upon, we are clearly of the opinion that the stipulation in the policy as to the insured becoming a coinsurer is in violation of the spirit and letter of the statute heretofore quoted, and is null and void, and that defendant is bound to pay the full amount of the loss sustained by plaintiff."

Defendant insists that the above doctrine is not sound and we are referred to the case of *Fireman's Fund Insurance Company v. Pekor*, 106 Ga. 1, 31 S. E. 779, where a contrary rule was announced. Upon reconsideration of the question, however, we see no reason to depart from the rule. In our opinion, the statute was designed to meet every case where the policy directly or indirectly provides for a liability for total loss less than the value fixed in the policy, or for liability for partial loss less than the actual loss sustained. Any other view would annul the statute by opening the door for all sorts of provisions designed to accomplish by indirection what the statute plainly prohibits. Judgment affirmed.

KENTUCKY TRACTION & TERMINAL CO. v. HUMPHREY.

(Court of Appeals of Kentucky. Feb. 22, 1916.)

1. STREET RAILROADS ⚡81—CARE REQUIRED IN OPERATION.

A motorman operating a street car within city limits and on a principal street must exercise ordinary care to discover the proximity of travelers on the street to the track, and exercise ordinary care to prevent injury to travelers, whether by collision or by frightening animals traveling on the street, causing them to produce injuries to their drivers or persons riding in the vehicles drawn by them.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 172-177; Dec. Dig. ⚡81.]

2. EVIDENCE ⚡570—OPINION EVIDENCE—TESTIMONY OF EXPERTS.

Expert testimony is regarded by law as the weakest character of testimony, and the tendency is in the direction of narrowing the rule permitting the introduction of such testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2395; Dec. Dig. ⚡570.]

3. EVIDENCE ⚡553—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS—REQUISITES.

A hypothetical question put to an expert must contain a recital of the facts proven conclusively, or facts which the testimony tends to establish, and such as the jury may be authorized to find, and must not omit proven facts, or those which the testimony tends to prove, which are material and have a bearing on the principal facts sought to be established or refuted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2369-2374; Dec. Dig. ⚡553.]

4. EVIDENCE ⚡553—EXPERTS—HYPOTHETICAL QUESTIONS.

Where, in an action for a personal injury alleged to have caused a miscarriage, there was no proof that discharges had been any other than normal ones for a pregnant woman, nor any proof that the discharges were bloody, a hypothetical question put to a physician, "Now, * * * assuming that woman in normal health and five or six months pregnant was riding in a buggy, and her horse became frightened, * * * and * * * turned around, crushing * * * the right front wheel, * * * and she was mashed backward against the back of the buggy, * * * and within a few days or a week bloody discharges began to pass from her and continued to pass from her, and within three or four weeks a doctor was called in to see her, and there was then symptoms of premature

childbirth, and within 60 days after the accident the child was born, and it was dead, what would you say, in the absence of any other cause, was the cause of the death of the child and of the premature birth," was objectionable, because incorporating statements not justified by the evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2369-2374; Dec. Dig. ⚡553.]

5. APPEAL AND ERROR ⚡1048—HARMLESS ERROR—HYPOTHETICAL QUESTIONS.

The error in allowing, over objection, a hypothetical question containing a statement not warranted by the evidence, and so framed as to almost force an answer from the witness, essential to establish the cause of action relied on by the party asking the question, is prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. ⚡1048.]

6. APPEAL AND ERROR ⚡1064—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

The error in a charge submitting to the jury whether the servants of a street railway company in charge of a car were negligent in failing to keep a lookout and to stop the car, arising from the fact that the duty should have been imposed only on the motorman, was not reversible, where the evidence relied on for a recovery disclosed the motorman's failure to keep a lookout.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ⚡1064.]

7. STREET RAILROADS ⚡93—OPERATION OF CARS—CARE REQUIRED.

A motorman, on discovering the apparent danger of a traveler on the street, caused by his horse becoming frightened, must exercise ordinary care consistent with the safety of the car and his duties to the passengers to stop the car or prevent further frightening of the horse.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. ⚡93.]

Appeal from Circuit Court, Franklin County.

Action by Mrs. T. Humphrey against the Kentucky Traction & Terminal Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Richard C. Stoll, of Lexington, Guy Briggs, of Frankfort, and Wallace Muir and William H. Townsend, both of Lexington, for appellant. Scott & Hamilton, of Frankfort, for appellee.

THOMAS, J. The appellee, with her husband, was traveling in an open top buggy on the pike leading from Frankfort, Ky., to Midway, in Woodford county, Ky., and while yet in the corporate limits of the city of Frankfort, and between the arsenal in the city and the city cemetery, the horse attached to the buggy in which they were traveling became frightened at the approach of a car operated by appellant on its electric line of railroad running between Frankfort and Lexington, Ky. At the point where the accident occurred, and some distance beyond it in the direction from which the car was approaching, the track of the railroad runs upon a part of the highway and over its northern edge, leaving, however, ample and sufficient space for

the public to travel over and upon the highway. According to the testimony of appellee and her witnesses, the approach of the car was discovered by her some 100 yards ahead of where she met it, and at this time the horse which she was driving began to scare and frighten at the approach of the car, which she and her witnesses claim was running at that particular place and time at a very rapid rate of speed. Her testimony shows that the horse became considerably unruly and was rearing up and otherwise manifesting evident fright, sufficient to warn the motorman in charge of the approaching car of the prospective danger to the occupants of the buggy. Just before the car got even with the horse the latter made a sudden turn, throwing the right front wheel against the curbing of the street, causing it to smash and break, whereby the buggy at that end on that side fell to the street. The husband was sitting on that side, and the natural decline of the buggy would cause the body of the appellee to be precipitated against that of her husband, but she claims that either the back or side of the buggy seat struck against her back, and perhaps side, or rather the fall threw her body against these parts of the buggy and inflicted perhaps some slight injuries. We say "slight," because the record is perfectly barren of any evidence showing any bruises producing discoloration, and there was a total absence of any character of wound by laceration, break, or otherwise.

The evidence of appellant, as developed by its witnesses, considerably preponderated to the effect that, while those in charge of the car saw the buggy approaching for perhaps the distance claimed by appellee and her witnesses, yet they say that the horse did not begin to take fright or to show any evidence of it until the car was within some 25 or 30 feet of the horse and buggy, and that it was running at that time at a rate of speed not exceeding from four to six miles per hour, and that the car was stopped as it got somewhere about even with the horse and buggy, whereupon the conductor jumped off of the rear end of the car and took hold of the bridle bits of the horse, when he soon became calm, and the car proceeded down the hill to the station of appellant in the city of Frankfort.

The testimony seems to be unanimous to the effect that about the time that the conductor took hold of the horse the husband of appellee got out of the buggy, followed by the appellee, and the appellee led the horse back into Frankfort, a distance of some 200 or 300 yards, and the husband pulled the buggy down the hill and carried it to some repair shop, where in about two hours it was repaired, and the journey to Midway was then proceeded with. The appellee remained at the house of her sister some four or five days, when she returned to her home in the country near Frankfort, and about four weeks thereafter she sent for Dr. Gwinn, a physician in the neighborhood, and he states

that he found her suffering from labor pains. About four weeks thereafter, or eight weeks after the accident, the appellee gave birth to a stillborn child, which the doctor says appeared to be a full-developed one, but, as he thinks, had been dead for some days before the miscarriage.

This suit was filed in the Franklin circuit court on December 5, 1913, seeking to recover damages of the appellant in the sum of \$10,000, it being claimed that the accident was the result of the negligence and carelessness of the motorman in charge of the car by failing to comply with the duties which the law imposes upon railroads, including electric railroads, as to travelers upon the highway immediately adjacent to their tracks, and it is claimed that the miscarriage was produced by and resulted from the injuries which plaintiff claims to have received. The answer is a denial of the allegations of the petition and a plea of contributory negligence, which plea was controverted, and upon the trial of the case there was a verdict and judgment in favor of appellee in the sum of \$1,000, and, to correct the errors claimed to have been committed by the lower court, this appeal is prosecuted.

[1] It will be observed that this accident occurred within the corporate limits of the city of Frankfort and on one of its principal streets. In such cases it has been determined many times by this court that it is the duty of those in charge of the car to exercise ordinary care to discover the proximity of travelers upon the street to its track and to exercise ordinary care to prevent injuring such travelers, whether by collision or by frightening animals traveling upon the street, causing them to produce injuries to their drivers or persons riding in the vehicle being drawn by them. Moreover, it is the rule that carriers must exercise ordinary care to prevent injuries by frightening animals upon highways paralleling the railroad track after the fright of such animals are well discovered in rural districts. *L. & N. R. R. Co. v. McCandless*, 123 Ky. 121, 93 S. W. 1041, 29 Ky. Law Rep. 563; *L. & N. R. R. Co. v. Street's Adm'r*, 139 Ky. 186, 129 S. W. 570, 139 Am. St. Rep. 471; *Ky. Traction & Terminal Co. v. Downing*, 152 Ky. 25, 153 S. W. 32.

The Downing Case, *supra*, was one against this same appellant while operating its car by the side of the turnpike, but not in the corporate limits of any city.

According to the testimony of appellee and her witnesses, her presence near to the track, as well as the fright of her horse, not only could have been seen by the exercise of ordinary care by the motorman, but same was seen by him, and he made no effort to either check the speed of the car or to stop it before the accident happened, showing that, if her testimony is to be believed as to the way the accident occurred, she would be entitled to

recover from the appellant whatever damages that could be shown to have proximately resulted from her injuries.

In an effort to show that the miscarriage resulted as a consequence of the injuries or of the fright of appellee, she testified upon the trial as follows:

"Q. What did you do after you got the wheel on the buggy? A. Went on up home and stayed a few days. Q. To your sister's? A. Yes, sir. Q. Three or four days? A. Yes, sir; and then came back home again, and taken my bed. Q. What was your condition? A. I was in a bad condition; I was just like I am now. Q. In a family way? A. Yes, sir. Q. At what period, what month, how long? A. Six months. Q. Did you suffer any after you got back home? A. Yes, sir; off and on all the time. Q. Did you have a doctor? A. Yes, sir; Dr. Gwinn. Q. Did he prescribe for you? A. Yes, sir. Q. How did you suffer? A. From labor pains. Q. What part of your body did they affect? A. My back and sides. Q. Did you suffer in any other way—anything else. Did you have any discharges or anything of that kind? A. Yes, sir; off and on all the time until the baby was born. Q. Describe to the jury how frequent—was it frequent or not? A. No; well a right smart, too. Q. Heavy or light? A. Heavy during times. Q. What doctor did you have? A. Dr. Gwinn. Q. Did he live in the neighborhood? A. Yes, sir. Q. When was the child born? A. The 8th of October. Q. Was it dead or alive? A. Dead; it had done mortified. Q. Describe to the jury whether or not you suffered much or little? A. I suffered a good deal. Q. How about after that? A. I suffered with my back and sides. Q. Have you ever recovered? A. No, sir; my sides still hurts. Q. How soon after the accident was it before you commenced to suffer? A. Right at once. Q. Were you in bed any while you were at your sister's? A. Right around all the time I was up there. Q. After you got hurt? A. Yes, sir; all the time, off and on."

Further along in her testimony she testified that she continued to do her household work with the assistance of some of her children who were old enough to help her, there being seven of them, and that she was troubled some at that time and on until the day of the miscarriage with swollen feet and limbs to the extent of sometimes being unable to wear her shoes. She also testified to having had a miscarriage in September, 1911, being twenty-five months before the one complained of in this suit, and at this first miscarriage the child had been conceived for the normal length of time. It was shown by the physicians who testified in the case that pregnant women are subject to the discharges testified to by appellee in that particular stage of pregnancy, and that they are also subject to swollen limbs and feet as testified to by her; that these symptoms are perfectly natural. The physicians both for appellant and appellee likewise testify that by far the most general cause producing a miscarriage is due to some depleted physical condition of the mother, and particularly to some syphilitic condition or to some disordered condition of the kidneys or liver. They furthermore testify that a blow or sudden jar (technically called trauma) is a very rare cause, and that wherever it is a producing cause the miscarriage follows within

a few days thereafter, and especially so when the fetus is as old as this one was at the time of the accident (being between six and seven months). They further testify that, when the miscarriage is produced by a blow or jar, that the fetus would necessarily die within at least two weeks, after which time nature would begin its efforts to expel it from the mother, which it would do within a much shorter time than was done in this case. Indeed, no physician witnesses who testified, some of whom were of long experience, had ever met with a case in his practice wherein the fetus had been carried by the mother without being expelled sooner than was this one by the appellee, although some of them testified that they had read in some medical publication where the contrary had been shown in one or two instances only.

With the record in this condition, upon the very vital issue as to whether the miscarriage was produced by the accident, the appellee, through her attorneys, over the objections of counsel for appellant, was permitted to propound to her physician witnesses this question:

"Now, doctor, assuming that woman in normal health and five or six months pregnant was riding in a buggy, and her horse became frightened at the approach of an interurban car, and the horse turned around, crushing in the buggy wheels, the right front wheel, and she was on the left-hand side of her husband, and he was on the right side, and she was mashed backward against the back of the buggy and the seat of the buggy, and within a few days or a week bloody discharges began to pass from her and continued to pass from her, and within three or four weeks a doctor was called in to see her and there was then symptoms of premature childbirth, and within sixty days after the accident the child was born and it was dead, what would you say, in the absence of any other cause, was the cause of the death of the child and of the premature birth?"

To which they would reply, in substance, as follows:

"There is no question in my mind but that I would attribute it to the shock or fright."

[2] Expert testimony is regarded by the law as the weakest character of testimony. It is a species of hearsay testimony forming an exception to the general rule forbidding the introduction of that character of testimony because of the necessities of the case, and the tendencies of the courts are constantly inclining in the direction of narrowing the rule permitting its introduction, rather than extending it. The expert witness, as latter-day experience has taught, always colors his testimony for the side introducing him, and, indeed, we learn from the history of the country that in great centers of population there exists experts following the business of bartering their expert or scientific knowledge to the litigant who can pay the highest price, and while there is nothing to show that the testimony of any of the physicians in this case was influenced by any such considerations, yet it is because of the existence of the facts which we have stated that the rule of

law permitting its admission has been brought to its present condition.

In substantiation of what we have said on this subject we read from volume 17 of Cyc. 267, as follows:

"The general uncertainty and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and that there are other elements of unreliability arising from human frailty, bias, loyalty to one's employer, pride of opinion, self-interest, or the heat engendered by controversy, which more or less unconsciously warp the mind of the witness, even without the more vulgar elements of venality and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice. Such courts have naturally characterized this class of evidence unfavorably and have ruled that such evidence should be received with 'caution,' with narrow scrutiny and with much caution, and never receiving at all except when absolutely necessary."

Upon this question Judge Peckham, speaking for the Court of Appeals of New York in the case of *Roberts v. N. Y. Elevated Railroad Co.*, 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499, says:

"It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him."

See, also, *Smith v. Smith*, 5 Ky. Opinions, 722.

Other authorities could be cited, but we deem it unnecessary.

[3] With this character of evidence being regarded by the law as we have stated, it is the more important that the circumscribing rules permitting its introduction should be the more strictly enforced. The hypothetical question grouping therein the facts forming the premises upon which the answer of the witnesses must be based must include no facts not shown by some of the testimony to have existed; nor must it omit any relative fact shown by some of the testimony to have existed. This is the universal rule, and is stated by Prof. Greenleaf in the sixteenth edition of his work on Evidence (volume 1, § 441k):

"It would therefore be necessary for him [the expert], in stating his opinion, not only to specify the data for it, but to specify them hypothetically; i. e., as only assumed by him to exist."

And further on in the same section:

"Thus the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them, and because it cannot before the jury's retirement be known what data they will find to be facts, and therefore what opinions are applicable to the case as found by the jury."

And again in section 441l:

"The purpose of the hypothetical presentation requires that the data put forward to serve as premises should be particularized with sufficient distinctness."

And again:

"An answer based upon a portion of the testimony should be treated upon the same principle, and is usually held improper."

In volume 17 of Cyc., supra, on page 247, the rule is stated thus:

"Hypothetical conjecture must be based upon facts as to which there is such evidence that a jury might reasonably find that they are established; but it is not necessary that the facts should be clearly proven, or that the exact language of the witness should be shown, or that immaterial facts should be covered by evidence."

This court, in the case of *Champ v. Commonwealth*, 2 Metc. 27, 74 Am. Dec. 388, upon the same subject says:

"Whatever diversity of opinion there may have been in relation to the admissibility of the opinions of experts upon questions of art or science, it is agreed on all hands that such opinions, to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should therefore always be excluded."

In the opinion of *Pannell v. Louisville Tob. Co.*, 118 Ky. 680, 68 S. W. 662, 82 S. W. 1141, 23 Ky. Law Rep. 2423, this court says:

"The mere opinions of witnesses without the facts on which they are based are of very little value."

And in the case of *Baxter's Adm'r v. Knox*, 44 S. W. 972, 19 Ky. Law Rep. 1973, this court, recognizing the rule being considered, says:

"It is not always necessary to prove to a certainty, or with any degree of certainty, that certain facts exist before the facts may be embraced in hypothetical questions, but is sufficient that all the facts hypothesized be proven by some witness."

The rule was also before this court in the case of *Davis v. Commonwealth*, 6 Ky. Law Rep. 658, and it is stated in the syllabus (the opinion not being printed in full), as we have herein indicated, as follows:

"The rule that requires that hypothetical questions asked of experts shall be based upon proved facts only does not require that the exact language of the witnesses be used, nor does it require that the questions shall be based upon facts conclusively established by the testimony; hypothetical questions can be based upon any state of facts that any of the testimony sustains, although there may be conflicting testimony."

From the authorities which we have cited and many others which could be cited it will be found that the rule requires the examiner to incorporate into the hypothetical question, not necessarily facts which have been conclusively proven, but that he must incorporate therein facts only which the testimony tends to establish and such as the jury may be authorized under the testimony to find. Nor can his question omit in its incorporation proven facts, or those which the testimony tends to prove which are material and would have a bearing upon the principal facts sought to be established or refuted.

[4, 5] Applying this rule to the instant case, we find there to be incorporated in the hypothetical question the following, "assuming that a woman in normal health," and "within a few days or a week bloody discharges began to pass from her," and, further, "in the absence of any other cause." The proof wholly failed to justify the incorporation of these statements in the question complained of. Indeed, when it was stated therein as propounded "in the absence of any other cause," the witness could not possibly make any other answer except the one desired, which was that the miscarriage was produced by the accident and resulted from it. There was no proof in the case that the discharges had been any other than the normal ones for a woman in the then condition of appellee, and no proof that the discharges were of such an alarming character as to be "bloody."

Without further elaborating this question, we conclude that the error in admitting the question to be propounded as framed was highly prejudicial. Its effect was to almost force an answer from the witness establishing the appellee's cause of action, and without which the miscarriage could not be connected with the accident. Indeed, the answer so obtained from the witness completely refuted the combined experiences of all the physicians who testified in the case, and at once bridged the chasm separating the reasonable from the almost unreasonable. While it is barely possible that this miscarriage was a part of the fruits of the accident, still, where the fact is in such doubt, the evidence to establish it should be admitted under the acknowledged safeguards of the law. The court should have sustained the objections to the question as propounded.

[6] Complaint is made of instruction No. 1 given by the court, and not without justification. It submitted to the jury the question as to whether the servants of the appellant in charge of the car were negligent in failing to keep a lookout and to stop the car, when this duty should have been imposed by the instruction only on the motorman driving the car. *Louisville R. Co. v. Gaar*, 112 S. W. 1130; *C. & O. Ry. Co. v. Lang Adm'r*, 135 Ky. 76, 121 S. W. 993. But this court has said in the case of *Ky. Traction & Terminal Co. v. Downing*, *supra*, that under the facts therein, which are similar to the ones in this case, a reversal would not be had for this error.

[7] The instruction, however, erroneously defined the duty of the motorman in charge of the car after discovering the frightened condition of the horse. Upon this point it says:

"Or by the exercise of ordinary care could have discovered that plaintiff's horse was frightened at the approach of the car, and she was in apparent danger, and he failed to have his car under reasonable control, or if said servant had then and could by reasonable effort have stopped the car," etc.

The error in the instruction upon this point consists in the use of the words "reasonable effort." It was the duty of the motorman, after discovering the apparent danger of appellee, or could have discovered it by the use of ordinary care, to have exercised ordinary care consistent with the safety of the car and his duties to the passengers to stop the car or prevent further frightening of the horse. Upon another trial the court will give in lieu of instruction No. 1 as follows:

"The court instructs the jury that it was the duty of the motorman in charge of the car of the defendant upon the occasion in question to keep a lookout for travelers on the street in close proximity to its cars, and to have said car under such control that it could be stopped within a reasonable time after the discovery, by ordinary care, of the peril, if any, to travelers upon the streets by reason of horses becoming frightened at the approach of the car; and the court instructs the jury that, if they believe from the evidence that, while plaintiff, on the occasion in question, was passing along East Main street, in Frankfort, Ky., riding in a buggy, to which a horse was attached, and the horse became frightened at the approach of the car in charge of the motorman, and after he discovered, or by the exercise of ordinary care could have discovered, that plaintiff's horse was frightened at the approach of the car, and she was in apparent danger, and he failed to have his car under reasonable control, and he negligently failed to exercise ordinary care consistent with the safety of the passengers on the car to stop the car, or to slow same down, and continued to negligently move the car towards the horse and buggy in which plaintiff was riding, thereby causing the horse to said buggy to scare and frighten, or turn said buggy around, thereby causing plaintiff to be frightened, shocked, or severely thrown against the buggy and injuring her, the law is for the plaintiff, and the jury should so find; but, unless the jury should so believe, the law is for the defendant, and the jury should so find."

For the errors indicated, the judgment is reversed, with directions to proceed consistent with this opinion.

STRATTON et al. v. WILSON.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

EXECUTORS AND ADMINISTRATORS ~~296~~—
SUIT BY HEIR—ORDER OF DISTRIBUTION.

In a suit under Civ. Code Prac. § 428, by an heir for the settlement of the estate, where the answer of the administratrix showed that there were no debts due by the estate, an order, directing her to make a partial distribution by delivering to plaintiff certain bonds designated in the order, made before the report of the commissioner had been confirmed—or any order determining the amount in her hands for distribution had been made, although not made until after nine months from her qualification, was not prejudicial to her, and was properly made.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1185-1198; Dec. Dig. ~~206~~.]

Appeal from Circuit Court, Oldham County.

Suit by Ada Stratton Wilson against Julia E. Stratton, administratrix, and others. From an order, directing the administratrix to make partial distribution of the estate by delivering to plaintiff certain bonds desig-

nated in the order, defendant administratrix appeals. Affirmed.

See, also, 168 Ky. 175, 181 S. W. 982.

Keith L. Bullitt and Bruce & Bullitt, all of Louisville, and R. T. Crowe, of La Grange, for appellant. Davis & Davis, of Louisville, D. H. French, of La Grange, and John J. Davis and Summers Davis, both of Louisville, for appellee.

CARROLL, J. Wilton A. Stratton died intestate on October 18, 1913, leaving as his only heirs at law his widow, the appellant, and his niece, the appellee. On November 19th the widow qualified as administratrix of his estate, and in April, 1914, the appellee, his niece, brought this suit against the administratrix to settle the estate of the decedent. The personal estate consisted of bonds of the value of more than \$180,000, and at the time the suit was brought, or at any rate when the answer of the administratrix was filed, there were no debts due by the estate. After the answer was filed the action was referred to the commissioner for the purpose of settling the accounts of the administratrix, and it seems that the commissioner filed a report, but it is not in the record. In February, 1915, the court entered an order, directing the administratrix to make a partial distribution of the estate by delivering to the appellee certain bonds designated in the order and aggregating in value about \$70,000. From the order directing this partial distribution the administratrix appeals, and asks a reversal on the ground that the order, directing the payment of his money before the report of the commissioner had been confirmed or an order made determining the amount in the hands of the administratrix for distribution, was premature.

The appellee had the right under the Code (Civ. Code Prac. § 428) to bring a suit for a settlement of the estate, and the order of court, directing the administratrix to deliver to her the bonds mentioned, was not made until after the expiration of nine months from the qualification of the administratrix. The answer of the administratrix, which was filed in May, 1914, admitted that all debts of the estate and funeral expenses had been paid, and also that there were no unsettled claims against the estate known to the administratrix. Under these circumstances we do not see how the administratrix was prejudiced by the order of distribution. It left in her hands \$40,000 or more after setting apart to her an amount equal to the sum ordered to be paid the appellee, and it is very plain from the briefs, as well as the record, that there were no debts or demands of any sort or character against the estate that could amount to anything like the sum left in the hands of the administratrix in ex-

cess of an amount equal to what was directed to be paid the appellee.

When nine months have expired from the date of the qualification of a personal representative, and there are no debts or demands asserted against the estate, there is no reason why he should not be required, in a suit brought for a settlement of the estate, to pay over to the heirs the shares to which they are entitled, and certainly there can be no objection to a proceeding like this when there is left in the hands of the personal representative for the purpose of paying the cost of administration and any debts against the estate that might arise a sum largely in excess of any debts or expenses that could possibly be asserted against the estate. The administratrix evidently felt very sure that the amount in her hands for the purpose of paying debts was amply sufficient for that purpose, or else she would have required a refunding bond.

The judgment is affirmed.

GILBERT et al. v. PARROTT.

(Court of Appeals of Kentucky. Feb. 22, 1916.)

1. BOUNDARIES ¶7—DESCRIPTION—CONSTRUCTION.

In 1830 R. conveyed land to H. described as beginning at the beech in the upper corner of land then owned by H., thence east 80 poles, south 250 poles, and west 80 poles to another line of land formerly owned by H., thence to the beginning and containing about 100 acres. Land had previously been conveyed to H. by a deed which described the boundary as running to a poplar and lynn, "thence N. 87 E. 40 poles to a beech," and it was claimed by defendant that the beech mentioned was the beginning corner of the land described in the R. deed. Plaintiffs, claiming under the R. deed, claimed that the beech in H.'s upper corner mentioned was about 100 poles from the poplar and lynn corner and on a bearing of about north 35 degrees east from it. This would make the R. land contain something like 150 acres, and would leave a strip between the R. land and the land previously conveyed to H. There was parol testimony that H. claimed this point as his upper beech corner, but no beech was located there, or had been for 30 years, and there was nothing to indicate that there ever was a beech there, while beeches located north 87 east 40 poles from the poplar and lynn corner were marked as corner trees. *Held*, that the beginning corner of the R. deed was, as contended by defendant, at these beeches.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58-65; Dec. Dig. ¶7.]

2. BOUNDARIES ¶3—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS—NATURAL OBJECTS.

In construing deeds and in locating lines and corners in the description of the land conveyed, courses and distances surrender to natural objects.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. ¶3.]

3. BOUNDARIES ¶7—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS—NATURAL OBJECTS.

For the rule that natural objects control over courses and distances to apply the natural

object mentioned in the deed must first be definitely located, and where there is a dispute as to its location and the proof shows two or more natural objects which might fill the designation, that one is to be accepted which appears to carry out the intention of the parties in making the deed and which most nearly conforms to the courses and distances as well as to the quantity of land proposed to be conveyed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 58-65; Dec. Dig. ¶7.]

4. PUBLIC LANDS ¶113—PATENTS TO LANDS PREVIOUSLY PATENTED.

A patent to land in so far as it affected land previously patented by another patentee was void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 313; Dec. Dig. ¶113.]

5. ADVERSE POSSESSION ¶103—EXTENT OF POSSESSION UNDER CONVEYANCE.

While an actual occupant of a portion of land under a deed may thereby have constructive possession to the well-defined and marked boundaries of the entire tract, so as to hold all of it adversely, this constructive possession cannot be extended beyond the boundaries of the tract, so as to include lands subsequently purchased by the occupant from a different vendor having a different chain of title; and to give title by adverse possession to such tract there must be an actual possession of some portion of it, claiming all of it to its well-defined and marked boundary, for the statutory period.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 590-594; Dec. Dig. ¶103.]

6. ADVERSE POSSESSION ¶71 — EXTENT OF POSSESSION UNDER CONVEYANCE.

Deeds purporting to convey 500 acres of land, but not describing any land and not acknowledged by anybody, were not deeds to land with any definite boundary, and could serve no purpose, except to make an occupancy thereunder one under color of title, and perhaps to constitute evidence as against the grantors.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 415-429; Dec. Dig. ¶71.]

7. APPEAL AND ERROR ¶1029 — HARMLESS ERROR—ERRORS AFFECTING PARTY NOT ENTITLED TO RECOVER—ADVERSE POSSESSION.

Instructions attempting to submit the question of title by adverse possession, though erroneous in that they failed to define adverse possession as being the actual occupancy of some portion of the land and claiming it to a well-defined marked boundary line, was not prejudicial where plaintiffs in no view of the case showed title to the land in controversy.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4035, 4036; Dec. Dig. ¶1029.]

8. TRESPASS ¶19—TITLE TO SUPPORT ACTION—DEFECTS IN DEFENDANT'S TITLE.

Plaintiffs, suing for trespass on land to which they claimed title must succeed on the strength of their own title, and the defects, if any, in defendant's title, could not avail them.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 18-31; Dec. Dig. ¶19.]

Appeal from Circuit Court, Knox County.

Action by Mary Gilbert and others against Charles Parrott. Judgment for defendant, and plaintiffs appeal. Affirmed.

Black, Black & Owens, of Barbourville, and J. P. Hobson & Son, of Frankfort, for appellants. J. M. Robson, of Barbourville, for appellee.

THOMAS, J. About 30 years ago, the exact date not being shown by the record, Wallace Gilbert died intestate, residing in Knox county, Ky. He left surviving him as his only heirs the appellants, Mary J. Gilbert, his widow, Samuel J. Gilbert, John Gilbert, Susan Gilbert, and Mary J. Black (née Gilbert). The latter is the wife of appellant James T. Black. It is claimed in the petition that at the time of the death of Wallace Gilbert, he was the owner of a tract of land in Knox county, situated on Big Richland creek and described as follows:

"Beginning at a beech in the upper corner of land now owned by Peter Hammons; thence east 80 poles to a stake; thence south 250 poles to a stake; thence west 80 poles to another line of land formerly owned by the said Hammons; thence to the beginning and containing about 100 acres."

As the heirs of this land the appellants filed this suit in the Knox circuit court on the 19th day of May, 1911, against appellee, Charles Parrott, in which they allege that the defendant had committed trespasses upon said tract of land by going thereon and cutting timber and appropriating it to his own use, and alleging that the amount of timber so taken was \$300, for which they prayed judgment against him. The answer is a traverse of the petition and especially so as to the plaintiffs' ownership of the land from which the timber was taken, and in a second paragraph it is alleged that the defendant was himself the owner of the land from which he took the timber, both by title from the commonwealth and by adverse possession. These allegations were denied and upon the trial, in which a great deal of testimony was taken, the jury returned a verdict for the defendant, and, complaining of this, this appeal is prosecuted.

Many errors are urged before us as grounds for a reversal, but according to the view which we take of this record, a number of them will not require consideration.

In an effort to establish their title to the tract of land, the plaintiffs introduced a patent issued by the commonwealth of Kentucky to William North on the 1st day of June, 1797, which patent covered a survey supposed to contain 5,000 acres. For several years after the issuing of such patent, the patentee, North, failed to pay taxes on the land, and for the purpose of collecting the unpaid taxes 2,500 acres of this tract was sold on the 23d day of November, 1804, by the then register of the land office, John Adair, at which sale one John Ballinger became the purchaser of the 2,500 acres sold. He assigned his bid to one John Logan, and the latter again assigned it to one John Rigal, and on September 2, 1817, John W. Foster, who was then register of the land office of the state of Kentucky, executed a deed to John Rigal for the 2,500 acres of land, and the tract of land involved in this

suit is a part of this 2,500 acres. John Rigal deeded to Peter Hammons the tract of land in controversy on the 28th day of June, 1830, and the description in such deed is exactly as it is in the petition as copied above. Previous to the execution of this deed from John Rigal to Peter Hammons, the latter had purchased other lands from Henry Banks, which adjoined the Rigal land on the west. This deed from Banks to Hammons was of date December 6, 1824, and the description of the land therein is as follows:

"Beginning at a hickory and running thence 42 E. 50 poles to another hickory; thence N. 24 E. 32 poles to a stake; thence N. 15 E. 36 poles to a stake; thence N. 25 W. 112 poles to a poplar and lynn; thence N. 87 E. 40 poles to a beech; thence S. 8 E. 157 poles to a stake; thence to the beginning; thence from the poplar and lynn N. 267 poles to a stake; thence E. 20 poles to a stake; thence S. 2 E. 264 poles to a stake called for in the above square on the beginning of the same."

It will be noticed that the fifth call in the deed of Banks to Hammons reads, "thence north 87 east 40 poles to a beech," and the succeeding or sixth call is, "thence south 8 degrees east 157 poles to a stake," followed by the last call, running to the beginning. It will also be noticed that in the Banks deed there is a second tract of land conveyed to Hammons beginning at the "poplar and lynn corner" mentioned in the first tract described in that deed.

[1] This controversy arises principally over the location of the beginning point in the description of the land conveyed on June 28, 1830, by John Rigal to Peter Hammons. This point is, as will be seen from the Rigal deed, "at a beech in said Hammons' upper corner," and it is the contention of the defendant that this point is at the termination of the fifth call of the Banks deed running from the *poplar and lynn* corner north 87, east 40 poles to a beech, and this beech corner constituted "said Hammons' upper corner"; while it is the contention of plaintiffs that the "beech in said Hammons' upper corner," constituting the beginning point of the description in the Rigal deed, is located something like 100 poles from the poplar and lynn corner and on a bearing of about north 35 degrees east from it. So that to reach the point contended for by appellants as being the beginning beech corner of the Rigal deed, the fifth call in the Banks deed, instead of reading as above, would have to read, "thence north 35 east 100 poles to a beech;" and to thus locate the beginning corner of the Rigal deed would make the tract of land conveyed by Rigal to Hammons contain, instead of 100 acres, something like 150 acres. It would furthermore leave a strip of land between the Banks tract conveyed to Hammons in 1824, and the tract conveyed by the Rigal deed to Hammons in 1830, which is contrary to the plain intention manifested by the Rigal deed when in the third call thereof it runs "80 poles back

to Hammons," and in the fourth call, "from that point to the beginning," which is the "beech" in said "Hammons' upper corner"; for, there is nowhere shown that Hammons ever had by any conveyance any upper beech corner, except the one located "north 87 degrees east 40 poles from the *poplar and lynn* corner" in the Banks deed.

[2, 3] It is the well-settled rule that in construing deeds and in locating lines and corners in the description of the land conveyed courses and distances surrender to natural objects. Devlin on Deeds, § 1029; Dupoyster v. Miller, 160 Ky. 780, 170 S. W. 182. But, for this rule to find application, the natural object mentioned in the deed must first be definitely located, and where there is a dispute as to the location of this natural object and the proof shows two or more natural objects which might fill the designation that one is to be accepted which appears to carry out the intention of the parties in making the deed and which most nearly conforms to the courses and distances, as well as conforms to the quantity of land proposed to be conveyed. There is some testimony in behalf of plaintiffs tending to show that Peter Hammons claimed his upper beech corner (being the beginning corner of the Rigal deed) to be located at the point contended for by them; but this testimony rests entirely in parol, and to so locate that corner would not only do violence to the manifest intention of the parties to the Rigal deed, wherein it is to be gathered therefrom that the last call should be in the line of Peter Hammons, but it would also be doing violence to the other calls in that deed and result in conveying at least 50 per cent. more land than therein expressed. Moreover it is shown indisputedly by the testimony that there is no beech located at the point contended for by plaintiffs, nor has there been one for more than 30 years, if then; nor is there any stump or other indication of any beech having ever been located there. It is true that something like 8 or 10 poles south of that point there is a standing beech, and another one down, but these beeches were in a conditional line, which for many years had been the agreed line between Peter Hammons and Jerry Hammons, and so far as we are able to detect has nothing to do with this controversy more than a circumstance to show that these beeches do not form the beginning corner of the Rigal deed, and therefore do not constitute the beech corner contended for by plaintiffs.

We are not inclined to allow this oral testimony, weakened as it is by the absence of any growing beeches, or indications of same, to locate the beginning beech corner of the Rigal deed so at variance with the course and distance of the fifth call in the Banks deed from the *poplar and lynn* corner in that deed.

At the point where there is a standing beech and another one down, marks are to

be found on them, but this cannot be accepted as fixing the beginning corner of appellants' land, not only because of the conditional line between Jerry and Peter Hammons, hereinbefore mentioned, causing these trees to be marked, but because of other conveyances made as shown by the record, but not necessary to consider in the determination of this case, as they do not relate thereto.

The beeches designated as being located "north 87 east 40 poles" from the *poplar and lynn* corner in the Banks deed, are marked, not only as line trees, but corner trees.

From the testimony in the case and governed by the rules of law for the interpretation of deeds, we are thoroughly convinced that the beginning corner of the Rigal deed, describing the land claimed by the plaintiffs in their petition, is as contended for by the defendant, which, being so, would leave the land upon which the trespasses complained of entirely without the boundary of plaintiffs.

It is claimed, however, that in 1871 Wallace Gilbert purchased from the heirs of W. P. Hale their interest in lands covered by a patent, obtained by Hale in 1859, for 500 acres, which covers the land lying north of the 100 acres described in the petition as herein determined, and that because of this purchase, as well as the contention hereinbefore considered, their claim extended sufficiently north of the Rigal tract to cover the land in controversy from which the timber was taken by defendant, and that they are therefore entitled to recover.

[4-6] In reply to this it may be said: First, that it is extremely doubtful if this Hale patent covers any part of the land alleged to have been trespassed upon; and, second, the Hale patent, in so far as it seeks to affect the land in controversy, is void, as the land at that place had been previously patented by William North, as hereinbefore seen; third, there is no testimony that there has ever been an actual settlement by the Gilberts upon any part of this Hale patent, and under a well-settled rule their actual possession under the Rigal deed could not extend their constructive possession beyond the boundaries thereof to the lines of another, and different survey acquired at a different time and from different parties. An actual occupant of a portion of the land may thereby have constructive possession to the well-defined and marked boundaries of the entire tract so as to hold all of it adversely, but this constructive possession cannot be extended beyond the boundaries of the tract so as to include land subsequently purchased by the occupant from a different vendor and having a different chain of title. To give title by adverse possession of the latter tract there must have been an actual possession of some portion of it claiming all of it to its well-defined and

marked boundary for the statutory period. *Trimble v. Smith*, 7 Ky. (4 Bibb) 257; *Smith v. Mitchel*, 1 A. K. Marsh. 207; *Wilson v. Stivers*, 34 Ky. (4 Dana) 634; *Jones v. McCauley*, 63 Ky. (2 Duv.) 15; *Swafford v. Herds' Adm'r*, 65 S. W. 803, 23 Ky. Law Rep. 1566; *Hendrickson v. Linville*, 104 S. W. 688, 31 Ky. Law Rep. 967; *Goff v. Low*, 107 S. W. 794, 32 Ky. Law Rep. 1098; *Brown v. Wallace*, 116 S. W. 764; *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755; *Charleroi Timber & Cannel Coal Co. v. Licking Coal & Lumber Co.*, 116 S. W. 682; *Bowling v. Breathitt Coal, Iron & Lumber Co.*, 134 Ky. 249, 120 S. W. 317. Moreover, the writings obtained from the heirs of Hale by Wallace Gilbert, purporting to convey, describe no lands, nor are any of them acknowledged by anybody. They cannot in any sense be construed to be deeds to land with any defined boundary, and the only purpose which they can serve would make an occupancy under them be with color of title and would perhaps be evidence as against the Hale heirs in a contest between them and Gilbert, or his heirs.

[7, 8] The instructions of the court, in so far as they attempted to submit to the jury title by adverse possession, were erroneous, in that they failed to define adverse possession as being an actual occupancy of some portion of the land and "claiming it to a well-defined marked boundary line." The quoted clause was omitted from the instructions, which was clearly erroneous. However, having reached the conclusion that plaintiffs in no view of the case showed title to the land in controversy, the error in the instruction was not prejudicial to them, and this fact also renders it unnecessary to consider the title of the defendant, under the well-recognized doctrine that in cases of this character the plaintiff must succeed on the strength of his own title. Whatever, therefore, may be the defects, if any, in the defendant's title to the premises trespassed upon, it cannot avail the plaintiffs in this suit.

It results, therefore, that the judgment is correct, and it is affirmed.

MONYAHAN v. CITY OF LANCASTER.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

MECHANICS' LIENS—§111—RIGHT TO—SUB-CONTRACTORS—DEFAULT BY PRINCIPAL CONTRACTOR.

Where the original contractor completes the work in accordance with the contract, the property owner is, though he may have paid the contractor, liable to mechanics, materialmen, and subcontractors, who have observed the statutory requirements for the amount of their claim equal to the contract price, but where the improvement is not in accordance with the contract, the owner is liable to them, to the extent of the reasonable value of the improvement, and he cannot set off any claim for damages he might have against the original contractor for failure to perform the work, although the claims of such subcontractors, etc., will be abated to the ex-

tent the owner was damaged by their failure to perform their contracts with the original contractor, while if the improvement is wholly worthless, the owner is not liable, and in any case the owner may have an abatement of the claim of the subcontractor, etc., to the extent he sustains damages for a subcontractor's failure to perform the contract. Hence where a filter plant was wholly worthless to a city by reason of the failure of the contractor and subcontractors to comply with the contract, the city, which engaged the work, is not liable, and that it had paid part of the purchase price to the original contractor does not create any liability.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 144-146; Dec. Dig. § 111.]

Appeal from Circuit Court, Garrard County. Action by P. U. Monyahan against the City of Lancaster. From a judgment for defendant, plaintiff appeals. Affirmed.

H. C. Kauffman, of Lancaster, and Greenleaf & Herrington and J. J. Greenleaf, all of Richmond, for appellant. J. E. Robinson, of Lancaster, for appellee.

CARROLL, J. On October 8, 1912, the city council of Lancaster entered into a contract with the Greer Filter Company for the construction of a filter plant in connection with its water supply. The contract with the Greer Company obligated it to construct a plant of 100,000 gallons daily capacity, and place the same in operation for the sum of \$2,250, within 60 days from the date of the contract. When the material for the construction of the plant was on the ground, the city was to pay 50 per cent. of the contract price and the remainder when the plant had been completed according to specifications, which were a part of the contract. After securing this contract, the Greer Company sublet the contract to Monyahan—

"to build the filter and filter house for \$314.00, payable when the work has been completed and accepted by the engineer."

Afterwards the contract price was increased to \$336.40. After this contract had been entered into between the Greer Company and Monyahan, and when the city had notice of the contract, it paid the Greer Company \$1,125, one-half of the contract price that it was agreed should be paid when the material was on the ground; but when the filter was completed, the city refused to accept it or to pay Monyahan any part of the price he was to be paid by the Greer Company, no part of which had been paid to him by the Greer Company. Upon the refusal of the city to pay his claim, Monyahan filed his mechanic's lien, and later brought this suit against the Greer Company and the city, seeking to recover from the city the \$336.40 which the Greer Company had agreed to pay him. The Greer Company did not answer, and judgment went against it by default, but the city filed an answer, denying that the filter plant had been completed according to its contract and specifications, and averred that the contract was broken in several respects,

to wit: (1) That the concrete walls used in the construction of the filter plant were not built according to the contract and would not hold water; (2) that the walls were not reinforced with steel rods, as stipulated in the contract; (3) that no baffle walls were built; (4) that the lumber used in the construction of the forms was not of that character or quality specified in the contract; (5) that the concrete was placed in the forms without being spaded away from the sides, and without the form planks being wet or oiled; (6) that the plant would not filter 100,000 gallons of water per day, or more than 60,000 or 70,000 gallons a day; (7) that the number of strainers called for in the contract were not furnished, and that it took more than 2½ per cent. of the water to clean the filter. It further set up that it had refused to accept the filter plant because it was entirely worthless for the purpose for which it was intended, and consequently it was compelled to and did erect a new filter plant in place of the one constructed under the Greer contract, and it asked that the petition of Monyahan be dismissed. Other pleadings were filed, completing the issues, and after the case had been prepared for trial, it was heard by the lower court, and a judgment entered dismissing the petition, and Monyahan appeals.

There appears to be no controversy between the Greer Company and the city, as the Greer Company apparently abandoned its right to collect from the city the balance of the contract price, or at least this record does not show that it ever asserted a claim against the city for this balance. Nor is there any controversy between the Greer Company and Monyahan, as the Greer Company permitted a judgment against it in favor of Monyahan, to go by default. It will thus be seen that the city had paid on the contract price only \$1,125, and this was paid to the Greer Company before the work was commenced and when the material for its prosecution had been put on the ground; and it now claims that it should not be required to pay any more because of the worthless condition in which the Greer Company left the filter plant. It is further contended that as the Greer Company has no enforceable demand against it for the remainder of the contract price, neither has the subcontractor, Monyahan, as there was a total failure of consideration. It is also said that the defective and worthless condition of the filter was due, not only to the imperfect manner in which the Greer Company did its part of the work, but also to the imperfect manner in which Monyahan did his part of it. On the other hand, counsel for Monyahan argue that the filter plant was not useless or worthless, but, on the contrary, could, by a little labor and expense, have been put in such condition as to comply with the contract, but the city would not allow this to be done, although it is admitted there were defects in its construction at the time the

Greer Company tendered it as a completed plant to the city. It is further said that no opportunity was given to the Greer Company or Monyahan to remedy the defects, as they would and could have done, and that aside from this, as the city paid to the Greer Company \$1,125 on the contract price after it had notice of Monyahan's contract and Monyahan was not responsible for the bad construction, it cannot escape liability to Monyahan for the amount of his lien claim, as it is less than the sum the city had paid to the Greer Company.

Before taking up the law of the case it is well to have a better understanding of the facts, because the conclusion reached with reference to the manner in which the contract was performed by the Greer Company and Monyahan will have much to do with the application of the law.

On the subject as to whether the filter plant was constructed in compliance with the contract or whether it was entirely useless to the city, there is much conflict in the evidence; but we think the weight of it sustains the contention of the city that the filter plant was so wholly defective in its construction as to be totally worthless. It is shown that in the matter of forms, rods to reinforce the concrete, the construction of the concrete walls, the baffle walls, the strainers, and in other respects the contract was not complied with. But the principal defect in the filter was the fact that it would not furnish, as specified in the contract, 100,000 gallons of filtered water every twenty-four hours, and that it required a great deal more than $2\frac{1}{2}$ per cent. of the amount of water filtered to clean the filter. To get an adequate supply of filtered water was, of course, the principal object the city had in view in the construction of the filter plant. It estimated that 100,000 gallons of filtered water would be needed every twenty-four hours to supply the demand, and the weight of the evidence shows that the filter was entirely inadequate to furnish this supply.

There is evidence on behalf of Monyahan by Prof. Crooks that he made an examination and test of the capacity of the plant at the instance of the Greer Company, and that in the test, which lasted an hour and forty-five minutes, the amount of water flowing into the basin was much more than would be necessary to make 100,000 gallons in twenty-four hours if the supply furnished during this hour and forty-five minutes was kept up during twenty-four hours. But we do not attach very great importance to this test. Conditions may have been so arranged as that when the test was made the filter plant showed a greater capacity than it would show if run for twenty-four hours, and the test appears to have been made under conditions created for the purpose of making the test. At any rate, the city became so thoroughly satisfied that the plant was inadequate to furnish the supply of water needed as to be worthless,

and therefore it entirely abandoned the plant and had constructed near by a new filter. What this new filter cost is not so very important, because the material question is, Was the plant as constructed by the Greer Company and Monyahan worthless? The lower court, in his judgment dismissing the petition of Monyahan, did not assign the reasons that influenced him, but evidently he must have been of the opinion, on the facts, that the filter plant was worthless, and therefore the city had received no consideration for the amount it had paid the Greer Company on the contract, and consequently the Greer Company had no claim against the city for the balance due under the contract if it had been complied with. And we think the weight of the evidence justified the lower court in coming to this conclusion, so that the facts may be summed up as follows: (1) That the Greer Company agreed to construct the plant for \$2,250, \$1,125 of which was paid when the Greer Company had put the material on the ground for the purpose of constructing the plant, the remainder to be paid when the plant was constructed according to contract. (2) That the Greer Company made a contract with Monyahan to do certain work on the filter plant for which he was to be paid by it \$336.40, and the city had notice of the fact that this contract was made before it paid to the Greer Company the \$1,125. (3) That the filter plant, due to the failure of both the Greer Company and Monyahan, was not constructed according to the contract, and was worthless to the city. (4) That the city had no contract with Monyahan, but his contract with the Greer Company obligated him to do the work he contracted to do in accordance with the terms of the contract between the city and the Greer Company. (5) It also appears that the worthless condition of the plant was attributable partly to Monyahan, but we do not regard this circumstance as material, because when the improvement is entirely worthless, it is not important whether this condition was due to the fault of the original contractor or the subcontractors, mechanics, or materialmen. The property owner has a right to look to the original contractor for the fulfillment of the contract and the construction of the improvement according to the plans and specifications, and if the improvement, when finished, turns out to be of no value whatever to the property owner, neither the original contractor nor the subcontractors, mechanics, or materialmen can enforce the payment of what would have been due them if the work had been done according to the contract. With this understanding of the facts, we will now look to the law of the case.

In the case of *Rieger v. Schulte & Eicher*, 151 Ky. 129, 151 S. W. 395, relied on by counsel for appellant, the facts were these: There Riegers entered into a contract with one Lah-

ner, by which Lahner undertook to erect a building for them according to plans and specifications for \$4,780. Lahner sublet a large part of the work and bought the material he used from various persons. The Riegers advanced to Lahner money from time to time as the work progressed, until the building was completed, at which time he had been paid \$3,031.38. Some of the subcontractors and materialmen were not paid, and they filed liens against the property and instituted a suit, in which they sought to subject the property to the payment of their liens. While this suit was pending, the Riegers filed a separate suit against Lahner, in which they sought to recover damages in the sum of \$1,643.50, alleged to have been sustained by them by reason of his failure to erect the building according to contract, and sought to set off this claim of \$1,643.50 against the liens which the subcontractors and materialmen were asserting against the property. It also appears that the claims of the subcontractors and materialmen amounted in the aggregate to \$2,070, while the Riegers claimed that the contract price of \$4,780 should be abated by the sum of \$1,643.50 on account of the failure of Lahner to erect the building according to the contract. Upon this state of the facts the court, in holding that the subcontractors and materialmen had a lien, said, in part:

"It will thus be seen that, if appellants' contention be sustained in toto, the contractor, if he has been paid nothing, would be entitled to a lien upon the building for \$3,087, this being the contract price, less the amount which appellants claim is due them because of the damage in the construction of the building. The subcontractors and materialmen have a lien upon the building to the extent of the amount for which the contractor was entitled to a lien. Counsel for appellants seems to recognize this principle as correct, but insists that, inasmuch as the contractor was, during the progress of the work, paid something more than \$3,000, his lien or right to a lien has been canceled; and hence the subcontractors and materialmen are not entitled to liens, although they had not been paid. This is not the law. The subcontractors and materialmen are entitled to a lien for the work done and material furnished in the erection of a building, although the owner thereof has been paid the full contract price. The only limitation upon the right of the subcontractor and materialman is that the sum total of their claims may not exceed the contract price. If the owner settles with the contractor, and leaves the claim of the subcontractor or materialman unsatisfied, under the plain provision of the statute, he is bound to pay them, although the effect of this may be to require him to pay twice for the building. It is no defense to the claim of the subcontractor or materialman, who has complied with the requirements of the statutes and whose work and material are of the standard as to quality and kind called for in the contract, that the owner had paid the contractor."

It is not seriously contended that the particular defects in the building, set up and relied upon as supporting the claim for damages, are properly chargeable to the accounts of these particular claimants, and, indeed, the evidence shows that they are not. Appellants may have a just ground of complaint

as to the contractor, and others who furnished material or labor, but with those questions these litigants have no concern. The sole question for determination in this case is:

"Was the material furnished by these claimants of the quality called for in the contract, and did the work, performed on the buildings by the subcontractors, conform to the requirements of the specifications? If so, they were entitled to a judgment for the respective amounts claimed by them, without regard to the character of work done by the contractor himself or other subcontractors or materialmen. As stated, the only limitation upon their right is that the sum total of all the liens shall not exceed the contract price."

In *Terrell v. McHenry*, 121 Ky. 452, 89 S. W. 306, 28 Ky. Law Rep. 402, Terrell, the owner of a livery stable, made a contract with McHenry to put a roof on the building, and McHenry sublet the work to one Miller. McHenry and Miller, after completing the work, filed mechanics' liens against the property and brought suit to enforce them. Terrell defended the suit on the ground that under his contract with McHenry he was not to pay for the roof if it leaked in 30 days, which it did, and therefore he resisted the enforcement of the liens. After holding that under the contract McHenry was not entitled to any lien because the roof did not come up to the requirements of the contract and was of no value, the court, in discussing the lien of Miller as a subcontractor, said:

"It is insisted that Miller, who did the work, is entitled to a lien as a subcontractor, although McHenry, under whom he worked, is not entitled to recover. We cannot concur in this construction of the statute. Miller was employed by McHenry, and, while McHenry says that he employed Miller at the request of Terrell, the evidence does not sustain him in this, and Miller, having been employed by McHenry, must look to McHenry for his pay. If McHenry was entitled to any lien on the house, Miller would be entitled to the benefit of that lien; but if McHenry has no claim which he can enforce, and never had any, there is nothing for Miller's right to attach to. If McHenry had had a claim he could enforce against Terrell, and Terrell had paid McHenry, leaving Miller unpaid, a different question would be presented. But where a contractor fails to carry out his contract, and the owner of the property does not get what he contracted for, and in fact gets nothing of any value; so that he is in no way liable to the contractor, and never was liable, the subcontractor must look to the person with whom he contracted for his pay. McHenry was to get nothing for the roof if it leaked within 30 days, nor until it was made to stop leaking. Miller, who was a subcontractor under McHenry, is in no better attitude, so far as Terrell is concerned, than McHenry, with whom he contracted. If Miller has a lien for his work, then the company in Chicago which furnished the material might also have a lien, and thus Terrell would be in effect required to pay for the roof, although it was guaranteed to him and was valueless."

In *Doll v. Young*, 149 Ky. 347, 149 S. W. 854, it appears that Young, the owner of a lot, contracted with one Lutz to erect a building on the lot at the price of \$2,350, and that the building when nearly completed blew down, and Lutz did not undertake to rebuild it or complete his contract; the result being that the building Young con-

tracted for was never built by the contractor. After this, mechanics and materialmen who had furnished labor and material in the construction of the building under contract with Lutz brought suit against Young to enforce the liens they had filed. But the court, following the rule laid down in *Terrell v. McHenry*, held that, as Lutz had not performed his contract with Young, and consequently Young had received no consideration for the price he agreed to pay for the construction of the building, the subcontractors and materialmen could not recover.

There is no conflict in these cases. In the *Rieger* Case it was held that the subcontractors, whose claims amounted to \$2,070, had an enforceable lien upon the property because the owners admitted that the value to them of the building erected under the contract was more than the claims of the subcontractors, and it did not appear that the subcontractors were responsible for the breaches of the contract committed by the contractor for which the owners asserted a claim in damages against the contractor.

In the *Terrell* Case the court held that if the improvement furnished by the original contractor under his contract with the owner was of no value or benefit to the owner, the mechanics or materialmen under contracts with the original contractor could have no lien on the property because the owner had not received anything of value. In other words, the rule laid down in these cases is: (1) That where the original contractor completes the work in accordance with the contract, the property owner will be responsible to mechanics, materialmen, and subcontractors who have fulfilled their contracts, and who have observed the requirements of sections 2463 and 2468 of the statutes for the amount of their claims that do not aggregate more than the contract price, although the owner may have paid the original contractor the full contract price; (2) that although the improvement may not have been constructed in accordance with the contract, and hence the owner does not owe the full contract price, he will yet be liable to subcontractors, materialmen, and mechanics who have observed the requirements of the statutes to the extent of the reasonable value of the improvement to him, and cannot set off any claim for damages he may have against the original contractor for failing to perform the work according to contract against the claims of the subcontractors, mechanics, or materialmen, although he may have an abatement of their claims to the extent that he was damaged by their failure to perform the contracts they had made with the original contractor; (3) that if the improvement contracted for is wholly worthless to the property owner and of no value at all to him on account of the

failure of the contractor to fulfill the contract, then a subcontractor, mechanic, or materialman can assert no claim against the property owner or lien on the property, although he may not be responsible for the conditions that resulted in the improvement being worthless and of no value to the property owner; (4) that in every state of case the property owner may have an abatement of the claim asserted by the subcontractor, mechanic, or materialman to the extent that the property owner sustains damages by his failure to perform his part of the contract. Having this view of the law of the case, and being of the opinion that the filter plant was of no value to the city, it follows that Monyahan has no claim against the city or lien on the property. The fact that the city had paid the Greer Company \$1,125 does not, of course, help the case for Monyahan. The city simply lost that much money. If it had not paid the Greer Company anything on the contract price, Monyahan would not be entitled to recover anything because the city, not having received anything of value, did not owe the Greer Company anything.

The judgment is affirmed.

STEWART DRY GOODS CO. v. MILLER.

(Court of Appeals of Kentucky. Feb. 23, 1916.)

MASTER AND SERVANT—§284—INJURIES TO SERVANT—CHILD LABOR LAW.

Under Ky. St. § 331a, subsec. 1, prohibiting employment of children under 14 years old in the transmission of messages, subsection 2, as amended by Act March 23, 1910 (Acts 1910, c. 85), prohibiting employment of children between 14 and 16 years old in the transmission of messages, unless the employer procures an employment certificate from the school superintendent, and subsection 11, forbidding the employment of children under 16 years old at any dangerous occupation, and making the decision of the county physician or city health officer as to these matters final, where an employer procured the certificate of the school superintendent, but not of the county physician or city health officer, and there was evidence that a boy 15 years old, employed as a messenger, was required to use frequently a freight elevator which was not reasonably safe, the question whether there was a violation of the statute was properly submitted to the jury; the purpose of the certificate of the school superintendent being to enable the school authorities to have a record showing where children of school age were employed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. §284.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by John K. Miller, by, etc., against the Stewart Dry Goods Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. C. Kinkead, H. H. Nettelroth, and Fred Forcht, all of Louisville, for appellant. O'Doherty & Yonts, of Louisville, for appellee.

TURNER, J. Appellee, John K. Miller, a boy then 15 years of age, in November, 1912, while employed by appellant as a messenger boy, had his heel crushed by an elevator operated by appellant's servants, which resulted in the amputation of his leg at a point between the ankle and the knee. Through his statutory guardian he instituted this action for damages, and upon the trial was awarded a verdict and judgment for \$10,000, from which this appeal results. In the pleadings two grounds of negligence were relied upon as a basis for a recovery: First, the negligent maintenance and operation of the elevator; and second, that the plaintiff while under 16 years of age was employed by the defendant in an occupation dangerous to life or limb as prohibited by our child labor statute. The court in its instructions submitted both of these questions to the jury, and authorized a recovery under the allegations as to unlawful employment. The only ground for reversal urged is that the character of employment is not such as is prohibited by our child labor statute, and that therefore any submission of this question to the jury was prejudicial error.

The child labor law was amended by the 1914 General Assembly, but the statute in effect when this injury occurred, and which must control this case, will be found in Carroll's 1909 Kentucky Statutes, § 331a, as amended by an Act of March, 23, 1910. The three subsections involved are as follows: Subsection 1:

"No child under fourteen years of age shall be employed, permitted or suffered to work in or in connection with any factory, work shop, mine, mercantile establishment, store, business office, telegraph office, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages. * * *

Subsection 2, as amended by the act of March 23, 1910 (Acts 1910, p. 256) provides that:

"No child between fourteen and sixteen years of age shall be employed, permitted or suffered to work in or in connection with any factory, workshop, mine, mercantile establishment, store, business office, telegraph office, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages, unless the person or corporation employing him"

—procures and keeps on file an employment certificate from the school superintendent as prescribed.

Subsection 11:

"No child under the age of sixteen years shall be employed at sewing belts, or to assist in sewing belts, in any capacity whatever, nor shall any child adjust any belt to any machinery: they shall not oil or assist in oiling, wiping or cleaning machinery; they shall not operate, or assist in operating, circular or hand saws, wood shapers, wood joiners, planers, sandpaper or wood polishing machinery, emery or polishing wheels used for polishing sheet metal, wood turning or boring machinery, stamping machines in sheet metal, and tinware manufacturing, stamping machines in washer and nut factories, operating corrugating rolls, such as are used in roofing factories, nor shall they be employed in operating any steam boiler, steam machinery, or other steam generating apparatus, or as pin

boys in any bowling alley; they shall not operate or assist in operating dough brakes, or cracker machinery of any description, wire or iron straightening machinery, nor shall they operate or assist in operating rolling mill machinery, punches or shears, washing, or grinding or mixing mills, or calendar rolls in rubber manufacturing, nor shall they operate or assist in operating laundry machinery, nor shall such children be employed in any capacity in preparing any composition in which dangerous or poisonous acids are used, and they shall not be employed in any capacity in the manufacture of paints, colors or white lead, nor shall they be employed in any capacity whatever in operating or assisting to operate any passenger or freight elevator, nor shall they be employed in any capacity whatever in the manufacture of goods for immoral purposes, nor in any theater, concert hall, or place of amusement wherein intoxicating liquors are sold, nor shall females under sixteen years of age be employed in any capacity where such employment compels them to remain standing constantly. Nor shall any child under sixteen years of age be employed at any occupation dangerous or injurious to health or morals, or to lives or limbs, and as to these matters, the decision of the county physician or city health officer, as the case may be, shall be final."

In this case the employer procured from the school superintendent the certificate of employment provided for in subsection 2, and the argument for appellant is that as that subsection authorizes the employment of children between 14 and 16 years of age in the distribution and transmission of merchandise and messages, and as the employment of messenger boy is not an occupation dangerous or injurious to health or morals or to lives or limbs, as is prohibited in the concluding clause of subsection 11, the employment was justified, and this issue should not have been submitted to the jury. It is urged that the transmission of messages or packages by a boy between 14 and 16 years of age is, from its very nature and upon its face, not a dangerous occupation such as is contemplated by the concluding sentence in subsection 11; that that subsection and the concluding clause thereof was intended only to apply to occupations which were inherently dangerous or having an actual tendency toward moral contamination. It is further plausibly and forcibly argued that there is of necessity some danger attending any occupation of a child, or even in play or sport indulged in by him, and that the prohibition of the statute is against the employment of children under the age of 16 in dangerous occupations, and was not designed to either enlarge or diminish the liability of an employer where a child under 16 years of age is engaged by him in an occupation not in itself dangerous or hazardous. It is true that under subsection 2 children between 14 and 16 years of age may be employed as messengers by the procurement of the certificate therein required; but that subsection must be construed in connection with subsection 11, and the latter, after enumerating a number of employments which the Legislature deemed dangerous to children under 16 years of age, doubtless realizing that there were certain employments in which children under that

age might be properly employed when the nature of their duties and the surroundings were properly understood in advance by a person qualified to pass upon them, further provided:

"Nor shall any child under 16 years of age be employed at any occupation dangerous or injurious to health or morals, or to lives or limbs, and as to these matters, the decision of the county physician or city health officer, as the case may be, shall be final."

From this concluding clause of that subsection there can be no doubt that the Legislature recognized that there were certain occupations which children under 16 years of age might or might not be properly engaged in, depending upon the nature of the particular duties required and depending upon the physical and moral surroundings while so performing those duties, and intended in each case to leave the final determination of this question to the county physician or city health officer. Therefore before an employer employs a child under 16 years of age, it becomes his duty to fully and fairly disclose to the county physician or the city health officer the nature of the duties which will be expected of the child, and the physical and moral conditions which will surround him while in the performance of those duties, and if he does so he may properly engage the services of the child without violation of the statute, and not otherwise. The validity of this delegation of authority to the county physician or city health officer was upheld by this court in the case of *L. H. & St. L. Ry. Co. v. Lyons*, 155 Ky. 396, 159 S. W. 971, 48 L. R. A. (N. S.) 667. And in the same case the court, in construing subsection 11, said:

"It was, of course, well known to the Legislature that there might be reasonable difference of opinion as to whether certain employments other than those specifically named in the statute were dangerous, and the obvious purpose of thus confiding to an officer the right to decide whether an employment was dangerous or not was to furnish to employers a means by which they might save themselves from the penalties of the statute in the event they employed a child in an occupation concerning the dangers of which there might be room for reasonable difference of opinion. We understand this reference of the question to the decision of the official named to mean that when an employer of labor wishes to engage the services of a child under sixteen years of age, in an occupation not specifically prohibited, but that might be regarded as dangerous or injurious to health or morals or to lives or limbs, he may apply to the county physician or city health officer, as the case may be, and obtain from him a decision; and if this officer, after having submitted to him a full and fair statement of the nature of the employment, decides that it is not dangerous or injurious to health or morals or to lives or limbs, the employer may engage the services of the child without violating the statute."

In the case at bar the court submitted to the jury the question of fact whether the occupation of the infant appellee was dangerous to lives or limbs, and in the case just quoted that was held to be proper in a case where the employer had not procured the re-

quired certificate from the physician or health officer.

The evidence in this case was that the infant appellee used a bicycle in carrying packages for appellant; that he was required to keep this bicycle in the basement of appellant's business place, and in the prosecution of his duties it was necessary that he should go to the basement 15 or 20 times a day to get his bicycle so that he might deliver packages; that in going thus to and from the basement he was required by his employer to use a freight elevator, and that that elevator, for several reasons not necessary to state, was neither constructed nor maintained in a reasonably safe way, and that upon the occasion of his injury it was overcrowded and improperly managed. If the said health officer or county physician had been applied to in this case, and had been fully acquainted with the necessity of the boy using that elevator 15 or 20 times a day, and with the facts as to its alleged construction and maintenance shown in the plaintiff's evidence, it is not probable that he would have given his consent to such employment. The certificate of the school superintendent, required by subsection 2, was not intended to authorize absolutely the employer to employ a child in an occupation which, under some circumstances, might be considered dangerous, but a reading of the whole act is convincing that the purpose of such certificate was to enable the school authorities to have a record showing where children of school age were employed so that trace might be kept of them. The authority of the employer to employ a child in any such occupation, which may or may not be dangerous according to the facts and circumstances surrounding the child while following such occupation, must come from the county physician or city health officer, as is expressly provided in subsection 11, and the authority of such officer must be exercised, as is evidently contemplated by the statute, only after a full and fair disclosure of the nature of the employment, the surroundings of the child, both physical and moral, while so employed.

Manifestly the purpose of the statute was to throw around children engaged in any occupation all possible safeguards to the end that they may reach maturity morally and physically fitted for the higher duties of citizenship. If, therefore, an employer sees proper to employ a child under 16 years of age in an occupation, where from the nature of the duties required and the physical surroundings reasonable men might differ as to whether the occupation was or was not dangerous, without first procuring the decision of the county physician or city health officer on this question, the question of fact as to whether such occupation was or was not dangerous must, of necessity, be submitted to the jury; for if the employment is dangerous he has violated the statute, and if

it is not dangerous he has not violated the statute.

Judgment affirmed.

VILLIER et al. v. WATSON.

(Court of Appeals of Kentucky. Feb. 23, 1916.)

1. ADOPTION \S 21—RIGHT OF INHERITANCE—DEPENDENT ON STATUTE.

The right of one not the child of another to inherit from such other as a child must necessarily derive its entire life from the statute, and must depend upon a compliance with the statute.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 35, 36, 38-40; Dec. Dig. \S 21.]

2. ADOPTION \S 20—DUTIES AND LIABILITIES—PARENTAL CONTROL.

Ky. St. \S 2071, provides that any person of age may by petition in the circuit court obtain an order declaring a person named heir at law of the petitioner, and capable of inheriting as though he were the child of the petitioner. Section 2072 provides that such court shall have authority by consent of the parents, or either of them, if one be dead, to give the petitioner the parental control of such adopted person, if an infant. *Held* that, in order to make valid an adoption, as an heir, the parental control does not necessarily go with the adoption.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 29-32; Dec. Dig. \S 20.]

3. JUDGMENT \S 470—CONCLUSIVENESS—COLLATERAL ATTACK.

A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment by parties or privies in any collateral action or proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 907; Dec. Dig. \S 470.]

4. ADOPTION \S 14—EFFECT OF SUBSEQUENT ADOPTION BY ANOTHER.

On the petition of V. stating that he was desirous of adopting two minor children and making them capable of inheriting from him as his heirs at law, that their father and mother were dead, and that they were in the custody and control of their grandfather, who joined in the petition, a judgment was rendered declaring such minors to be heirs at law of V., and awarding the parental control to V. One of the children subsequently returned to her grandfather's house, and the grandfather, with V.'s consent, took the other child and filed a petition stating that he was desirous of adopting them and making them his heirs at law. V. joined in the petition and consented to their adoption by the grandfather, and a judgment was entered adjudging them to be heirs at law of the grandfather, and that he have the parental control of the children. *Held* that, as the proceeding by the grandfather to adopt the children did not seek to annul the prior judgment of adoption, even if the court had power to do so, the former judgment was conclusive on collateral attack, and the children were entitled to inherit from V., especially as the second judgment did not declare the children to be capable of inheriting from the grandfather as though they were his children, but merely declared them to be heirs at law, which, as grandchildren, they already were, and hence made no change in their status, except the change of right of parental control.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 22, 24, 25; Dec. Dig. \S 14; Judgment, Cent. Dig. \S 914.]

5. ADOPTION \S 21—RIGHT OF INHERITANCE—DEPENDENT ON STATUTE.

The right of an adopted child to inherit is based upon the statute, and not upon any common-law or civil law status.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 35, 36, 38-40; Dec. Dig. \S 21.]

6. ADOPTION \S 14—JUDGMENT OF ADOPTION—ABROGATION.

A judgment of adoption was not abrogated so as to defeat the adopted children's right of inheritance from the adoptive parent by a judgment bestowing the parental control of the adopted children upon a party other than the adopting parent, as the statute relative to adoption, when invoked, creates the same relations between an adopted child and its adoptive parent as a child bears to its own parent, as near as may be, and the courts have authority in proper cases to take the parental control of children from their parent, and vest such control in another when the good of the child demands such drastic action, and such action does not destroy the right of inheritance from the parent by the child.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. \S 22, 24, 25; Dec. Dig. \S 14; Judgment, Cent. Dig. \S 914.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Proceeding by Marian Villier and others to set aside an order appointing Ruth N. Watson as administratrix of the estate of Paul Villier, deceased. From a judgment refusing to remove the administratrix, the petitioners appeal. *Affirmed*.

Benj. F. Gardner, of Louisville, for appellants. W. H. McCullough and J. W. S. Clements, both of Louisville, for appellee.

HURT, J. Paul Villier, who was a resident of Jefferson county, filed a petition in the Jefferson circuit court, by which he sought to adopt Ruth N. Watson and Nellie Marie Watson, who were two infant children, under the provisions of sections 2071 and 2072 of the Kentucky Statutes. He stated in his petition that he was a resident of Jefferson county, and that the infants were also domiciled in the county; that Ruth Naomi Watson was 12 years of age, and Nellie Marie Watson was 7 years of age; that their father and mother were dead, and they were then in the custody and control of their grandfather, Henry Watson, who joined in the petition for the purpose of consenting that Villier should have the parental control of the children; that he (Villier) desired to adopt the children and make them capable of inheriting from him as his heirs at law, and prayed that the court render a judgment to that effect. Afterwards he filed an amended petition, in which he stated that he had been a married man, but had obtained an absolute divorce from his wife, and had been restored to all the rights and privileges of an unmarried person. On the 9th day of April, 1906, the action having been submitted, the court adjudged that Villier was a person over 21 years of age, and that:

"The said Ruth Naomi Watson and Nellie Marie Watson and each of them are hereby declared to be heirs at law of the said Paul Villier, and, as such, capable of inheriting as though they and each of them were the children of said Villier. The said Villier is further awarded and given the parental control of said children and each of them, and said Villier, with respect to said children, shall be under the same responsibilities as if they and each of them were his own children."

Villier took the custody of the children, and they resided with him at his residence for about four years, during which time he seems to have treated them kindly and provided for their wants as a real father, but at the end of this time the older girl, Ruth Naomi Watson, left the home of Villier and went to that of her grandfather, Henry Watson. With the consent of Villier, the grandfather removed the younger girl from the house of Villier to his home.

Thereafter the grandfather, Henry Watson, filed his petition in the Jefferson circuit court, in which he alleged the infancy of the two children; the fact that they were declared by the former judgment of the court to be the heirs at law of Villier, and their parental control conferred upon Villier; that "he (Watson) was desirous of adopting the children and making them capable of inheriting as his heirs at law," and also of having the parental control of the children; that he and said children were residents of the county, and prayed that they be declared his heirs at law, and, as such, capable of inheriting from him as though they were his children, and that he be given the parental control of them." Paul Villier joined in the petition and consented to their adoption by Watson, and also that Watson have the parental control of them.

This cause having been submitted for trial, the court adjudged the children to be the heirs at law of Watson, and capable, as such, of inheriting as his heirs at law, and reciting the fact that Villier, who by the former judgment had been given parental control of the children, had consented to Watson having their parental control, also adjudged that Watson have the parental control of the children. Previous to the time of their adoption by Villier their grandfather, Henry Watson, had been appointed and qualified as the statutory guardian of the two girls. After the last-mentioned judgment the girls never resided with Villier. On January 2, 1915, Villier died intestate, domiciled in Jefferson county. He did not leave surviving him any children of his own, but there survived him one sister and three half-sisters, and two nephews and a niece, children of a deceased brother.

On January 9, 1915, Ruth N. Watson, who at that time was above the age of 21 years, applied, as a relation of the decedent, entitled to a distributive share of decedent's estate, for appointment as administratrix of his estate. The county court sustained her motion and granted her the administration

of the estate. She executed bond as such, and proceeded to the administration. On January 11, 1915, the above-named kinsfolk of the decedent entered a motion in the county court to set aside the order appointing the appellee as administratrix, and to appoint in her stead the Louisville Trust Company. The county court overruled the motion, and from the order overruling their motion they appealed to the circuit court. The circuit court sustained the action of the county court, and refused to remove the appellee as administratrix, and from its judgment the collateral heirs of Villier have appealed to this court.

It is conceded that, if appellee is a daughter of decedent by adoption, and entitled to inherit from him as though she were his child, the motion of appellants to have her removed as administratrix ought not to prevail, but, if she is not such heir, and not entitled to inherit from him as though she were his child, the appellants ought to succeed upon their motion.

It is also conceded that, by virtue of the judgment of the court by which Villier adopted the appellee and her sister, and which declared them to be his heirs, and, as such, capable of inheritance from him as though they were children of his, the appellee became an heir of Villier at his death, and entitled to inherit from him as though she were a child of his, and to inherit such portion of his estate as she would inherit if she were his own child, under the terms of the statutes which constitute the laws of descent and distribution in this state. Thus the controversy is narrowed to the determination of what effect, if any, the judgment of the court by which the girls were adopted by Watson had upon the judgment of adoption of them by Villier, and what effect, if any, the subsequent conduct of the parties had upon the efficacy of the judgment through which they were adopted by Villier.

[1] This, being one of the states which derives its legal principles and theories in large part from those of the common law, had no provision in its laws whereby one could make another who was an alien to his blood an heir of his, in the sense of a child, until in the year 1860, when a statute was adopted which for the first time in its judicial history permitted persons not of kin to assume such relations as would enable one to inherit from another as though he were a child of such other. The right of one not the child of another to inherit from such other as though he were a child of such other must then necessarily derive its entire life from the terms of the statute, and must depend upon the fact that there has been a compliance with the statute. The statute under which the deceased, Villier, adopted the appellee and her sister are sections 2071 and 2072, Ky. St., and which are as follows:

"Sec. 2071. Any person twenty-one years of age, may, by petition filed in the circuit court

of the county of his residence, state in substance, that he is desirous of adopting a person, and making him capable of inheriting as heir at law of such petitioner; and said court shall have authority to make an order declaring such person heir at law of such petitioner, and, as such, capable of inheriting as though such person were the child of such petitioner; but no such order shall be made if the petitioner be a married man or woman, unless the husband or wife join in the petition.

"Sec. 2072. Said court shall have authority, by consent of the parents, or either of them, if one be dead, to give the petitioner the parental control of such adopted person, if an infant; and said petitioner shall be under the same responsibilities as if the person so adopted were his own child."

[2] It will be observed that the court has authority, upon application of one who is desirous of adopting another and making him capable of inheriting from him as his heir, to render a judgment declaring such person to be the heir of the petitioner, and capable of inheriting from him as though he were the child of the petitioner, and this the court may do without the consent of the person adopted as an heir, or any one for him; but, if the person adopted is a minor, the court may adjudge that the petitioner have the parental control of the one adopted, upon the consent of his parents, or one of them who may be living. In order to make valid an adoption as an heir, the parental control does not necessarily go with the adoption as an heir.

The decree of the court is the source for determining the rights of the parties under the statute, and is conclusive. The decree in the case at bar adjudged that appellee was an heir at law of the decedent, and, as such, capable of inheriting from him as though she were his own child. In I. C. J. 1391, it is said:

"A final decree of adoption is conclusive upon all parties interested in the proceedings."

The same authority (I. C. J. 1393) holds that a judgment of adoption cannot be collaterally attacked, except for want of jurisdiction of the court which rendered it.

[3] In 23 Cyc. 1055, the rule is laid down:

"A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity or binding effect, by parties or privies, in any collateral action or proceeding."

To the same effect is the doctrine as stated in 1 R. O. L. 626, 627. The same is the rule in this state. *Paul v. Smith*, 82 Ky. 451; *Com. v. Morrison*, 4 Bibb, 336; *McIlvoy v. Speed*, 4 Bibb, 85; *Lockett v. Gwathmey*, Litt. Sel. Cas. 121.

[4] No action or proceeding was ever brought for annulling or overturning the judgment. The proceeding by Watson to adopt the children as his heirs and to obtain parental control of them, and to which Villier gave his consent, did not seek to annul or set aside the prior judgment of adoption by Villier, and the judgment rendered by the court in the action did not attempt to dis-

turb the prior judgment of adoption. The judgment rendered in the second proceeding, it will be observed, did not declare the children to be capable of inheriting from Watson as though they were his children, but declared them to be heirs at law of Watson, which they already were, as they were the children of his deceased son, and hence the only change rendered by the judgment in their status was a change of right of parental control of them from Villier to Watson, which, as the judgment recites, was by the consent of Villier. The judgment by which appellee and her sister were declared to be the heirs of Villier, and, as such, capable of inheriting from him as though they were his own children, never having been annulled or set aside in any direct proceeding for that purpose, it seems must now be conclusive upon all parties and immune from collateral attack. It is, however, insisted for appellants that it was unnecessary to set aside the judgment decreeing the children to be heirs of Villier in order for them to lose the right of inheritance from him, because the second adoption was procured by the same parties who petitioned for the first adoption, and the court was authorized to annul its first judgment, by which Villier made the adoption, upon their request. Without determining whether it was within the power of the court to set aside the judgment by which Villier made the adoption, it is sufficient to say that such request was not made by the parties, nor such relief granted by the court.

[5] Relying upon analogies, which counsel claim to draw from the civil law, it is insisted that a second adoption so changes the status of the child that it loses its right of inheritance from the first adoptive father. These analogies are drawn from the civil law, upon the theory that, as the law of adoption was unknown to the common law, and was a creature of the civil law, its principles ought to govern the status of an adopted child and control its rights of inheritance. The right of an adopted child to inherit is, however, based upon the statute, and not upon any common-law or civil law status. This court, in *Atchison v. Atchison's Ex'r*, 89 Ky. 489, 12 S. W. 942, 11 Ky. Law Rep. 705, said:

"The adoption, as authorized by our statute, gives the one adopted the status of a child, with all the capacity to inherit that it would have if, in fact, the child of one adopting it."

In the same case the following language was used:

"The mode of descent and distribution is regulated by the statute under which all of these parties would have taken if there had been no will, and, when the adoptive father dies intestate, the child, inheriting as if, in fact, a child of the decedent, can take in no other mode than that pointed out in the statute."

From these excerpts the conclusion is drawn that the court was following the analogies of our own statute laws regulating descent and distribution, and not drawing its conclusions from the civil law. While in the case of *Power v. Hafey*, 85 Ky. 671, 4 S.

W. 683, 9 Ky. Law Rep. 369, the court called the civil law to its aid, the conclusion reached was one in consonance with our laws of descent. In that case it was held that the adopted child's children inherited as grandchildren from the adoptive father, where the adopted child died before the adoptive father. The same rule would have applied in the case of the children of a real son or daughter who died before its parent. In *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563, it was held that property received by an adopted child from his adoptive father returned to that parent or his kindred when the adopted child died in infancy and without issue, and property held by an adopted child which it received from its father returned to him when the child died in infancy. In *Anderson v. Mundo & McGraw*, 77 S. W. 926, 25 Ky. Law Rep. 1644, it was held that the property of an adopted child could not be reached by the creditors of the adoptive parents, upon the ground that its maintenance had been borne by the adoptive parents. In the case of *Atchison v. Atchison*, supra, it was held, under the statute of descent and distribution in force at that time, that, where there was an adopted child which survived the adoptive father, the widow could only take one-third of the personalty, instead of one-half, to which she was entitled, in case of the death of the husband leaving no issue. In *Drain v. Violet*, 2 Bush, 156, it was held that a son who had been adopted by the husband, and not by the wife, through an act of the General Assembly, could not inherit from the widow of his adoptive father. His case was analogous to a son who cannot inherit from a stepmother. Hence it appears that this court, in determining the rights of inheritance of adopted children, has followed the analogies to be drawn from our own laws of descent, rather than from such as may be drawn from the civil law; but no analogy has been allowed to have effect beyond the terms and purpose of the statute authorizing adoption. All the authorities agree, that the fact of adoption does not lose the adopted child's right of inheritance from his parents. With this right existing, it would be difficult to see why a child could not inherit from two or more persons who might by adoption bestow that right upon him. If such rule, as is contended for by appellants, should prevail, and a child was held in adoption, the adoptive father or other designing person could take away the child's right of inheritance from the adoptive father by procuring some penniless person to adopt the child as his heir, which he might do without the child's or any one else's consent, and the parental control could be acquired by the consent of the adoptive parent. In *Russell's Adm'r v. Russell's Guardian*, 14 Ky. Law Rep. 236, the superior court held that, where a child under the control of the Louisville

Baptist Orphans' Home was adopted, and the adoptive father dies, and the Home canceled the contract of adoption in consideration of another adopting the child, it did not deprive the child of its right of inheritance under the original article of adoption.

[8] It is insisted that the adoption by Villier was not alone as provided by section 2071, supra, but as provided by that, and also as provided by section 2072, supra, that is, the same judgment which declared appellee to be an heir of Villier also gave the parental control of her to him, and, the judgment in the proceeding by Watson having bestowed the parental control upon Watson, that it had the effect to abrogate the judgment in the proceeding by Villier in toto, and thus took away the right of appellee to inherit from Villier as his heir. In this contention we cannot concur. The statute does not empower the court to declare an adopted child an heir of an adoptive father because he is awarded the parental control of the child, but it empowers the court to grant the parental control of the child to the adoptive father because the child is made his heir and made capable of inheriting from him as though it were his child. The intent of both sections of the statute supra, when invoked, is to create the same relations between an adopted child and its adoptive father as a child bears, under the laws, to its own father, as near as may be. The courts are invested with authority, in proper cases, to take the parental control of children from their parents and to vest such control in another, when the good of the child demands such drastic action. Section 2123, Ky. St.; *Hamilton v. Christian Church Widows' & Orphans' Home*, 153 Ky. 429, 155 S. W. 1128.

When the law, through the courts, takes a child from the parental control of the parent, the action does not destroy the right of inheritance from the parent by the child. Neither does the willful or unjustified departure of the child from the parental roof and control destroy its right of inheritance. The parent cannot take from his child its right of inheritance, though he may make the right valueless by a disposition of his property. The case of *Hamilton v. Widows' & Orphans' Home*, supra, is not based upon a state of facts altogether similar to the facts of this case. In that case Hamilton had released the custody and control of his infant son to a children's society which was authorized by its charter to make a contract for the adoption of the child. The society made a contract with Bedford by which the parental control of the child was given to him, and he adopted the child as his heir, but the society reserved the right to cancel the contract for failure to perform the conditions by Bedford. Bedford, by the proper proceedings in court, adopted the child as his heir, under the provisions of section 2071, supra. Thereafter, in a litigation between Hamilton, Bedford, and

the society, the circuit court adjudged the custody and parental control of the child to the society, as against both Hamilton and Bedford, and set aside the decree of adoption of the child by Bedford. Upon appeal this court sustained the judgment of the circuit court to the extent that it canceled the contract for the parental control of the child between Bedford and the society and gave the parental control to the society, as against its father, but reversed the judgment of the circuit court to the extent that it set aside the decree of adoption. The decree of adoption in that case did not award the parental control of the child to the adoptive father, as the decree did in the case at bar, but in that case the contract of adoption with the society did give the parental control to Bedford, and it derived its authority to the parental control of the child from its father. The effect of the court's holding was that, under those circumstances, the right to inherit from the adoptive father was not necessarily connected with, nor did it depend upon, the adoptive father's right to the parental control of the child.

For the reasons indicated, it appears that the appellee is an heir of Villier, and entitled to inherit from him as if she was his child. As such, she is a distributee of his estate. The judgment is therefore affirmed.

ELSEY v. PEOPLE'S BANK OF BARDWELL.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

1. BILLS AND NOTES §121 — PERSON PRIMARILY LIABLE — DISCHARGE OF INSTRUMENT.

One signing a negotiable note on the face thereof, without anything appearing thereon to indicate that he signs as surety or as other than maker, is primarily liable, within Negotiable Instruments Act (Ky. St. c 90b) § 191, and though a surety for the principal maker is not discharged except in one of the ways provided by section 119, though the holder takes the note with knowledge of the facts.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255, 256; Dec. Dig. § 121.]

2. BILLS AND NOTES §146—NEGOTIABLE INSTRUMENTS ACT—CONSTRUCTION.

The negotiable instruments act covers the entire subject of negotiable instruments and is a complete body of law on that subject and controls in all cases to which it is applicable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 361; Dec. Dig. § 146.]

Appeal from Circuit Court, Carlisle County.

Response to petition for rehearing. Rehearing granted, and judgment of circuit court affirmed.

For former opinion, see 166 Ky. 386, 179 S. W. 392.

John E. Kane, of Bardwell, for appellant. Robbins & Robbins, of Mayfield, and T. M. Collins, of Bardwell, for appellee.

MILLER, C. J. The facts of this case may be found in 166 Ky. 386, 179 S. W. 392. The case was prepared and tried in the circuit court, and argued and decided upon the appeal to this court, upon the theory that the note was not a negotiable instrument, or was not affected by the negotiable instruments law of this state. Neither party mentioned that act in his brief; and, in their petition for a rehearing, counsel for appellee concede that the case was correctly decided in this court under the law of this state which antedated the negotiable instruments law. For the first time, however, it is suggested in the petition for a rehearing that, under the negotiable instruments law, J. L. Elsey, although he was a surety, is primarily liable upon the note sued on, and has not been discharged from that liability in any one of the five ways provided in section 119 of the act.

[1] The case is controlled by the negotiable instruments act, which is found in chapter 90b of the Kentucky Statutes. Section 60 of that act reads as follows:

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

In the case at bar, J. L. Elsey signed the note without anything appearing on the face of the note to indicate that he signed it as surety, or as other than maker.

Section 29 of the act further provides as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

And section 191 thereof further provides:

"The person 'primarily' liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are 'secondarily' liable."

Finally, section 119 also provides:

"A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation. (3) By the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

In *First State Bank of Nortonville v. Williams*, 164 Ky. 143, 175 S. W. 10, it was held that an accommodation maker, or surety, on a promissory note, was primarily liable, although the fact of suretyship was known to the payee. The authorities sustaining the doctrine are cited in that case, where it was said that, the act having covered the entire subject of discharge and release, it controls;

and its meaning should be ascertained by interpreting the language used, and not by assuming that the former law on the subject should remain unaltered. And it may be said to be the general rule that one who signs a promissory note on the face thereof, and who in that way becomes a surety for the principal maker, as J. L. Elsey did in this case, is, by force of section 191, supra, primarily liable for the payment of such note. First State Bank of Nortonville v. Williams, 164 Ky. 143, 175 S. W. 10; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280; Vanderford v. Farmers' & Mechanics' National Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; Richards v. Market Exchange Bank Co., 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99.

In view of the decision in the Williams Case, a further discussion of J. L. Elsey's liability is unnecessary. And J. L. Elsey not having been discharged in any one of the ways provided by section 119, supra, he remains liable upon the note.

[2] Appellant insists, however, that it was never contemplated by the Legislature in passing the negotiable instruments law that it should have the effect to repeal or abrogate existing laws with reference to the duties and liabilities of parties to negotiable instruments, and that sureties remain, as formerly, the favorites of the law and bound only by the letter of their obligations. The act, however, covers the entire subject of negotiable instruments, and must be treated as a complete body of law upon that subject, and controlling in all cases to which it is applicable. Broadus' Dev. v. Broadus' Hrs., 10 Bush, 299.

The petition for a rehearing is granted, the former opinion is withdrawn, and the judgment of the circuit court is affirmed.

McKAY v. LOUISVILLE & N. R. CO. et al.
(Supreme Court of Tennessee. Feb. 11, 1916.)

1. CERTIORARI § 68 — SCOPE OF REVIEW — PETITION—ASSIGNMENTS OF ERROR—NECESSITY.

Under Acts 1907, c. 82, creating the Court of Civil Appeals and regulating the method of reviewing its judgments, on petition by defendant for certiorari to review the opinion and judgment of the Court of Civil Appeals, which on some questions was favorable to the defendant and against the plaintiff, plaintiff, who presented no petition for certiorari and no assignment of errors, was concluded by the court's rulings adverse to him.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.]

2. CONTRACTS § 147 — CONSTRUCTION—INTENTION OF PARTIES.

The object in the construction of contracts is to ascertain the intention of the parties and what the contract means as a whole.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.]

3. CONTRACTS § 169—CONSTRUCTION—RELATION OF PARTIES.

In the construction of contracts, courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object to be accomplished.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.]

4. CARRIERS § 307—LIMITING LIABILITY — EXPRESS COMPANY'S EMPLOYEES—CONTRACTS OF EMPLOYMENT.

A contract, whereby plaintiff, then employed as a messenger by an express company, entered into a contract with the express company containing the words "have entered or am about to enter," for a continued future employment, agreeing to the express company's contract to save defendant railroad harmless from all liability to the company's employees for any injury on defendant's line, whether caused by negligence of defendant or otherwise, and ratifying its contracts with carriers when accepted by the express company, initiated a new term of employment, so as to constitute a good consideration for the plaintiff's contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.]

5. CARRIERS § 307 — CONTRACT LIMITING LIABILITY—READING CONTRACT—EFFECT.

In such case, plaintiff, in the absence of any fraud practiced upon him by the express company in procuring the contract, was bound thereby, whether he did or did not read the contract when he signed it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.]

6. CARRIERS § 307—EXPRESS MESSENGER — RELEASE OF CARRIER'S LIABILITY—EFFECT.

Plaintiff, who by contract with an express company for employment as messenger assumed the risk of injury, and released his claims against carriers for liability for personal injury and ratified the company's contracts with carriers, and agreed to save the company harmless as to any claims for personal injury, and who received the employment as a consideration, was bound by his contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491, Dec. Dig. § 307.]

7. CARRIERS § 241—PASSENGER — EXPRESS MESSENGER.

Under such contract of employment, the employee, injured by wreck on defendant's line, did not stand to the defendant in the relation of a passenger, so as to make defendant liable for his injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 977-979; Dec. Dig. § 241.]

8. CARRIERS § 307—PUBLIC POLICY — RELEASE OF RIGHT TO RECOVER FOR PERSONAL INJURY.

Such contract, in respect to plaintiff's surrender of his right of action against the carrier for personal injury in consideration of his employment by the express company, was not void as against public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.]

Certiorari to Court of Civil Appeals.

Action by Val McKay against the Louisville & Nashville Railroad Company and others. From a judgment of the Court of Civil Appeals reversing a judgment of the circuit court for defendants, dismissing the suit, and remanding the cause for further proceedings, defendants bring certiorari. Re-

versed, and judgment of circuit court affirmed.

Jno. T. Allen, of Nashville, for plaintiff. Chas. C. Trabue and F. M. Bass, both of Nashville, for defendants.

BUOHANAN, J. The case is pending on certiorari. The writ has been granted and argument allowed. It is a suit for damages for personal injuries sustained while plaintiff, in the discharge of his duties as a messenger for the Southern Express Company, was riding in an express car, part of a passenger train operated by the defendant railroad company. The train was wrecked, and the injuries to plaintiff resulted.

To the declaration averring the negligent operation of the train as the cause of the wreck and consequent injuries to plaintiff, the railroad company, by way of defense, interposed its plea of the general issue, and, in addition thereto, a special plea, as was its right under section 4637, Shan. Code. This special plea admitted that the defendant was a corporation and common carrier on and prior to the date of the injury to plaintiff, but averred that on said date there was in force between it and the Southern Express Company a contract, by the terms of which it was agreed between the parties that the railroad company would furnish, for the use of the express company in the transaction of its business, cars to be hauled by the railroad company on its line, to be used for the transportation of express matter, and to be occupied by employes of said express company in charge of such express matter, such employes to be transported in said express cars free of charge by the railroad company, and that the express company should protect and hold harmless the railroad company from all liability that the railroad company might incur, or be under to the employes of the express company for any injuries such employes might sustain while being transported by defendant over its line, whether such injuries were caused by the negligence of the railroad company or its employes, or otherwise, and that pursuant to said contract the railroad company did furnish to the express company cars known as express cars, and one of these was occupied by plaintiff as express messenger at the time plaintiff sustained the injuries on which this suit is based; plaintiff being in said express car as custodian of express matter therein being transported. The plea then averred the execution by plaintiff of the contract, the material parts of which are set out on the margin of this opinion.¹

To meet this special plea, plaintiff filed a replication in which it was averred that the said accident release was executed by him without consideration, inasmuch as he was at the time it was signed already in the employ

of the express company, and was given no new or different contract of employment, and further that the contract was against public policy, and for this reason void. Other matters were averred in the replication which need not be set out for reasons later appearing herein.

The company demurred to the replication. The trial judge sustained the demurrer. Plaintiff declined to plead over, whereupon his suit was dismissed, and he prosecuted his appeal.

By the judgment of the Court of Civil Appeals it was held that the replication was sufficient, and, accordingly, it reversed the judgment of the circuit court and remanded the cause for further proceedings.

[1] The petition for certiorari seeks a review of the opinion and judgment of the Court of Civil Appeals. Upon some questions made by the replication the opinion of the Court of Civil Appeals was favorable to the railroad company and against the plaintiff. The latter has presented no petition for certiorari and no assignment of errors, and is therefore concluded by the rulings adverse to it made by the Court of Civil Appeals on the points referred to above. See *C. N. O. & T. P. R. Co. v. Brock*, 132 Tenn. (5 Thomp.) 477, 178 S. W. 1116; *Knight v. Cooley*, 131 Tenn. (4 Thomp.) 21, 173 S. W. 435; *Murrell v. Rich*, 131 Tenn. (4 Thomp.) 378, 412, 175 S. W. 420; chapter 82, Acts of 1907.

[2, 3] The Court of Civil Appeals was in error in its construction of the legal effect of the accident release contract. In the construction of contracts the object is to ascertain the intention of the parties, and the important question is what the contract means as a whole. *Paige on Contracts*, vol. 2, § 1112; *Arbuckle v. Kirkpatrick*, 98 Tenn. (14 Pick.) 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854. Courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object sought to be accomplished. *Paige on Contracts*, vol. 2, § 1123. There is no need in this case to resort to extrinsic evidence in the construction of the contract. Its terms are wholly free from ambiguity.

[4] The contract begins as an application for employment and contemplates a term in futuro, but the applicant does not ask for a term for any particular length of time. He is content that the company may have the right to terminate the future term at its pleasure, and he agrees to all of the terms thereafter set out, and that all his representations are for the purpose of procuring employment with the company. He then makes certain representations about himself, and thereafter agrees to execute a bond for the protection of the company, and then affixes his signature to his application. The conclusion is irresistible that this application looked to a future employment as contradistinguished from one which existed when the

¹ See note at end of case.

application was made, and it follows that a term existing when the application was made was extinguished by acceptance of the offer made by the applicant. Such acceptance ended the pre-existing employment, and initiated the new one contemplated by the application. This view is strengthened by other parts of the contract presently to be noticed. The next part of the contract is the accident release.

It is manifest that the words "have entered, or am about to enter," in the first clause of the accident release part of the contract, are intended to cover, on the one hand, the case of an applicant who, at the time of his application, was in the service of the company under a former contract of employment, which the applicant intended to come to an end by the acceptance of his offer to make a new contract, and, on the other hand, those words were intended to cover the case of an applicant who had not heretofore been employed by the company. The signature of the applicant affixed to this part of the contract completed his offer. The next and final part of the contract is the acceptance of the applicant's offer by the company.

[5, 6] The signature of the company to the last portion of the contract ended the old contract and completed the new one. Its signature was a definite acceptance of the offer of the applicant to enter into the new and to abandon the old contract relations. By this completed contract, in the absence of an averment in his replication of fraud practiced upon him by the express company in the procurement of the contract, the plaintiff is undoubtedly bound in law, whether he read the contract or not, at the time he affixed his signature thereto. *Railroad Co. v. Stone & Haslett*, 112 Tenn. (4 Cates) 348, 79 S. W. 1031; *Railroad Co. v. Smith*, 123 Tenn. (15 Cates) 678, 134 S. W. 866. Plaintiff stipulated for employment of a certain kind, and employment of that kind he received from the company. The consideration for the rights which he surrendered by the terms of the contract was the employment received, and the law does not allow that he shall deny the consideration, ignore his contract, and reassert and recover under his surrendered rights, after having enjoyed the benefits for which he contracted, and which he received, as the result of his contract.

Upon the question of consideration, it is immaterial whether plaintiff stipulated for a term of service to be extinguished at the pleasure of his employer or at a fixed time in futuro. The material fact is that he received what he contracted for, and what he received was of value in the eye of the law. Our conclusion therefore is that the contract was binding upon him, unless public policy avoids it.

[7, 8] Therefore the next question is whether the relationship of common carrier and passenger existed between the railroad com-

pany and plaintiff at the time he sustained his injuries. Many state courts of last resort had answered this question in the negative in passing upon cases involving facts and contracts like this, or closely analogous to it, prior to the decision in *Baltimore & Ohio S. W. Ry. Co. v. William Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560. The question was also answered in the negative in the case last named. The contract involved in that case was in substance the same as the one involved here, and there, as here, the action was by an express messenger, and against a railroad company. The question certified in that case, after stating the material facts and the terms of the contract, was as follows:

"Does said railroad company assume, towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employees of the railroad company?"

The opinion of the court, after referring to *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397 [9 Sup. Ct. 469], 32 L. Ed. 788—held that while the principles declared in the cases above referred to were salutary, and the court had no disposition to depart from them, yet it was not to be forgotten that the right of private contract was no small part of the liberty of the citizen, and that the usual and most important function of courts of justice was rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appeared that such contracts contravened public right or public welfare. The opinion continues:

"It was well said by Sir George Jessel, M. R., in *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider; that you are not lightly to interfere with this freedom of contract.'"

It was further said in the opinion that the agreements created a very different relationship between Voight and the railway company from the usual one between passengers and railroad companies. It was pointed

out that Voight was under no stress as a passenger desiring transportation from one point to another on the railroad; that his occupation of the car especially adapted to the uses of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company, and, said the opinion:

"He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger."

The opinion then points out the distinction between the Voight Case and the Lockwood Case.

What has been said about the case last commented on fairly indicates the view taken of the question by decisions which had preceded that case, and by decisions which have followed it and approved its reasoning. Very elaborate notes discussing the cases on this subject will be found accompanying *Denver & R. G. R. Co. v. Whan*, 11 L. R. A. (N. S.) 432, and *Coleman v. Pennsylvania R. Co.*, 50 L. R. A. (N. S.) 432.

The great weight of authority evidently supports the view that the relationship is not that of passenger and carrier in cases analogous on their facts to the present case and the Voight Case. In those jurisdictions where, under similar contracts and facts, a contrary ruling is found, it is generally rested upon some peculiar constitutional or statutory provision. An opinion by the Supreme Court of the United States approving the doctrine of the Voight Case is to be found in *Santa Fé, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787, and a later case by the same court is *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849. In the case last named the contract involved was between the Pullman Company and one of its porters. The latter sued the railway company for injuries sustained while the porter was in the discharge of his duty on the Pullman car, resulting from a collision caused by the negligence of the defendant. The defense was based on a contract between the porter and the Pullman Company similar in import to that under consideration in the present case. The court held it to be clear that unless the contract was condemned by statute it was valid, and was a bar to plaintiff's recovery, citing the Voight Case and *Santa Fé, P. & P. R. Co. v. Grant Bros. Construction Co.*, supra. The statute relied on as destroying the validity of the contract was section 5 of the Employer's Liability Act of April 22, 1908, 35 Stat. at L. 66, c. 149 (U. S. Comp. St. 1913, § 8661), which provides that any contract, the purpose or intent of which shall be to enable any common

carrier to exempt itself from liability created by this act, shall to that extent be void. But the court held that the Pullman porter was not an employé of the defendant railroad company within the meaning of that statute, and it was also held that the relationship between the railroad company and the Pullman Company was not one of co-proprietorship, and on this point the opinion cites *Oliver v. Northern P. R. Co.* (D. C.) 196 Fed. 432.

Upon the foregoing authorities, we think it clear that the contract set up by the special plea was founded upon a sufficient consideration, was not opposed to public policy, and was a bar to the judgment sought by the plaintiff. The only case cited by the Court of Civil Appeals to sustain its construction of the contract is *Purdy v. R. W. & O. R. R. Co.*, 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736. In respect of the release which the baggageman in that case signed, the New York court, in its opinion, said:

"He simply signed the contract, and the defendant kept on employing the plaintiff as baggageman; in other words, continued the already existing employment."

The language above quoted distinguishes the Purdy Case from the present one, for here, as we have held, the parties terminated the old and created a new contract, of which new contract the accident release was a part. The Purdy Case was referred to in a later New York case. *Runt v. Herring*, 2 Misc. Rep. 105, 21 N. Y. Supp. 244. The court, in that opinion, said:

"The recital of the employment and the dollar paid distinguishes the case from *Purdy v. Rome, etc., R. Co.*, 125 N. Y. 209 [26 N. E. 255, 21 Am. St. Rep. 736], and probably discloses a sufficient consideration to sustain the agreement."

It results that the judgment of the Court of Civil Appeals is reversed, and the judgment of the circuit court is affirmed.

NOTE.

"Contract.

"Application for Employment with Southern Express Company.

"I hereby apply for employment by the Southern Express Co., and agree that my employment, if I am employed by the said company, shall not be for any particular length of time, and that the said company reserve to itself the right to terminate the contract at pleasure, and I agree to all of the terms and conditions hereinafter set out, and all of the statements hereinafter made, are made as representations for the purpose of procuring employment with said company."

"Accident Release.

"Whereas, I, the undersigned, have entered, or am about to enter, the employment of the Southern Express Company, and in the course of such employment may be required to render services in the care, carriage, or handling of merchandise and property in course of transportation by cars, vessels and vehicles, belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of for-

warding property delivered to it to be forwarded;

"And whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes:

"Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

"And I do hereby agree to indemnify and save harmless the Southern Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employé of any person or corporation, or otherwise.

"And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

"I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action, arising out of such injury, or connected with or resulting therefrom.

"I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

"And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employé free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negli-

gence of such corporations or persons, or of any employé of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

"And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation and of all persons upon whose railroad, stage or steamboat lines the Southern Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

"I further agree in consideration of my employment by said Southern Express Company, that I shall assume all risks of accident or injury which I shall meet or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employes, or whether occasioned by the negligence of any railroad, steamboat or canal company, or stage company with which the said express company may be in such contractual relations, or by the agents, servants, or employes of any such company, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do expressly declare that while traveling over any of the lines of railway, or stageroad, or steamboat routes, or while being about to so travel for the said Southern Express Company, the relation of passenger and carrier will not exist between me and such carrier, but my rights upon such lines shall exist solely because of my employment with the said Southern Express Company.

"Witness my hand and seal this 23d day of June nineteen hundred and seven.

"[Sign name in full] Valentino McKay.

"Note.—If applicant is under age his guardian must also sign this release.

"_____, Parent or Guardian.

"In the presence of: C. M. Fisher. Ra."

"Contract of Employment.

"On the statements and conditions contained in the foregoing application the Southern Express Company hires the applicant above named to serve as messenger, and to perform such other services as may be directed from time to time; from June 23, 1907, and agrees to pay him for his services at the rate of (agreed upon, or to be agreed upon, for such employments to which the applicant may be assigned from time to time), _____ dollars per month, or fractional part thereof, while occupying such position, or until the date of his resignation or discharge.

"Dated at Nashville, Tenn., 8/23, 1907.

"Southern Express Company,

"By C. M. Fisher, Ra.

"Valentino McKay, Employé."

"Witness: C. M. Fisher."

LINDSAY v. COLLINGS. (No. 502.)*

(Court of Civil Appeals of Texas. El Paso. Jan. 13, 1916. Rehearing Denied Feb. 10, 1916. On Motion to Certify, Feb. 10, 1916.)

1. MORTGAGES \S 560 — ACTION ON SECURED DEBT—LAW GOVERNING.

A California note secured by mortgage on real estate there is governed by Code Civ. Proc. Cal. \S 726, providing that there can be but one action on a debt so secured, an action of foreclosure with ascertainment of any deficiency, so that, such action having been brought, and nothing realized, because of a prior mortgage, though the mortgagor was not a resident of that state so that a personal judgment could be obtained against him, action cannot thereafter be maintained on the note in Texas.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1604; Dec. Dig. \S 560.]

Higgins, J., dissenting.

On Motion to Certify.

2. COURTS \S 247—JURISDICTION—CERTIFIED QUESTION.

Rev. St. 1911, arts. 1521, 1522, as amended by Acts 33d Leg. c. 55, providing that causes in which the judges of the Court of Civil Appeals may disagree on a question may be carried to the Supreme Court by certificate, do not apply to a case originating in the county court; article 1591 making final judgment of the Court of Appeals therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 751, 754; Dec. Dig. \S 247.]

Appeal from Reeves County Court; Ben Randals, Judge.

Action by A. Y. Lindsay against E. L. Collings. Judgment for defendant, and plaintiff appeals. Affirmed, and motion to certify overruled.

Buck & Fleming, of Pecos, for appellant. J. W. Parker, of Pecos, for appellee.

WALTHALL, J. This suit was brought in the county court at law of Reeves county, Tex., by appellant, A. Y. Lindsay, a resident of the state of California, against appellee, E. L. Collings, a resident of the state of Texas, and is an action to recover upon a promissory note, executed, delivered, and made payable in California, in the sum of \$500, interest and attorney's fees. Appellee admitted the following facts pleaded by appellant: The execution and delivery of the note payable to appellant in California; the execution and delivery to appellant of a certain mortgage on certain real estate in California, described in the petition, given to secure said note, and all of the terms and provisions of said mortgage as pleaded (copying the note there sued on in the body of the mortgage); that the said mortgage was a subsequent and second lien on said property and subject to a certain note for \$1,500 signed by appellant and payable to Lula Mae Taylor, and that appellant took said second mortgage lien to secure the payment of the \$500 note sued on; that thereafter Lula Mae Taylor brought suit in California against appellant, appellee, and others to foreclose the first mortgage lien on said

property; that in said foreclosure suit appellant entered his appearance and filed a cross-action against appellee and others named, for the purpose of foreclosing his said second mortgage lien on said property and paying said \$500 note, interest, and attorney's fees; that appellant was cited to appear and answer said suit and cross-action, but made no answer; that the said property was sold under order of the California court in said suit, but for an amount insufficient to pay any part of said \$500 note; that no part of said \$500 has ever been paid; that at the time of bringing said California suit appellant was a resident of Texas, and no personal judgment was had on him in said suit; that appellant has employed attorneys to bring this suit, and has contracted to pay a fee of \$75, which is a reasonable fee. Further answering, appellee denied that the Lula Mae Taylor \$1,500 note had not been paid; alleged that the \$500 here sued on and the said second mortgage lien were executed and delivered in California and made payable to appellant in California, and that the entire transaction was one and was entered into in said state, and that appellant sued appellee upon said note and trust or mortgage lien in California, and that said suit obtained a decree of foreclosure of said second mortgage lien on said property. Appellee further pleaded section 726 of the Code of Civil Procedure of California, which is in part as follows:

"726. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage."

Appellee further pleaded the interpretation given said section 726 by the Supreme Court of that state, and introduced in evidence the following opinion in Meyer v. Weber, 183 Cal. 682, 65 Pac. 1111:

"The Woodbridge Canal & Irrigation Company, a corporation, being indebted to the plaintiff in the sum of \$3,280, on July 28, 1894, executed to the plaintiff its promissory note for that amount, and, to secure the same, at the same time executed its mortgage upon a tract of land in San Joaquin county, and also at the same time, as further security, indorsed and assigned to the plaintiff the note and mortgage in suit. The note reads as follows:

"\$1,963.66. Woodbridge, Cal., May 28, 1894.

"Ten years after date we promise to pay to the Woodbridge Canal & Irrigation Company, or order, the sum of nineteen hundred sixty-three and $\frac{66}{100}$ dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon, in like gold coin, at the rate of 6 per cent. per annum from date until paid. Interest payable annually, on the 1st day of September of each year, and in de-

fault of payment at said times the same to be then added to the principal and form a part thereof, bearing interest at the same rate.

"This note is secured by a mortgage of even date herewith.

Helen Weber.

"C. M. Weber.

"Julia H. Weber."

"Although the note is dated May 28th, it was not delivered until June 15th, at which time the mortgage to secure the same, and referred to in the note, was executed and delivered to the said corporation, the Woodbridge Canal & Irrigation Company. The plaintiff subsequently brought an action to foreclose the mortgage executed to her by the Woodbridge Canal & Irrigation Company, and such proceedings were therein had that a decree of foreclosure and sale was rendered, and thereupon the property mortgaged sold and applied on the judgment, leaving a deficiency of \$2,639.49. Thereupon plaintiff brought the present action to foreclose the mortgage assigned to her.

"The defense is that the consideration for the note and mortgage was an agreement in writing entered into between the makers and the payee, the Woodbridge Canal & Irrigation Company, that said company should construct a ditch from the main canal, or branch thereof, to the line of the land of the Webers, being the same described in the mortgage, of sufficient size and election to allow the irrigation of said land, and flow the water to said land for the purposes of irrigation, and that said company never at any time constructed a ditch or branch canal to the land for which the water was to have been furnished, and that no water has at any time been brought to the said land; that said Woodbridge Canal & Irrigation Company became insolvent on or about October 5, 1896, and was thereafter deprived of the possession of all of its works, canals, and property, by reason whereof the said company was, and ever since has been, rendered incapable of performing its contract with said defendants Weber, and that in consequence the consideration of said note and mortgage has totally failed.

"The court finds the facts as set up in the answer of defendants Weber, that the note and mortgage in suit were made and delivered to said company in pursuance of the terms and conditions of said agreement; that the company never at any time constructed a ditch or branch of any size to the land in question, and no water has at any time since the making of said agreement been brought to said land by said company; and that the consideration of said note and mortgage has failed. Upon the findings of fact the court entered judgment in favor of said defendants.

"The appeal is on the judgment roll, and the only question presented is whether the instrument in suit is a negotiable promissory note, within the meaning of the Civil Code. The appellant contends that it is, and that it must be considered separate from and independent of the mortgage given to secure the same; that the clause 'this note is secured by mortgage of even date herewith' may be disregarded, as forming no part of the obligation to pay as specified in the note. But the mortgage was delivered at the same time as the note, relates to the same subject-matter, and they form, substantially, one transaction. They must therefore be taken and considered together. Civ. Code, § 1624. The plaintiff recognizes this to be so from the very fact of bringing the action. By the note on its face it had ten years to run, and the only consequence of the failure to pay the interest annually was that it should be 'added to the principal, and form a part thereof, bearing interest at the same rate.' But by the mortgage given to secure the note it is provided, in case default be made in the payment of 'any installment of interest, as provided in said note, then the whole sum of principal and interest shall be due, at the option of the said party of the second part, its

successors or assigns; and suit may be immediately brought, * * * although the time for payment of said principal sum may not have expired;' and it is provided that costs and charges may be included in the decree of foreclosure, 'including reasonable counsel fees.' Counting upon the terms of the mortgage, and not of the note, as distinguished therefrom, the plaintiff alleges a failure to pay the interest, and an election to consider the whole amount due, and further alleges the employment of an attorney to secure its foreclosure, and asks for a reasonable sum to be fixed as his fee. In *Phelps v. Mayers*, 126 Cal. 549 [58 Pac. 1048], the defense was that the suit was prematurely brought, on the ground that the note in suit did not provide that the principal debt should be due on default in payment of interest, and that hence a foreclosure for both principal and interest was unwarranted. That contention is answered as follows by this court: 'The note and mortgage, however, must be construed together. Interest on the note is payable semiannually, and the mortgage is clear that upon default in the payment of the interest equally with default in the payment of the principal the mortgagee may cause the premises to be sold, and retain from the proceeds "the said principal and interest." There is scarcely room for interpretation in these provisions.' See, also, *Nagle v. Macy*, 9 Cal. 426; *Hyde v. Mangan*, 88 Cal. 320 [26 Pac. 180]. An independent action on a promissory note secured by mortgage is prohibited in this state. 'There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter' (Code Civ. Proc. § 726); that is, by a suit to foreclose, and a sale of the mortgaged premises, and ascertainment of the deficiency, if there be any (*Toby v. Oregon Pacific R. R. Co.*, 98 Cal. 494 [33 Pac. 550]; *Hibernia Savings and Loan Society v. Thornton*, 123 Cal. 62 [55 Pac. 702]). Whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until the decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. The liability is therefore contingent, and dependent upon the fact whether upon the sale of the mortgaged premises there shall be a deficiency. The plaintiff in this case, in bringing the suit, recognized the fact that the mortgage was inseparably connected with the note. As already stated, according to the terms of the note, independent of the mortgage, the action would have been prematurely brought, and at the time it was brought it could only be sustained by reference to the clause in the mortgage giving an option to the owner, in case of default in the payment of interest at the time specified, to consider the whole debt due. Being inseparably connected with the mortgage, and affected by the conditions contained therein, the note is not negotiable, within the law merchant or Civil Code. Kent, under the head of 'The Essential Qualities of Negotiable Paper,' says that, to constitute a negotiable note or bill, 'it is essential that it carry with it a personal credit given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event.' 3 Kent's Commentaries. 'A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment.' Civ. Code, § 3088. * * * In *Adams v. Seaman*, 82 Cal. 636 [23 Pac. 53, 7 L. R. A. 224], in commenting upon these provisions of the Civil Code, it is said, 'An instrument is not negotiable if it have any condition not certain of fulfillment,' and it was held that a provision for the payment of an attorney's fee in case of foreclosure was a contingency rendering the note nonnegotiable.

"The assignment and transfer of the note and mortgage in question, therefore, was without prejudice to any set-off or other defense existing

in favor of the defendants Weber, the same as though there had been no assignment, and the action had been brought by the company to whom they were given. Civ. Code, § 1459; Code Civ. Proc. § 398. As the findings of the court show an utter failure of consideration as between the original parties, judgment properly followed in favor of the defendants.

"Judgment affirmed."

In addition to the above, we make following quotation from the case of *Toby v. Oregon Pacific R. R. Co.*, 98 Cal. 490, 83 Pac. 550, a California Supreme Court opinion, construing said section 726 and introduced as evidence on the trial:

"Under that section there can be but one action for the recovery of any debt, etc., which must be in accordance with the provisions of that chapter. It further provides that a personal judgment may be entered for a balance remaining due, if the proceeds of the incumbered property shall be insufficient, etc. To confine a recovery in such classes to one action, to make the mortgaged property the primary fund out of which satisfaction is to be had, and to give the plaintiff a personal judgment for such balance as may remain due after the exhaustion of the mortgaged property, are the three essential things provided for."

[1] The case was tried without a jury. Judgment was rendered for appellee. The trial court made and filed findings of fact and conclusions of law. The facts found by the court are substantially the facts pleaded; there being no controversy as to the facts. Appellant excepted to the trial court's conclusions of law, filed a motion for a new trial, and, same being overruled, gave notice of appeal. Appellant presents four assignments of error, all going to the question of the judgment that should have been entered.

Personal contracts are governed by the laws of the place where made, unless a different place is fixed by the contract for its performance. *Jones v. National Cotton Oil Co.*, 31 Tex. Civ. App. 420, 72 S. W. 248; *Cantu v. Bennett*, 39 Tex. 303. In *Shreck v. Shreck*, 32 Tex. 588 (5 Am. Rep. 251) it is said:

"It is certainly a general principle that in judicial actions upon contracts the law of the place where the contract was made governs in determining its construction, obligation, and enforcement, its validity or invalidity."

It is impossible to consider a contract separately from the remedy given by the law of its enforcement, because it is this that supplies it with legal vitality. The law is the essential factor in every contract, and is presumed to be considered by the parties in their deliberations. Among the elements of a contract nothing is more important than its means of enforcement. It is a branch of its vital existence—the thing that gives it life. Without it the contract ceases to be. In matters of contract the ideas of right and remedy are inseparable. *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229. The statute invoked provides an absolute defense in the state where the contract was made; therefore it must be so held in the state where the suit was brought.

It seems to us and from what has been said that, under the section of the California Code above quoted, and the interpretation of the section by the Supreme Court of that state, had this suit been filed in California, the suit filed by appellant seeking and obtaining an order foreclosing the second mortgage given to secure the note sued on here, the note and mortgage being one and the same transaction, would be a perfect defense to this suit. True, appellant in that suit, appellee at that time being a resident of Texas, could not have a personal judgment against appellee for any unpaid deficiency remaining. But appellant had before him his remedies at the time of filing his suit in California. He could there foreclose his mortgage and purchase appellee's right of redemption, or he could sue in Texas and recover a personal judgment against appellee. He elected to pursue the former. To give the appellant a second suit would be to give him a right he did not have in California, the forum of the transaction. Appellant's right to sue was limited by the law of the place where made to one action. By his suit there he exhausted that right. This state evidently could not widen his right, or give him one that does not go with his contract. This state could do no more by comity than to furnish him a forum and procedure in which to exercise and enforce a right given him by reason of his contract, and that right is construed and limited by the law of the place of its making.

We are of the opinion that the trial court was not in error in entering judgment for appellee.

The case is affirmed.

HIGGINS, J. (dissenting). I am of opinion that section 726 of the California Code has no application to this suit brought in Texas, and that judgment should have been rendered for appellant. Very briefly stated, my views are:

The law of Texas applied to the facts of this case would not prevent a recovery. The laws of California, if applicable, will prevent recovery. The question thus reduces itself to a determination of whether the laws of Texas or California shall prevail.

It is well settled that the construction and validity of a contract is governed by the law of the place where it is made. But it is universally conceded that the affording of remedies in one state for enforcing a contract made in another depends entirely upon judicial comity and that the remedies and procedure are therefore governed entirely by the *lex fori*. In other words, the *lex fori* prevails over all other laws so far as concerns matters that relate to the remedy as distinguished from the substantive contract. 5 Ruling Case Law, pp. 931, 942, et seq.; cases cited in 4 Michie, Ency. Dig. p. 260; 9

Cyc. 690 et seq.; 2 Parsons on Contracts (9th Ed.) p. 588; 2 Wharton Conflict of Laws (3d Ed.) § 675a; 3 Am. & Eng. Ency. Law (1st Ed.) 576; 2 Bouvier's Law Dictionary (3d Ed.) 1940.

The portion of section 726 of the California Code pertinent to the question considered is quoted in the majority opinion, and it is unnecessary to repeat same. As I construe same and the rest of the section, it relates purely to the remedy and matters of procedure connected therewith. It does not in any wise affect the substantive contract between the parties.

It may be conceded that, where the remedy provided by the *lex loci* affects the validity and obligation of a contract, the same is imported into and becomes an essential part of the contract. Thus, while the question of limitation of the time for bringing an action is ordinarily a matter of remedy and is governed by the *lex loci*, it is otherwise when the limitation becomes incorporated into the cause of action as a part or condition thereof. In other words, statutes of limitation, unless they discharge a debt, go to the remedy merely and questions arising under them are to be determined by the law of the forum. 9 Cyc. 691, and cases there cited. This same rule is applied by some of the courts as to contracts falling within the statutes of fraud of the state where made, but which would be valid under the law of the forum. In this case the statutes of fraud of the *lex loci* are regarded as affecting the validity and obligation of a contract, rather than the remedy upon same. The cases of *Jones v. National Cotton Oil Co.*, 31 Tex. Civ. App. 420, 72 S. W. 248, and *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229, referred to in the majority opinion, fall within this category.

The doctrine upon which this class of cases rests is well stated in *Cochran v. Ward*, as follows:

"There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract it is imported into and becomes an essential part of it, and characterizes it whenever it is the subject-matter of litigation."

* * * This doctrine does not conflict with the general rule that in matters of procedure the *lex fori* controls. 'Procedure,' in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, and the nature and effect of process, and perhaps to all other matters of remedy only which are not incorporated into the contract as affecting its nature and obligatory character."

It will be readily seen, as is expressly stated in *Cochran v. Ward*, that these are not even exceptions to the rules relating to the *lex loci* and *lex fori*. They merely furnish illustrations that in some instances the remedy becomes a part of and affects the validity and obligation of a contract. These and many other cases to like effect are distinc-

tions, and not exceptions to the rule. For discussion of the subject, see 2 Wharton on Conflict of Laws (3d Ed.) §§ 675a, 676, et seq. The distinction is also pointed out in 5 *Bulfinch Case Law*, p. 942, in referring to *Cochran v. Ward*.

I regard said section 726 as affecting the remedy and procedure merely as to actions brought in California for the recovery of any debt or the enforcement of any right secured by mortgage, and that the same in no wise affects the validity, obligation, or right under the contract. This being its nature, it can have no extraterritorial effect, and the right of *Lindsay* to bring this suit in Texas to recover a personal judgment upon the note, which he was unable to obtain in the California suit, is not affected thereby. There is nothing in the law of Texas which would prevent him from pursuing his remedy by this suit to obtain such a personal judgment, and, in my opinion, it is error to apply the provisions of section 726 of the California Code and deny a recovery.

On Motion to Certify.

WALTHALL, J. [2] Appellant has filed a motion to certify in this case, based upon the dissenting opinion of Associate Justice E. F. HIGGINS.

This is a county court case. Upon an examination of chapter 8, tit. 32, R. S. 1911, relating to the certification of questions to the Supreme Court, it will be observed there are three separate articles of the statute relating to certification. One of the articles is 1619, formerly 1043, which gives to the Court of Civil Appeals the right to certify questions in any case pending in said courts whenever there arises an issue of law which it should deem advisable to present to the Supreme Court for adjudication. Under this article of the statute it was immaterial whether the case was a district or county court case. *Wallis v. Stuart*, 92 Tex. 568, 50 S. W. 567.

By article 1620, R. S. 1911, formerly 1040, it is provided that, when any Court of Civil Appeals shall in any cause render a decision in which any one of the judges therein sitting shall dissent as to any conclusion of law material to the decision of the case, and said judge enters the ground of his dissent of record, then said court shall, upon motion of the party to the cause, or on its own motion, certify the point or points of dissent to the Supreme Court. In cases governed by this article of the Revised Statutes of 1911 a case which originated in the county court could not be certified to the Supreme Court; it having been held in *Herf v. James*, 86 Tex. 230, 24 S. W. 396, that the judgment of the Court of Civil Appeals in such a case is final, and the Supreme Court would have no jurisdiction thereof.

By article 1623 of the Revised Statutes of

1911 provision is made for certification whenever any one of the Courts of Civil Appeals arrives at an opinion in the decision of a case which may be in conflict with an opinion theretofore or thereafter rendered by some other Court of Civil Appeals on any question of law, and such court refuses to concur with the opinion in conflict with the opinion so arrived at by the first-mentioned court.

By chapter 55 of the General Laws of the Thirty-Third Legislature certain statutes relating to the jurisdiction of the Supreme Court were amended, and article 1521 of the Revised Statutes was amended so as to read as follows:

"The Supreme Court shall have appellate jurisdiction coextensive with the limits of the state, which shall extend to questions of law arising in civil causes in the Courts of Civil Appeals in the following cases when same have been brought to the Courts of Civil Appeals by writ of error, or appeal, from final judgments of the trial courts:

"(1) Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"(2) Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

"(3) Those involving the validity of statutes.

"(4) Those involving the revenue laws of the state.

"(5) Those in which the Railroad Commission is a party.

"(6) Those in which, by proper application for writ of error, it is made to appear that the Court of Civil Appeals has, in the opinion of the Supreme Court, erroneously declared the substantive law of the case, in which case the Supreme Court shall take jurisdiction for the purpose of correcting such error."

And article 1522 of the Revised Statutes was amended so as to read as follows:

"All causes mentioned in article 1521 may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals as elsewhere provided, except those mentioned in subdivision 6, which must be presented by application for writ of error."

In the case of *Bank v. Powell* (Tex.) 163 S. W. 561, it was expressly held by the Supreme Court that it had jurisdiction by certified question in no case except it be embraced in one of the first five subdivisions of article 1521. We must therefore look to the provisions of article 1521 as amended to determine whether or not the Supreme Court would have jurisdiction in this case by certified question. By the first subdivision of said amended article it is to be observed that the Supreme Court has jurisdiction by certified question in those cases in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision. This subdivision corresponds to article 1620 of the Revised Statutes. By subdivision 2 of amended article 1521, it is to be observed that the Supreme Court has jurisdiction by certified question in those cases in which one of the Courts of Civil Appeals holds differently from a prior decision of its own or of another Court of Civil Appeals

or of the Supreme Court upon any such question of law. This subdivision corresponds to article 1623 of the Revised Statutes of 1911. Said amended article 1521 contains no provisions corresponding to the provisions of article 1619, Revised Statutes 1911.

In *Cole v. State* (Tex.) 170 S. W. 1036, and *McFarland v. Hammond* (Tex.) 173 S. W. 645, it was expressly held that article 1591, R. S. 1911 was not repealed by said chapter 55, Gen. Laws 33d Leg. Referring back now to the above-cited case of *Herf v. James*, it will be noted that the Supreme Court based its holding that it had no jurisdiction by certified questions by reason of the dissent by one of the judges of the Courts of Civil Appeals in county court cases because, by the fifth section of the act of May 13, 1893,* the judgment of the Courts of Civil Appeals in such county court cases was made final. Article 1591, R. S. 1911, is in almost the same language and in substance is to the same effect as the fifth section of said act of May 13, 1893. It thus appears that the Supreme Court in this case would have no jurisdiction by certified question unless it be upon the ground of the dissent herein. While there has been some change in the verbiage of the statute, yet the statute at present relating to certification in cases of dissent is, in substance, the same as section 32 of the act of May 13, 1893. Article 1591, R. S. 1911, is now in force, and is, in substance, the same as the fifth section of the act of May 13, 1893. We thus have this situation: In *Herf v. James* it was held that in county court cases, wherein a dissent was filed, the Supreme Court had no jurisdiction under section 32 of the act of May 13, 1893 (to which section subdivision 1 of amended article 1521 corresponds), because such section 32 was controlled by section 5 of the same act (to which section article 1591, R. S. 1911, corresponds), because in such cases the provisions of section 5 made final the judgment of the Court of Civil Appeals; and in *Cole v. State* and *McFarland v. Hammond* it is distinctly held that said article 1591, R. S., relating to cases in which the Courts of Civil Appeals is made final, is not repealed by said chapter 55, Gen. Laws 33d Leg. The conclusion thus follows that as to county court cases subdivision 1 of amended article 1521 is controlled by article 1591, R. S.; that in such cases the Supreme Court has no jurisdiction by certified question, because the judgment of the Court of Civil Appeals is final.

It might be that the analogy of the rule announced in *Herf v. James* is destroyed by amended article 1522, quoted above, but, as we understand the opinions in *Cole v. State* and *McFarland v. Hammond*, there is no qualification to the holding there made that article 1591 is not repealed by said chapter 55. In the light of that holding, we are constrained to the view that in cases of this

*See supplemental opinion following.

character the rule announced in *Herf v. James* is applicable, for which reason the motion to certify is overruled.

Supplemental Opinion.

WALTHALL, J. In the opinion rendered on motion to certify, reference is made to the act of May 13, 1893. This reference is incorrect. It should be the act of April 13, 1892. See General Laws First Called Session 22d Legislature, p. 25. Our reference to the act was made from the opinion in *Herf v. James*, as it is officially reported in 86 Tex. 230. In preparing our opinion we were using such official report. Such citation in the official report is incorrect. The act is correctly cited in the *Herf v. James* opinion as it is reported in 24 S. W. 396.

WILSON v. AVERY CO. OF TEXAS et al. (No. 894.)

(Court of Civil Appeals of Texas. Amarillo.
Jan. 19, 1916. Rehearing Denied
Feb. 9, 1916.)

1. SALES — 897 — COMPETENCY — QUALITY OF LIKE ENGINES.

In an action to recover money paid for an alleged defective engine, where plaintiff's evidence tended to show that the engine was constructed on a wrong mechanical principle, and hence was valueless, defendant could show that its other engines, constructed upon the same principle, were efficient, by introducing the testimony of other buyers that their similar engines were satisfactory.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1136; Dec. Dig. — 397.]

2. TRIAL — 86 — RECEPTION OF EVIDENCE — ADMISSIBILITY — LIMITING APPLICATION.

Testimony tending to establish one of two issues on trial, incompetent or irrelevant as to the other issue, is not inadmissible for such reason; the duty being upon the party against whom it is offered to make proper request of the trial court to limit the testimony to the issue upon which it is admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 226; Dec. Dig. — 86.]

3. APPEAL AND ERROR — 1050 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In an action to recover money paid for an alleged defective engine, the admission, without objection, of evidence for defendant that the engines manufactured and sold by it were successful, rendered harmless the admission of testimony of buyers of its engines that they were satisfactory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. — 1050.]

4. APPEAL AND ERROR — 1050 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

The admission of evidence if error was harmless, where another witness, without objection, testified to substantially the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. — 1050.]

5. APPEAL AND ERROR — 1062 — SPECIAL ISSUES — OMISSION OF QUESTION — HARMLESS ERROR.

Where two special issues submitted to the jury substantially the same question as was

omitted in another, and they were answered adversely to appellant, the omission was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. — 1062.]

6. FRAUD — 20 — FRAUDULENT REPRESENTATIONS — RELIANCE.

Where the buyer of an engine, in purchasing, did not rely upon the seller's fraudulent representations made to induce the purchase, the buyer had no cause of action based upon such fraudulent representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. — 20.]

7. SALES — 285 — WARRANTY — NOTICE OF DEFECT.

The failure of the buyer of an engine to give notice to the seller by registered letter within the specified time of any defect, as required by the seller's written warranty of the engine as a condition to recovery, prevented the buyer's recovery for breach of the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 806-808, 810; Dec. Dig. — 285.]

8. APPEAL AND ERROR — 984 — PRESUMPTIONS FAVORING COURT BELOW.

Where the evidence is sufficient to warrant finding by the trial court of a fact justifying the judgment rendered, the Court of Civil Appeals will presume in support of the judgment below that the trial court so found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. — 934.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by J. A. Wilson against the Avery Company of Texas and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Turner & Rollins, of Amarillo, and B. Frank Bule, of Canyon, for appellant. C. E. Gustavus and M. J. R. Jackson, both of Amarillo, and Burgess, Burgess, Germany & Chrestman, of Dallas, for appellees.

HUFF, C. J. The appellant, Wilson, instituted suit against the Avery Company and G. L. Roberts to recover certain money paid and to cancel two certain notes, which he alleges were paid and executed to the Avery Company for a certain engine purchased from that company. He alleges that certain representations were made with reference to its capacity for ploughing, thrashing, and other matters, and that the representations were not true, and the engine would not do the work represented, and that it was of inferior material and workmanship, etc. He also set up and sought a recovery upon a written warranty because of the failure of the engine to do the work which it was warranted to do; and, in addition thereto, he set up certain special damages.

The appellees answered this, denying specifically the several allegations, and in addition thereto set up the conditions of the warranty and a failure to comply with the conditions with reference to giving notice, etc., and that appellant had purchased the engine after having it thoroughly tried and tested for the

length of time agreed upon, and refused to accept it upon mere representations and required a written warranty of guaranty; that he kept it for some seven or eight months, without giving notice of the defects as required by the warranty.

The case was submitted to a jury upon special issues, and upon their findings judgment was rendered for the appellee company and for Roberts, from which appellant appeals.

The first assignment presents the action of the court in admitting, over the appellant's objections, the testimony of one E. Dillon to the effect that he had seen the engine of appellant, and that he (witness) had purchased an engine from appellee like the one purchased by appellant; that he had been operating his engine more than a year, plowing and thrashing grain with it; that he ploughed about 1,500 acres of land, and had thrashed between 60,000 and 70,000 bushels of small grain during the summer of 1914; that said engine had strength enough to pull the plows he had been pulling on it; that he had never had any difficulty as to the strength of the engine in thrashing; that it had operated successfully in plowing and thrashing.

By the second assignment complaint is made of the testimony of G. L. Roberts to the effect that several parties, naming them, had purchased engines similar to the one in question, and that he had seen them in operation, and stated that the bearings on those engines were of the same size and material as the bearings on appellant's engine, and that in none of the engines had there been trouble with the bearings, and that the capacity of the oil pipes in said engines was ample to furnish sufficient supply.

By the third assignment complaint is made of J. H. Bogee's evidence, wherein he testified that he had an engine similar to appellant's; that his engine could thrash from 1,200 to 1,500 bushels of wheat per day; and that he had never had any trouble with his engine, and no part had proven weak or defective.

The fourth assignment is to the testimony of one Brinkman to the effect that he had purchased an engine like appellant's; that he had used his engine for thrashing and ploughing; that he had ploughed about 800 acres, and thrashed something like 40,000 bushels of small grain; that his engine operated successfully, and had sufficient power, and that he had never had trouble with it; that he was pulling 27 disc plows, and could cut from 15 to 16 feet in sod, and had power to pull them 8 inches deep, and no part of the engine had proven defective or insufficient.

[1] The appellant objected to the above testimony, on the ground that what other engines had done, etc., was incompetent and irrelevant, and the comparison of other engines was insufficient to show that appellant's engine was of the character or kind to do the work, or to show that his engine had met

warranty. The appellant sought to recover the money he had paid on the machine and to cancel the notes executed by him therefor, on the ground: (1) He was induced to purchase the same by false representations; (2) upon the warranty executed by appellee. He alleged that the engine was made of inferior material, and "that it is not properly constructed; that it is wholly worthless and of no value as an engine, and continually got out of repair." The appellant, in proving his case, introduced the testimony of G. F. Drane, who qualified as an expert in the construction of engines, and who testified that, according to mechanical principles, the engine in question was not properly constructed; that the oiling system used T-joints, which were abrupt turns, causing the pipes to clog so that oil could not be properly distributed to the working parts of the engine, and part of the bearings did not get oil, and would heat and melt out, and that plain joints with low-grade curve should have been used; that the crank and shaft bearings were too light, and not the proper size for the size of the engine, where they were joined to the main shaft; that for an engine of that size the cylinder should be constructed of chilled cast. The engine was not properly fastened down, etc. Some other witnesses indicated by their testimony that the engine was constructed on incorrect mechanical principles. By this testimony it was the evident purpose of appellant to show that the engine was not according to the warranty; that is, that it would not "do well the work for which it was intended," because of its plan or method of construction, and was not constructed according to correct mechanical principles. There were two methods of showing that the engine did not comply with the warranty: (1) That it was in a bad or disabled condition, and because thereof would not do the work for which it was intended; or (2) because of the particular method or principle upon which it was constructed, which was such as to render it unfit to do the work well for which it was intended. The issue therefore presented by appellant was that the engine was constructed on a wrong mechanical principle, and hence would not do the work well, and that thereby it was valueless and useless for the work intended. Any fact relevant to that issue was admissible. Appellant would have been authorized to show that appellee's engines made upon the principle of this one would not do the work. This fact would have been a relevant fact. Why may not the appellee show that its other engines constructed upon the same theory or principle as the one in question would do the work in rebuttal of an assault upon the mechanical principles under which it was constructed? This would not be a relevant fact to show that the particular machine was defectively built or had faulty or bad material in it, and the workmanship in this particular engine was bad or defective, and for that reason would not do

the work. Where the issue is alone as to the faulty construction of a particular engine, and not an attack upon the mechanical principles upon which it was constructed, we think the rule is generally recognized that the manner in which other engines worked would not be relevant or admissible, under the excluding rule of *res inter alios acta*, and should be excluded. Our courts have recognized this rule, and the rule is also recognized by other courts. *Fetzer v. Haralson*, 147 S. W. 290; *Haynes v. Plano Mfg. Co.*, 36 Tex. Civ. App. 567, 82 S. W. 532; *Hill v. Hanan*, 131 S. W. 245.

We do not think in the cases cited that the method of construction or the mechanical principle upon which the machine was constructed were placed in issue by the parties seeking a recovery and as a ground of recovery upon the warranty. In an action to recover the price of shovel handles sold to the defendant, evidence of the good quality of other like handles sold by the plaintiff at the same time was admitted, accompanied by direct evidence that the latter were of the same kind and quality as the former. The United States Supreme Court held the admission of this testimony was not error. We apprehend, however, this evidence was held admissible in that case, at least in part, for the reason that the defendant therein had given evidence that the handles in question were inferior to the handles purchased in previous years. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. 116, 27 L. Ed. 100.

Our Supreme Court held in *Railway Co. v. Carter*, 95 Tex. 461, 68 S. W. 159, that engines used by the railway company, other than the one setting out fire, were in bad condition was admissible. So in *Tuttle v. Moody*, etc., 100 Tex. 240, 97 S. W. 1037, in a suit for damages to cattle in failing to furnish sufficient water in a certain pasture, testimony as to the condition of another pasture was admissible in connection with evidence showing the condition of both lots of cattle. *Tuttle v. Moody*, 94 S. W. 134.

Wigmore on Evidence, vol. 1, § 451, states that:

Evidence is admissible "of the tendency of a machine or apparatus, as shown by other instances of its operation, under similar circumstances, to operate defectively or otherwise (for example, in actions of breach of warranty or personal injury). Here the working of other similar machines (tools or apparatuses) would be equally receivable, provided the conditions were similar and a confusion of the issues was not involved."

The following cases, cited in the note to the above, appear to be in point in this case: *Brierly v. Doral Mills*, 128 Mass. 291; *Nat. B. & L. Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131; *Davis v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040; *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1149; *Avery v. Burrell*, 118 Mich. 672, 77 N. W. 272.

In *Barnett v. Hogan*, 18 Idaho, 104, 108 Pac. 743, in a suit on a breach of warranty on an iron safe as fireproof, it is said:

"In rebuttal the plaintiff offered evidence to show that other safes manufactured by the Victor Safe & Lock Company upon the same plan and theory of construction as the safe under consideration had passed through fires, and that the contents had been properly and adequately protected. This the trial court refused to admit. This was clearly error. The very best evidence that could possibly be received in support of the warranty claimed was made by the Victor Safe & Lock Company was that safes of similar kind, constructed upon the same plan and theory, and out of like material, had passed through fires and the contents were not materially injured. The fact that the safes to which such evidence was directed were a different size or different number than the particular safe under consideration would not render such evidence inadmissible, provided such safes were constructed upon the same general plan * * * and of the same material."

The following authorities in some measure support the above proposition: *Corbin v. U. S.*, 181 Fed. 296, 104 C. C. A. 278; *Dempster v. Fitzwater*, 6 Kan. App. 24, 49 Pac. 624; *Beach v. Huntsman*, 42 Ind. App. 205, 85 N. E. 523; *Buckley v. Kansas City*, 95 Mo. App. 188, 68 S. W. 1069. The evidence offered in this case tended to show that the warranty had not failed in so far as the plan and method of construction was involved. This issue was presented by appellant, by his testimony, in order to establish his case. His expert assailed the mechanical principles used in the construction of the engine. The fact that engines constructed on the same plan did the work intended, and were efficient, rebutted a failure of warranty on that issue tendered by appellant. The appellant, having himself advanced the issue, should have been prepared to meet the fact that other engines of like construction and plan would do the work. He therefore cannot be said to have been surprised at the result of an issue of his own making. The question of bringing into the trial other and different engines, and possibly other issues, if the evidence is otherwise relevant, rests largely in the discretion of the trial court.

[2] The evidence admitted, to which objection was made, tended to establish one issue, but perhaps was not competent or relevant to the other issue under the warranty, but would not be inadmissible for that reason. The duty was upon appellant to make the proper request of the trial court to limit the testimony to the issue upon which it was admissible. *Railway Co. v. Wilson*, 50 S. W. 156; *Railway Co. v. Adams*, 63 Tex. 200; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. Rep. 356.

[3] The testimony of George Culpepper was admitted without objection. He testified that he was familiar with the make of the engines sold and manufactured by appellee, with reference to its oiling system, bearings, etc., and that these engines were successful. This evidence we regard as substantially the same as that to which objection was made, and that the admission of the other evidence objected to is thereby rendered harmless. *Railway Co. v. Porterfield*, 92 Tex.

442, 49 S. W. 861. The above four assignments will be overruled.

[4] The fifth assignment complains at the admission of the testimony of E. Dillon that appellant "made no complaint about his engine that I heard of." This evidence of the witness was given after the witness had stated that he purchased from appellee the same kind of engine that appellant purchased, and which is in controversy. That he and appellant were together when appellant, at the fair in Amarillo, examined the engine which he afterwards purchased. After the witness purchased his engine the appellant went to the field where the witness was using his engine and examined the plow attached to it, and in his examination of the plows and the engine rode on them while at work. This testimony objected to is shown to have occurred after the time when appellant claimed his engine would not work. It occurs to us the circumstances under which the witness says that appellant made no complaint were such as to reasonably call for some expression of dissatisfaction with reference to his engine. While he was under no duty to do so at that time, or called upon directly to do so, ordinarily negative testimony, or the fact that a party remained silent when there was no obligation upon him to speak, is immaterial and of no probative force, and should not be admitted in evidence. We think, however, there was no material injury shown in admitting this evidence, and that its admission should not reverse the case, if there was error in admitting it. The witness W. H. Nicholson testified to facts which substantially cover the same testimony as given by the witness objected to. Nicholson's testimony was not objected to, and no complaint is made here of its admission. This, we are inclined to think, renders the above testimony harmless.

[5] The sixth assignment is overruled. The objection is made to the eleventh special issue, because the issue, as submitted, was incomplete. The thirteenth and fourteenth special issues submitted to the jury substantially the same question as here contended was omitted in the eleventh, and the jury answered these issues adversely to appellant.

The seventh assignment is overruled. If issue 18 submitted was not as full or as accurate as it should have been in submitting the issue made by the pleadings, we nevertheless think the fourteenth issue fully covered the point.

We sustain appellees' exception to the eighth and ninth assignments of error.

[6] We believe, aside from the above questions, that the court properly rendered judgment for the appellees. The alleged cause of action is based in one count upon fraudulent representations made to appellant which induced him to purchase the engine. The jury, in answer to the issues, substantially found that appellant, in the purchase of the engine,

did not rely upon the representations claimed. The findings of the jury in this particular are amply supported by the evidence.

[7] The appellant also relied upon a written warranty. This warranty required, after a trial of the engine, if there was any defect or failure to properly perform in the work for which it was purchased, that the appellant should give notice to appellees at Dallas, Tex., by registered letter, within the specified time, setting out specifically the manner in which the notice should be given. This notice was not given and under the terms of the warranty a recovery could not be had. The contract of warranty in this case is similar to the warranties passed on by the courts of this state in various cases.

[8] The evidence is amply sufficient to warrant the finding by the trial court that the notice required by the warranty was not given, and we will presume he so found in support of the judgment. The contract of warranty is substantially the same as in the case of *Shearer v. Garr, etc.*, 41 Tex. Civ. App. 39, 90 S. W. 684; *Case v. Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835; *Fetzer v. Haralson*, 147 S. W. 290 (on motion for rehearing); and several other cases.

We find no reversible error, and the case will be affirmed.

ESTES v. McWHORTER. (No. 522.)

(Court of Civil Appeals of Texas. El Paso. Feb. 8, 1916.)

1. LIMITATION OF ACTIONS \S 119—STATUTE OF LIMITATIONS—INTERRUPTION BY SUIT—SUPPRESSING CITATION.

Where plaintiff, suing on a note, suppressed citation of the defendant when he filed his petition, and took no steps to procure issuance and service of citation on or before the date when four years from the maturity of the note elapsed, merely instructing the clerk after such date to issue in time for the next June term, such failure to issue and serve citation barred plaintiff's suit, since the running of the statute of limitations was not interrupted.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 529-535; Dec. Dig. \S 119.]

2. LIMITATION OF ACTIONS \S 119—STATUTE OF LIMITATIONS—INTERRUPTION BY SUIT—WAIVER OF CITATION.

Where suit on a note was barred because plaintiff failed to procure the issuance and service of citation on or before the date on which four years from the maturity of the note elapsed, so that the running of the statute of limitations was not interrupted, the subsequent filing by defendant of a waiver of citation and service did not remove the bar of the statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 529-535; Dec. Dig. \S 119.]

3. LIMITATION OF ACTIONS \S 119—STATUTE OF LIMITATIONS—INTERRUPTION BY SUIT—SUPPRESSING CITATION.

Plaintiff's suit on a note was barred, where he suppressed citation when he filed his petition and failed to take steps to procure its issuance and service on or before the date when four years from the maturity of the note elapsed, so that the suit failed to interrupt the statute of

limitations, though defendant in his original answer did not plead limitation.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 529-535; Dec. Dig. ¶ 119.]

Appeal from Martin County Court; A. C. Eldson, Judge.

Action by A. D. Estes against S. D. McWhorter. From a judgment for defendant, plaintiff appeals. Affirmed.

R. N. Grisham, of Sweetwater, and Frank Judkins, of El Paso, for appellant. S. W. Pratt, of Stanton, and Gibbs & Anderson, of Midland, for appellee.

HIGGINS, J. On February 28, 1914, Estes filed this suit against McWhorter to recover upon the latter's promissory note dated March 22, 1909, due twelve months after date. Citation was never issued in the case, but on June 1, 1914, defendant executed and filed a waiver of citation and service, and agreed to enter an appearance, which he did on June 10, 1914.

In response to special issues the jury found:

"That plaintiff did not have citation issued at the time his original petition was filed; that the issuance of citation was delayed at the instance of plaintiff; that defendant did not promise to file a waiver of citation prior to four years from the maturity of the note, to wit, March 22, 1914; that plaintiff requested the clerk at the time he filed his petition to have citation issued at the earliest term to which it was returnable, to wit, the June term, 1914."

Upon these findings, judgment was rendered for defendant upon the theory that the note was barred by limitation. All of the evidence upon this phase of the case is as follows:

Defendant testified:

"I did not agree with the plaintiff to waive citation. I signed a waiver. Plaintiff did not ask me to waive citation. H. Hamilton, county clerk, came to me about May 15th and told me about the suit and that he was ready to issue citation, and I told him that I would waive citation."

Mr. Hamilton, the county clerk, testified:

"When this suit was filed, or about that time, either Judge Daniel, who filed the suit, or S. L. Estes, told me to hold up on the citation, that the plaintiff had made a proposition to the defendant that if the defendant would give him a new note before the running of the statutes of limitation, with a clause in it that if McWhorter did not gain his land the note would not be payable, that plaintiff would compromise the case. But he said that he wanted the suit to go on unless so settled, and that he wanted citations to issue for the June term, 1914. It was some time thereafter, perhaps about fifteen days, before the June term, that I saw the defendant and talked with him about the filing of the suit, and told him that I was ready to issue the citation, but he said that he did not want the citations to issue, and in order to save cost would waive citations and service. For this reason I never issued the citations. McWhorter thereafter did waive citation and service, and same is on file in the papers of the case, and has been since the June term, 1914. Plaintiff, at the time of filing the suit told me to be sure

and get out the citations for the June term. Citations were delayed by the plaintiff to see whether McWhorter would make the new note before the running of the statute of limitation."

[1] The testimony indicated conclusively establishes that prior to four years from the maturity of the note, no such steps were taken to interrupt the running of the statute of limitation, as is required by the decisions of our courts. No other judgment could have been rightfully rendered, except that which was rendered. No effort was made to procure the issuance and service of citation, except the instruction to the clerk to issue citation for the June term. Citation was suppressed by plaintiff at the time he filed his petition, and under our decisions it is very clear that it was incumbent upon him to take some steps to procure the issuance and service thereof on or prior to March 25, 1914, at which time four years from the maturity of the note would have elapsed. Merely instructing the clerk to issue in time for the June term was insufficient. The clerk could have complied with this instruction by issuing long subsequent to March 25th, but in ample time to compel an appearance at the June term. The failure to have citation issued and served on or prior to March 25, 1914, or making an effort so to do, barred the note. *Bates v. Smith*, 80 Tex. 242, 16 S. W. 47; *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645; *Maddox v. Humphries*, 30 Tex. 494; *Wood v. Railway Co.*, 15 Tex. Civ. App. 322, 40 S. W. 24; *Wood v. Mistretta*, 20 Tex. Civ. App. 236, 49 S. W. 236; *Railway Co. v. Flatt*, 36 S. W. 1029; *Insurance Co. v. Templeton*, 3 Willson, Civ. Cas. Ct. App. § 424; *Tribby v. Wokee*, 74 Tex. 142, 11 S. W. 1089; *Goldstein v. Gans*, 32 S. W. 185; *Faires v. Loessin*, 46 Tex. Civ. App. 551, 102 S. W. 924.

[2, 3] The subsequent filing by defendant of a waiver of citation and service thereof did not remove the bar of the statute of limitation. Neither is it of any consequence that in his original answer he did not plead limitation.

Affirmed.

NATIONAL NOVELTY IMPORT CO. v. DUNCAN. (No. 908.)

(Court of Civil Appeals of Texas. Amarillo. Jan. 26, 1916. On Motion for Re-hearing, Feb. 16, 1916.)

1. EVIDENCE — 420 — PAROL EVIDENCE — DELIVERY ON CONDITION.

In an action for goods sold and delivered on an order given by the buyer to a seller's salesman, parol evidence was admissible to show that the written order was not to be delivered to the seller to be filled within 30 days.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. ¶ 420.]

2. PRINCIPAL AND AGENT — 103 — SALES — 85 — ORDER — VERBAL AGREEMENT OF SELLER'S SALESMAN — EFFECT.

On an order for the sale of goods to be shipped at the seller's earliest convenience, the ver-

bal agreement of the seller's salesman that the order should not be delivered to the seller within 30 days is binding upon the seller, and the contract is avoided by a violation of the agreement.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. ¶¶ 103; *Sales*, Cent. Dig. §§ 236-238; Dec. Dig. ¶¶ 85.]

On Motion for Rehearing.

3. SALES ¶387—ACTION FOR PRICE—EVIDENCE.

In an action for goods sold and delivered, defended on the ground that the buyer's order for goods to be shipped at the seller's earliest convenience had been given to the seller's salesman on condition that it would not be put in within 30 days, the buyer's letter to the seller, omitting the terms of the contract, was for the jury on the question of his credibility as to making a contract upon a precedent condition of delivery.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1108; Dec. Dig. ¶387.]

Appeal from Gray County Court; Siler Faulkner, Judge.

Action by the National Novelty Import Company against W. E. Duncan. Judgment for defendant, and plaintiff appeals. Affirmed.

Hoover & Dial, of Canadian, for appellant. Chas. C. Cook, of Pampa, R. E. Underwood, of Amarillo, and P. R. Underwood, of Floydada, for appellee.

HENDRICKS, J. The appellant instituted suit against the appellee, for the sale and delivery of certain items of jewelry and upon the following order, signed by the appellee:

"National Novelty Import Company, St. Louis, Mo.—Gentlemen: Please ship at your earliest convenience f. o. b. St. Louis, goods above listed, on above terms, which we have carefully read and found satisfactory. We agree that no statements made by ourselves or the salesmen will be a part of this agreement, unless indorsed in writing on the original order. Positively no goods on commission or consignment. [Signed] W. E. Duncan, 'Pampa, Texas.'"

[1] The defendant, Duncan, among other things, pleaded that it was agreed:

"That such order should not be delivered to plaintiff for the purpose of being filled prior to the expiration of such period of 30 days; and the said Smith agreed that if defendant would execute such purported order, that he would hold the same for such period of 30 days, and that, if within that period the defendant should decide that he did not desire to have such goods shipped, then, upon notifying plaintiff of his desire, such conditional order * * * should cease and terminate. * * *"

The plaintiff excepted to this pleading on the ground that the understanding and agreement was not alleged to be in writing, and, if true, could not be urged as a defense because the same would ingraft parol terms upon the written instrument, not contained therein, which exceptions were overruled by the court, and the action assigned as error.

It is also assigned, for the same reasons, that the trial court erred in permitting the defendant to testify:

"That he had an agreement with the agent of plaintiff that he would hold the order 30 days before the goods would be shipped out, * * *"

Page on Contracts, vol. 2, § 1209, announces the rule applicable to this condition as follows:

"If the party against whom relief is sought, on a written contract concedes that the contract was placed in the possession of the adversary party, but claims that it was taken with the understanding that it was not to go into effect unless some other or further event should happen, and that such event has not happened, he is not seeking to vary or contradict the contract, but to show that no contract between the parties ever came into effect. Evidence of conditions precedent to the taking effect of a written contract is therefore admissible. This is simply the rule that an instrument may be delivered to the adversary party to take effect on the happening of a future event, restated in terms of the parol evidence rule."

In *Parker v. Naylor*, 151 S. W. 1103, this court said, citing numerous authorities:

"It is the settled law of this state that parol evidence is always admissible to show that a written contract was delivered, effective upon conditions."

[2] It is suggested that the statements and agreements, unless indorsed upon the back of the contract, if the contract is delivered to the plaintiff by the agent, though the delivery is conditional to the agent, the principal is not bound. The opinions in the cases of *Merchants' National Bank v. McNulty*, 31 S. W. 1096, *Commonwealth Bonding & Casualty Co. v. Bomar*, 169 S. W. paragraph 3, page 1062, and *U. S. Gypsum Co. v. Shields*, 106 S. W. 726—at least the logic of those decisions without going into extended reasons—are convincing otherwise. The argument against the latter two will probably be that they are fraud cases. The contracts were similar to the one in this case and Justice Neil's argument is quite applicable. A contract upon a conditional delivery, if violated, is not controlled by such stipulations to reject the defense, any more than they could control fraud. Either would avoid the contract. Writs of error were denied in those cases.

There are no objections to the charge of the court brought forward in the brief and assigned as error. We have carefully considered appellant's authorities and think they are clearly distinguishable and inapplicable to the character of defense against the contract interposed in this record.

We overrule appellant's assignments and affirm the judgment.

On Motion for Rehearing.

Duncan testified:

"He [meaning the agent] said he wanted to carry the order and I told him I would write him a letter in care of the house at St. Louis, and he said they would file the letter up there. During the 30 days I had to decide, he [the agent] was to hold the order."

"The delivery to Smith [the agent] was in fact a mere manual transfer from the possession of

the maker to the possession of Smith. It was not, indeed, a 'delivery' within the meaning of the law." Bank v. McAnulty, 31 S. W. 1096.

The stipulations in a contract, whatever their nature, if the delivery to the agent is conditional, and there is no real delivery, are immaterial upon the immediate question. The case of Bybee v. Carriage Co., 135 S. W. 205, is not applicable to this condition. There is nothing to show, at least conclusively, that, as between Duncan and the agent, the agent was to file with, or forward to, his principal, this contract within 30 days.

[3] Duncan's letter to the company, omitting the terms of the contract, was for the jury on the question of his credibility as to the making of a contract upon a precedent condition of delivery. His actions, in finally taking the goods from the station house, looking the goods over and shipping them back, are not relied upon as waiver or ratification—at least in this court.

Motion overruled.

JORDAN v. STATE. (No. 3910.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

1. CRIMINAL LAW §1144—APPEAL—DENIAL OF MOTIONS—PRESUMPTION.

Denial of motions for continuance and new trial must be presumed correct, there being no statement of facts or bills of exceptions showing the testimony heard, agreed to, approved by the trial judge, and filed in term time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §1144.]

2. CRIMINAL LAW §594—CONTINUANCE—ABSENT WITNESS.

Refusal of continuance for absence of a witness, for a long time a fugitive from justice, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. §594.]

3. CRIMINAL LAW §594, 917—CONTINUANCE—ABSENT WITNESS.

There was no error in denying a continuance or a new trial based on absence of a witness, where he makes affidavit that he did not know and would not testify what defendant in his application alleged he would.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332, 2161, 2162; Dec. Dig. §594, 917.]

4. HOMICIDE §101—JUSTIFICATION.

Communication by deceased to defendant of the fact that he had had intercourse with defendant's wife did not justify the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §131; Dec. Dig. §101.]

5. CRIMINAL LAW §633—CONDUCT OF TRIAL—CALLING NAMES OF WITNESSES.

That when the case was first called for trial, before a jury was impaneled or announcement of ready made, while both parties were calling their witnesses to determine whether they were ready, the name of defendant's wife was called, shows no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1450, 1451, 1453, 1454, 1459; Dec. Dig. §633.]

6. CRIMINAL LAW §1037—ARGUMENT OF PROSECUTING ATTORNEY—OBJECTION—REVIEW.

That defendant may complain of the statement of prosecuting attorney in argument that defendant's wife was present, he should have asked an instruction for the jury not to consider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. §1037.]

7. CRIMINAL LAW §721½—ARGUMENT OF PROSECUTING ATTORNEY—WIFE AS WITNESS.

The prosecuting attorney may comment on the failure of defendant to produce his wife as a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §1673; Dec. Dig. §721½.]

Appeal from District Court, Scurry County; John B. Thomas, Judge.

Edward B. Jordan was convicted, and appeals. Affirmed.

Woodruff & Woodruff, of Sweetwater, and Smith & Spiller, of Snyder, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the murder of his father, and his punishment assessed at 25 years in the penitentiary.

The original and supplemental record, as well as the statement of facts, are quite voluminous, especially the statement of facts. We have carefully read and considered all of them.

Appellant made a motion for a continuance to get two absent witnesses, his brother, H. C. Jordan, and Sid Hill. The state contested the motion. At the time, and before the trial, the court heard much evidence on this contest. In addition, the appellant made the overruling of his motion a ground of his motion for a new trial. This was also contested by the state. The court again heard evidence when hearing this contest of his motion for a new trial. There was no statement of facts agreed to, approved by the judge, and filed within term time of what this testimony was on either of said hearings by the court. Appellant has a bill of exceptions to the overruling of his motions, but this was filed long after the term at which he was tried had adjourned.

[1] It is the settled law of this state, held many times in the decisions of this court, that a statement of facts or bills of exceptions showing the testimony heard on such motion must be properly agreed to, approved by the trial judge, and filed in term time, and, if not, this court cannot consider it, but must, and does, presume that the action of the lower court was correct. Jones v. State, 163 S. W. 76; Graham v. State, 73 Tex. Cr. R. 23, 163 S. W. 726; Hoskins v. State, 73 Tex. Cr. R. 109, 163 S. W. 426; Forrester v. State, 73 Tex. Cr. R. 67, 163 S. W. 67; Roberts v. State, 180 S. W. 1080. Many other decisions

are cited in the opinions in these cases. It is unnecessary to collate them here.

[2] Without discussing whether or not the diligence in this case was sufficient, or that the testimony of either of said witnesses was material or probably true, or the insufficiency of the application to continue and motion for new trial on that ground was wholly insufficient on various other grounds, we will state that the record, the motions themselves, and the statement of facts on the trial of the case, without doubt, show that appellant's brother, H. C. Jordan, was a fugitive from justice, and had been, with appellant's knowledge, for perhaps two or three years before this case was tried. On that ground alone the court's refusal to continue on account of the absence of that witness and refusing a new trial was correct. *Anderson v. State*, 53 Tex. Cr. R. 344, 110 S. W. 54; *Sims v. State*, 45 S. W. 707; *Sinclair v. State*, 34 Tex. Cr. R. 453, 30 S. W. 1070; *Deckard v. State*, 58 Tex. Cr. R. 38, 124 S. W. 673.

[3] The affidavit of the other witness, Sid Hill, was attached to the state's contest of appellant's motion for a new trial, and it shows that that witness did not know and would not testify what appellant alleged he would in his application for a continuance. *Wilkins v. State*, 35 Tex. Cr. R. 525, 34 S. W. 627; *Henry v. State*, 38 Tex. Cr. R. 306, 42 S. W. 559; *Hinman v. State*, 59 Tex. Cr. R. 29, 127 S. W. 221; and *Singleton v. State*, 57 Tex. Cr. R. 560, 124 S. W. 92.

[4] The evidence was amply sufficient to show, and we think the jury therefrom could conclude, as they did, that the appellant killed his father with malice. The court therefore did not err in refusing to give, and should not have given, his special charge to the effect that the evidence was insufficient to base a conviction for murder and instructing the jury peremptorily to find him not guilty of that offense. Neither did the court err in refusing to give his special charge to the effect that, if they believed from the evidence that deceased communicated to him the fact that he had had illicit intercourse with his wife, this was within the eyes of the law adultery, and appellant was justified in killing his father, and to find him not guilty. Such charge was not the law. The court in his charge submitted even more favorably than the evidence, and the law would justify every issue in appellant's favor that was raised by the evidence, or even remotely suggested thereby.

[5] Appellant has a bill which, together with the judge's qualification and approval thereof, shows that, when the case was first called for trial, both parties proceeded to call their witnesses to determine whether they were ready. Among the witnesses called were several of the Jordan women. The court did not know that any one of them was appellant's wife until his attorneys so

stated to the court. At this time no jury had been impaneled and no announcement of ready made, and, when the motion for a continuance was heard and overruled, his wife's name was not called as one of the witnesses. This, of course, shows no error.

[6, 7] Appellant has another bill, which alleges that the district attorney "stated in his argument to the jury that the defendant's wife was then present in the courtroom," to which he objected. The bill in no way shows the action of the court. The record shows appellant did not ask any charge instructing the jury not to consider this remark by the district attorney. It is the well-settled law of this state, as stated by Mr. Branch in his *Criminal Law* (section 61), as follows:

"State's counsel may comment on the failure of defendant to produce his wife as a witness or upon any omissions in her testimony, if she testifies"—citing quite a number of cases decided by this court to that effect.

This bill shows no error whatever. *Moon-ey v. State*, 176 S. W. 56, and cases therein cited.

Nothing else is presented for review.
The judgment is affirmed.

DAVIDSON, J., not present at consultation.

WILSON v. STATE. (No. 3926.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916. Rehearing Denied Feb. 16, 1916.)

1. CRIMINAL LAW §814.—INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

Where the defendant was identified by a witness, who stated that she recognized him as the man who made the entry into the house, that a light was burning, and that she recognized him by the funny shape of his head and his mustache, it was not error to fail to charge on circumstantial evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. §814.]

2. BURGLARY §28 — EVIDENCE — ISSUES — WANT OF CONSENT.

Where the indictment alleged that the burglary was made in the nighttime by force with intent to steal, and the defendant was identified by one witness as the burglar, but he denied that he was the person who burglarized the house, consent to the entry was not an issue, and, if alleged or evidence thereon was introduced, it could be treated as surplusage, since it was an attempt to prove circumstantially matters unnecessary to be proved.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 67-78; Dec. Dig. §28.]

Appeal from Criminal District Court, Williamson County; A. S. Fisher, Judge.

Barney Wilson was convicted of burglary, and he appeals. Affirmed.

Melasky & Moody, of Taylor, for appellant.
O. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at five years' confinement in the state penitentiary.

[1] Appellant insists that the court erred in failure to charge on circumstantial evidence. No such charge was called for, as Miss Kelley testified that she recognized the defendant as the man who made the entry into the house; that a light was burning, and she recognized him by the funny shape of his head and his mustache. This positive identification of appellant rendered it unnecessary to charge on circumstantial evidence.

[2] Appellant insists that, as the house was alleged, in the indictment, to belong to Will Goff, and charged that the entry was made without his consent, Goff should have been called as a witness to prove that he did not give consent; that want of consent could not be proven by circumstantial evidence, but if want of consent is proven by circumstantial evidence, then when such fact is proven by circumstantial evidence, it is fundamental error not to instruct the jury on the law of circumstantial evidence. In a case of burglary it is not necessary to allege nor prove want of consent to make the entry, unless such fact becomes an issue in the case. In this case no such issue arises on the testimony. Miss Kelley positively identifies appellant as the person who made the entry and stole the clothing. Appellant denies he is the person who burglarized the house. So consent is not an issue in the case, and in such case it was not necessary to allege nor prove that the entry was made without the consent of Will Goff, and, even if alleged, such allegation in a burglary indictment may be treated as surplusage, it being unnecessary to the sufficiency of the indictment; the indictment alleging that the entry was made in the nighttime by force. *State v. Williams*, 41 Tex. 98; *Summers v. State*, 9 Tex. App. 390; *Taylor v. State*, 23 Tex. App. 639, 5 S. W. 141; *Buchanan v. State*, 24 Tex. App. 199, 5 S. W. 847; *Smith v. State*, 22 Tex. App. 350, 3 S. W. 238; *Sampson v. State*, 20 S. W. 708.

There is no allegation in the indictment that any property was in fact stolen, but only that entry was made with intent to commit theft. If the indictment contained a count charging theft, then it would have been necessary to allege and prove want of consent as to that count. But as no such allegation is made, the state was not required to call Mr. Goff as a witness and prove want of consent. And as it was unnecessary, the fact that Mrs. Goff was permitted to testify that she did not give consent, and her husband was absent on the occasion, would present no error. The state was making proof by circumstances of a fact that it was wholly unnecessary to prove.

The judgment is affirmed.

DAVIDSON, J., not present at consultation.

PEUGH v. MOODY et al. (No. 2438).*

(Supreme Court of Texas. Feb. 19, 1916.)

PRINCIPAL AND SURETY \Leftarrow 118—RELEASE OF PRINCIPAL—CONSENT OF SURETY—EVIDENCE.

Where the surety on a note was a party to an arrangement for the settlement of the principal's debts, and participated in negotiations with the payee to accept the settlement proposed, held, that the release of the principal by the payee's acceptance of the settlement was made with the surety's consent and did not discharge him from liability for the balance of the note.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 286-295; Dec. Dig. \Leftarrow 118.]

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by Robert Moody and others against W. F. Peugh. From a judgment for the plaintiffs, affirmed by the Court of Civil Appeals (145 S. W. 296), defendant brings error. Affirmed.

Ramsey, Black & Ramsey, of Austin, and E. C. Gray, of Higgins, for plaintiff in error. H. E. Hoover, of Canadian, for defendants in error.

PHILLIPS, C. J. The suit was upon a note given to the First National Bank of Higgins, executed by the W. F. Peugh Mercantile Company, a corporation, as principal, and W. F. Peugh as surety, afterwards transferred to the plaintiffs. Peugh was president of the company and its principal stockholder. It became financially involved, and its affairs were turned over to a trustee to be administered for the benefit of its creditors, who obtained under such administration fifteen per cent. of their claims. Subsequently an arrangement was made whereby Peugh and certain of the creditors provided a fund for the payment of fifty per cent. of the remaining indebtedness to such of the company's other creditors who were willing to accept that proportion of the amounts due them in settlement of their claims against it, the parties providing the fund to take over the company's assets. The bank, then the owner of the note, through its cashier agreed to this, and such a settlement was made with it.

The defense of Peugh to the suit for the balance due upon the note was, that the bank's settlement with the company released him as a surety. On the trial a verdict was instructed against him.

If the evidence conclusively established that Peugh consented to the bank's release of the company from the indebtedness, the verdict was properly directed. He contends that such is not the force of the evidence. We have examined it fully, and are convinced that it presented no issue on the question. It is undisputed that Peugh was a party to the settlement proposal; that he personally contributed a portion of the fund provided for that purpose; and that he took part in the negotiation with the bank's cashier for the

bank's acceptance of the plan of settlement with respect to its claim. He was, one of the promoters, in other words, as the undisputed proof shows, of the settlement that was made with the bank; was interested in its procurement; and, as one of those proposing it to the bank, took part in the transaction in which it was effected.

It is urged that to avoid his release as a surety from the obligation of the note, as the legal consequence of the settlement, the burden was upon the plaintiffs to establish his affirmative consent to the release of the principal debtor; that, according to the proof, he merely remained silent at the time the bank's cashier expressed his willingness to make the settlement, which, it is said, did not evidence his consent to the principal's release, or, at least, presented an issue of fact as to whether he was concluded in his defense by estoppel, which was not pleaded. But we do not think the question is in that attitude. A main object of Peugh and the four creditors associated with him in the settlement plan, in executing the transaction with the bank, was to obtain the company's release from any further liability for its debt. The settlement was to be made with the bank on no other basis. He participated in the transaction itself, plainly acting as one of the promoters of the plan. It is difficult to perceive how, under these circumstances, his position in the transaction could have been other than one of positive agreement to the company's release from the debt. It was that which he and his associates sought to accomplish in the transaction, and which they did accomplish. Necessarily, he consented to a result that he intended to bring about and helped to effect.

The judgment of the Court of Civil Appeals is affirmed.

FT. WORTH & R. G. RY. CO. v. STEWART.
(No. 2435.)

(Supreme Court of Texas. Feb. 16, 1916.)

1. CARRIERS — § 820 — INJURY BY FELLOW PASSENGER — CONDUCTOR'S NEGLIGENCE — QUESTION FOR JURY.

In a passenger's action for injuries from a fellow passenger, *held* that, under the evidence, the conductor's negligence in not ejecting the offending passenger was for the jury.

[*Ed. Note.*—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320; *Negligence*, Cent. Dig. § 301.]

2. CARRIERS — § 321 — INSTRUCTIONS — CONFORMITY TO PLEADING AND EVIDENCE.

In a passenger's action for injuries from an assault by a fellow passenger, *held*, that the pleadings and evidence justified an instruction charging that plaintiff could not recover if the assault was so sudden that it could not have been reasonably prevented by the conductor.

[*Ed. Note.*—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1348; Dec. Dig. § 321.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by A. M. Stewart against the Ft. Worth & Rio Grande Railway Company. From a judgment for plaintiff, which was affirmed by the Court of Civil Appeals (146 S. W. 355), defendant brings error. Reversed and remanded.

Andrews, Ball & Streetman, of Houston, and C. L. McCartney, of Brownwood, for plaintiff in error. T. C. Wilkinson, of Brownwood, for defendant in error.

YANTIS, J. This suit was instituted in the district court of Brown county, Tex., by A. M. Stewart, the defendant in error, against the Ft. Worth & Rio Grande Railway Company, plaintiff in error, to recover damages for personal injuries inflicted upon Stewart by a passenger on the plaintiff in error's train. It was alleged by Stewart that on the 15th day of May, 1908, he was a passenger thereon, going from Ft. Worth to Brownwood; that while making this journey he was set upon and assaulted by another passenger; that he was struck across the head over the left ear with a large bottle of whisky; that by said blow he was knocked down, his scalp badly contused, and his skull fractured; that as a consequence of said blow and said injuries his hearing in his left ear had been totally destroyed; that the defendant's conductor in charge of said train knew that the passenger who assaulted him and several of his associates were drunk and quarrelsome, and knew that they had already, while on said train, been quarreling and fighting; that they had fought with the conductor, and had threatened to assault plaintiff, and the conductor knew that an injury was threatened to plaintiff by them, and he negligently failed and refused to quiet or suppress the drunken conduct of the man who assaulted him, and his associates, and refused to eject them from the train, or otherwise protect the plaintiff.

The plaintiff in error alleged that, if Stewart was struck by a fellow passenger, it was done without its knowledge, and without the knowledge of its servants and agents in charge of said train; that they had no reasonable cause to anticipate that any one would make an assault, or was likely to make an assault upon the plaintiff; that, if the defendant in error was assaulted, such assault was a sudden, willful, and unexpected act on the part of some third person in no wise connected with the defendant, and in no manner under its control; and that said injuries could not reasonably have been foreseen, anticipated, or prevented by the plaintiff in error.

There was a trial by jury, which resulted in a verdict in favor of Stewart, and against the railway company. The judgment of the

district court was affirmed by the honorable Court of Civil Appeals for the Third District. A writ of error was granted by this court, and the questions presented by the petition for writ of error will now be reviewed:

Plaintiff in error claims there was error in the refusal by the trial court to give defendant's special charge No. 8, which is as follows:

"If you believe from the evidence in this case that under all the circumstances defendant's conductor, at and before the time plaintiff was assaulted as testified to by him, ought to have remained with plaintiff for his care and protection, yet if you believe from the evidence that the attack made upon plaintiff was so sudden and of such a character that the conductor, if present, could not reasonably have prevented same, then you are instructed that you cannot find a verdict for the plaintiff on account of the fact that said conductor was not present and personally looking after plaintiff's protection at the time he was assaulted."

The honorable Court of Civil Appeals, in passing upon this assignment, held that it was not error to refuse said charge; it being of the opinion that it was the duty of the plaintiff in error's conductor to eject the passenger who assaulted Stewart and his associates from the train, and that the conductor was guilty of negligence in failing so to do before the assault was committed, and that, as the special charge requested authorized the defeat of liability on a less degree of care by the conductor than ejection, it was proper to refuse it.

To hold as a matter of law that the conductor was guilty of negligence in not ejecting said parties from the train, the evidence that it was the conductor's duty so to do should be so conclusive that all reasonable minds would agree that it was his duty to take such action. If there was room for reasonable minds to differ about this, then it was a question of fact for the jury to determine, and could not be held by this court to be negligence as a matter of law; there being no statute which required the conductor to eject them. It becomes appropriate, therefore, to quote the material portions of the evidence which has a bearing upon this issue:

Stewart testified, in substance, that he was on the road most all the time, but that he had a place in Brownwood, in which city he maintained headquarters; that on May 15, 1908, about 2:30 a. m., he boarded the plaintiff in error's train at Ft. Worth, with Brownwood as his destination; that he went into the smoker, and found a lot of people sleeping in there, and a good deal of noise, and nearly all of the seats taken, and that he passed on to the little compartment that was partitioned in the front end of the car, about four seats; that some other gentleman was lying on the right-hand side, and that he took two seats on the left-hand side and placed them together and went to sleep; that later in the night the conductor came

through and took up his ticket, and that he again went to sleep; that it must have been about 4 o'clock in the morning when he was awakened by a fellow having his foot over the seat and across his (Stewart's) neck, which excited him, and that he grabbed the fellow by the ankle and knocked his foot off of his neck, and looked up, and Mr. Blythe and this fellow were fighting; that this fellow had Mr. Blythe around the throat with both hands, and two or three other fellows had hold of this man pretending to pull him off, and this other man had his foot over the seat and across Stewart's neck; that, when the others pulled him loose, he turned loose with one hand and commenced pounding the conductor over the head with his fist; that, when they got him loose, Mr. Blythe, the conductor, passed into the large room of the smoking compartment; that he (Stewart) then told these fellows, about the time Mr. Blythe left to go into the other end of the car, "It looks to me like you fellows might find some other place to fight instead of fighting over me;" that Mr. Blythe passed out and did not reply; that this fellow said, "By God, maybe you don't like it;" that he replied, "I don't like it;" "I am a passenger on this train like you are, and not mixed up in the fights at all;" that a considerable quarrel followed, and that he ran his hand in his pocket as though he was going to pull a gun; that he (Stewart) said, "Young man, you are too close to me to pull a gun; I will knock you through that window too quick to think about it; I am just as liable to use it as you are;" and there were several words passed between them, and the parties passed back out at the front end of the car on the platform; that he heard talking out there; that there were four of these fellows, and that they all went out together; that in a few minutes Mr. Blythe, the conductor, came back, and that it looked to him like he met the other parties in about the same place, and they passed some words and licks; that he sat in his seat and did not take any hand; that he thought he was out of it, as he had had his say and was perfectly satisfied; that Mr. Blythe, the conductor, and the other parties then passed into the large end of the compartment; that after this second fight these parties began to abuse him for everything they could think of; that he replied, "There are four of you fellows; I cannot fight all of you;" that at the time these fellows were talking to him Mr. Blythe was standing in the door listening to them; that they abused him and called him a "damn son of a bitch," and everything in the world that could be thought of; that they called him everything, names that he would not like to mention; that the fellow that afterwards struck him with the bottle did the talking; that the other fellows did not do a thing but listen; that they did not try to quiet the fellow who was talking; they

never said a word; that they were all drinking; that this fellow that was talking was drunk enough to stagger; that after these fellows had left the place where Stewart was and had gone into the other compartment, in about five minutes, he should judge, though he could not say positively, Mr. Blythe came back into the little compartment where he was then alone, and said, "Stewart, I believe if I was in your place I would go up and go in the chair car; those fellows are liable to do you bodily harm," and said, "Did you notice that fellow keep putting his hand on his hip pocket?" that he (Stewart) replied, "Yes," and that Blythe said, "I would go back in the chair car, where there is more people," and that the conductor then walked out, and that he (Stewart) stood there and studied about a minute, and decided that he had better do that, though it looked like running, and that he picked up his suit case and pushed the door open with his crippled arm, and that after he had passed through the door, and had gone three or four steps from the door, this fellow raised up in his seat and "lammed me across the head with a bottle of whisky"; that the whisky flew all in his face, and that the bottle cut the brim of his panama hat, and knocked him senseless for a minute, and that, when he (Stewart) turned around to pick up his hat, he looked back, and between himself and this little door he had come out of was one of those fellows with his sleeves rolled up about his elbows, and the blood was streaming down his arm; he was wiping the blood off with his other hand; that the fellow that struck Stewart was gone before he (Stewart) knew anything about it; that prior to being assaulted he asked Mr. Blythe what all this was about, and that he replied, "Well, that fellow got on the train, he was one of the firemen at Waco, and got on the train, a crowd of them, at Ft. Worth, and when he went through taking up tickets he came to this fellow who said that he could not find his ticket, and he (Blythe) made him pay his fare;" that Blythe said, when the fellow came back in there and jumped on him, that he had found his ticket in the meantime and had come back to him to get him to refund his money and take the ticket and that Mr. Blythe said that he would not do it and told him how to do it, to turn it in to the ticket agent; that Mr. Blythe said something about having quarreled with him before that time; he said that they had fussed about this money, and the fellow got mad about it.

Stewart testified at greater length than stated herein, but the other portions of his testimony consist almost entirely of repetitions of the portions already stated herein.

The conductor, Blythe, testified, in substance, as follows: That he remembered the circumstances happening on his train in May, 1908, at the time one of the passengers

struck Stewart with a bottle; that he did not see him when he was struck; that prior to the time he (Stewart) was struck he had seen him in the small partitioned end of the smoking car where he secured his ticket; that he (Blythe) did not have any difficulty in that compartment with a man prior to the time Stewart was hit with a bottle; that he had some trouble with this man before Stewart was struck just before reaching Stephenville; that in leaving Ft. Worth he had eight or ten volunteer firemen of Stephenville; that one of them handed him a \$10 bill and said he had lost his ticket, and would have to pay his fare; that he gave him a receipt for his money, and when they had reached within two miles or less of Stephenville he went to the front end of the train to commence to take up hat checks from people that were going to get off at Stephenville; that on reaching the front end of the car the man who had paid his fare approached him and said, "I have got the ticket here and want my money back;" that he (Blythe) told him that he would have to take the receipt and his ticket to the agent at Stephenville and he would get a refund of his money; that he (Blythe) could not give it to him; that the man said, "You are the man that got my money, and you are the man that has to give it back to me;" that he renewed his statement to the man that he would have to get it from the agent, and then started through the partition door, not looking for any trouble, and not expecting any, and as he got his back to the man he put his arm around his (Blythe's) neck, and pulled his head back and struck him a glancing blow on the side of the head; that in getting loose from him he was thrown or pushed in some manner against Mr. Stewart, who was lying down on two seats in this small end of the car, and that Mr. Stewart got up and put his fist in the man's face and said, "Damn you; you have caused trouble here all night, and I will whip you and whip you now," and with that the boy passed out into the back end where the rest of the crowd was, and gathered them together and came into the small end, several of them, making the remark that nobody could whip one of their crowd; that he (Blythe) quieted them down, and pacified them, and pushed them out—got them in the other end of the car, and by that time the train stopped at Stephenville; that he (Blythe) went out through the front end and went into the office and transacted his business in there and unloaded his people, and when they pulled out of Stephenville he (Blythe) came in the front end that he had gone out of and there lay the remains of a bottle on the floor, with a very strong smell of whisky; that the train was pulling into Stephenville when he got these boys back; that when he got them back there they sat down; that he (Blythe) never had any other difficulty with

this man than the one difficulty already related by him; that he did not go back where Stewart was after the difficulty he had had in Stewart's presence, and did not say to Stewart that he had better get out of there, that those boys were liable to hurt him, and that he never told him anything of that sort at all; that he did not go back in there and say anything to Stewart; that after the little trouble between him and this passenger, and the words that were passed between the passenger and Mr. Stewart, he (Blythe) got all those boys back in the other end of the car, and they sat down; that there was nothing said by any of them back there and nothing done which caused him to think that they were liable to go back there and assault Mr. Stewart; none of them made any threat against them in his presence or hearing; that the only thing that was said was while they were all there together in the small end of the car; that when he got them back in the other end of the car after this trouble the train had stopped at that time, or stopped a very short time afterward; that he (Blythe) did not get a chance to take up his Stephenville checks at all; that this man he had a difficulty with had paid his fare to Stephenville, and was a passenger to Stephenville, and was expected to get off there; that at that time he (Blythe) never anticipated nor expected any further trouble between any one; that he supposed it was all quieted down; that there had been no trouble on the train at all that night; that those boys had slept all night; that the man he had a difficulty with got on the train at Ft. Worth, and had probably had a drink or two; that after the train left Ft. Worth and pulled out his conduct was all right; he had been sleeping; there had been no trouble of any sort between Blythe and this man prior to the time the train was approaching Stephenville; that he did not tell Stewart that he had been having trouble with him along the road since he had left Ft. Worth; that he did not call Mr. Stewart's attention to the fact that this man had put his hand in his pocket as if to draw a pistol.

[1] The testimony of Stewart and Blythe quoted is in conflict in relation to the greater portion of the conduct of the passenger who struck the blow and that of his companions. In determining whether the conductor was guilty of negligence as a matter of law in failing to eject these parties from the train prior to the assault, the testimony of the conductor as to the conduct of the alleged disorderly passengers should be taken as true; for it was within the province of the jury to believe it, and to reject the testimony of Stewart. If the jury rejected the testimony of Stewart on this question, as it was within their province to do, and believed the con-

ductor instead, then we would not be authorized to hold that the evidence was so conclusive as to the disorderly conduct of the fellow passengers as to establish as a matter of law that it was the duty of the conductor to eject the passengers before the assault was made. The conductor's testimony does not show such a state of facts. The evidence of the conductor was to the effect that the fellow passengers, though they had taken a drink or two, were not disorderly at any time except when one of them assaulted him for not returning his money after he found his ticket; that after the quarrel one of them had with Stewart they all returned to their seats in the coach, and were seated and quiet, apparently pacified, and no further trouble was expected by him; that he did not advise Stewart to go back in another coach, or state that he feared they would make an assault on him if he did not go; that at the time of the quarrel had with Stewart by the fellow passenger the train was within two miles or less of Stephenville, which was the destination of the assaulting party and his associates, according to their tickets, and it was within the contemplation of the conductor that they would soon leave the train at Stephenville. An ordinarily prudent person situated as he was, and under the circumstances related by him, might not have stopped the train to eject these men when the train would stop at their destination within so short a distance. It presented a question of fact for the jury to determine, and not one of law for the court to decide.

[2] The defendant had pleaded that the assault which was made upon Stewart occurred so suddenly that the defendant's conductor could not have prevented the same. The evidence from the defendant's viewpoint tended to support this defense. It had a right to have such defense submitted to the jury, unless the undisputed evidence showed that the conduct of the fellow passengers was of such a nature as that the conductor was, as a matter of law, guilty of negligence in not ejecting them. Whether or not this is true when considered in the light of Stewart's testimony alone, we do not think it is true if Stewart's evidence should be disregarded, which it was the privilege of the jury to do. We are of the opinion the court erred in refusing the defendant's special charge No. 8, quoted, and for this error the cause should be reversed and remanded.

We have considered the other assignments presented, and do not think any of them presents reversible error.

For the error indicated, the judgment of the honorable Court of Civil Appeals and the judgment of the district court are reversed, and the cause is remanded for another trial.

JOHNSON v. JOHNSON. (No. 181.)

(Supreme Court of Arkansas. Feb. 14, 1916.)

1. DIVORCE — SUFFICIENCY OF EVIDENCE.

Divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 408-407; Dec. Dig. —127.]

2. DIVORCE — APPEAL — CAUSE OF ACTION — STATUTE.

Where the evidence in an action for divorce for the wife's desertion in another state was not sufficient to establish such alleged ground, the Supreme Court cannot determine whether the chancellor erred in construing Kirby's Dig. § 2678, relative to the proof of a cause of divorce occurring outside of and existing in the state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. —184.]

3. EVIDENCE — HEARSAY — AFFIDAVIT.

An affidavit attached as an exhibit to a deposition in an action for divorce stating that affiant, at plaintiff's request, had gone to see his wife and asked her to return and live with plaintiff, and that she had refused, was but written hearsay testimony and incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. —318.]

4. DIVORCE — EVIDENCE — AFFIDAVIT.

There is no warrant in law for the introduction of an affidavit in evidence to establish a ground of divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 365, 366; Dec. Dig. —111.]

5. DIVORCE — COMPLAINT — ADMISSION — FAILURE TO ANSWER.

The statements of a complaint for a divorce are not taken as true because of the defendant's failure to answer or his admission of their truth, but must be proved.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349-352; Dec. Dig. —108.]

6. DIVORCE — APPEAL — REVERSAL — GROUNDS.

It was immaterial that the chancellor refused to grant a divorce for a reason other than the proper one, when the plaintiff was not entitled to a divorce on the case made.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. —184.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action for divorce by Leslie Johnson against Margaret Johnson. Decree for defendant dismissing the complaint, and plaintiff appeals. Affirmed.

This appeal comes from a decree denying appellant a divorce. The complaint alleged as a ground therefor that appellee had deserted him willfully and without cause in the state of North Carolina, refused longer to live with him, and went to the home of her father, where she still lived; that he came from North Carolina on the 14th day of February, 1914, and asked his wife, before leaving, to come with him, which she refused to do; that he established a residence in Pulaski county, Ark., and thereafter insisted on her coming here to live with him as his wife, which she refused to do; and that

his cause of divorce existed in this state for more than a year, and occurred within five years next before the commencement of the suit.

Constructive service was had, and appellant testified to the marriage; that his wife deserted him and returned to the home of her parents without reasonable cause, and refused to live longer with him in North Carolina; that she refused to come with him to the state of Arkansas, and refused to come to this state and live with him after he had established his residence here. He attached to his deposition as an exhibit the affidavit of one J. T. Puckett, in which it was stated that the affiant at the request of appellant had gone with appellant's father to see his wife, Margaret Johnson, and asked her to return to and live with her husband, and in reply to the question, "Leslie Johnson wants to know if you will go and live with him," her answer was, "No; I will not go and live with him; I never intend to live with him again," that in her remaining conversation she expressed no desire to live with him, nor did she ask any questions about him.

The court found that the desertion occurred in the state of North Carolina, where it is not recognized as a ground for divorce, and therefore did not exist, and could not continue to exist in this state within the meaning of our law authorizing the granting of a divorce if the cause therefor existed in this state, and dismissed the complaint for want of equity.

Rose, Hemingway, Cantrell, Loughborough & Miles and Coleman & Lewis, all of Little Rock, for appellant.

KIRBY, J. (after stating the facts as above). [1, 2] Appellant contends that the chancellor erred in construing the statute (section 2678, Kirby's Digest) relative to the proof of a cause of divorce that occurred outside and existed in this state, but this court cannot determine the question, since the testimony is not sufficient to establish the facts of the alleged ground for divorce.

"Divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor." *Sisk v. Sisk*, 99 Ark. 94, 136 S. W. 987; *Shelton v. Shelton*, 102 Ark. 55, 143 S. W. 110; *Kientz v. Kientz*, 104 Ark. 381, 149 S. W. 86.

[3, 4] There is no evidence whatever in the record corroborating the testimony of appellant, Leslie Johnson, relative to the wife's abandonment and desertion of him and the cause thereof. The affidavit attached to his deposition as an exhibit was but written hearsay testimony, was incompetent, and without probative force. There is no warrant in our law for the introduction of an affidavit in evidence to establish a ground for divorce.

[5, 6] The statements of the complaint for a divorce are not taken as true because of the failure of the defendant to answer, or his or her admission of their truth, and must be proved, and affidavits cannot be admitted to establish the issues. *Smith v. Feltz*, 42 Ark. 355. It makes no difference that the chancellor refused to grant a divorce for a different reason, since appellant was not entitled to a decree upon the case made.

Affirmed.

STREUDLE et al. v. LEROY et al. (No. 140.) (Supreme Court of Arkansas. Jan. 31, 1916.)

1. PLEADING ⚡412—DEFAULT IN PLEADING—WAIVER.

Where a decree for complainants was rendered dismissing the cross-complaint for want of prosecution and was afterwards opened on defendant's motion and testimony heard and the cause tried as if the issues had been made up by the pleadings and tried on the merits, defendant thereby waived complainant's failure to answer the counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. ⚡412.]

2. DAMAGES ⚡40—PREVENTION OF PERFORMANCE—RECOVERY OF PROFITS.

Where plaintiff agreed to perform certain work for defendant and was prevented from doing so by defendant's failure, he was entitled to recover the profits which the evidence made it reasonably certain that he would have made if the defendant had carried out his contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. ⚡40.]

3. APPEAL AND ERROR ⚡1009—FINDING OF CHANCELLOR—REVIEW.

A finding of the chancellor with reference to a state of accounts between the parties, not against the preponderance of the evidence, must be upheld and his decree affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. ⚡1009.]

Appeal from Crittenden Chancery Court; Chas. D. Frierson, Chancellor.

Bill by L. B. Leroy and others against O. T. Streudle and others, with answer and cross-complaint by defendants. Judgment for complainants, dismissing the cross-complaint, and defendants appeal. Affirmed.

Wright, Miles, Waring & Walker, of Memphis, Tenn., for appellants.

HART, J. On November 25, 1913, appellants and appellees entered into a written contract, whereby the former agreed to furnish the latter with a sawmill, and the latter agreed to supply its own hoop machine and appliances at Proctor, Ark. Appellants agreed to furnish appellees logs and strips of timber necessary for the manufacture of hoops, and appellees agreed to manufacture hoops for appellants at a stipulated price. The contract provided that the transactions and moneys paid out or received under the agreement should be under the personal control and custody of John Reichert, one of ap-

pellants, for which appellees should pay \$3 per day. It was also agreed that L. B. Leroy, one of the appellees, should receive out of the pay roll \$5 per day for his services as manager of the mill when in operation. The contract provided that all of the operating expenses and repairs should be at the expense of appellees, and also provided the basis on which appellants and appellees should share the profits and bear the losses of the enterprise. Other provisions were incorporated into the contract which the views we shall hereinafter express render it unnecessary for us to incorporate in the statement of facts. Appellees filed a bill against appellants in which they sought an accounting. They alleged that there were 182 working days in the period covered by the contract; that the mill had a capacity to manufacture 40,000 hoops per day; that appellants failed to furnish them with material sufficient to enable them to run at full capacity; and that appellants and appellees became partners in the enterprise by the terms of the contract. The complaint was filed on the 20th day of April, 1914. On the 26th day of April, 1914, appellants filed what they termed an answer and cross-complaint. They denied that they became partners with appellees under the terms of the contract; denied that they failed to carry out the contract on their part; denied that the mill had a capacity of 40,000 hoops per day; alleged that they furnished to appellees the logs and strips of timber called for by the contract; alleged that appellees failed to comply with the terms of the contract on their part; alleged that, in order to keep the business going, they furnished to appellees large sums of money which they were not required to furnish under the contract; and, by way of counterclaim, asked judgment for the amount found to be due them. Appellees did not file any answer to the counterclaim of appellants. On June 11, 1914, appellants filed a motion in which they asked for judgment against appellees in the sum of sum of \$3,119.04 because of the failure of appellees to answer their counterclaim. On the 27th day of January, 1915, the court heard the case upon the pleadings and the depositions on the part of appellees. The court found that the cross-complaint or counterclaim of appellants should be dismissed for want of prosecution and rendered judgment in favor of appellees. On January 30, 1915, appellants filed a motion to vacate the decree entered of record January 27, 1915, and stated the grounds therefor in their motion. On February 6, 1915, the court took under consideration the motion to vacate the decree until April 1, 1915, and time was given each party within which to take proof. On the 26th day of April, 1915, the court entered a decree opening the decree of January 27, 1915, and after hearing the motion of appellants for a decree

in their favor filed June 11, 1914, overruled the same. The case was heard on the depositions taken by both parties, and a decree was entered in favor of appellees for the sum of \$1,201.85, being a smaller amount than was awarded them by the former decree. The case is here on appeal.

[1] It is first contended by counsel for appellants that the court erred in not rendering judgment in their favor when they moved for judgment on June 11, 1914, for failure of appellees to answer their counterclaim. They rely upon the case of *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372, to sustain their contention.

It will be remembered that the court opened the decree rendered on January 27, 1915, and gave the parties leave to take proof in the case. A great volume of testimony was taken, and the state of accounts between the parties was thoroughly gone into. There could be no mistake whatever as to the issues between the parties. The issues were thoroughly made up, and both parties introduced testimony to support their claim. The motion for judgment for failure to answer their counterclaim was made by appellants in June, 1914. When the court opened the decree in 1915 and gave appellants leave to take testimony, they proceeded to take their testimony, and the case went to trial as if the issues had been made up by the pleadings. Under these circumstances, appellants will not be allowed any advantage from this defect in the pleadings, but are deemed to have waived it by going to trial on the merits of the case. This holding, we think, is in accord with the rule laid down in *Young v. Gaut*, supra, and other decisions of this court bearing on the question.

[2] This brings us to a consideration of the case on its merits. In the case of *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343, the court said that, where plaintiff agreed to perform certain work for defendant which he was prevented from doing by defendant's fault, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made had the defendant carried out his contract.

In the case of *Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 105 Ark. 421, 151 S. W. 275, the court held that, where a party to a contract is prevented from performing same by fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the other party carried out his contract.

The court below was governed by these principles of law in its finding in favor of appellees.

[3] The record contains about 675 pages of typewritten matter. The whole state of accounts between the parties was gone into by the testimony of witnesses taken in the form of depositions and exhibits attached thereto.

Nothing could be gained by a statement in detail of the evidence relating to these questions, nor would it serve any useful purpose to enter into a protracted discussion of them. We have carefully considered the evidence as disclosed by the record, and are of the opinion that the finding of fact made by the chancellor with reference to the state of accounts between the parties is not against the preponderance of the evidence.

Therefore, under the settled rules of this court, the finding of the chancellor must be upheld, and the decree will be affirmed.

CITY OF EL DORADO v. UNION COUNTY et al. (No. 138.)

(Supreme Court of Arkansas. Jan. 31, 1916.)
HIGHWAYS \Leftarrow 130—DIVISION OF ROAD FUNDS
—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 7, § 28, vests the county courts with exclusive original jurisdiction in matters relating to county taxes, roads, bridges, etc. Const. Amend. No. 5, adopted January 13, 1899, authorized the county court, when sitting as a levying board, to levy a road tax of not more than three mills on the dollar when the majority of the qualified electors of the counties shall have voted therefor. Acts 1913, p. 998, enacted to provide a division of the road funds paid by taxpayers within the corporate limits of plaintiff city, provides, by section 1, that the county court shall apportion one-half of the road funds collected within the corporate limits of plaintiff city, to be used by its authorities in working and improving its streets, and by section 2 that the collector pay to plaintiff city the fund so apportioned. Const. art. 16, § 9, declares that no county shall levy a tax exceeding one-half of 1 per cent. for all purposes, but may levy an additional one-half of 1 per cent. to pay indebtedness existing when the Constitution was ratified, and Kirby's Dig. § 7280, provides that the county court in counties not requiring the full constitutional limit of five mills for expenses of county government may levy a road tax not exceeding three mills on the dollar. The county court levied for general county purposes a tax of four and one-fourth mills, and an optional road tax of three-fourths of a mill, and also levied a three-mill road tax, and plaintiff city petitioned for one-half of the three-fourths mill optional road tax. *Held*, that the act had no reference to the optional road tax, but applied only to the road tax raised under amendment No. 5, so that the city could not recover.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 387; Dec. Dig. \Leftarrow 130.]

Kirby, J., dissenting.

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Petition by the City of El Dorado against Union County and others. Judgment for defendants dismissing the petition, and petitioner appeals. Affirmed.

Geo. M. Le Croy, of El Dorado, for appellant. R. G. Harper, of El Dorado, for appellees.

WOOD, J. Act No. 230 of the Acts of 1913 is entitled:

"An act to provide for a division of the road funds paid by the taxpayers within the cor-

porate limits of the city of El Dorado, in Union county."

Section 1 of the act reads:

"That the county court of Union county, Arkansas, shall, at the term held at which the collector of Union county makes his annual settlements, apportion one-half of the road funds of every kind collected within the corporate limits of El Dorado in Union county, Arkansas, to be used by its authorities on and in working and improving the streets, bridges and culverts of said city. This act shall apply to the road taxes collected for the year of 1912 and each year thereafter."

Section 2 provides that the collector shall pay into the city treasury of El Dorado the said funds so apportioned.

Section 3 repeals all laws in conflict.

The agreed statement of facts shows that at the October term, 1912, of the Union county court, the same being a regular meeting of the levying court of that county, there was duly and legally levied for county general purposes a tax of four and one-fourth mills and also three-fourths of a mill, an optional road tax, for the purpose of building and maintaining roads and bridges in Union county under the provisions of section 7280 of Kirby's Digest. The levying court also levied the regular three-mill road tax, which had been voted under amendment No. 5 to the Constitution. The appellant petitioned for one-half of the three-fourth mill optional road tax levied under the provisions of section 7280 of Kirby's Digest, supra. The lower court refused its petition, finding that, of the five-mill tax levied for county general purposes, three-fourths of a mill was levied and appropriated by the levying court and expended for building and maintaining roads and bridges under proper orders of the county court; that the levy and appropriation was made prior to the passage of Act No. 230 of the Legislature; that the county court at the time of the levy and expenditure of the three-fourths of a mill optional road tax acted within the terms and provisions of the law then in force and dismissed the petition, from which appellant has duly prosecuted this appeal.

Amendment No. 5 of the Constitution, adopted on January 13, 1899, authorized the county court, when sitting as a levying court, to levy a road tax of not exceeding three mills on the dollar when a majority of the qualified electors of the counties shall have voted therefor.

Act 230 has reference to the road funds levied and collected under amendment No. 5 of the Constitution. It has no reference whatever to the optional road tax provided for by section 7280 of Kirby's Digest, supra, which is levied and collected solely as a part of the general revenue under the authority of article 16, § 9, of the Constitution. All taxes levied for general revenue purposes under article 16, § 9, of the Constitution, supra, and the optional road tax as a part of such general revenue funds, levied and appropriated under the provisions of section 7280 of

Kirby's Digest, must be expended under the supervision of the county courts. Article 7, § 28, of the Constitution vests the county courts with exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, etc. And under these provisions of the Constitution the Legislature would have no power to vest any other tribunal with jurisdiction over the expenditure of the funds raised under (article 16, § 9, supra) the general revenue clause of the Constitution.

If the act under review, therefore, applied to the optional road tax which is levied and appropriated as a part of the general revenue, it would be in violation of the above section of the Constitution, giving to the county courts exclusive original jurisdiction over all matters relating to county taxes, roads, bridges, etc. For it will be observed that this act confers power upon the municipal authorities of the city of El Dorado to use the road funds mentioned therein "in working and improving the streets and culverts of said city." It also provides that the collector shall pay the fund apportioned by the county court for the use of the city into the city treasury of El Dorado. The whole act shows that it was the purpose of the Legislature to give to the authorities of the city exclusive control over the one-half of the road funds apportioned to the city. Construed as applying only to the road tax raised under the provisions of amendment No. 5 to the Constitution, the act under consideration is a valid law. For in *Texarkana v. Edwards*, 76 Ark. 22-24, 88 S. W. 862, we said, speaking of amendment No. 5 to the Constitution:

"We see nothing in the amendment to the Constitution which authorizes the collection of a county road tax that prevents such an equitable distribution of the funds."

And in *Sanderson v. Texarkana*, 103 Ark. 529-535, 146 S. W. 105, 107, we said:

"The amendment [No. 5] does not specify to what jurisdiction the road tax, when collected, shall be confided. It simply provides that the tax, when collected, shall be expended upon the roads and bridges in the county. The streets of the city are public roads within the county, and the part of the road tax apportioned by the above act of the Legislature to the city of Texarkana was collected from property situated within the limits of that city, and by that act such portion of said tax apportioned to the city is directed to be expended upon its streets. The fund is therefore by the act directed to be expended for the very purpose named in said amendment to the Constitution. In the absence of any constitutional inhibition, the Legislature has full power, not only to apportion said road tax between the county and the municipality, as was directly held in the case of *Texarkana v. Edwards*, above, but also, as therein suggested, it has the power to direct whether the municipal council or the county court shall be the agency which shall have the jurisdiction and the right to expend the portion of the fund apportioned to the city, when collected, upon the streets of such municipality."

The court, in *Sanderson v. Texarkana*, supra, had under review "An act to grant to the city of Texarkana, Miller county, for use on the streets of said city, three-fifths of the road tax collected on property within the cor-

porate limits of said city, and for other purposes." The road tax referred to in the act was raised under the authority of amendment No. 5 to the Constitution, and it was sought to enjoin the sheriff and collector of Miller county from paying into the county treasury three-fifths of the road tax collected for the year 1910 from the property situated within the corporate limits of the city of Texarkana, and to compel him to pay same into the treasury of that city. One of the contentions of the collector was that the act was unconstitutional, because it took away the jurisdiction of the county court over the expenditure of the fund, and was in conflict with article 7, § 28, of the Constitution; and we held that in the constitutional amendment under which the tax was raised no provision was made as to "what governmental agency shall receive or disburse the funds collected from such tax," and that, in the absence of the constitutional inhibition, the Legislature might confer on any governmental agency it saw fit the power of supervision and control of streets.

The appellant invokes the above decision as authority for its contention that it is entitled to one-half of the optional road tax, but, as we have seen, the optional road tax was raised under the general revenue clause of the Constitution (article 16, § 9), and not under amendment No. 5; hence *Sanderson v. Texarkana* has no application further than to show that the act under consideration was a valid law.

It follows that the findings and judgment of the circuit court were correct, and the judgment is affirmed.

KIRBY, J., dissenting.

LINDSEY et al. v. RITCHEY et al.
(No. 141.)

(Supreme Court of Arkansas. Jan. 31, 1916.)

1. EXCHANGE OF PROPERTY ¶8—CONSIDERATION—SUFFICIENCY OF EVIDENCE.

In an action to cancel and set aside a deed, to cancel a bill of sale, and to recover possession of the land and personalty, evidence held sufficient to support the chancellor's finding that there was a total want of consideration to plaintiffs for the transfer of the land and personalty to defendants.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. ¶8.]

2. SALES ¶149—BILL OF SALE—CONSTRUCTION—PROPERTY TRANSFERRED.

Defendants' bill of sale to 175 head of horses described as being from three to eight years old, weighing 900 pounds and up, sound and free from blemishes and diseases of all kinds, was not merely a sale to plaintiffs of defendants' claim to horses running wild on the range, but purported to be a sale of the horses themselves.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 349; Dec. Dig. ¶149.]

Appeal from Sharp Chancery Court; G. T. Humphries, Chancellor.

Suit by I. S. Ritchey and others against R. L. Lindsey and others. From a decree for plaintiffs, defendants appeal. Affirmed.

David L. King, of Williford, for appellants. Lehman Kay, of Salem, for appellees.

HART, J. Appellees instituted this action against appellants to cancel and set aside a deed from appellees to appellants, to cancel a bill of sale from appellees to appellants for a sawmill and horse and mule, and to recover possession of said land and personal property. The chancellor found the issues in favor of appellees, and the case is here on appeal. The facts, so far as are necessary to a determination of the issues raised by the appeal, are as follows:

[1] In the first part of the year 1913 appellees owned 320 acres of land situated about five miles from Hardy, in Sharp county, Ark.; a sawmill being situated on the land. Appellants were the owners of a bill of sale for some horses in Coconino county, Ariz. After some negotiations between the parties appellees agreed to exchange their land, their sawmill outfit, and a horse and mule for 175 head of horses belonging to appellants, the horses being in Coconino county, Ariz. Pursuant to this agreement appellees executed a deed to appellants to the tract of land in Sharp county, Ark., and a bill of sale for the sawmill and a horse and mule which were at the time on the land. Appellants executed a bill of sale to 175 head of horses of certain brands, the horses running on the range in Coconino county, Ariz., the horses ranging in age from three to eight years, and to weigh 900 pounds or more each.

Appellee Ritchey testified that after the trade was made he went to Coconino county, Ariz., to locate his horses; that when he arrived there he made a diligent search, and was unable to find any horses on the range with the brands described in the bill of sale from appellants to appellees. He testified that Coconino county, Ariz., is about 2,000 miles from Sharp county, Ark., and that on that account he relied upon the representations of appellants about the horses in making the exchange of his lands for the horses; that appellants represented that the horses would weigh from 900 pounds up and were between the ages of three and eight years; that appellants represented that they could gather up the 175 head of horses out of a big bunch of Normans and Percherons of about 12,000; and that appellants represented that they knew the horses were there.

Ritchey further testified that he ascertained from the records after arriving in Coconino county, Ariz., that a certain corporation had executed various bills of sale to horses of the same brands as those mentioned in the bill of sale from appellants to appellees, and that he found that from 7,000 to 12,000 head of horses had been transferred

by these various bills of sale, and that after a diligent search he was unable to find any horses of those brands in that county.

Other witnesses for appellees also testified to the effect that a corporation had formerly owned horses of these same brands in Coconino county, but had sold them, and that at the time the bill of sale to the horses involved in this suit was executed there were no horses of those brands in Coconino county, except, perhaps, a carload scattered over the county; that a carload would amount to about 33 head; that the few remaining head left were scattered about, and so wild that it would cost more than they were worth to capture them; that the state also had a lien on them for taxes and pasturage fees to the amount of more than \$1,200; and that as soon as any horses of those brands were captured the authorities impounded them for the payment of taxes.

R. L. Lindsey, one of the appellants, made the trade with J. S. Ritchey, one of the appellees, and testified in favor of appellants substantially as follows: He denied that he represented to appellees that the horses were in Coconino county, Ariz., and said that appellees knew as much about the horses as appellants, that none of them had ever been in Arizona, and that they all understood that appellants had a bill of sale to some wild horses there, and that they were only transferring this claim to wild horses to appellees.

Other witnesses testified for appellants that there were several hundred horses of the brands described in the bill of sale running on the range in Coconino county, Ariz. These witnesses were officers and employés of the corporation which had formerly owned the horses of these brands in Coconino county. During the course of the examination they admitted that the corporation had gone out of business and had not attempted to sell any horses in Coconino county for several years past, and that they had entirely abandoned all claims to their property there. It was also shown that some of these officers had been indicted for a fraudulent use of the mails in the sale of the horses.

The chancellor found that there was a total want of consideration to appellees in the sale of their lands, and we are of the opinion that the finding of the chancellor was fully warranted by the evidence.

[2] It is insisted by counsel for appellants that appellees knew as much about the horses as they did; that appellees knew that they had a bill of sale to certain wild horses running on the range in Coconino county, Ariz., and that they only sold to appellees their claim to these wild horses. In this respect, however, they are contradicted by the record. Appellants executed to appellees a bill of sale to 175 head of horses, and in the bill of sale these horses were described

as being from three to eight years old and weighing 900 pounds and up. They were described as being sound and free from blemishes and diseases of all kinds. Instead of selling to appellees a claim for 175 head of horses, appellants executed to appellees a bill of sale for 175 head of horses running on the range in Coconino county, Ariz. The horses were described as above stated in the bill of sale.

It is true an attempt was made by appellants to show that there were horses of the brands described in their bill of sale running on the range in Coconino county, Ariz., but the testimony was vague and indefinite, and fell far short of establishing their contention. The most that can be said of it was that a corporation had been organized several years before for the purpose of dealing in these horses; that it had executed bills of sale to horses of this same description to the amount of between 7,000 and 12,000 head; that nearly all of the horses it owned of these brands had been shipped out of the county; that perhaps only about 33 head remained in the county, and that these were scattered, and that the state had a lien on them for more than their value; that the corporation had gone out of existence, and some of its officers had been indicted for fraudulent use of the mail in connection with the sale of these horses.

In short, we do not think the testimony of appellants' witnesses gives a very satisfactory account of the number of horses of the brands described in the bill of sale from appellants to appellees; and opposed to their testimony is the testimony of disinterested witnesses in behalf of appellees to the effect that there are only about 33 head of horses of these brands in the county, and that they are so scattered that it would cost more to gather them up than the horses are worth. And, in addition to this, there was testimony tending to show that whenever any horses of these brands are captured the state authorities at once assert the state's lien on them for taxes.

A careful consideration of the whole record leads us to the conclusion that the horses described in the bill of sale from appellants to appellees were not in existence at the time the bill of sale was executed. Therefore the chancellor was correct in finding that there was a total want of consideration for the transfer of the land and personal property of appellees to appellants.

There being no consideration for the exchange, the chancellor was right in setting aside and canceling the deed from appellees to appellants and restoring to appellees the lands embraced in the deed, and also in canceling the bill of sale to the sawmill and restoring it to the possession of appellees.

The decree will therefore be affirmed.

OLSON v. SWIFT & CO. (No. 185.)

(Supreme Court of Arkansas. Feb. 7, 1916.)

1. TRIAL \Leftarrow 191—INSTRUCTIONS—ASSUMPTION OF FACT.

In an action on account for meat sold defendant, an instruction that if the jury should find plaintiff sold and delivered meat to defendant, they should find for plaintiff for the value thereof, deducting any payments made, was not erroneous as assuming that the sale was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. \Leftarrow 191.]

2. ACCOUNT, ACTION ON \Leftarrow 7 — EVIDENCE — SUFFICIENCY.

In an action on account for meat sold and delivered defendant, who it was claimed was the owner of the business, and also guaranteed payment, evidence held to warrant finding that the sales were made to defendant.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. \Leftarrow 7.]

3. GUARANTY \Leftarrow 24—CONTRACTS—ACTIONS—INSTRUCTIONS.

Where the contract of guaranty provided that it could not be canceled except after ten days' notice in writing, a verbal revocation of it, if accepted and acted upon, will relieve the guarantor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 26, 27; Dec. Dig. \Leftarrow 24.]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by Swift & Co. against John Olson. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee brought suit on account against John Olson for a balance of \$932.15 claimed to be due upon itemized bills. It later filed copy of a guaranty given by Olson, at his request. The answer denied the allegations of the complaint and any indebtedness to the plaintiff, and alleged that defendant was never indebted to appellee, except in accordance with the terms of the guaranty which had been canceled on April 2, 1911, and that he overpaid his account \$900, judgment for which was prayed. Appellee amended its complaint and alleged that statement was rendered to the defendant of his account for merchandise sold long before the institution of the suit which was retained by him without objection. The defendant answered the amended complaint alleging that the Capital and Majestic Meat Market was operated by J. W. Olson, which fact was known to plaintiff, and that he was responsible for that reason, and obtained a guaranty for certain sales made to the market; that he had notified plaintiff, both verbally and in writing, not to sell the market any more meat on the credit and to cancel the guaranty made in May, 1911. Defendant denied the allegations of the counterclaim.

It appears from the testimony that Swift & Co. sold and delivered to the Capital and Majestic Meat Market goods and products, from the 17th day of February, to the 26th of March, to the amount of \$3,024.10, and was paid on the account \$2,091.95, leaving a bal-

ance claimed to be due of \$932.15. The last item of credit was made May 10, 1912, upon the payment of \$1,500 to the company by appellant.

The written guaranty was introduced in evidence as follows:

"April 2, 1911.

"On consideration of \$1, and other good and valuable considerations, to me in hand paid, the receipt whereof is hereby acknowledged, and the further consideration that Swift & Co. sell goods, wares, and merchandise upon credit to Capital and Majestic Meat Market of Little Rock, county of Pulaski, state of Arkansas, do hereby guarantee to said Swift & Co., its successors and assigns, the payment at maturity in accordance with the terms of sale, of the price and value of all goods, wares, and merchandise sold by them to the Capital and Majestic Market from time to time on and after the date hereof until ten days' notice in writing, signed by me to said Swift & Co., its successors and assigns, of the withdrawal on this guaranty; it being understood that my liability at any time shall not exceed \$3,000—hereby waiving notice of nonpayment and of acceptance of this guaranty.

"Witness my hand and seal this 2d day of April, 1911.

"Witness: T. E. Willis, as to

"John Olson. [Seal.]
"J. W. Olson, Mgr."

The manager for Swift & Co. testified that he knew John Olson; that the last payment was made on May 10th; that he took the guaranty from him for the payment for meat furnished the Capital and Majestic Meat Market, chiefly because such an institution could change hands easily without disclosing who was in charge of it; that he talked to defendant several times before he made the last payment by check for \$1,500, and demanded payment of the balance of the account after said payment was made; that he had quit selling said market on a credit a month before the \$1,500 payment was made; that they refused and declined to sell on the credit any more after John Olson notified them that he would not be responsible.

Olson, the defendant, testified that he had no interest whatever in the business, although he owned the fixtures in the house, and that he only gave the guaranty to help his nephew, who was conducting and was the owner of the business, that he might procure the additional amount of meats necessary for supplying the trade during the Reunion in Little Rock. He also said that he canceled the guaranty about March 8th by verbal notice to the manager of Swift & Co., not to sell any more on a credit, and upon going to his home in Saline county wrote said company on the 14th day of March, 1912, a copy of which letter was produced, directing them not to sell any more meat on a credit to said market, as there "was money enough to pay cash, and I do not want any credit whatever"; also "cancel guaranty that was given you during the Confederate Reunion, May, 1911, if you have not already done so." He said he paid \$1,600 on March

8th after he had been sent the telegram from Swift & Co. in February informing him of the amount of the account, which was the first information he had ever had that he was owing said company anything; that he had never been sent a bill. He stated he gave the manager notice then not to sell any more on credit, and did not see him any more until May.

J. W. Olson testified that he was running the meat market, buying and selling and attending to the business for his uncle, John Olson; that he was the manager of the business, all of which belonged to his uncle. The checks used by him in payment of claims were signed "John Olson, Prop., by J. W. Olson, Manager." He and his uncle both testified that the shop was leased to J. W. Olson on May 16, 1912, and he testified likewise that the goods were sent C. O. D. by Swift & Co. after his uncle "notified them not to give me further credit at the meat market."

The court instructed the jury, giving over appellant's objection, appellee's instruction No. 1, as follows:

"The jury are instructed that if you find from the evidence that plaintiff sold and delivered meat and other food products to the defendant at the Capital and Majestic Meat Market, you will find for the plaintiff for the value thereof after deducting any and all payments made by the defendant as a credit against said purchases."

The jury returned a verdict in favor of Swift & Co. for \$857.78, and from the judgment thereon this appeal is prosecuted.

Mehaffy, Reid & Mehaffy, of Little Rock, for appellant. James A. Comer, of Little Rock, for appellee.

KIRBY, J. (after stating the facts as above). [1] Appellant contends that the court erred in giving said requested instruction, which he insists does not submit the question as to whether the meat and food products were sold to the defendant, but assumes that they were sold to him. We do not agree with this contention. The instruction tells the jury that if they find from the evidence that plaintiff sold and delivered meat and food products to the defendant at the Capital and Majestic Meat Market, they would find for the plaintiff, etc., thus submitting to the jury and requiring them to find that appellee sold and delivered the meat and food products to the defendants before they could find in its favor for the value thereof.

[2] It is also urged that there was no testimony upon which to base said instruction from which the jury could find that the meat and food products were sold to the defendant. It is not disputed that the goods were sold and delivered to the Capital and Majestic Meat Market, and while the testimony is not satisfactory and conclusive that it was

sold to the defendant, it is sufficient to support the verdict of the jury.

[3] Some of the other instructions are complained of, and especially one of appellee's, relating to his liability under the guaranty, amended by the court. The court inserted after the words "canceled or revoked it in writing or verbally" the words "if accepted and acted upon." This amendment only told the jury that notwithstanding the guaranty provided that it could not be canceled, except after ten days' notice in writing, that his verbal revocation or cancellation of it, if accepted and acted upon, would suffice, and relieve the defendant from further liability thereon, which was a correct statement of the law, and no error was committed in making the amendment.

We do not deem it necessary to set out the other instructions complained about, nor analyze them, since the court is of opinion that the instructions given submitted the issues fairly to the jury. It reduced the claim in the amount of two or three items, evidently found by the jury to have been delivered after the cancellation of the guaranty and the notification not to extend further credit.

The judgment is affirmed.

WATERS v. MOORE. (No. 131.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. LIBEL AND SLANDER — 100 — PLEADING AND PROOF—VARIANCE.

In an action for slander, where the complaint alleged that defendant stated that there was a shortage in plaintiff's accounts as treasurer with the county, and his bondsmen had to make it good, proof that defendant stated that plaintiff had been short in some public office, and that his official bondsmen had to make good the shortage, did not constitute a substantial variance, since the charge of official dishonesty was the essence of defendant's slander; while, where the words charged to have been spoken are proved, but with the omission or addition of words not varying their sense, the variance is not material.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. § 100.]

2. LIBEL AND SLANDER — 100 — PLEADING AND PROOF—VARIANCE.

In an action for slander, where the complaint alleged that defendant stated of plaintiff that he was short in his accounts as treasurer of a county, and his bondsmen had to settle his shortage, testimony by the witness testifying to the slander, not positive as to whether the office named was that of county clerk or county treasurer, but that it was one office or the other, the proof showing that plaintiff had held only the office of county treasurer, and never that of county clerk, and that defendant had been a surety on plaintiff's bond as county treasurer, and not on any other bond, did not constitute a substantial variance, since the charge of official dishonesty was the essence of defendant's slander; while, where the words charged to have been spoken are proved, but

with the omission or addition of words not varying their sense, the variance is not material.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. §=100.]

Appeal from Circuit Court, Garland County; Jeff. T. Cowling, Judge.

Action by Milton P. Moore against W. W. Waters. From a judgment for plaintiff, defendant appeals. Affirmed.

Gibson Witt, of Mt. Ida, and A. J. Murphy, of Hot Springs, for appellant. T. P. Farmer, of Hot Springs, for appellee.

SMITH, J. This is an action for slander instituted by appellee against appellant, and the complaint alleged:

That on or about the 6th day of April, 1913, the appellant unlawfully, falsely, and maliciously spoke and published of and concerning appellee the following false, malicious, and defamatory words: "He (meaning the plaintiff) was short in his accounts as treasurer of Garland county, and his bondsmen had to settle his shortage"; that the defendant by said language meant to charge the plaintiff with the crime of embezzlement; and that said language in its common acceptation amounted to charging the plaintiff with the crime of embezzlement."

In a second count the complaint further alleged the use of the following defamatory words:

"There was a shortage in his accounts with the county and his bondsmen had to make it good"

—It being alleged that appellant used said language with reference to appellee, meaning thereby to charge that appellee did not pay to Garland county money which he had in his hands as treasurer of said county, and that he had embezzled funds of Garland county, and that his official bondsmen were required to settle his said shortage; that said language in its common acceptation amounted to charging appellee with the crime of embezzlement.

The answer contained a general denial of the material allegations of the complaint, and denied the use of the language set out in the complaint, and at the trial of the cause appellant denied having used the language quoted. He further testified that appellee had been treasurer of Garland county, and that he had been one of the sureties on his bond, but he denied having said that he or any one else had been called upon to pay any shortage in appellee's accounts, or that there was any shortage in his accounts.

In behalf of appellee Mr. Leo McLaughlin testified that he was present at a caucus which appellant also attended, at which time the persons present were discussing the election of a city collector, and that several members of the city council expressed their intention of voting for appellee for this office; and concerning this conference the following questions were asked this witness:

"Q. Do you know whether he said when he was treasurer of Garland county? A. Well, he was short in his accounts in some public office. I don't remember whether it was county clerk

or county treasurer or what, but he said the account was made up and paid by the bondsmen, by Mr. Moore's bondsmen, at the expiration of his term. Q. Well, did you hear anything else said by Mr. Waters about Mr. Moore? A. Let me think just a minute. No; I don't recall anything else. It has been so long ago that I hadn't given it much thought, but he just said that Mr. Moore was short in his accounts in some office. I don't remember what office it was, some political office, though, that he had held, and the shortage had to be made up at the expiration of his term by his bondsmen."

After detailing the purpose of the caucus which appellant attended, and after stating the names of the gentlemen who were there, T. J. Pettit testified on behalf of appellee as follows:

"Q. Now, if you remember, just state what Mr. Waters said about Mr. Moore. A. Well, in sitting at the table—it was a large round table—there was each candidate; I think there were three. Each had their friends. I was for Milt Moore and one or two others at this meeting. There were two noncommittals, wouldn't say who they were for, and there were others for Watkins. I forget the names of the other candidates; I think there were three. And in talking pro and con every fellow was expressing his opinion of the different candidates. Mr. Waters made some remark about Milt Moore, and seemed surprised that some of us were with him. He said, 'You ain't going to vote for him, are you?' or something like that, and some of them said, 'Yes,' and then he made some remark; his exact words I cannot place; it was some remark about Milt being short with the county, and that he had to pay it at one time, and he looked in his pocket— Q. Just tell it as near as you can, Mr. Pettit, what he did say in regard to his shortage. A. I cannot remember the exact words. I know he looked in his pocket for a piece of paper. He said, 'I have it right here;' looked in his pocket for his pocket-book, but he didn't find it. He said, 'I guess I left it at home,' or something like that. Q. But he said he had been short with the county? A. He didn't say short. He just said, 'I had to pay,' or 'Had to pay for that fellow,' or something like that; made some remark as if he had to pay something for Mr. Moore to the county or make good for something. Just what his words were I cannot remember now."

Upon their cross-examination these witnesses stated that they were not positive that they had quoted the exact words used by appellant, but that they had given substantially his statements as they remembered them.

Appellant insists that there is a variance between the alleged slanderous words set out in the complaint and the proof offered in support of these allegations, and the correctness of this position is the only question of importance in the case.

A similar question was raised in the recent case of Laster v. Bragg, 107 Ark. 74, 153 S. W. 1116. In the opinion in that case the rule in such cases as stated in Townsend on Slander was quoted and previous cases of our own on the subject were cited, and the discussion of the subject was closed with the following statement:

"Hence it will be seen that, while * * * words charged in the complaint were not proved, the words proved are substantially proved as laid. Both the words charged and the words proved impute the crime of larceny. The meaning of the rule above announced seems to be

that, if the words charged to have been spoken are proved, but with the omission or addition of words not at all varying or affecting their sense, the variance will not be regarded as material. While it is not necessary under the rule to prove as laid all the words which are alleged to have been spoken by the defendant, yet so much of them must be proved as is sufficient to sustain the cause of action. As we have already seen, the actionable word in the instant case is the word 'thief,' because it imputes the crime of larceny. The words accompanying it were merely descriptive, and in the application of the rule to the facts of this case we conclude that the slander proved substantially corresponded with the allegation of the complaint, and there was no variance."

See, also, *Miller v. Nuckolls*, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. (N. S.) 149, 113 Am. St. Rep. 122, 7 Ann. Cas. 110; *Townsley v. Yentsch*, 98 Ark. 312, 135 S. W. 882; *Morris v. State*, 109 Ark. 530, 160 S. W. 387, Ann. Cas. 1915C, 925.

Applying the rule thus stated to the allegations of this complaint, we think there was no substantial variance.

[1] The second count of the complaint alleged that:

"There was a shortage in his accounts with the county, and his bondsmen had to make it good."

The charge of official dishonesty is the essence of this allegation, and the proof on the part of appellee is that appellant stated that appellee had been short in some public office, and that his official bondsmen had to make good this shortage.

[2] Nor do we think that there was any variance between the proof and the allegations of the first count of the complaint, which count alleged that appellant had accused appellee of being short in his accounts as treasurer of Garland county, and that his bondsmen had to settle that shortage. It is true that the witness who undertook to name the office referred to by appellant was not positive whether the office stated was that of county clerk or county treasurer, but he did say that it was one office or the other, and the proof shows that appellee had held only the office of county treasurer, and had never held the office of county clerk, and that appellant had been a surety on appellee's bond as county treasurer, and had not been surety on any other bond.

The judgment of the court below is therefore affirmed.

STATE v. FOX et al. (No. 128.)

(Supreme Court of Arkansas. Jan. 24, 1916.)

1. INDICTMENT AND INFORMATION \S 137—MOTION TO QUASH—INSUFFICIENCY OF EVIDENCE BEFORE GRAND JURY—STATUTE.

Under Kirby's Dig. \S 2203, 2204, providing that upon the arraignment, or upon the call of the indictment for trial if there is no arraignment, the defendant must either move to set aside the indictment or plead thereto, and section 2279, providing that a motion to set aside the indictment can be made only on the grounds of substantial error in the summoning or forma-

tion of the grand jury, the presence of a person not a grand juror when the grand jury acted on the indictment, and that the indictment was not legally found and presented, it was error to quash an indictment for want of legal and sufficient evidence before the grand jury to warrant the finding thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 480-487; Dec. Dig. \S 137.]

2. CRIMINAL LAW \S 308—EVIDENCE—PRESUMPTIONS—FINDING OF "INDICTMENT."

An "indictment" is merely an accusation against a defendant, and does not even raise a presumption of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 731; Dec. Dig. \S 308.

For other definitions, see Words and Phrases, First and Second Series, Indictment.]

3. INDICTMENT AND INFORMATION \S 202—ERROR—EFFECT.

Any irregularity in the finding and the return of an indictment by the grand jury does not deprive the accused of any substantial right, since the trial before a jury on the plea of not guilty affords an opportunity to establish his innocence, or the truth of the charge.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 640-650; Dec. Dig. \S 202.]

4. GRAND JURY \S 41—NATURE OF PROCEEDINGS.

The grand jury is an inquisitorial body whose proceedings are intended to be kept secret.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. \S 86, 87; Dec. Dig. \S 41.]

Appeal from Circuit Court, Prairie County; Thos. C. Trimble, Judge.

W. L. Fox was indicted for embezzlement, and W. H. Fox, for embezzlement and conversion, and from an order quashing the indictments, the State appeals. Reversed and remanded, with directions to overrule the motions to quash.

These cases were briefed and tried together. The grand jury of Prairie county returned indictments; one against the defendant W. L. Fox, charging him with embezzlement in January, 1913, of \$5,000, in gold and silver, lawful money of the United States, from the Hazen Power & Light Company, of which he was secretary and treasurer, and one against W. H. Fox, charging him with the embezzlement and conversion to his own use in November, 1913, of two engines and boilers of the value of \$2,000, the property of the Hazen Power & Light Company, of which he was president. Defendant filed like motions in each case to quash the indictments, alleging, as grounds therefor, that said indictments were not based on any legal evidence, and that the only witness who appeared before the grand jury was E. K. Hathaway, and he stated upon oath that he did not give any evidence that warranted the finding of said indictment, and, further, that S. A. Robertson, a member of the grand jury, because of spite and feeling against the defendant and his connections, induced said grand jury to return said indictment without any legal evidence to support the finding

of same. The affidavit of Hathaway was exhibited with the motion, in which he stated that he took charge of the books and accounts of the Hazen Power & Light Company as receiver on the 17th of February, 1914, and checked them all over, and could not find from said accounts that W. L. or W. H. Fox had embezzled or unlawfully made away with any moneys or property belonging to the said company; that he was unable to find any evidence of where said Fox embezzled the sum of \$5,000 on January 13th, or at any other time. Affiant stated, further, that he was called before the grand jury, and made the foregoing statement, in substance, and that the indictments could not have been returned on the evidence he gave before the grand jury. The minutes of the grand jury, showing his testimony, were read before the court, and the court sustained the motion and quashed the indictments, and from said judgments the state appealed.

Wallace Davis, Atty. Gen., Hamilton Moses, Asst. Atty. Gen., and Jas. B. Reed, of Lonoke, for the State. Trimble & Williams, of Lonoke, for appellees.

KIRBY, J. (after stating the facts as above). [1-3] The state contends that the court erred in quashing the indictments, being without authority to review the evidence upon which they were found and determine the sufficiency thereof. The statutes provide that the grand jury can receive none but legal evidence, and should find an indictment when all the evidence before them, taken together, would, in their judgment if explained, warrant a conviction by a trial jury. Sections 2203, 2204, Kirby's Digest. Upon the arraignment or upon the call of the indictment for trial, if there is no arraignment the defendant must either move to set aside the indictment or plead thereto, and section 2279 of Kirby's Digest provides:

"The motion to set aside the indictment can only be made on the following grounds:

"First. A substantial error in the summoning or formation of the grand jury.

"Second. That some person other than the grand jurors was present before the grand jury when they finally acted upon the indictment.

"Third. That the indictment was not found and presented as required by law."

Section 2286 of Kirby's Digest designates the grounds upon which a demurrer is a proper pleading to the indictment, none of which would warrant the action of the court herein, if the motion were considered a demurrer. An indictment is merely an accusation against a defendant, and does not even raise a presumption of guilt, and any irregularity in the finding and return of it by the grand jury does not deprive the accused of any substantial right, since the trial before a jury on a plea of not guilty affords an opportunity to establish his innocence or the truth of the

charge. *Latourette v. State*, 91 Ark. 65, 120 S. W. 411; *Worthem v. State*, 82 Ark. 321, 101 S. W. 757. The statute expressly provides that a motion to quash an indictment can only be made on the grounds specified in said section 2279, and this limitation excludes any right to make such motion for any other than one of the specified causes. The motion to quash the indictment for want of legal and sufficient evidence adduced before the grand jury to warrant the finding thereof certainly does not come within the first and second subdivisions of said section, and we do not think it can be said to be included within the third subdivision that the indictment was not found and presented as required by law.

[4] In the *Latourette* Case, *supra*, a like question was raised, after conviction, but the court held that the failure of the grand jury to receive legal evidence was a mere irregularity, and was waived by the plea of not guilty. It was never the purpose of the law, as clearly indicated by the statute designating the only grounds upon which a motion to quash, or set aside, an indictment can be made, that such motion could be made because of the introduction of illegal testimony or the want of any testimony at all to support the return of an indictment, and thus bring the testimony and proceedings before the grand jury to review by the trial court before a plea to the charge by the accused. The grand jury is an inquisitorial body, the proceedings of which are intended to be kept secret, and cannot be examined and reviewed by a trial court upon a motion to set aside or quash an indictment, except for the causes specified in the statute. *Borello v. Superior Court*, 8 Cal. App. 215, 96 Pac. 404; *State v. Longstreet*, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317; *U. S. v. Cutler*, 5 Utah, 608, 19 Pac. 145; *State v. Britton*, 131 La. 877, 60 South. 379; *State v. Walsh*, 76 N. H. 581, 84 Atl. 42; *Lee v. State* (Tex. Cr. App.) 148 S. W. 587; 22 Cyc. 422.

It follows that the court erred in sustaining said motion and quashing the indictments, and its judgment is reversed, and the cause remanded, with directions to overrule same and for further proceedings, according to law.

SHAWMUT LUMBER CO. v. WAITES.

(No. 159.)

(Supreme Court of Arkansas. Feb. 7, 1916.)

1. APPEAL AND ERROR ⇐1078 — BRIEFS — POINTS NOT ARGUED.

Grounds of a motion for a new trial not specifically argued in the brief may be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ⇐1078.]

2. JUSTICES OF THE PEACE §86—JURISDICTION—PERSONAL JUDGMENT.

On an affidavit filed in justice's court asking for judgment in the sum named for labor performed and for an order of attachment, the justice had jurisdiction to render personal judgment against the defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 280-294; Dec. Dig. §86.]

3. JUSTICES OF THE PEACE §141—APPELLATE JURISDICTION — PERSONAL JUDGMENT—ACTION IN REM.

On appeal in such case to the circuit court, where it was tried de novo, the circuit court had the same jurisdiction that the justice had, and might render a personal judgment; the order of attachment being subsidiary and incidental to the relief sought and not making the action a proceeding in rem.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. §141.]

4. JUSTICES OF THE PEACE §191—APPEAL—BOND—JUDGMENT—SURETIES.

Where the party appealing from a judgment in a justice's court and his sureties by the express terms of the appeal bond became liable for any judgment rendered by the circuit court, that court properly entered judgment against the sureties, as well as against the appellant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 735-750; Dec. Dig. §191.]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Action by W. F. Waites against the Shawmut Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 25th of November, 1914, the appellee filed before a justice of the peace the following affidavit (omitting formal parts):

"The plaintiff, W. F. Waites, states that the defendant, the Shawmut Lumber Company is justly indebted to him in the sum of \$133.49, for labor performed by plaintiff for the defendant for hauling sawlogs to defendant's sawmill," etc.

Appellee prayed for judgment and an order of attachment. Summons was issued, and included therein was a writ of attachment, commanding the Shawmut Lumber Company to appear on the 10th of December, 1914, to answer the claim of plaintiff for debt amounting to \$133.49.

On the 12th of December, 1914, a trial was had before a jury, who returned a verdict in favor of the appellee against appellant for the amount claimed, and also sustaining the attachment of the lumber described in the writ of attachment, and judgment was entered directing a sale of the lumber to satisfy the demand. The appellant, on the day the judgment was rendered, gave notice and prayed for an appeal to the circuit court, and on the 4th day of January, 1915, it filed an affidavit and appeal bond, which provided that if the appeal should be dismissed it would satisfy the judgment of the justice, or if judgment should be rendered against it on a trial anew in the circuit court it would

satisfy that judgment. The justice refused to grant the appeal. Application was made to the circuit court for an order requiring the justice of the peace to grant the appellant an appeal, and for a restraining order against the appellee, the justice, and the sheriff from further proceedings under the justice's judgment, and the appellant tendered with the application his appeal bond. The circuit judge granted the prayer of the petition and granted the appeal. The appeal was perfected, and on the 16th of March a trial was had by a jury in the circuit court. Evidence was adduced, and the court instructed the jury, to which no exceptions were saved, and the jury returned a verdict in favor of the appellee in the sum of \$136.15. The appellant's motion for a new trial was overruled, judgment was entered against appellant and the sureties on its bond, and it duly prosecutes this appeal. Other facts stated in the opinion.

J. W. Bishop, of Nashville, for appellant.
C. E. Johnson, of Delight, for appellee.

WOOD, J. (after stating the facts as above).

[1] We treat as abandoned those grounds of the motion for a new trial that are not specifically argued in the brief. Therefore the only question for our consideration on this appeal is whether or not the circuit court had jurisdiction to render the judgment against the appellant and the sureties on its appeal bond.

[2, 3] The appellant's counsel urges that the circuit court was without jurisdiction for the reason, as he states, that the cause was one in rem, involving the question as to whether or not the appellee was entitled to a lien on a certain pile of lumber owned by the appellant. The affidavit, to which we must look for the jurisdiction of the justice, prayed for judgment in the sum named and for an order of attachment. The justice therefore had jurisdiction to render personal judgment against the appellant, and on appeal to the circuit court the case was tried de novo, and the circuit court had the same jurisdiction that the justice court had. The order of attachment was subsidiary and incidental to the relief prayed, and prayer for such order did not constitute the action a proceeding in rem, as appellant contends. When judgment was rendered against the appellant in the justice court and it filed its appeal bond, under the provisions of that bond the appellant and its sureties were bound to satisfy any judgment that should be rendered against it.

[4] By the express terms of the bond the appellant and its sureties became liable for any judgment rendered by the circuit court, and that court therefore did not err in entering judgment against the sureties on the bond as well as against the appellant.

The judgment is therefore affirmed.

McCARTY et al. v. CAROLINA
LUMBER CO.

(Supreme Court of Tennessee. Feb. 14, 1916.)

1. STATES \S 13—BOUNDARIES—ESTABLISHMENT—POWERS OF COURT.

The Supreme Court of the United States has, by the provisions of Const. U. S. art. 3, \S 2, original and exclusive jurisdiction to establish the boundaries between states, and such boundaries must be established either by its decree or by agreement of the states, so that courts of either state in an ejectment suit between citizens can determine only where the boundary is, and not what it should be.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

2. STATES \S 13—BOUNDARIES—ESTABLISHMENT.

The determination of the United States Geological Survey as to the boundary between states is not conclusive, since the survey was without authority to establish a line, and attempted only to represent the line as it was then thought to be located.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

3. STATES \S 13—BOUNDARIES—ESTABLISHMENT—VALIDITY.

North Carolina commissioners of 1799 correctly interpreted the call of the Cession Act (Laws 1789, c. 3), which read, "running from the end of Iron Mountain where the Nolachucky river runs through it, to the top of Bald Mountain," as requiring departure from the top of Iron Mountain at a point where both Little and Big Bald Mountains were visible, and running from there to Little Bald, and thence to and along the top of the range to Big Bald.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

4. STATES \S 13—BOUNDARIES—ESTABLISHMENT—CORRECTION.

Although commissioners in running a boundary between states should have run it in a certain way, other than that adopted, that question is immaterial in determining what the boundary is, since that is shown by their act, and not what their acts should have been.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

5. STATES \S 13—BOUNDARIES—ESTABLISHMENT—MARKING.

Although the boundary as run by a boundary commission was not clearly marked by artificial marks, if the natural marks were clear the line was sufficiently established and would override the incorrectness of a line marked by trees or other artificial lines.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

6. STATES \S 13—BOUNDARIES—ESTABLISHMENT—USAGE.

The fact that inhabitants along the boundary between states sent their children to schools of one state and paid taxes to it is not conclusive of the proper location of the boundary, especially where the region was wild and inaccessible and they could only have employed the schools which they did employ.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

7. STATES \S 13—BOUNDARIES—ESTABLISHMENT.

Where North Carolina by its boundary commission of 1799 established the boundary between it and Tennessee, and Tennessee thereafter made but spasmodic attempts to have the line changed, each of which contemplated fur-

ther action by North Carolina, which was not taken, the boundary originally established was the legal boundary.

[Ed. Note.—For other cases, see States, Cent. Dig. \S 12; Dec. Dig. \S 13.]

8. JUDGMENT \S 565—RES JUDICATA—PERSONS CONCLUDED.

Where the evidence was insufficient to show that the parties to a suit in ejectment involving the question of a state boundary were the parties to a prior suit in a federal court in another state, dismissed there on the ground of want of jurisdiction and the order of dismissal specifically provided that it should be without prejudice, the judgment was not res judicata and did not estop the parties in ejectment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1018; Dec. Dig. \S 565.]

Appeal from Chancery Court, Unicoi County; Hal H. Haynes, Chancellor.

Ejectment by Mary E. McCarty and others against the Carolina Lumber Company. From a decree dismissing the bill, the complainants appeal. Affirmed.

G. T. Lee, of Johnson City, and Susong & Biddle, of Greeneville, for appellants. Powell, Price & Shelton, of Bristol, Va., A. S. Higginbotham, of Tazewell, Va., and E. Frank Watson, of Burnsville, N. C., for appellee.

TURNER, Special Judge. This is an ejectment suit by the devisees of one N. B. McCarty brought November 17, 1911, by bill in chancery court in Unicoi county, Tenn., against the defendant, Carolina Lumber Company, to recover a large boundary of mountain land alleged to be situated in Unicoi county, Tenn., adjoining the line between the states of Tennessee and North Carolina; also to enjoin the defendant from committing acts of trespass and waste on said land. Service of process was made by a Tennessee officer upon an agent or employé of the defendant, and the defendant made a special appearance and filed two special pleas: First, denying the court's jurisdiction over the defendant, on the ground that process had been served by a Tennessee officer in the state of North Carolina; and, second, denying the jurisdiction of the court over the subject-matter on the ground that the lands sued for are located, not in the state of Tennessee, but in the state of North Carolina. No issue is made upon the complainants' title. They have, however, deraigned title from certain Tennessee grants, with intermediate conveyances down to themselves. The sole issue in the case as now presented is one of fact, to wit, the true location of the state line between Tennessee and North Carolina fixing the boundary between the lands of the complainants and the defendant. Each party contends for a different location of this line, the one claimed by complainants being referred to as the "water shed" line, running about a mile or more east of the line insisted on by the defendant, known as the line surveyed and located by

the North Carolina commissioners in 1799. Large volumes of evidence have been taken upon this issue, which has been thoroughly considered by the court, but it would be too tedious to recite all of its details in this opinion. Therefore we will content ourselves by stating the most material and controlling facts which are determinative of this issue.

The act of 1789 (chapter 3) of North Carolina, ceding its western territory to the United States, the deed made pursuant thereto, and the Constitution of Tennessee adopted in 1796 (article 11, § 32), upon which this western territory so ceded by North Carolina to the United States was admitted to the Union as the state of Tennessee, all agree in their descriptions of that boundary line between North Carolina and this ceded territory, now the state of Tennessee, as follows:

"Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of said mountain, to the place where Watauga river breaks through it; thence a direct course to the top of the Yellow Mountain where Bright's road crosses the same; thence along the ridge of said mountain between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain, from thence along the extreme height of said mountain, to *where the Nolachucky river runs through the same, thence to the top of the Bald Mountain*; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of said mountain, to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of the said mountain, to the place where it is called the Unicoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of the said mountain, to the southern boundary of this state."

The particular part or call of this boundary line involved in this case is the line *from the top of Iron Mountain where the Nolachucky river runs through the same to the top of Bald Mountain.*

In 1796, soon after the state of Tennessee was admitted to the Union, North Carolina passed an act (Laws 1796, c. 18) providing for accurately and distinctly running, marking, and permanently establishing the boundary line between these states, and named Joseph McDowell, Mussendine Matthews, and David Vance as commissioners to meet commissioners to be appointed by the state of Tennessee for that purpose and directed them, in conjunction with said Tennessee commissioners, to fix and permanently establish the boundary line between the two states, and the same to mark and ascertain as distinctly as possible agreeable to the true intent and meaning of the Cession Act aforesaid, and to cause an accurate plot or plan of the boundary line to be made specifying courses, distances, natural and artificial marks, and return the same to the next General Assembly to be preserved among the archives of the state. It was also directed that a copy of this act be certified to the Governor of the state of Tennessee, with request that she appoint commissioners for a

like purpose, and then provided that if it should so happen that the state of Tennessee should fail to appoint commissioners, or such commissioners after appointment should fail or refuse to act with the North Carolina commissioners, the latter were authorized, empowered, and required singly and by themselves to proceed to take all such measures as under the laws and Constitution of the state and of the United States may be taken or had for effecting the purposes intended by this act. It further provided that the state of North Carolina would at all times ratify and be bound by the action of these commissioners. It does not appear that Tennessee took any action in this matter. On May 22, 1799, the North Carolina commissioners undertook the location of this boundary line, and on October 15, 1799, certified and reported their action to North Carolina. They did not run and locate the entire boundary line. They began at the Virginia line as directed, and ran the line to the top of a high pinnacle of the Smoky Mountain beyond the French Broad river, where they stopped. On December 30, 1802, Governor Roane of Tennessee by letter requested of Governor James Turner of North Carolina to certify for Tennessee's use, a copy of the report and plot of the North Carolina commissioners, showing the location and calls of this line. This request was complied with, and the secretary of state of North Carolina, on July 10, 1803, certified such a copy and it appears to have been transmitted to the Governor of Tennessee and filed with her secretary of state. The copy of this report and map, appearing in this record, is certified from the Tennessee archives.

No act of the Legislature of either state appears ratifying this action of the commissioners, but on November 4, 1805, the Tennessee Legislature passed an act (Laws 1805, c. 47), reciting that it was believed that the North Carolina commissioners in running said line had left the main Bald Mountain and took a ridge running westwardly to the lower Painted Rock on French Broad river, contrary to the true intent and meaning of the Cession Act, and appointing certain commissioners to meet commissioners of the state of North Carolina thereafter to be appointed to re-run or locate that part of the boundary line and directing a report of their action to be made to the next succeeding Legislature. No action appears to have been taken under this act either by North Carolina or by the Tennessee commissioners thereby appointed. The part of the line there indicated did not involve that part of the line now in dispute in this case.

In 1819 North Carolina passed an act authorizing the Governor to appoint three commissioners to meet like commissioners to be appointed by the state of Tennessee to settle, and run and mark the boundary between the two states agreeably to the true intent and meaning of the Cession Act and directing the

Governor to give notice thereof to the Governor of the state of Tennessee, and request the appointment of commissioners on the part of that state, and by another section of the act it was provided that if for any reason Tennessee failed to appoint such commissioners or having appointed them, they should neglect or refuse to act, the commissioners appointed under that act on behalf of North Carolina were authorized and required to proceed in running and marking said line from the Smoky Mountains where the line terminated, which was run in 1799, under the direction of McDowell, Matthews, and Vance, commissioners, etc., and that said commissioners should cause an accurate plan of said boundary line to be made, specifying courses and distances, natural and artificial marks thereof, and return the same to the General Assembly of the state. In response to this act Tennessee on July 26, 1820, passed an act (Laws 1820, c. 22) authorizing the Governor of this state to appoint three commissioners to meet the North Carolina commissioners to settle, run, and re-mark the boundary line between the states, agreeably to the true intent and meaning of the Cession Act, and further providing that whatsoever the commissioners or a majority of those of each state shall do in the premises shall be binding on this state. The commissioners were accordingly appointed and on August 31, 1821, reported that they had met with the commissioners from North Carolina to settle, run and mark the dividing line between the two states, from the termination of the line run by McDowell, Vance, and Matthews in 1799, to the southern boundary of said states, and that they had run and marked said dividing line as directed and returned with their report a plot or map of the line. A similar report was made to North Carolina by her commissioners, and the reports were submitted by the Governors of the respective states to their Legislatures and each state by an act of her Legislature of 1821, ratified and confirmed the action of this joint commission. This action by the commissioners expressly recognized the line previously run from the Virginia line to the top of Smoky Mountain by McDowell, Matthews, and Vance in 1799, and limited their work to extending the boundary line from that point to the Georgia line as the southern boundary line of North Carolina and Tennessee, and it would seem that the North Carolina and Tennessee Legislatures by adopting and confirming their action likewise recognized the line of 1799, but nothing affirmative on that subject appears in the act. However, on September 21, 1832, the Tennessee Legislature adopted a joint resolution (Laws 1832, p. 58) referring to the previous act of the Tennessee Legislature of November 4, 1805, in regard to that part of the line of 1799, from the top of Bald Mountain to the Painted Rock on French Broad river and authorized the

Governor to open correspondence with the Governor of North Carolina upon the propriety of appointing commissioners on the part of each state to run and mark said line according to the true intent and meaning of the Cession Act. Nothing appears in this record as to any action taken under that resolution. It does appear, however, that at various dates from 1831 to 1847 the state of Tennessee made a considerable number of grants of land along this 1799 line making it the boundary of said grants including the part of the line in dispute in this case, and also that part of the line mentioned by the act of 1805, and the resolution of 1832 above recited. Nearly all of these lands along this line, from the top of Bald Mountain to the French Broad river, were entered by, and granted to, a former member of this court, Judge Jacob Peck, and members of his family. He was a resident of Jefferson county, in the Eastern division of the state, an eminent land lawyer, and evidently thoroughly familiar with the existence and history of this state line. In 1881 North Carolina passed an act (Laws 1881, c. 347) authorizing the Governor of that state to appoint a competent commissioner to act with surveyors or commissioners appointed or to be appointed by any of the contiguous states including Tennessee to re-run and re-mark by some permanent monument at convenient intervals not greater than five miles the boundary lines between that state and any of said contiguous states. It also provided that if such commissioners disagreed, the Governor was authorized to appoint arbitrators to settle their disagreements, and directed a report of their action to the General Assembly of the state.

Tennessee in 1885 passed an act (chapter 80) appointing three commissioners, William E. Tilson, Frank H. Hannum, and David White of Unicoi county, to act in conjunction with the commissioners of the state of North Carolina, who should run and mark the state line between said states, commencing on the Iron Mountain at the Indian Grave Gap and run the same to the point where the Jonesboro and Asheville, North Carolina, road passes through the Bald Mountain. This section of the line embraced that part now in dispute in this case. It further provided that said commissioners should ascertain the true line between said states, between said points, and mark the same as was provided to be done by the commissioners of both states *when the same was last done*. Here is a recognition of the former survey.

It seems that the Governor of North Carolina appointed a commission headed by J. M. Gudger to meet this commission, and to run this line. In 1886 they did meet and run the line, but when they came to that part now in controversy, the North Carolina commissioners insisted on re-running and re-marking the line as run by the North Car-

olina commissioners in 1799, and attempted to do that while the commissioners for Tennessee insisted that the true line according to the meaning and intent of the Cession Act should run by what is designated in this record as the "watershed line," and they did run and mark such a line, and it is that line which is now insisted on by the complainants as the true line between the state of Tennessee and North Carolina, and the true boundary line of the land sued for in this case. In other particulars and parts of the line so run by these commissioners there seems to have been no disagreement. The North Carolina commissioner reported his action to the Governor of North Carolina, together with the disagreement of the Tennessee commissioners and their action in running this so-called watershed line, but it does not appear that the Tennessee commissioners made any report of their action, and no action by either the state of Tennessee or of North Carolina appears to have been taken on these surveys. On March 11, 1889, North Carolina passed another act authorizing the Governor to appoint commissioners to re-run and re-mark the line between that state and contiguous states, including Tennessee, but no action seems to have been taken under this act, either by Tennessee or by the Governor or commissioners of North Carolina. In 1908, North Carolina brought a suit against Tennessee in the Supreme Court of the United States to settle disputes which had arisen between the states, or citizens thereof, over the true location of certain parts of the line run and fixed by the commissioners in 1821. The results of that suit are shown by the report of the action of the court in *North Carolina v. State of Tennessee*, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97, hereinafter referred to. This litigation was immediately induced by previous suits between citizens of the states over conflicting grants of the same lands by the two states; the result of which, by the judgment of the United States Circuit Court of Appeals at Cincinnati, are reported in the cases of *Belding v. Hebard*, 103 Fed. 523, 43 C. C. A. 296, and *Stevenson v. Fain*, 116 Fed. 147, 53 C. C. A. 467.

Reverting now to the action of the North Carolina commissioners in 1799 affecting the particular part of the state line involved in this controversy, we find that the Iron Mountain referred to in the Cession Act ends at its south or southwestern extremity rather abruptly, where the Nolachucky river runs through it; but the river, in cutting through the body of the mountain, passes through a gorge by a tortuous course of about 8 miles in length, and in a direct line probably 2 or 3 miles. On the opposite side of the river, and generally speaking parallel thereto, is a range of mountains running in a general east and west course, the eastern part of which is known as Flat Top Mountain and

the western part as No Business Ridge or Mountain, the two being connected by a lower ridge, making a rather decided gap between; then going southward, or southwestward, there intervenes a valley or depression between this mountain range and the next, known as Bald Mountain, on which are two distinct and prominent peaks, known as the "Little Bald" and the "Big Bald" Mountains. From the eastward, leading up to these peaks, is a ridge locally known as "Chestnut Ridge," running somewhat parallel to the Flat Top Mountain. Between these two mountains, Flat Top and Chestnut Ridge, lies the valley or depression above mentioned, locally known as "Coxe's Cove." In this valley or cove there is a divide or watershed, from which the waters flow eastward by Big creek and westward by Granny Lewis creek and Spivey creek; but from both sides of this divide the waters ultimately flow westwardly into the Nolachucky river, and eastwardly into the same river, called, however, in North Carolina, the "Toe river." In other words, the waters of Big creek flow eastwardly around the Flat Top Mountain into the Toe river, while the waters of Granny Lewis creek and Spivey creek flow westward around No Business Ridge or Mountain, into the Nolachucky river. There is one point on the summit and for some distance down the face of the Iron Mountain from which, looking southward, the Little and Big Bald Mountains or peaks can be seen at a distance of from 6 to 8 miles; the Little Bald being the nearer by a couple of miles. There is about 500 feet difference in the elevation of these mountains, the Big Bald being the higher; but looking from the point referred to on the Iron Mountain the Little Bald Mountain, owing to its nearer situation, appears to be the higher and more prominent. The two are connected by a high ridge of the Bald Mountain range. From the point on the Iron Mountain referred to, the Big Bald is about 10 degrees further west than the Little Bald. When the commissioners had run the line to the southwestern end of the Iron Mountain to the point above referred to where they could sight these peaks of the Bald Mountains through the gap between the Flat Top and No Business Mountain, the calls of their lines are as follows:

"Call 572: South 10 west 28 poles descending.

"Call 573: South 23 west descending the Iron Mountain crossing Nolachucky at 220 poles at the mouth of a laurelly branch; then partly up said branch and partly on the spurs of the mountain to the top of a high mountain; then crossing Devils creek at the distance of 1,230 poles, one continuing laurel thicket from Nolachucky to this place, whole distances of 4 miles 133 poles to the top of Little Bald Mountain.

"Call 574: South 49 west, 2 miles to the top of Big Bald."

The line in dispute in this case is call No. 573 from the Iron Mountain where the Nolachucky river runs through the same to the

top of the *Bald Mountain*, as defined in the Cession Act, and to the top of *Little Bald Mountain*, as described in the commissioners' report. This line crosses Nolachucky river at the mouth of a laurelly branch as named by the commissioners, now called Devils creek, and, as shown by a diary kept by the commissioners, was called at that time the Devils Arse, but the commissioners evidently decided to give it the more polite name of a laurelly branch. This branch or creek rises at the foot of the ridge connecting Flat Top and No Business Mountains, and flows northward through a rough narrow gorge into the Nolachucky river, with a number of spurs or ridges projecting along the way from both sides. This line called for by the commissioners runs in a general course up this gorge along and across Devils creek, crosses the ridge or gap between Flat Top and No Business Mountains; then crosses the Coxes Cove depression, running very near the head spring of Granny Lewis creek, and crosses the headwaters of Spivey creek, called by the commissioners Devils creek; thence ascending a ridge of the Bald Mountain to the top of the Little Bald Mountain. Hence it will be seen that it does not follow any watershed.

The Tennessee commissioners in 1886, instead of re-running this call of the North Carolina commissioners of 1799, conceived the idea that the true line called for by the Cession Act required them to find and follow a watershed from the Nolachucky river where it runs through the Iron Mountain to the top of the Bald Mountain, and in order to do this they left the top of the Iron Mountain at a point somewhat northeast of the point where the North Carolina commissioners had left it and pursued a ridge running southward from that point towards the Nolachucky river, and crossed the river from that point by a line to an opposite ridge of the Flat Top Mountain; followed this ridge to the summit of Flat Top; descended Flat Top to the low divide or watershed above referred to in Coxes Cove; followed that to the Chestnut ridge, ascended the same to a point which is denominated Rocky Knob or Big Rock, and then followed the top of this ridge to the summit of Little Bald Mountain, and there met the line of the North Carolina commissioners. They marked this watershed line as the true state line. As stated above, Captain Gudger, the commissioner of North Carolina at that time, undertook to follow and mark the line as run by the North Carolina commissioners in 1799, and, as hereinbefore stated, these are the two lines which beget this present controversy.

The complainants object to the 1799 line principally upon the ground that it does not follow the watershed, but they attack it also on the ground that the course called for by the commissioners is not the correct course, allowing what they assert to be the proper variation, and that the distance called for,

4 miles and 183 poles from the Nolachucky river, is incorrect, in that the true distance is about 6 miles. They have procured and introduced in evidence the field notes of the surveyors running this line in 1799 and the diary kept by one of the company, showing that this territory was exceedingly rough and offered great difficulties in passing through it, and that instead of surveying the straight line called for they surveyed a crooked line of many calls over such territory as was passable, and afterwards reduced that survey to a straight line, and assert that in this reduction to a straight line they missed both the true course and distance of it. It is apparent from the weight of this evidence that they did make a mistake, and a considerable mistake, in the distance. It does not so clearly appear that the course was mistaken. It is now run with a variation of 5 degrees and 30 minutes, to wit: On the call of south 28° 30' west, whereas the complainants and their witnesses say that it should be run on a variation of only 4 degrees and 30 minutes, and from their assumed point of departure from the end of Iron Mountain that it can only be run on a course at present of South 32° west. This variance, however, is produced entirely by a change of the starting point from the face of Iron Mountain. It is possible that the course called for by these commissioners of south 23° west is mistaken by a degree, and should have been south 24° west, which can easily be accounted for by the mistake made in their measurement of distance in calculating the course of a straight line. The resultant of their zigzag survey of 4 miles and 183 poles, and a like survey of a distance of practically 6 miles, would evidently show some considerable difference in the course indicated. This of course is merely conjectural. They could have made the course certain by sighting direct and reverse from one mountain to the other. However this may be, we regard it as utterly immaterial, as a mistake in both course and distance is easily corrected by the call from one mountain to the other, both of which are permanent in their location, and very prominent and well known. That will, of course, control the calls for course and distance. The only element of doubt, if doubt there could be, on this point is to determine the exact point on the Iron Mountain from which they began this line. That has been reduced, however, to a practical certainty by the engineers and surveyors introduced by the defendant in this case. The discrepancies shown by the witnesses of the complainants have been begotten not in the effort to relocate and survey this line of the commissioners of 1799, but in the effort to locate and survey what they now conceive to be the line which those commissioners should have located and surveyed, and in doing that they have assumed an entirely different point of departure from the end of the Iron Moun-

tain. That, of course, can easily be done when the end of the mountain, generally speaking, covers a width or distance of 2 or 3 or more miles.

[1] The real issue in this case is where the state line is, not where it *ought to be*. This court has no jurisdiction or power to establish a line between these states. Neither state is a party to this suit. Such a line must be established either by compact of the sovereign states themselves (*Poole v. Fleegeer*, 11 Pet. 185, 9 L. Ed. 680; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233), or, if by judicial proceedings, then by decree of the United States Supreme Court. That court, by a provision of the United States Constitution (article 3, § 2), has original and exclusive jurisdiction over such an issue. *Virginia v. Tenn.*, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537. But this court in the suit of private parties may fix and adjudge the actual location of a line as affecting the boundaries of their lands. The chief contention of the complainants is that what they call the watershed line is the one intended by the Cession Act of 1789, and in support of that they quote from the opinion of Judge Lurton in the case of *Belding v. Hebard*, 103 Fed. 523, 43 C. C. A. 296, to this effect:

"The intention of the North Carolina Cession Act of 1789 was to make the crest of the great mountain ranges extending across the state of North Carolina in a southwestwardly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described."

While this is generally true there are many notable exceptions. It is a physical impossibility to find a continuous watershed line along the calls given in the Cession Act of 1789. The mountains along this line are broken and separated by the passage from east to west through them of various water courses, some of which are the Watauga, the Nolachucky, the French Broad, the Big Pigeon, the Little Tennessee, and the Hiwassee rivers. At each of these breaks not only the continuity of the watershed is destroyed, but numerous subsidiary and lateral watersheds into these several streams on both sides are found. So that in attempting to find a watershed line from one of these streams to the next, it would open the question to discretion and judgment as to what one should be followed leading up from the water course to the main top or extreme height of the adjoining mountains.

[2] The Tennessee commissioners in 1886 showed considerable ingenuity in finding the watersheds followed on their line, but others, both to the east and west of it, can be found. The United States Geological Survey of this district followed and indicated the same line as the boundary line between these states, and the same is so shown on their maps. Upon this fact the complainants largely rely to establish this as the correct line, but the Geological Survey was without authority in this matter, and did not undertake to establish,

but merely to represent, what they gathered from local information to be the state line. They evidently procured their information from Tennessee claimants as their survey was made subsequent to the action of the Tennessee commissioners in 1886.

As was said by the Supreme Court of the United States in the case of *North Carolina v. Tennessee*, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97:

"The Cession Act is very general and necessarily demanded definition to satisfy the requirements of a boundary line, a line not only necessary to mark private property but political jurisdiction."

In defining this boundary by running, locating, and marking the same on the ground a large degree of discretion and judgment must necessarily have been delegated to the commissioners appointed for that purpose, and it appears from their action that they did not interpret the Cession Act to hold them with absolute strictness to the watershed line, as is evidenced by the line as found and fixed by the Circuit Court of Appeals at Cincinnati, in the case of *Stevenson v. Fain*, 116 Fed. 147, 58 C. C. A. 467, *supra*, and by the Supreme Court of the United States in the case of *North Carolina v. Tennessee*, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97.

By the way, the line which was in controversy in the case of *Belding v. Hebard*, 103 Fed. 523, 43 C. C. A. 296, which the Circuit Court of Appeals found to run with the watershed, the Supreme Court in this case of *North Carolina against Tennessee*, largely on newly discovered evidence, rejected, and found the true line to be the Slick Rock line, not the watershed line.

Another notable departure by the commissioners of 1821 from the watershed line was the last line running from the 101-mile tree a due south course, crossing the Hiwassee river and extending on the same course to the Georgia line, in all about 15 or 16 miles, without regard to the watershed, thereby locating in Tennessee, which otherwise would have been located in North Carolina, the present very rich Ducktown copper district. The Legislatures of both states in 1821 gave sanction to this construction of the Cession Act by the commissioners by passing acts ratifying and adopting the line as run.

[3] In our opinion the commissioners of 1799 correctly interpreted the call of the Cession Act, to wit: From the end of the Iron Mountain where the Nolachucky river runs through the same to the top of Bald Mountain. This call would indicate a straight line from the one point to the other.

In view of this fact the point of departure from the Iron Mountain selected by them from which they could see the two peaks of the Bald Mountains, Little and Big, was the proper, if not the only, one to be selected. Some question might have arisen as to which peak of the Bald Mountain was intended as the other terminus of this line.

In November, 1796, North Carolina grant-

ed to Jno. G. Blount a large boundary of land containing some 320,000 acres, which was intended to be bounded by the state line along this course, and in surveying the boundaries of that grant from the south to the northeastward, the surveyor ran and located the line as the state line under the Cession Act from the top of Big Bald Mountain, 2,020 poles (it now appears to be 2,120 poles), to the Nolachucky river where it breaks through the Iron Mountain, and the latter point was substantially the same point on the Iron Mountain from which the state line commissioners in 1799 ran their line. It is shown by the witnesses that from the top of Big Bald Mountain, as well as from the top of Little Bald Mountain, this particular face of the Iron Mountain is visible through the gap between the Flat Top and No Business Mountains as a very confined or restricted spot. Had the commissioners seen fit to follow this interpretation of the Cession Act, we could see no valid objection; but we think they gave a better interpretation to the Cession Act by running to the nearer peak or top of Bald Mountain, to wit, the Little Bald, thence following the top of the range to Big Bald.

[4] The complainants, however, insist that they should have run from the Iron Mountain to the top of Flat Mountain as a part of the Bald Mountain Range, and thence followed the watershed to Little Bald and Big Bald. Conceding that they might, or even should, have done this in their discretion and best judgment in interpreting the call of the Cession Act, the fact remains that they did not do it, and this court has no power to revise and correct their action. But we are of opinion that had they done this they would have been in error for the reason that we cannot find as a fact that the Flat Top Mountain is any part of the Bald Mountain Range. It has not only always been called and known as a separate mountain, but as a physical fact it is separate. The watershed referred to in Coxe's Cove is too insignificant in elevation to indicate any continuation of the one range into the other. The continuation of Bald Mountain range at this point is by the Chestnut Mountain or Ridge, turning eastward and running almost parallel with the Flat Top Mountain until it ends at the Caney creek, a tributary to the Nolachucky or Toe river in North Carolina.

[5] It is further claimed by the complainants that this line run by the North Carolina commissioners in 1799 was not marked plainly, while the other line showed its marks. As a matter of fact the former line does show several marked trees, and tradition indicates a number of others which have disappeared, but lacking such marks, the natural objects, to wit, the two mountains called for, would establish the line and would even override the incorrectness of the line marked by trees or other artificial monuments.

"Mountains and streams will control artificial monuments, such as marked trees." Ayers v.

Watson, 118 U. S. 596, 11 Sup. Ct. 201, 34 L. Ed. 803.

[6] Some proof is introduced as to the inhabitants of this disputed region paying taxes and sending their children to school in Tennessee. For a long time this was a very wild, inaccessible, and uninhabited region. One Hensley made a settlement on the Tennessee side of this line, but very near the line, and he and some other families after him resided there a number of years and paid taxes and sent their children to school in Tennessee. One other settlement was made east of the Hensley place, to wit, by Jesse Martin, in which he and some other families subsequent to him lived, and possibly they paid taxes and more certainly sent their children to school in Tennessee. They had access to none other, and at that time—in more recent years—grantees under Tennessee grants were asserting the watershed line as the state line. So it is not strange that the Tennessee schools admitted these children. So far as granting these lands is concerned, the Tennessee grants up to 1847 followed and called for this line of the North Carolina commissioners of 1799. The calls of one grant to Irwin of 1856 render it somewhat doubtful as to whether it intended to call for this line or the watershed line. It was a younger grant, however, by parties interested in an older grant calling for the other line. Not until 1890, after the Tennessee commissioners of 1886 had run and marked the watershed line, was any grant made which distinctly called for this watershed line. That grant was to one Hensley. It appears that the complainants derails their title not only from this Hensley grant covering the disputed territory, but also from the Irwin grants, one or both of which called for the other line as the Tennessee line. So far as the few citizens of North Carolina and Tennessee who knew this region and occasionally visited it and the fewer who resided near it or in it are concerned, it appears that some claimed the one line and some the other to be the state line, and some even the line of the Blount Grant, and certainly after 1886 there was some considerable doubt and conflicting claims as to the true location of the state line. These circumstances we regard as altogether inconclusive and of little or no weight in determining this question. It is perfectly clear that the commissioners of 1799 ran and fixed a line from one of these mountain tops to the other, and we do not think any of these circumstances will in any way interfere with or change that line.

[7] We are further of opinion, from the history hereinbefore recited, that Tennessee not only knew of the location of this line by the North Carolina commissioners, but taking her action and inaction altogether into account, she acquiesced in, and in a large measure, adopted this as the boundary line between the states. Her only dissents from

it were spasmodic, and contemplated further action on the part of North Carolina in conjunction with Tennessee in changing or relocating certain parts of the line. Nothing of this kind, however, was ever done.

So long as this line of 1799 remains unchanged by effectual negotiations or litigation between North Carolina and Tennessee, it must be treated as correct, and agreeable to the true intent and meaning of the Cession Act and both sovereign parties interested. Certain it is that it cannot be changed at the suit of private individuals or citizens of one state against those of the other, in a court without power or jurisdiction in the first instance to settle and establish such a line, even in a suit of one state against the other.

In *Virginia v. Tennessee*, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537, it was held that a boundary line between states which has been run out, located, and marked upon the earth and afterwards recognized and acquiesced in by them, for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant.

To the same effect is the holding in the case of *Maryland v. West Virginia*, 217 U. S. 1, 30 Sup. Ct. 268, 54 L. Ed. 645.

[8] During the progress of this case, the complainants amended their original bill and averred that the defendant was estopped to deny the so-called watershed line as the true line between these states, and the boundary line between the complainants' and defendant's lands, by reason of a certain judgment of the United States District Court at Asheville, N. C. On September 14, 1905, a suit in ejectment and to enjoin trespass and waste was brought in the superior court of Buncombe county, N. C., by W. T. Weaver, and others, against Indian Creek Lumber Company, and others, involving some or all of the lands in controversy in this case. That suit was removed by the defendants to the United States District Court, and there put at issue by general denial of the plaintiffs' allegations. On June 24, 1912, judgment was entered by that court to this effect:

"And it appearing from an examination by the court that the lands in controversy and about which this suit is brought are on the Tennessee side of the United States Geological line, as shown by the testimony taken by the referee, it is therefore adjudged that this court has no jurisdiction over the subject-matter of the said action, and it is therefore dismissed, however, without prejudice to such party or parties as may be interested in the lands in controversy."

The plaintiffs in that suit are averred to be the predecessors in title of the defendant in the present suit, and the defendant in that suit to be a privy or agent of the complainants in this suit, and that this judgment of the United States District Court precludes the defendant in the present controversy. The defendant meets this contention by showing that its original and real vendor

of the lands in dispute is the Big Creek Lumber Company, not a party to the North Carolina suit. The defendant took title to these lands by warranty deed from the Big Creek Lumber Company, and it also bought adjoining lands from Weaver and others, known as the Johnson heirs, who would and did convey only by quitclaim deed. In preparing that deed the defendant's counsel used in the description a general boundary which embraced not only the lands purchased from the Johnson heirs, but also the lands conveyed by the Big Creek Lumber Company, as aforesaid. The defendant further insists that the Indian Creek Lumber Company was neither a privy or representative of the complainants. The relation, if any, of this corporation to the complainants is not clearly disclosed in the record. It is indicated that the Indian Creek Lumber Company had been organized for the purpose of taking timber from these lands, and that N. B. McCarty, the owner of these lands, owned the majority of the stock in this Indian Creek Lumber Company, and from those circumstances complainants would infer the alleged relation between McCarty and this corporation.

Mr. Charles Ford, next friend of the minor complainant, testified, however, that the Indian Creek Lumber Company had no deed or contract for these lands from McCarty, and the record is entirely silent as to whether it had any contract for timber or acted as agent of McCarty. But aside from these questions this judgment appears on its face to have been without prejudice to the rights of the parties so far as the title to the lands is concerned. The only point of adjudication is that the federal court did not have jurisdiction, and that adjudication was rested upon the location not of the true line between the states, but of the United States Geological line. As hereinbefore indicated, that line was not determinative of the state line, neither could the judgment of the United States Court at Asheville change that line from its true location. As a matter of fact it did not undertake to do so. We do not think that this judgment amounts to an estoppel on the parties to that suit as to the true boundaries of the lands, and furthermore that it cannot in any way aid the title of complainants in this case; and for all these reasons it cannot estop the defendant in this case upon the issues herein involved.

The appellants further complain of the action of the court below in overruling certain exceptions made on the hearing to evidence introduced by the defendant. We have examined these exceptions and do not think they are well made. On the hearing of the case in the court below the chancellor found the issues in favor of the defendant and dismissed the complainants' bill. To this action the complainants excepted and appealed, and in this court have assigned errors to the effect that the chancellor erred in his conclusions

and should have found the issues in favor of the complainants. For the reasons already stated in this opinion, we conclude that there is no error in the chancellor's decree, and it is therefore affirmed, with costs.

W. R. TURNER, Special Justice, sat in lieu of WILLIAMS, J., who was incompetent.

PEOPLE'S NAT. BANK v. CORSE.

(Supreme Court of Tennessee. Feb. 15, 1916.)

1. UNITED STATES ⚡67—CONTRACTS—BOND OF CONTRACTOR—LIABILITY ON.

A bank which furnishes money to a federal contractor to pay for materials or labor does not come within a bond guaranteeing performance of the contract, and conditioned that the contractor shall promptly make payment to all persons supplying labor or material.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⚡67.]

2. SUBROGATION ⚡7—RIGHT TO SUBROGATION—VOLUNTEERS.

Where a surety on the bond of a government contractor completed the work, its right to subrogation to the rights of the federal government was superior to the right of a bank which advanced money to the contractor for payment of labor and materials, though the bond guaranteed performance, and was conditioned upon payment of all claims for labor and material.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 58, 77, 83, 92; Dec. Dig. ⚡7.]

8. UNITED STATES ⚡76—PRIORITIES—RIGHT TO.

The United States' right of priority in payment of debts due it is not an attribute of sovereignty, but depends on the acts of Congress.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 59; Dec. Dig. ⚡76.]

4. UNITED STATES ⚡76—PRIORITIES—LIENS.

Under Rev. St. § 3466 (U. S. Comp. St. 1913, § 6372), providing that, where a debtor is insolvent or the property of an absconding debtor is attached, claims due the United States shall first be satisfied, the federal government has no lien on the property of its debtors as such.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 59; Dec. Dig. ⚡76.]

5. UNITED STATES ⚡76—PRIORITIES—RIGHT TO—"ABSENT DEBTOR."

The property of a nonresident government contractor was attached in the state courts. The surety on the contractor's bond replevied it, and, completing the building, claimed subrogation to any priority of the federal government, under Rev. St. §§ 3466, 3468 (U. S. Comp. St. 1913, §§ 6372, 6374), declaring that whenever any person indebted to the United States is insolvent, or when the estate of an absent debtor is attached, debts due the United States shall be first satisfied, and that whenever the principal in any bond given the United States is insolvent, and the surety pays to the United States money due, the surety shall have like priority. *Held*, that though a nonresident debtor be deemed an absent debtor within the statute, yet the United States had no priority, as the attachment did not operate as a sequestration of the contractor's property for distribution among his creditors, and hence the surety had none.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 59; Dec. Dig. ⚡76.]

For other definitions, see Words and Phrases, First and Second Series, Absent.]

6. ATTACHMENT ⚡314 — REPLEVY BOND — JUDGMENT.

In attachment, where defendant intervened, replevying the property, under Shannon's Code, § 5269, sections 5131-5144, relating to actions of replevin, and providing for alternative judgments for monetary value of property or its return, are not applicable, and, judgment going against the intervener, there should be no provision for return.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1120-1130, 1138, 1139, 1379½; Dec. Dig. ⚡314.]

Appeal from Chancery Court, Robertson County; J. W. Stout, Chancellor.

Suit by the People's National Bank against James Corse in which the New England Casualty Company intervened, replevying the property attached. From a decree against the intervener, it appeals. Affirmed.

J. E. Garner, of Springfield, and Smith & Berry, of Nashville, for appellant. True & Dorsey, of Springfield, for appellee.

WILLIAMS, J. The United States let a contract for the erection of a post office building in Springfield to Corse, who executed a bond to the government, with the New England Casualty Company as surety. This bond guaranteed the performance of the contract, and contained a clause to the effect that the contractor should promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Corse borrowed money of complainant bank, which was used to pay for such labor and material. The bank filed a bill of attachment on the ground that Corse was a nonresident of the state, and caused a lot of materials to be attached, which materials were at the time stored near the public building, then in course of construction, and in railway cars, unloaded at the time, as the property of Corse. It had been ordered by and consigned to him.

The surety company in that cause filed its petition of intervention to set up its claims, and executed a replevy bond in a sum equal to the value of the material for the release of the same from the levy of the attachment. The contentions, outlined below, were so far ruled in favor of the bank by the chancellor as that a recovery on the bond for its amount was allowed.

One of the claims of the surety company is that it is entitled to be subrogated to the right of the United States, it having completed the building and complied with the contract of its principal, Corse.

[1] A claim of the appellee bank is that the surety must fail, because the bank was itself entitled to look to the bond and to appellant as surety thereon, on account of the fact that it advanced money to contractor Corse which went to pay for materials wrought into the building. This is not maintainable. Money furnished by a bank for the specific purpose of paying for materials or labor is not there-

by placed within the protection of the provisions of such a bond. *United States, for use, etc., v. Rundle*, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505; *Illinois Surety Co. v. City of Gallon* (D. C.) 211 Fed. 161. And see *Hardaway v. National Surety Co.*, 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321, affirming 150 Fed. 465, 80 C. C. A. 283. These decisions proceed upon principles recognized in our cases. *McDonald v. Railroad*, 93 Tenn. 281, 290, 24 S. W. 252; *Smith v. Neilson*, 13 Lea (81 Tenn.) 461.

[2] The equity of the surety company, entitling it to subrogation, is held superior to that of such a volunteer who had advanced money to the contractor. *Henningsen v. U. S. Fidelity, etc., Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, affirming 143 Fed. 810, 74 C. C. A. 484.

[3-5] The main contention of the surety for error in the chancellor's decree is that, under the federal statute, the bank could not by its attachment gain a lien on or title to the property levied on which would be superior to appellant's right of subrogation to the priority of the United States.

This claim is based on sections 3466 and 3468 of the Revised Statutes of the United States (U. S. Comp. St. 1913, §§ 6372, 6374), as follows:

"Sec. 3466. Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

"Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent * * * as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

It is urged that Corse was insolvent, and that the attachment by the bank was based on his nonresidence, which is claimed to be the equivalent of the term "absent debtor" in section 3466.

If the words "absent debtor" may be construed to mean nonresident (*Den v. Deaderick*, 1 Yerg. [9 Tenn.] 125, 135, and *Camman v. Bridgewater, etc., Co.*, 12 N. J. Law, 84, holding the terms not to be synonymous), and not merely to imply a resident who has removed himself from his home, we think it clearly established that the United States did not have priority, or a prior claim to the property, that prevented the bank's attachment taking precedence.

The right of the United States to priority does not rest, as does that of the states, up-

on any prerogative of sovereignty, but is based exclusively on acts of Congress. *United States v. State Bank*, 6 Pet. (81 U. S.) 29, 8 L. Ed. 308; *Re Devlin* (D. C.) 180 Fed. 170.

The federal courts have held that the above statute does not create a lien on the property as such. *U. S. v. Hooe*, 3 Cranch (7 U. S.) 73, 2 L. Ed. 870; *Beaston v. Farmers' Bank*, 12 Pet. (37 U. S.) 102, 9 L. Ed. 1017.

When the statute was enacted, the effect of an attachment of any goods of a debtor was, in some of the states of the Union, to cause a distribution among all creditors, through the medium of a trustee for the benefit of all creditors. From an early day, the statute here involved was construed to operate to give priority to the United States only where by the law the property of the debtor was, upon being attached, thus sequestered for distribution among all of his creditors; and where, as in this state, the attaching creditor fixes a lien upon the property (subject to be perfected by judgment later entered) that inures to his own benefit, and where only the property attached is affected, the United States has no priority that overrides the lien of the attachment. *Watkins v. Otis*, 2 Pick. (19 Mass.) 88; *U. S. v. Wilkinson*, 5 Dillon, 275; ¹ *U. S. v. Canal Bank*, 3 Story, 79, 25 Fed. Cas. No. 14,715; *Beaston v. Farmers' Bank*, supra; note to *State v. Foster*, 29 L. R. A. 226, 234; 29 Cyc. 750.

If it be conceded that appellee would have a right to be subrogated to the priority of the United States upon payment of the principal debtor's obligation, under the statute or the common-law rule that he who pays the debtor's debt to the sovereign succeeds, by subrogation, to the priority of the latter, the relief asked by the intervening petition must be denied for that there is here no right to priority in the United States.

[6] The intervenor and appellant contends that the chancellor was in error, in rendering a money judgment against it on the bond without providing, in the alternative, for a return of the property replevied, so far as it was not wrought into the building.

In this there is a failure to distinguish a replevin bond in an action of replevin (Code, Shannon, §§ 5131-5144) and a replevy bond such as this (Code, Shannon, § 5269), which makes no provision for a return of the property affected.

In event of its being cast in the suit, a decree incorporating a judgment against the casualty company on the replevy bond for the debt, without any provision for a return of any part of the property, was therefore the correct one. *Gibson's Suits in Chancery* (2d Ed.) § 886.

We are of opinion that the chancellor properly decreed, on the above contentions of the casualty company, in favor of the bank. Affirmed.

¹ Fed. Cas. No. 16,695.

DANIELS v. FRANCE.

(Court of Appeals of Kentucky. Feb. 29, 1916.)

1. CANCELLATION OF INSTRUMENTS \Leftrightarrow 59—RECOVERY FOR IMPROVEMENTS.

A grantee in a deed executed by a married woman in which her husband did not join is not entitled, on the cancellation of the deed, to be reimbursed for the cost of improvements made in good faith on the premises, but may recover only to the extent the improvements enhanced the vendible value of the property, not exceeding the reasonable value of the improvements, but where the improvements did not enhance the vendible value, the grantee may remove them, if practicable.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. \Leftrightarrow 59.]

2. CANCELLATION OF INSTRUMENTS \Leftrightarrow 59—RECOVERY FOR IMPROVEMENTS.

A grantee in a deed executed by a married woman alone who failed to perform his contract to support the grantor in consideration of the deed, could not, on the cancellation of the deed, recover for improvements or past support.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. \Leftrightarrow 59.]

3. CANCELLATION OF INSTRUMENTS \Leftrightarrow 59—RECOVERY FOR IMPROVEMENTS.

A grantee in a deed executed in consideration of his supporting the grantor and her husband for life, who left the grantor and her husband on the premises to take care of themselves, failed to perform his agreement to support, and in a suit by the grantor for the cancellation of the deed, the grantee was not entitled to recover for improvements.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. \Leftrightarrow 59.]

Appeal from Circuit Court, Pike County.

Action by Nancy France against Lewis Daniels. From a judgment for plaintiff, defendant appeals. Affirmed.

W. Scott Whitt and Auxier, Harman & Francis, all of Pikeville, for appellant. Roscoe Vanover, of Pikeville, for appellee.

MILLER, C. J. The appellee, Nancy France, is the grandmother of the appellant, Lewis Daniels. By her deed dated November 21, 1898, Nancy France conveyed 84 acres of her land, in Pike county, to the appellant, Lewis Daniels, for the consideration that Daniels would support Nancy France and her husband as long as they lived. Nancy France was then a married woman; but her husband, Gen. France, did not join in her deed. Daniels took possession of the land and held it until May, 1913, when Nancy filed this action, seeking to cancel the deed and regain possession of the land, upon the ground that, she being a feme covert when she executed the deed, it was void because her husband did not unite with her therein, and also because Daniels had failed to comply with his covenant for the support of Nancy and her husband. The answer traversed the petition, and alleged that upon the execution of the deed Daniels took possession of the land and

erected valuable and lasting improvements thereon which greatly enhanced its value; that he built a frame dwelling of four rooms upon said land, at a cost of \$600, in which Nancy and her husband resided with the appellant for a period of about seven years; that during that time he furnished her and her husband the necessities of life, at an aggregate cost of \$1,260, which, when added to the improvements upon the land, made a total expenditure by him of \$2,140. The answer further alleged that Daniels was willing and had offered to maintain Nancy and her husband, and that she refused the offer. In the meantime, Gen. France had died. The proof consists of the deposition of Nancy France upon one side, and the depositions of Lewis Daniels and Peter Daniels upon the other. The circuit court granted the relief prayed, by canceling the deed and quieting the title of Nancy France to the land which was conveyed to Daniels, and from that judgment he appeals.

The proof shows that Daniels built a four-room frame house upon the land, at a cost of \$600, and placed his grandmother and her husband therein, and lived with them for about seven years. It also shows that Daniels inclosed a portion of the farm with a wire fence, at a cost of between \$50 and \$100, that he planted an orchard, which he says was worth \$200 to him, and that he erected a storeroom at a cost of about \$100, and paid taxes which he claims aggregated \$24. Daniels kept a store for about three years, and during that time Nancy France carried a key to the store and obtained anything she wanted from the stock, for the purpose of maintaining herself and her husband. Daniels continued this support for a period of about seven years, at a cost of \$15 per month, aggregating \$1,260, thus making the total amount of \$2,124 expended for their support and for the improvements on the land, according to Daniels' contention. Daniels further testified that the land was worth only about \$300 at the time it was conveyed to him, and that after he had improved it, it was worth \$1,000 to him. At the expiration of the seven years, Daniels left the farm, and has since lived across the river, in West Virginia, a distance of not more than half a mile, from the land in question. After Daniels moved from the farm, his support of his grandmother and her husband consisted only in his permitting them to use the farm and maintain themselves from its produce and rents, although it does not appear that it was ever rented during that time.

[1] Appellant invokes the well-established rule that where a married woman makes a deed conveying her land, in which her husband does not join, it is not binding upon her, and she has the right to have it canceled; but, having received and used a large part

of the consideration therefor, she will be permitted to cancel the deed only upon equitable terms. *Hawkins v. Brown*, 80 Ky. 186. It is insisted that in such a case the rule is that a married woman will not be permitted to profit by her own act to the prejudice of a purchaser, and that she will be put upon terms to refund the consideration by paying for such necessary improvements as may have been made in good faith. *Heck v. Fisher*, 78 Ky. 643; *McDanell v. Landrum*, 87 Ky. 409, 9 S. W. 223, 12 Am. St. Rep. 500.

There are, however, at least two limitations upon this general rule, one being that the person making the improvements in good faith is not entitled to be reimbursed to the full extent of the cost of the improvements, but only to the extent that the improvements have enhanced the vendible value of the property, not to exceed the reasonable value of the improvements; and, to secure the payment of which sum he will be allowed a lien upon the property. If the improvements do not enhance the vendible value of the property, the person putting them on the premises will not be allowed anything except the privilege of removing them, if it be practicable to do so. *Thomas v. Thomas*, 16 B. Mon. 421; *Pulliam v. Jennings*, 5 Bush, 433; *Hawkins v. Brown*, 80 Ky. 186; *Robards v. Robards*, 85 S. W. 718, 27 Ky. Law Rep. 494; *Bell v. Blair*, 89 S. W. 732, 28 Ky. Law Rep. 614; *Poole v. Johnson*, 101 S. W. 955, 31 Ky. Law Rep. 168; *Glass v. Hampton*, 122 S. W. 804.

[2] Another limitation is that the grantee must, as a prerequisite to his right to claim anything for improvements, carry out his contract by supporting the grantor. If he fails to keep his contract, his right to be reimbursed for improvements or past support is lost, and the grantor may recover the property for the purposes of that support which the grantee has failed to supply.

[3] In the case at bar, appellant admits he left his grandmother and her husband to take care of themselves about eight years before this suit was brought. His claim that he supported them by giving his grandmother the use of her own land is hardly worth serious consideration; and, having failed to keep his contract, he is entitled to no relief. Judgment affirmed.

TAYLOR COAL CO. v. MILLER.

(Court of Appeals of Kentucky. Feb. 29, 1916.)

1. MASTER AND SERVANT — 101, 102 — INJURY TO SERVANT — LIABILITY OF MASTER.

A coal company furnishing the means by which employes are carried to and from their work, must exercise ordinary care to provide reasonably safe methods of transportation, and an employe injured through the negligence of the company has a cause of action therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. —101, 102.]

2. MASTER AND SERVANT — 203 — INJURY TO SERVANT — ASSUMPTION OF RISK.

An employe in a coal mine riding to his place of work on a coal car furnished by the employer to take employes to and from their work does not assume any risk of danger growing out of the misconduct of the animal drawing the car while under the control of another employe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 533-543; Dec. Dig. —203.]

3. MASTER AND SERVANT — 208 — INJURY TO SERVANT — ASSUMPTION OF RISK.

The employe having nothing to do with the repair of the track did not assume the risk of a defect in the track causing a derailment, and it was the duty of the employer to keep the track in reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. —208.]

4. EVIDENCE — 505 — EXPERT TESTIMONY — HYPOTHETICAL QUESTIONS.

A question put to an expert testifying from information gained by personal observation must call for an opinion, and not for a conclusion on his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2308; Dec. Dig. —505.]

5. APPEAL AND ERROR — 1048 — PREJUDICIAL ERROR — RULINGS ON EVIDENCE.

Where, in an action for personal injury, the evidence was conflicting on the question whether the injury caused tuberculosis of plaintiff and there was evidence that several members of his family had died from tuberculosis, error in allowing a question put a physician as to whether or not in his judgment as a physician the tuberculosis would be the natural and proximate result of the injury, because calling for a conclusion and not for an opinion merely, was prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. —1048.]

6. DAMAGES — 216 — PERSONAL INJURIES — INSTRUCTIONS — EVIDENCE.

Where, in an action for personal injuries, the evidence showed that plaintiff was permanently injured and his earning power diminished, but the evidence was conflicting on the question whether the injury caused tuberculosis from which plaintiff suffered, the court must charge that though plaintiff was permanently injured and his earning power diminished thereby, yet if he was afflicted with tuberculosis which diminished or destroyed his earning power and the disease was not attributable to the injury, nothing should be allowed for impairment of his earning capacity caused by the disease, while if the tuberculosis was wholly attributable to the injury, the jury should not diminish the verdict in his behalf on account of the disease.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. —216.]

7. TRIAL — 251 — INSTRUCTIONS — USE OF WORDS.

Where plaintiff suing for a personal injury was entitled to recover, if the injury was caused by ordinary negligence of defendant, the word "gross," as applied to negligence, should be omitted from the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. —251.]

8. DAMAGES — 95 — PERSONAL INJURY — MEASURE OF RECOVERY.

The measure of the recovery of one suing for a personal injury is such a sum as the jury may believe from the evidence will reasonably compensate him for his mental and physical suf-

fering, if any, and for the impairment, if any, of his earning capacity resulting directly from the injury caused by the negligence of defendant, not exceeding the sum demanded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.]

9. COSTS § 255 — RECORDS — TYPEWRITTEN RECORDS.

Typewritten records for the Court of Appeals should be typewritten with a black record ribbon and on good weight paper so that the records may be easy to read, and where the transcript of the evidence is typewritten on very thin paper with a worn or faded ribbon so that it is hard to read, the official stenographer will be allowed only one-half the usual charges for his transcript.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 844; Dec. Dig. § 255.]

Appeal from Circuit Court, Ohio County.

Action by Don Miller against the Taylor Coal Company. From a judgment for plaintiff, defendant appeals. Reversed, with direction for new trial.

Glenn & Simmerman and H. P. Taylor, all of Hartford, for appellant. Ernest Woodward and Otto C. Martin, both of Hartford, and Ben D. Ringo, of Owensboro, for appellee.

CARROLL, J. The appellee, Miller, was employed as a "loader" by the appellant coal company in its mine, and as the place at which he worked was about two miles from the mine entry, the company had for a long time been in the habit of carrying Miller and other miners who worked where he did to and from their work in cars.

In February, 1914, while Miller was being carried from the mine entry to his place of work in company with other miners, on a coal car drawn by a mule, the car was thrown off the track, in consequence of which Miller received injuries; and in this suit for damages there was a judgment in his favor for \$2,000.

The derailment of the car, as shown by the evidence of Miller and his witnesses, was due to the defective condition of the track, as well as to the fact that the car was going at an unsafe rate of speed on account of the unmanageable mule that was pulling it.

[1] Inasmuch as the coal company furnished the means by which Miller and other employes were carried to and from their work, it was the duty of the company to exercise ordinary care to provide reasonably safe methods of transportation, and if Miller was injured by defects in the track, or by the unmanageable character of the mule, or by other causes attributable to the negligence of the coal company, he had a cause of action against it. *L. & N. v. Walker*, 162 Ky. 209, 172 S. W. 517; *Sandy Valley & Elkhorn Ry. Co. v. Bridgman*, 168 Ky. 219, 181 S. W. 1101.

[2] It is contended, however, by counsel for the coal company that as the derailment of the car was caused principally by the

mule that was being driven by one of the company's men going faster than was prudent, Miller assumed the risk of any danger growing out of the misconduct of this mule. But the mule was not under the control of Miller, nor was it being driven by him. It was owned by the coal company, was being driven by one of its men, and Miller did not assume any risk, due to the misconduct of the mule, while riding on the car furnished for his use by the company.

[3] Nor did he assume the risk of defects in the track that contributed to the derailment of the car. He had nothing to do with the repair of the track, and it was the duty of the coal company to keep it in such repair as to leave it in reasonably safe condition for the use to which it was put.

There is of course conflict in the evidence as to the qualities of the mule as well as to the condition of the track, but there was sufficient evidence showing the defective condition of the track as well as the bad character of the mule, to take the case to the jury and to sustain the verdict.

[4] On the trial of the case it appeared that Miller had tuberculosis, and it was the contention of his counsel that the injuries he received produced the tuberculosis. In support of this theory two or three physicians were introduced, and, among other questions, they were asked this: "State whether or not in your judgment as a physician, the tuberculosis would be the natural and proximate result of the injury I have supposed?" And they answered: "It would." The objection urged to this question and answer is that the witnesses were permitted to state their conclusion on the facts instead of their opinion. It is of course admitted that it was competent for these physicians to give an opinion as to whether or not the injuries received by Miller would have caused the tuberculosis with which he was then afflicted. But they were asked not for an expression of opinion, but for their conclusion.

It is a well-settled rule in the law of evidence in this jurisdiction, as said in *Etna Life Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523, that:

"It is permissible in the examination of a witness introduced as an expert to submit a hypothetical question, and ask his opinion thereon; or, if the witness has personal knowledge of the matter he is inquired of concerning, he may give his opinion based on such knowledge. But the question should not be put in such form as to make the answer the conclusion of the witness, instead of his opinion. It is the office of the expert to express an opinion and the province of the jury to draw its own conclusions from the opinion, so expressed. Here, the witness not only expressed his opinion, but also drew from his own opinion a conclusion upon a question which was the very matter in issue. The facts upon which the opinion of the expert was desired should have been submitted to him in a question, and his answer should have been his opinion, and not his conclusion."

To the same effect are *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932; *Cumberland Telephone & Telegraph Co. v. Peacher Mill Co.*, 129 Tenn. 374, 164 S. W. 1145, L. R. A. 1915A, 1045.

We do not understand counsel for Miller to controvert the correctness of this principle, but they insist that it is only applicable when a hypothetical question is submitted to an expert, and should not be applied when the expert is testifying after a personal examination of the person concerning whom he is called on to express an opinion. But we do not see how any sound distinction can be made in the application of this rule between the answer to a hypothetical question and the answer to a question based on personal observation. Whether the witness is testifying as an expert from information imparted to him by a hypothetical question, or from information gained by a personal observation, he is in both instances called on to give an expression of opinion arrived at from information received by him, and in neither case should he be asked or permitted to give more than an expression of his opinion. An expert who is called on for the purpose of enlightening the jury concerning a matter that they might not understand without the assistance of some person skilled in the particular matter under consideration, is allowed to give his opinion for the benefit of the jury, but not to express a conclusion upon this opinion, as that is the province of the jury.

[5] Counsel further argue that this evidence was not prejudicial to the substantial rights of the defendant, and therefore does not constitute reversible error. There might be cases in which this character of evidence would not be error. But under the peculiar facts of this case this expert evidence was very material. There is much conflict in the evidence as to whether the injuries Miller received had anything to do with the tubercular disease with which he was afflicted and from which he died shortly after the trial; and, besides this, there was evidence that several members of his family had died with this disease; so that it was of unusual importance that this expert evidence should have been received by the jury in the form required by the rules controlling its admission.

[6] Complaint is also made of the wording of the instruction allowing the jury to diminish the damages in the event they reached the conclusion that the ability of Miller to earn money was diminished by the tubercular disease with which he was afflicted. Several instructions were offered on this subject by counsel for the defendant, and the court gave the jury one that does not seem to us to present correctly this feature of the case. In lieu of instruction "Y" the jury should be told on another trial

that although they may believe from the evidence that plaintiff was permanently injured by the negligence of the defendant and his power to earn money was diminished or destroyed thereby, yet if they further believe from the evidence that he was afflicted with tuberculosis of the throat and lungs, which diminished or destroyed his power to earn money, and this disease was not caused by or directly attributable to the injuries he received, the jury, if they find for the plaintiff, should not allow anything for the impairment or destruction of his earning capacity caused by this disease. But if they believe that the tuberculosis was wholly caused by and directly attributable to the injuries he received, the jury should not diminish the finding, if any, in his behalf on account of this disease.

[7] In cases like this the plaintiff is entitled to recover if his injuries were caused by the ordinary negligence of the defendant, and so the word "gross" should be omitted from the instructions.

[8] In lieu of instruction No. 2 the jury should be told that if they find for the plaintiff, the measure of his recovery is such a sum in damages as they may believe from the evidence will fairly and reasonably compensate him for his mental and physical suffering, if any, and for the impairment or destruction, if any, of his ability to earn money that may have resulted directly from his injuries, if they were caused by the ordinary negligence of the defendant, but not exceeding in all the sum of \$10,000; and the jury should read and consider instruction "Y" in connection with this instruction.

[9] There is another matter to which attention should be called. The transcript of the evidence is typewritten on very thin paper such as is used in making carbon copies, and about half of it was written with a worn or faded ribbon, so that it is very trying on the eyes to read any of it. All records for this court should be typewritten with a black record ribbon, and on good weight paper, so that the matter will be easy to read. The condition of this transcript is such that we feel warranted in condemning it, and the official stenographer will only be allowed one-half the usual charges for this transcript.

The judgment is reversed, with direction for a new trial in conformity with this opinion.

JARBOE'S ADM'R v. COLEMAN et al.
(Court of Appeals of Kentucky. Feb. 25, 1916.)

1. MASTER AND SERVANT—278—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for a servant's death on the ground of the master's negligence in allowing machinery and appliances with which he was required to work to remain in a defective and dan-

gerous condition, as known to it, but unknown to the servant, held insufficient to show the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 934, 956-958, 960-969, 971, 972, 977; Dec. Dig. ¶278.]

2. MASTER AND SERVANT ¶177 — MASTER'S LIABILITY—FELLOW SERVANTS.

Negligence, if any, of fellow servants in failing to inform their foreman of the defective condition of appliances used by servant could not be imputed to the master or render him liable in damages for the servant's death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. ¶177.]

3. MASTER AND SERVANT ¶205 — DEATH OF SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT.

A servant not charged with the duty of inspection is not required to make a detailed examination of the place where he is put to work or of the appliances to be used in the work, nor to take notice of any defect which would not be apparent to one who usually has neither time nor opportunity for more than a casual glance at the place of work or the appliances for work, but may rely on the master's adequate discharge of his duty to use ordinary care to make the place of work and the appliances for work reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. ¶205.]

4. MASTER AND SERVANT ¶219—DEATH OF SERVANT—ASSUMPTION OF RISK—OBVIOUS DEFECTS.

A servant may recover for an injury caused by any defect in his place of work or in the appliances for work making them dangerous for use, unless the defect or the danger is so obvious that one in his situation ought, with the exercise of reasonable care, to discover it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. ¶219.]

5. MASTER AND SERVANT ¶219—ASSUMPTION OF RISK—DEFECTIVE MACHINERY—KNOWLEDGE.

Where the defect in machinery and the danger to be apprehended from its continued use were not only obvious, but were known to the deceased servant better than to any one else, the risk attending its use in such condition, though greater than the ordinary risks incident to the employment, was assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. ¶219.]

6. MASTER AND SERVANT ¶234—MASTER'S LIABILITY—CONTRIBUTORY NEGLIGENCE.

A master, ignorant of a defect in machinery because of the deceased servant's negligence in failing to inform him of the defect which had been caused by his further negligence in striking and niching a pulley a few days before his death was not liable for the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. ¶234.]

7. MASTER AND SERVANT ¶230—CONTRIBUTORY NEGLIGENCE—YOUNG AND INEXPERIENCED SERVANT.

A servant killed while employed in a spoke factory from the master's alleged negligence in allowing the machinery and appliances to become defective and dangerous, as known to him, but unknown to servant, could not be excused for the want of ordinary care, where it appeared

that he was an intelligent young man of normal physical and mental development, capable of properly attending to the operation of the machine at which he worked, and he had been fully instructed by the foreman how to operate his machine, and had worked at it two months before his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687-700; Dec. Dig. ¶230.]

8. MASTER AND SERVANT ¶285—ACTION FOR SERVANT'S DEATH—NEGLIGENCE—EVIDENCE.

In an action for a servant's death when entangled in a belt and hurled against an overhead pulley, where the evidence failed to show whether his death was caused by the conveyor belt's jumping off a defective pulley and catching him, or whether in attempting to adjust the belt he put his leg inside of it while in motion, as he had done on previous occasions when he had been warned of the danger of so doing and so became entangled in the belt, leaving the cause of his death purely a matter of conjecture, the peremptory instruction for defendant was authorized.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ¶285.]

Appeal from Circuit Court, Pulaski County.

Action by Bruce Jarboe's administrator against J. S. Coleman, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Emmett Puryear, Robert Harding, and J. W. Rawlings, all of Danville, R. B. Waddle, of Somerset, and J. P. Hobson & Son, of Frankfort, for appellant. O. H. Waddle & Son, of Somerset, and Rodes & Rodes, of Danville, for appellees.

SETTLE, J. Bruce Jarboe, a young man 18 years of age, lacking one day, lost his life in a spoke manufactory at Somerset, Ky., owned and operated by the appellees, J. S. Coleman and R. H. Coleman, as partners under the firm name "Columbia Single Tree Company." At the time of his death, and for two months prior thereto, the decedent was a factory hand in appellees' employ, engaged in operating a machine called an "equalizer." While so engaged, he became entangled in a belt and was hurled against an overhead shaft or pulley and killed. This action was brought against the appellees by the administrator of his estate to recover damages for his death.

The cause of action alleged in the petition was that the death of the decedent was caused by the negligence of the appellees in allowing machinery and appliances at which he was required to work to be and remain in a defective and dangerous condition, which was known by them, but was not known by the decedent. The first paragraph of appellees' answer contains a traverse; the second a plea of contributory negligence; and the third assumption of risk; that is, that the death of the decedent resulted from an ordinary risk incident to the business, which he assumed in accepting the employment. All

affirmative matter of the answer was controverted by reply, thus completing the issues. The trial resulted in a verdict for the appellees, returned by the jury in obedience to a peremptory instruction from the court. From the judgment entered upon that verdict, the administrator has appealed.

The machine the decedent was operating when killed was located in an open shed attached to the factory building proper, and was used to make uniform in length pieces of timber or sticks to be later converted into spokes. The machine was composed of two circular saws and a conveyor; the saws being placed opposite each other, so that each, when in motion, would at the same time cut an end of the same stick. The conveyor carried the sticks to the saws and through and beyond them into the mill, where they were made into spokes. Each of the circular saws was driven by a leather belt which ran on a pulley attached to an overhead shaft; the shaft being kept in motion by a larger belt running from the factory engine within the building. The conveyor was operated by a canvas belt four inches wide, which at its lower end ran upon a thirty-inch wooden pulley attached to the machine on its left or north side, and at the upper end upon an iron pulley eight inches wide attached to the overhead line shaft. The canvas belt for operating the conveyor was what is known as a cross-belt; that is, the two sides of the belt were crossed halfway between the two pulleys. The line shaft revolved about 400 times per minute.

The following facts were established by the appellant's evidence and are undisputed: In operating the equalizer the operator was required to stand in front of it about two feet to the right of the conveyor belt, which was on the left side of the machine, and place upon the conveyor chain the pieces of timber which would be carried by the conveyor chain into and through the saws; thence into the mill to be turned into spokes. It was also the duty of the operator to keep his machine oiled, replace any belts that came off, and to repair any belt that needed repairing, and, when anything went wrong with the machine, that he could not himself repair, to report the difficulty to the foreman, who would see that the repairs were made. It was no part of the foreman's duty to inspect the machinery of the factory.

It further appears from the evidence that the decedent's father, J. O. Jarboe, who was appellees' foreman in charge of the spoke factory, of his own accord and without direction or suggestion from appellees employed the decedent, Bruce Jarboe, to operate the equalizer, and at the time of doing so fully explained to him how it should be operated, and that for two months prior to his death the machine was properly operated by the latter, who during that time received the wages of a regular hand, namely \$2 per day. It also appears from the evidence that about

five minutes before his death Bruce Jarboe went to his father, appellees' foreman, and obtained of him the key to a room in which extra belts were stored, to get material to repair a belt on his machine. The evidence is silent as to what Bruce Jarboe did after obtaining the key. It shows, however, that appellees' employes near his place of work heard a noise, and saw Bruce Jarboe being hurled around the overhead shaft. They immediately ran to his assistance, and upon reaching him found that his leg was inside the conveyor belt, which was off the lower pulley and that this belt and the leg of the decedent had become wrapped around the upper pulley attached to the line shaft. The machinery was stopped as quickly as it could be done, the belt cut, and the body of decedent was taken down.

The pulley on the line shaft around which the conveyor belt and the decedent's leg were wrapped is called a split pulley, because composed of two semicircular sections which, when joined together, fit around the line shaft. On one edge of the pulley, where the two sections joined, there was a triangular niche or hole in the face of the pulley, an inch in width, a part of which was in each section of the pulley. The edge of the belt had caught in this niche, which caused it to wind itself around the pulley. It could not be told from the appearance of the niche how long it had been in the pulley. It appears from the proof, however, that the line shaft pulley and another which was put in use in the supply room were purchased by appellees about four months before the accident in question. The niche in the line shaft pulley, according to the testimony of W. A. Cundiff, one of appellees' witnesses, was made by the decedent, Bruce Jarboe, about a week before the accident. Cundiff was then assisting Jarboe in putting on the conveyor belt on the latter's machine; Cundiff being at the wooden pulley near the ground, and Jarboe at the metal pulley on the line shaft. Failing in their first attempt to put on the canvas belt, the decedent, in a fit of anger or from some other unjustifiable cause, took a black-jack spoke and struck the pulley a blow that broke a piece of the metal from the face of it, thereby making the niche therein. Powell, another witness for appellees, passed Cundiff and the decedent while they were attempting to put on the belt, and saw the latter break the pulley, and heard Cundiff tell him: "You had better have it fixed; it is liable to fray the life out of you." Powell then told the decedent that there was a new pulley upstairs which he ought to have put on, to which the latter replied that he would some day when they were shut down. George Hargis, another employe of appellees, testified that, in passing where the decedent, Cundiff, and Powell were at the time of the conversation referred to, he heard the warning that Cundiff gave decedent with respect to the niche which the latter had made in the pulley. Cun-

diff, who gave the decedent the warning, was not the superior, but merely a fellow servant, of the decedent in appellees' service. He operated a turning machine just inside the factory about 12 feet from the decedent's machine, and within full view of same. There was no evidence conducing to prove that J. O. Jarboe, appellees' foreman, was ever informed of or knew anything about the existence of the niche in the pulley at his son's machine.

The witness Powell further testified that on a previous occasion he had seen the decedent, Bruce Jarboe, thrust his leg inside the revolving canvas belt and draw the belt off the wooden pulley, and had then warned him that the act was dangerous, and that the proper and a safe way to remove the belt was with a spoke, as by holding the spoke or a stick against the edge of the belt it could readily be thrown off the pulley; furthermore, that at the time of giving this warning to the decedent he told him of an accident that had happened to another boy who had been injured in attempting to draw the belt off the pulley by throwing his leg against it as had been done by the decedent.

After the decedent's body had been removed following the accident, the witness Hopper noticed that a leather belt operating one of the circular saws on the equalizer had been freshly cut and put together again, and he then discovered on the ground near the conveyor belt the pliers which the decedent had evidently used in repairing the belt mentioned.

[1] It is our conclusion that the evidence found in the record wholly fails to show that the decedent's death was caused by the negligence of appellees or any of their employes. It does, it is true, show a defect in the metal pulley attached to the overhead line shaft, and that this defect, a niche, made the operation of the equalizer at which the decedent worked dangerous. But, as the niche causing the defect in the pulley was made by him, its existence was, of course, known to him down to the time of the accident which resulted in his death, as was also the danger of operating the equalizer with the defective pulley. As to these facts and the further fact that appellees did not know of the defect in the pulley until after the death of the decedent, there was no contrariety of evidence. The defect in the pulley was also known to appellees' employes Cundiff, Powell, and Hargis, because Cundiff was present when the decedent made the niche, and Powell and Hargis saw it immediately after it was made, and heard Cundiff warn the decedent of the danger of further using the pulley in its defective condition and advise him to report it to appellees' foreman, that a new pulley might be supplied. Notwithstanding this warning and advice, he failed to notify the foreman of the defective condition of the pulley, and continued to use it until overtaken by death.

[2] Cundiff, Powell, and Hargis, if they thought of the matter at all after the warning from the former to the decedent of the danger of further using the defective pulley, doubtless took it for granted that, as he alone operated the equalizer, he would take enough care for his own safety to inform his father, appellees' foreman, of the defect in the pulley and the necessity of replacing it with one that would be reasonably safe for use. At any rate it was not made to appear from the evidence that they were under any duty to inform the foreman of the defective condition of the pulley; and, if it could properly be charged that they were guilty of negligence in failing to do so, as they admittedly were only fellow servants of the decedent, such negligence would not be imputed to appellees or render them liable in damages for the decedent's death.

[3, 4] The question whether appellees are liable for the death of the appellant's decedent must be determined by the rule announced in *Pfisterer v. J. H. Peter & Co.*, 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605, and reaffirmed in numerous later cases decided in this jurisdiction, which, in substance, declares that a servant not charged with the duty of inspection is not required to make a minute or detailed examination of the place where the master puts him to work or of the instrumentalities to be used in performing it, nor to take notice of any defect which would not be apparent to one who usually has neither time nor opportunity for more than a casual, hurried glance at the place of work or the instrumentalities, but is entitled to rely on the master's having adequately discharged his primary duty of using ordinary care to make the place of work and instrumentalities of work reasonably safe for his use; hence in such case the master would be liable to the servant for an injury sustained by the latter, caused by any defect in the place of work or instrumentalities, that made them dangerous for the servant's use, unless the defect or danger was so obvious that one situated as was the servant ought, by the exercise of ordinary care, to have discovered it. *L. & N. R. Co. v. Foley*, 94 Ky. 224, 21 S. W. 866, 15 Ky. Law Rep. 17; *L. & N. R. Co. v. Vestal*, 105 Ky. 461, 49 S. W. 204, 20 Ky. Law Rep. 1288; *Cov. Sawmill & Mfg. Co. v. Clark*, 116 Ky. 461, 76 S. W. 348, 25 Ky. Law Rep. 694; *Freestone Co. v. McGee*, 118 Ky. 311, 80 S. W. 1113, 25 Ky. Law Rep. 2211; *Shemwell v. O. & N. R. Co.*, 117 Ky. 562, 78 S. W. 448, 25 Ky. Law Rep. 1671; *Wilson v. Chess & Wymond Co.*, 117 Ky. 572, 78 S. W. 453, 25 Ky. Law Rep. 1655; *Gratz v. Worden*, 82 S. W. 395, 26 Ky. Law Rep. 723; *McFarland's Adm'r v. Harbison & Walker Co.*, 82 S. W. 430, 26 Ky. Law Rep. 747; *Carey v. Samuels*, 88 S. W. 1052, 28 Ky. Law Rep. 8; *Bell-Coggeshall Co. v. Lewis*, 89 S. W. 135, 28 Ky. Law Rep. 152; *Corley v. Paducah Cooperage Co.*, 89 S. W. 512, 28 Ky. Law Rep. 451; *Cov. & Cin. Bridge Co. v.*

Hull, 90 S. W. 1055, 28 Ky. Law Rep. 1039; Louisa Coal Co. v. Hammond's Adm'r, 160 Ky. 271, 169 S. W. 709; B. & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

The rule in question is admirably stated in *Buey's Adm'r v. Chess & Wymond Co.*, 84 S. W. 563, 27 Ky. Law Rep. 198, as follows:

"It must be kept in reasonable repair. The master's duty extends to seeing that the machinery is in that condition of repair, and consequently he must use reasonable endeavor to keep himself informed of the condition. This the master may do by requiring the servant in charge of the machine, where he is competent to do so, to ascertain its condition, and to report it to the master, or to the superior in charge, and who represents him. The servant is not bound to increase the hazard of his employment by working at machinery or with tools in unfit condition. By bringing the fact, where it is known to the servant, to the master's attention, the defects can be remedied by the one in authority, or the servant be absolved from the increased risks incident to their use, if the danger is not such as that none but a reckless person would continue their use in that condition. When, however, the servant actually knows of the imperfection, and of the danger it involves to him, and continues without complaint, or without bringing it to the master's attention, he assumes for the time the increased hazard in addition to the ordinary risks of his employment. The law requires the master to do what he reasonably can do toward protecting his workmen in employments dangerous to life or limb. But employers are not omniscient. They cannot actually know the condition of every piece of machinery or tool at every instant of its use. The workman who has it in immediate charge has the best opportunity for learning of such defects as may occur at any moment, and are open to his view. It is his duty to report it so that it can be repaired. If he fails in that duty, the master may or may not be liable if some other person is injured by it, but, if the neglectful servant himself suffers an injury from it, the master having no knowledge of the situation, it is a safe rule that lets the negligent servant bear the consequences of his own action."

[5, 6] Here the defect in the machinery and the danger to be apprehended from its continued use were not only obvious, but were known to the decedent better than to any one else; therefore whatever risk attended the use of the machine in its defective condition, though greater than one of the ordinary risks incident to the employment, was assumed by the decedent with complete knowledge of the risk thereby incurred. At the same time it was a danger from which appellees could not have protected him, because they knew nothing of the defect in the machinery, which want of knowledge resulted from the decedent's negligence in failing to inform them of the defect which had been caused by his further negligent act in striking the pulley with a piece of timber but a few days before his death.

[7] His want of care in the several particulars mentioned cannot be excused upon the ground of his youth, because it appears from the testimony of his father, appellees' foreman, that he was an intelligent young man of normal physical and mental development, capable of properly attending to the duties appertaining to the operation of the machine at which he was put to work, and that when employed and put to work at the machine he was fully instructed by the father how to operate it, and had worked at it for two months before his death. As said in *Interstate Coal Co. v. Deaton*, 148 Ky. 160, 148 S. W. 396, a case in which the jury was sustained by a young man 17 years of age:

"It is the rule that, if an employé, notwithstanding his minority, has sufficient intelligence and experience to appreciate the danger of a situation, the rule applicable to adults may be applied in his case."

It is patent, therefore, that upon the ground thus far considered appellees were entitled to the peremptory instruction directing a verdict in their behalf.

[8] The peremptory instruction was also authorized upon yet another ground. The evidence fails to show how the decedent lost his life; whether his death was caused by the conveyor belt's jumping off the defective pulley and thereby catching his body and wrapping it about the overhead shaft, or whether, in attempting to make some adjustment of the belt, he stuck his leg inside of it while in motion, as he had been known to do on a previous occasion when warned of the danger of such an act, and thereby became entangled in the belt, cannot be told from the evidence. In other words, the cause of his death is purely a matter of conjecture or speculation. The facts of the case bring it clearly within the rule announced in *Stuart's Adm'r v. N. O. & St. L. Ry. Co.*, 146 Ky. 127, 142 S. W. 232, and the cases therein cited. In that case it is said:

"But in all cases of this character, where it is sought to recover damages for negligence or wrongful act, there must be some evidence to show that the deceased lost his life through the negligence of the defendant, and this evidence must be sufficient to charge the defendant with a breach of duty. A recovery cannot be had on mere surmises or speculation as to how the injury that is complained of happened, nor will it be presumed that the defendant was guilty of * * * negligence. If the injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability, then the well-settled rule is that a recovery cannot be had. * * *"
McDonald's Adm'r v. Lou, Car Wheel, etc., Co., 149 Ky. 801, 149 S. W. 1142; *Strock's Adm'r v. L. & N. R. Co.*, 145 Ky. 150, 140 S. W. 40; *L. & N. R. Co. v. Stayton's Adm'r*, 163 Ky. 760, 174 S. W. 1104; *Dana & Co. v. Blackburn*, 121 Ky. 706, 90 S. W. 237.

Judgment affirmed.

HAUSS v. SURRAN.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

1. SALES Ⓒ429 — WARRANTY — REMEDY FOR BREACH.

Where a contract of sale of machinery merely permits the buyer to return it if it is not as warranted, and does not provide that it shall be deemed to fulfill the warranty unless returned, he may, though it does not satisfy the warranty, retain it, and recoup his damages for the breach, in an action by the seller for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1224-1229; Dec. Dig. Ⓒ429.]

2. SALES Ⓒ392 — RECOVERY OF PRICE BY BUYER—RETURN OF ARTICLE.

Unless an article sold is absolutely worthless for every purpose, though it is useless to the buyer, he must return, or offer to return, it before he can recover the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1128-1131; Dec. Dig. Ⓒ392.]

3. SALES Ⓒ442 — BREACH OF WARRANTY—DAMAGES.

The measure of damages for breach of warranty of power of machinery sold and installed is the difference between its value as installed and its value as warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. Ⓒ442.]

Appeal from Circuit Court, Campbell County.

Action by Albert F. Hauss against George Surran. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Judson A. Shuey, of Newport, and Edward C. Lovett, of Cincinnati, Ohio, for appellant. Barbour & Bassmann, of Newport, for appellee.

CLAY, C. Plaintiff, Albert F. Hauss, brought this suit against George Surran to recover the balance of the purchase price of a small electric light plant. Defendant counterclaimed for damages for breach of warranty. The jury found for defendant, and judgment was entered accordingly. Plaintiff has moved for an appeal.

On May 7, 1914, plaintiff contracted with the defendant to install an electric light plant, consisting of machinery and appliances connected to 150 light outlets for tungsten lamps and one G. E. arc light. The purchase price was \$611, payable \$200 when the machinery was shipped, \$200 on June 15, 1914, and \$211 on July 15, 1914. Under the contract, the machinery was to consist of one six horse power "Sandow" kerosene engine mounted on skids, fully equipped with oil and water tanks and throttling governor, belted to a 4-kilowatt 115-volt Robbins & Myers direct current generator, type "I," connected to a slate switchboard by main wires, one voltmeter, voltage regulator, and fused main dynamo switch. The warranties of the manufacturers of the engine and generator were made a part of the contract between plaintiff and defendant. With respect to the generator, the warranty is as follows:

"It is guaranteed that the generator installed will be a 4 kilowatt at 115 volts and is capable of carrying 200 twenty watt (16 C. P.) tungsten lamps at its rated voltage continuously without injurious heating.

"The company agrees to furnish all generators in good operative condition, free from all defects in labor and material, and agrees that they will deliver their rated output successfully, provided they are kept in proper condition and operated normally.

"The company agrees to correct at its own expense any defects in labor and material in its apparatus which may develop under normal and proper use within thirty days after said apparatus has been placed into service, provided the purchaser gives to the company immediate written notice of such defects. Responsibility for defects resulting from improper storage or handling, prior to placing the apparatus into service, will not be assumed by the company. Liability for consequential damages, due to failure to meet the conditions of this guaranty, will not be assumed by the company."

With respect to the engine, the warranty is as follows:

"We guarantee that the engine will be entirely satisfactory to you, you to be the judge and jury. You will be allowed a 15 days' trial dating from the time you receive the engine and if, for any reason whatever, you do not feel entirely satisfied with the engine and wish your money back, every cent you have paid us for it will be refunded without question and without argument if you will write us for shipping instructions which we will immediately furnish within the fifteen days.

"We guarantee every Sandow engine to be free from defect when shipped from our factory and any part proven defective from this cause will be replaced without costs if the part to be replaced is returned to our factory for examination, transportation charges prepaid. This guaranty is effective for five years from date of sale.

"Furthermore—we guarantee that every Sandow engine has before shipment been tested under actual conditions to insure its satisfactory operation and power and that it has developed its rated horse power on our stand test."

According to the evidence for plaintiff, the plant was installed at Phoenix Grove Park and tested, and gave perfect results. Shortly after the plant was installed, in answer to a complaint, he went to the plant and found that they had blown a fuse, and that the lights had been short-circuited in one of the amusement tents. About a week after the plant was installed he put on a muffling device. One time in August he went up there to see how the plant was running, and operated the plant for two hours. He was in the habit of calling up the plant over the telephone every Monday or Tuesday morning and inquiring how it was working, and always received the message that it was working nicely. The only two times he went to the plant in response to complaints were when the fuse was blown and when he took Mr. Pickett up there in the month of August.

Defendant and his witnesses testified that the plant from the very beginning failed to work properly or to give the necessary light. Plaintiff, in response to numerous complaints, came to the plant on several occa-

sions and was unable to make it work properly. Notwithstanding the failure of the plant to work properly, defendant continued to operate it up to about the 25th day of August. There is further evidence to the effect that the engine in question was not a six horse power engine and was not sufficient for 150 lights.

[1, 2] For the plaintiff it is insisted that if the defendant retained the machinery and failed to return, or offer to return, it within a reasonable time, he thereby waived the breach of warranty, and the court erred in failing to submit this phase of the case to the jury. In our opinion, this principle is not applicable to the facts of this case. Here the contract was executed. Of course, where the condition is that the article sold shall be deemed to fulfill the warranty unless returned within a specified or reasonable time, and the buyer retains the goods after that time, he cannot avail himself of the breach unless requested by the seller to keep the machinery under the promise that he will make it operate in a satisfactory manner, or the seller, by his course of dealing, has induced the buyer to believe that he may keep the machinery without losing his right to return it within the time fixed. *Dick v. James Clark, Jr., Electric Company*, 161 Ky. 622, 171 S. W. 198; *McCormick Harvesting Machine Company v. Arnold*, 116 Ky. 508, 76 S. W. 323, 25 Ky. Law Rep. 663. But where the sale is executed and the provision of the contract is not imperative, but merely permits the buyer to return the property, he may, at his election, resort to that remedy, or he may retain the article and recoup his damages for the breach of the warranty in an action by the vendor for the price. *Shupe & Co. v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Ellwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Cook v. Gray*, 2 Bush, 121; *Harrigan and White v. Advance Thresher Company*, 81 S. W. 261, 26 Ky. Law Rep. 317; *Ruby Carriage Company v. Kremer*, 81 S. W. 251, 26 Ky. Law Rep. 274. Unless the article is absolutely worthless for every purpose, the buyer cannot recover the price unless he returns the article or offers to return it. In the case under consideration, defendant not only warranted that the engine was a six horse power engine, but that it had sufficient power to light 150 lights and one arc light. The additional warranties were those contained in catalogues of the manufacturers. It does not appear that there was any defect in the generator. The chief complaint is with respect to the power of the engine. The warranty of the manufacturer with respect to the engine merely permits the buyer to return it. It does not provide that a failure to return shall constitute a waiver of the warranty. That being true, plaintiff's retention of the machinery did not constitute a waiver of the warranty.

Here the answer and counterclaim, after setting out the breach of warranty, asked

for damages to plaintiff's business. To this portion of the answer and counterclaim a demurrer was sustained. The answer and counterclaim further alleges that the light plant was useless to the defendant, and—"that by reason of said failure of said electric light plant, he lost the sum of \$200, paid to the said plaintiff."

The mere fact that the plant was useless to the defendant did not dispense with the necessity for his returning, or offering to return, the machinery, if he desired to rescind and recover the price. It is only where the plant is absolutely worthless, and not merely worthless to the defendant, that he may sue for the price without having returned or offered to return the plant. We, therefore, conclude that the answer and counterclaim was not good on demurrer. On the return of the case defendant will be permitted to amend and set up his damages for the breach of the warranty.

The court instructed the jury as follows:

"(1) The jury will find for the plaintiff in the sum of \$411, with interest from July 15, 1914, unless they believe from the evidence that the engine installed at the place in question, if kept in proper condition and properly operated, would not develop six horse power and sufficient to successfully and continuously operate the plant with 150 tungsten lamps of 16 and 8 candle power as per contract, and one arc lamp, in which event they will find for the defendant.

"(2) If the jury find for the defendant under instruction No. 1 and believe from the evidence that the engine in question was not sufficient to develop 6 horse power, etc., they shall find for the defendant as damages the difference between what they may believe from the evidence the plant as installed to have been reasonably worth and the amount paid thereon by defendant, to wit, the sum of \$200, not to allow under this instruction, however, an amount in excess of \$100."

It will be observed that instruction No. 1 authorizes a finding for the defendant if the plant did not come up to the warranty, regardless of the amount of damages to which defendant was entitled. In other words, the jury were compelled, under this instruction, even though they believed defendant had been damaged only to the extent of \$100 or \$150, to disregard the balance of plaintiff's claim and render judgment for the defendant. It follows, therefore, that instruction No. 1 is erroneous.

[3] The effect of instruction No. 2 is to assume that if the plant did not comply with the warranty, it was worth less than \$200. It seems to disregard entirely the fact that defendant was liable for \$411, and that, unless his damages exceeded this amount, there should still be a finding in favor of plaintiff. In a case like this, the measure of damages is the difference between the value of the machinery as installed and its value as warranted. *Marbury Lumber Company v. Stearns Mfg. Co.*, 107 S. W. 200, 32 Ky. Law Rep. 739.

Since the machinery is not absolutely worthless and was not returned, or offered to be returned, defendant's defense is confined

to its claim for damages. That being true, the court on another trial will instruct the jury in substance as follows:

(1) You will find for plaintiff in the sum of \$411, with 6 per cent. interest from July 14, 1914.

(2) If you believe from the evidence that the engine in question, if kept in proper condition and properly operated, would not develop six horse power, or power sufficient successfully and continuously to operate the plant with 150 tungsten lamps of 16 and 8 candle power, and one arc lamp, you will find for the defendant and fix his damages as provided in instruction No. 3.

(3) If you find for defendant under instruction No. 2, the measure of his damages is the difference between the value of the plant as warranted and its value as installed.

(4) If you find for defendant, and your finding be less than your finding for plaintiff, you will return a verdict in favor of plaintiff for the difference; but if your finding for defendant exceed or equal your finding for plaintiff, you will either return a verdict in favor of defendant for the excess not exceeding \$200, or merely find for the defendant on the whole case.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

SLONE v. MASON COAL & COKE CO. et al.

(Court of Appeals of Kentucky. Feb. 24, 1916.)

WILLS — 545 — DECEASED DEVISEE — "ISSUE."

The word "issue" in Ky. St. § 4841, providing if a devisee or legatee dies before testator, leaving issue surviving testator, such issue shall take, does not have the meaning of "heirs," so as to include ancestors (citing 2 Words and Phrases, Second Series, Issue).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. 545.]

Appeal from Circuit Court, Pike County.

Action between Bethena Slone and the Mason Coal & Coke Company and others. From an adverse judgment, said Slone appeals. Affirmed.

Childers & Childers, Sam C. Stowers and F. W. Stowers, all of Pikeville, for appellant. J. J. Moore, York & Johnson, and Butler & Moore, all of Pikeville, for appellees.

CLARKE, J. Elbert Rowe made a will devising his property to his bastard child Rosa Hester Slone, who died without issue seven days before the testator. The testator, Elbert Rowe, left no widow or children, and his mother and father were dead, but he was survived by a brother and nephew, who are appellees.

The only question in this case is whether appellant, mother of the devisee, under said will, is the owner of the property left by said testator, or whether same belongs to his brother and nephew, and that question depends solely upon the meaning of the word "issue" in section 4841 of the Kentucky Statutes. Said section is as follows:

"If a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will."

Counsel for appellant insist that the word "issue" used in said section is synonymous with the word "heir," and that in contemplation of said statute the mother is the issue of her own child. In addition to the clever, if not convincing, argument of counsel for appellant, he presents as authority for said argument the following, in reference to sections 1400, 1401, and 4841 of the Statutes, found in *Cherry v. Mitchell*, 108 Ky. 1, 55 S. W. 689:

"We think all these provisions mean the same persons, whether designated as 'heirs,' 'descendants,' or 'issue.'"

And again in the same opinion in reference to section 463 of the Kentucky Statutes, which provides that the word "issue," as applied to the descent of real estate, shall be construed to include all the lawful lineal descendants of the ancestor, this court said:

"That the words 'lawful lineal descendants of the ancestor' were apparently used to designate all those persons who might lawfully inherit the estate."

Those statements by this court, while true in reference to the facts then before it, were evidently made inadvertently and were much broader than was necessary in the decision of that case, and in our judgment entirely too broad to be true generally. The only question involved in that case was whether or not a bastard child, under section 4841 of the Kentucky Statutes, inherited property devised to its mother by her father when the mother died prior to the death of the testator; and the only thing decided in that case was that the word "issue" in said section applied to the bastard child as the heir of the mother. So far as the facts and decision in that case were concerned, any one of said words, "heirs" "descendants," or "issue" would have had the same effect, and it was not material or necessary to notice their differences in meaning.

In the instant case, however, to regard the differences in the meaning of these words would lead to different results, dependent upon which word is used, and they cannot be used synonymously. We therefore find ourselves unable to consent that the obiter dicta in the *Cherry v. Mitchell* Case are binding when the facts are entirely different from those in that case, and were not in contemplation when said statements were made. Such statements always must be read in connection with the facts of the particular case in which they are made, and while it is true that the word "issue" may be construed sometimes so as to mean "heirs," when such meaning is given to it, it must be by force of its connection and association with other words

or peculiar facts. *Miller v. Miller*, 151 Ky. 563, 152 S. W. 542; *Bonnycastle v. Lilly*, 153 Ky. 834, 156 S. W. 874.

No such words of reference are used in connection with the word in the statute under consideration; nor are there any facts involved in this case to warrant such a construction here. Both the ordinary and technical meaning of the word "issue" are too well established to render a discussion thereof either necessary or profitable. It is sufficient to state that the construction sought by appellant, that it includes ancestors, is not only unsupported by authority, but is in direct opposition to all definitions and constructions of the word that we have been able to find (*Webster's New International Dictionary*; *Bouvier's Law Dictionary*; 14 Cyc. 38; 25 Cyc. 1442; 2 *Jarman on Wills*, 33; *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86; *Words and Phrases*, Second Series, vol. 2, p. 1212); and, besides, would do violence to our statutory definition, which is in language so plain and unambiguous as to forbid, rather than warrant, a judicial construction based upon a speculation of the legislative intent.

Wherefore the judgment is affirmed.

CLARK v. OWENSBORO CITY R. CO.
(Court of Appeals of Kentucky. Feb. 29, 1916.)

1. CARRIERS \S 333—STREET CAR PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Where a street car passenger attempted on her own initiative to alight before the car came to a stop, and fell and was injured, she took the risk of injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1385, 1386, 1388-1397; Dec. Dig. \S 333.]

2. APPEAL AND ERROR \S 171 — THEORY OF CASE—INSTRUCTIONS.

Where the case for plaintiff was submitted to the jury under instructions presenting correctly his theory of the case, he cannot complain because the court did not permit a recovery on some other theory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. \S 171.]

Appeal from Circuit Court, Daviess County.

Action by Nannie E. Clark against the Owensboro City Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Louis I. Igleheart, of Owensboro, for appellant.

CARROLL, J. The appellant, as plaintiff below, brought this suit against the appellee, as defendant, to recover damages for personal injuries sustained, as alleged, by the negligence of the defendant in the operation of a car on which the plaintiff was a passenger. The petition charged that:

"The motorman in charge of said car brought same to a stop near the corner of Venable ave-

nue and West Ninth street for the purpose of allowing her to alight therefrom; that she thereupon started to leave said car; that, while in the act of stepping from said car to the ground, the said motorman in charge of said car, by and through gross negligence, suddenly started said car forward, and plaintiff was thereby thrown violently to the street;" that her injuries were caused by the "negligence of the defendant in suddenly starting said street car before the plaintiff had sufficient time to alight therefrom, and in failing to give plaintiff sufficient time to leave said car before starting said car."

The answer was a traverse of the petition, accompanied by a plea of contributory negligence set out in the usual form.

On the trial of the case the plaintiff testified:

"I said, 'Let me off at Venable avenue,' and he motioned for me to get off, and before I could make my step to get down the step he started the car, before I could get off, and he threw me out into the road. Q. When did you tell him to put you off at Venable avenue? A. At the end of the car line. Q. Did he hear you? A. Yes, sir; and when he got there he stopped the car. Q. Was it an open car? A. A closed car; and he motioned for me to come and get off when he stopped the car. Q. What did you do? A. When he motioned for me to get off, and when I went to make my step he started, and it threw me against the street. Q. Did he give you enough time to get off? A. No, sir; he did not. If he would have given me enough time, I would not have got hurt."

The motorman testified as follows:

"When I got back to McGill avenue two squares, Ben Fielden got on the car, and when I stopped the car Mrs. Clark walked on the front platform, and I caught her by the arm, and I said, 'You don't want to get off here; you want to get off at the next square,' and she said, 'All right,' and stepped back inside the car, and was getting change and holding to the door-facing of the car, and I went up the street and ran about halfway between McGill and Frayser, and threw my current off and was looking back, and I passed over Venable avenue, and Mr. Brady's house is nearly on the corner of Venable avenue, and I went about halfway between Venable avenue and Brady's house, and there was not an electric light burning near that place, and when I brought my current to a stop I goes up slow with the current off, and when I stopped my car and turned around she was laying opposite my door. * * * And I said, 'This old lady stepped off the car and hurt herself.' I said, 'What is the matter?' And she said, 'It is my fault; I should have waited until the car stopped.'"

Ben Fielden, a passenger on the car, said:

"At McGill avenue she started to get off, and the motorman told her that it was not the place, and she stepped back inside the car, and I got on the car and stepped inside the door and got out my change and put it in the box, and by the time I did that I was at the next crossing, and as soon as the motorman shut off the current to stop it this lady walked out and stepped off, while the car was running. By the time she hit the ground the car stopped, and her feet were right where you get off the car."

With the evidence in this condition, the court instructed the jury, in substance, that if they believed from the evidence that the car on which the plaintiff was riding stopped at Venable avenue for the purpose of allowing the plaintiff to get off, it was the duty of the employees in charge of the car not to

start it until she had a reasonable opportunity to alight therefrom with safety, and that, if the car was suddenly started before she had such opportunity, and by reason thereof she was thrown into the street, they should find for the plaintiff. They were further told that:

"If they believed from the evidence that the plaintiff, Nannie E. Clark, attempted to alight from the street car on which she was a passenger before it came to a stop and while said car was in motion, then the jury should find for the defendant."

The jury returned a verdict for the defendant, and from the judgment on this verdict the plaintiff appeals. The only ground relied on for reversal is that the court erred in giving the instruction that, if the plaintiff attempted to get off while the car was in motion, they should find for the defendant. The objection urged to this instruction is that it should have been left to the jury to say whether the plaintiff was guilty of negligence in attempting to alight from the car before it stopped.

It has been written in a number of cases that it is not negligence per se for a passenger on a street car to make preparations to alight from the car before it comes to a standstill or to get off before the car actually stops. *Sandlin v. Lexington Ry. Co.*, 110 S. W. 374, 38 Ky. Law Rep. 518; *L. & N. R. R. v. Eakin's Adm'r.*, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, 20 Ky. Law Rep. 736; *Ford v. Paducah St. Ry.*, 96 S. W. 441, 29 Ky. Law Rep. 752.

But this question can only arise in cases in which the carrier seeks to charge the passenger with contributory negligence in attempting to alight from the car before it actually stops, and when the passenger claims that the carrier has been guilty of some negligence in connection with his act in attempting to alight, as, for example, when the carrier suddenly increases the speed of the car at a time when it has notice that a passenger is about to get off. It has no application to a case presenting facts like the one we have.

[1] There is no claim that the defendant was guilty of negligence of any character before the car came to a stop; and, if the plaintiff, before the car did stop, attempted to alight from it, she took the risk of any injury that might happen to herself, simply because the defendant was not guilty of any act of negligence in connection with the movement of the car or respecting the plaintiff before the car came to a stop. The plaintiff in her petition charged, and in her evidence said, that the negligence of the company consisted in starting the car after it had stopped for her to get off and before she had a reasonable opportunity to do so. She did not claim, either in her petition or evidence, that she was attempting to alight from the car while it was running at a slow rate of speed or at such a rate of speed as that a

person of ordinary prudence might attempt to get off in safety. Nor is there any complaint that her case was not properly submitted to the jury upon the theory advanced in her petition and evidence as to how the accident happened.

The evidence of the company was that, without notice or warning to the person in charge of the car, the plaintiff, in attempting to get off before the car came to a stop, fell and injured herself, without any negligence on the part of the person in charge of the car; and this theory was submitted in the instruction of which the plaintiff complains. But there is no merit in this complaint. *Central Kentucky Traction Co. v. Combs*, 143 Ky. 529, 136 S. W. 1045; *Louisville Ry. Co. v. Ruxer*, 161 Ky. 312, 170 S. W. 655; *Pack v. Camden Interstate Ry. Co.*, 154 Ky. 535, 157 S. W. 906.

In the *Combs* Case the trial court gave an instruction such as the plaintiff argues should have been given in this case, and we held that, although the instruction was not authorized under the pleadings and evidence, the traction company could not complain of it, because it had asked a similar instruction.

[2] When the case for the plaintiff is submitted to the jury under instructions presenting correctly his theory of the case, he cannot complain because the court did not authorize a recovery in his behalf on some other theory. The plaintiff must win or lose on the case he makes out for himself.

The judgment is affirmed.

CITY OF DAYTON v. REWALD.

(Court of Appeals of Kentucky. Feb. 10, 1916.)

1. EMINENT DOMAIN ⇄ 271 — GRADING STREET — DAMAGE TO ABUTTING OWNER — CONSTITUTIONAL PROVISIONS.

Under Const. § 242, providing that municipal corporations invested with the power of taking private property for public use shall make just compensation for property taken or injured, which shall be paid or secured before such taking or injury, an abutting owner whose property has been injured by the regrading of a street might maintain an action against the city for damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741; Dec. Dig. ⇄ 271.]

2. EMINENT DOMAIN ⇄ 293 — GRADING STREET — ACTION FOR DAMAGES — SUFFICIENCY OF ANSWER.

In an abutting owner's action for damages to her property by the regrading of a street, an answer attempting to plead in general terms the plaintiff's contributory negligence as the cause of the damage, if any, not showing in what the alleged contributory negligence consisted, in view of the fact that none of the damages complained of could have been prevented by anything which plaintiff might have done, was bad on demurrer.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 797-802; Dec. Dig. ⇄ 293.]

3. EMINENT DOMAIN §307 — INJURY TO ABUTTING OWNER—QUESTION FOR JURY.

In an abutting owner's action against a city for damages to her property by the city's regrading of a street, where the evidence as to the cause of a settling of the house so as to break a window sill was conflicting, the issue was for the jury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 820-824; Dec. Dig. § 307.]

4. EMINENT DOMAIN §303—GRADING STREET—INJURY TO ABUTTING OWNER—MEASURE OF DAMAGES.

In such action the measure of damages was the difference between the market value of the property just before it became known that the regrading was to be done and its market value after the work had been done.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 815-817; Dec. Dig. § 303.]

5. EMINENT DOMAIN §298 — REGRADING STREET—INJURY TO ABUTTING OWNER—EVIDENCE.

In such action the plaintiff might show the condition of the building as it was left after the regrading, what would be necessary to arrange it so that it could be used at all, and its condition after such arrangement.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 807; Dec. Dig. § 298.]

6. EMINENT DOMAIN §308 — DAMAGES TO ABUTTING OWNER — SUFFICIENCY OF EVIDENCE.

In an abutting owner's action for damages to her property from the lowering of the grade of a street, evidence held to sustain a verdict for plaintiff for \$800.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 815-817; Dec. Dig. § 308.]

Appeal from Circuit Court, Campbell County.

Action by Margaret Rewald against the City of Dayton. Judgment for plaintiff, motion for new trial overruled, and defendant appeals. Affirmed.

Kelly & Regenstien, of Newport, for appellant. A. M. Caldwell, of Newport, for appellee.

THOMAS, J. The appellant, city of Dayton, is a city of the fourth class in this commonwealth. Between the months of March and November, 1913, in accordance with an ordinance previously passed by its board of councilmen, it reconstructed Sixth street in the corporate limits between Dayton avenue and Berry avenue. The reconstruction of it, among other things, consisted in the lowering of the grade of the street, as well as that of the sidewalks in front of the abutting property on either side from 13 inches at the highest point, down to a level with the former existing street. The appellee, Margaret Rewald, was at the time and when this suit was filed the owner of a lot abutting upon the sidewalk on the south side of said street, upon which there stood a 2½-story brick building, flush to the street, which had been erected for something like 35 years. This building lacked about 7 feet covering the entire front of appellee's lot,

and the remaining 7 feet thereof was used as a walkway to get to the rear of the building. This walkway was made of concrete, as was also the walk in front of the lot. The appellee used the front part of the first story of the building situated on the lot as a furniture store, and in the second story and attic of the building there was also merchandise stored. In the rear of the building the appellee, with her family, lived, her husband having died some years previous. Immediately in front of appellee's lot the grade of the street, as well as the sidewalk, was lowered from 13 to 10 inches; and, claiming that the market value of her property had been damaged by this act of the city, the appellee filed this suit, seeking to recover damages of it to the amount of \$2,000. Upon a trial she was awarded by the jury a verdict for \$800, upon which judgment was rendered, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

[1] That a suit may be maintained against a city by an abutting property owner for the damages which might result from the excavation of a street in front of the property there can be no doubt. The right of action is given by section 242 of the Constitution of Kentucky, and the right to maintain it has been decided by this court in an unbroken line of decisions from the time of the adoption of the Constitution. *City of Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700, 19 Ky. Law Rep. 1450, 39 L. R. A. 349; *Yates v. Big Sandy R. R.*, 89 S. W. 108, 28 Ky. Law Rep. 206; *Pickrell v. City of Louisville*, 125 Ky. 213, 100 S. W. 873, 30 Ky. Law Rep. 1239; *City v. Jephson*, 53 S. W. 1046, 21 Ky. Law Rep. 1028; *City v. Detweiler*, 47 S. W. 881, 20 Ky. Law Rep. 894; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128, and see notes to section 13; *R. & L. Turnpike Co. v. Madison Co.*, 114 Ky. 351, 70 S. W. 1044, 24 Ky. Law Rep. 1260; *Hay v. City of Lexington*, 114 Ky. 665, 71 S. W. 867, 24 Ky. Law Rep. 1495; *Henderson v. City*, 132 Ky. 390, 111 S. W. 318, 33 Ky. Law Rep. 703, 22 L. R. A. (N. S.) 20; *City v. Sauter*, 149 Ky. 721, 149 S. W. 1029; *Cassell v. Board of Council*, 134 Ky. 103, 119 S. W. 788; *Ewing v. City*, 140 Ky. 726, 131 S. W. 1016, 31 L. R. A. (N. S.) 612; *City of Louisville v. Kaye*, 122 Ky. 599, 92 S. W. 554; *City of Lexington v. Chenault*, 151 Ky. 774, 152 S. W. 939, 44 L. R. A. (N. S.) 301.

[2] The answer in the first paragraph is a general denial of the allegations made in the petition, and in the second paragraph there was an effort made to plead, in general terms, what is claimed to be contributory negligence on behalf of appellee as the producing cause of the damage, if any, which she sustained by the acts complained of. It is not shown in the pleading in what the con-

tributory negligence, if any, consisted. A demurrer was sustained to this second paragraph, and complaint is made on this appeal of this ruling of the trial court. This complaint is made upon the authority of the opinion in the case of *City of Lexington v. Chenault*, *supra*, wherein this court upon the question said:

"But the defendant was entitled to some instruction presenting its defense. It was the duty of the property holder to use ordinary care to protect the property and minimize the loss. On the whole case, we conclude that a new trial should be granted."

It is not shown by the opinion that the city presented its contention by a plea, or that it attempted to do so, but it offered an instruction upon that defense which was presented by the evidence upon the trial. The principal damage complained of in that case was that which was sustained by the building because of the foundation being weakened by having its lateral support taken away on account of the improvement to the street. The proof was to the effect that this damage could have been rendered insignificant, if not entirely prevented, by the construction of a retaining wall, which could have been done at comparatively little cost. Manifestly the rule invoked should have been applied under such a state of facts. It is altogether different in the instant case. Here none of the damages complained of or testified to could have been prevented by anything which the appellee could have done. Without further comment, we conclude that there was no error committed by the court under the facts of this case in sustaining the demurrer to the second paragraph of the answer.

[3, 4] The record shows that this lot before the improvements complained of was elevated above the then existing sidewalk something like two feet, and that, as it is now constructed, the walk is three feet or more below the front entrance of the building, as well as being that much below the front entrance of the concrete walk running to the rear of the building. It is contended by appellee that these newly made conditions render it necessary for her to construct two additional steps to enable customers and others desiring to enter into her building to do so, and that the same condition exists with reference to the walk along by the side of her building. She also claims that by removing the dirt in front of her building the lateral support of it was weakened, which caused a settling of the house to such an extent as to break a stone window sill under the front show window of the west side of the building. The necessity for the construction of the steps is admitted by the city, but it is claimed by it that the breaking of the window sill was not produced by anything that it did, but, on the contrary, it contends that the sill was broken before the reconstruction of the street or the sidewalk. In regard to this it is sufficient to say that there is a contrariety of evidence upon this point

making an issue eminently proper for determination by a jury. The measure of damages in actions like this is the difference between the market value of the property just before it became known that the work was to be done and its market value after the work shall have been done. See cases *supra*.

It is insisted by appellant that this rule for the measurement of damages was violated in the trial of this case, because the court permitted the appellee and her son, and perhaps another witness, to testify about the loss of customers in her business as a furniture dealer growing out of the increased difficulty, or inconvenience, of entering into the store, produced by the increased number of steps, and, further, that another witness, in giving his reason for the decreased valuation of the property by reason of the work, was permitted to state the probable cost of lowering the floor of the building to its relative height to the new sidewalk which it had with reference to the old sidewalk. Upon an examination of the record, however, it will be found that much of this testimony was not objected to; on the contrary, whenever an objection was entered, it was sustained, and the court, in the presence of the jury and on several occasions, stated the rule as to the correct measure of damages as hereinbefore stated. Indeed, the testimony of the witnesses as to the cost of adjusting the building to the present sidewalk was brought out by attorney of appellant upon cross-examination.

[5] The appellee had a right to show by her proof the condition of the building as it was left after the improvement and what would be necessary to arrange it so that it could be used at all, and what would be its condition after complying with those necessities. See *City of Lexington v. Chenault*, *supra*. Nothing more than this was done, and under the facts as we have above recited we find no error of the court, at least none prejudicial to the substantial rights of appellant, in the admission or rejection of testimony. The instructions in very apt terms submitted the correct rule for the measure of damages applicable to the rights of the parties in suits like this as announced by this court in the case *supra*, and there is no cause for reversal growing out of any supposed failure of the court to properly instruct the jury.

[6] It is shown that the appellee constructed a retaining wall across the seven-foot space of the front of her lot occupied by her concrete walk to the rear of the house, and that this cost \$2.80, which was paid by appellee. It is also claimed that the additional concrete steps above mentioned and rendered necessary could have been constructed at a cost of \$5, and it is therefore insisted that these items, amounting to \$7.80, are all of the damages to which appellee is entitled. The error of the appellant in this regard is so glaringly apparent that a mere statement of the proposition is self-refuting. From what has been stated, it is manifest that the dam-

age to this property is mainly, if not entirely, the additional inconvenience to the owner as well as the public, in entering into or going away from the premises, augmented by the damage of the crack in the window sill if the reconstruction produced it, which, if done at all, was before the work was completed. It is equally manifest that the only way which such inconveniences can be obviated is by elevating the walk or lowering the building. The first, the appellee cannot do without the consent of appellant; and the second she does not have to do. However, if she did, it would be at a cost much greater than the verdict in this case. Many witnesses testified for appellee in regard to the damage to her property because of the improvement. They placed the difference in the market value of the property, within the limitation of the rule hereinbefore mentioned, at from \$500 to \$2,000 less than its value before it was known that the improvements were to be made. A less number of witnesses, but equally positive, testified that the property was not decreased in value because of the improvements, but that it was increased from \$1,000 to \$2,000. This testimony made a sharp contradiction in the evidence upon this issue of fact, and is one for which a jury is impaneled to try. Under appropriate instructions they returned a verdict for appellee. They were fully authorized to do so under the evidence, and we fail to find any error prejudicial to the substantial rights of the appellant.

The judgment is affirmed.

FIELDS & COMBS v. VIZARD INV. CO. (Court of Appeals of Kentucky. Feb. 29, 1916.)

1. VENDOR AND PURCHASER — OPTION CONTRACTS—RIGHTS OF PARTIES.

A contract, supported by a valuable consideration which binds the owner of land to convey the same to the purchaser on demand and payment of the price within a specified time, and which does not bind the purchaser to take the land at any time, and which expressly provides that the contract, unless the privilege of purchase is exercised within the specified time, shall be void, is an option to purchase at the price fixed for the definite time; and, where no offer has been made by the purchaser or his assignees to exercise the option until after the expiration of the time, the contract is not enforceable against the owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. ¶ 3.]

2. BROKERS — EMPLOYMENT — REVOCATION OF CONTRACT.

A contract which makes one the agent of the owner of land for the sale thereof is simply a listing contract, revocable at any time by the owner, and notice of revocation terminates the rights under the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 11; Dec. Dig. ¶ 10.]

3. VENDOR AND PURCHASER — CONTRACTS—OPTION CONTRACTS—PERFORMANCE.

A contract supported by valuable consideration, which grants a party thereto the right to purchase the land of the adverse party at a fixed price per acre, provided the party makes a

survey to ascertain the acreage at his own expense, and exercises the option to purchase within a specified time, and which binds the adverse party to convey a good title in the event the right to purchase is exercised within the life of the contract, is binding on both parties, enforceable at the option of the party or his assignee, if exercised by making a survey and paying the price within the time fixed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ¶ 18.]

4. RECORDS — VENDOR AND PURCHASER — RECORDING WRITTEN INSTRUMENT—OPTION CONTRACTS—NOTICE.

An option contract for the purchase of land is a contract for an interest in land, and, when properly acknowledged, is recordable, and, when recorded, gives notice to a subsequent purchaser of the vendor.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 7; Dec. Dig. ¶ 6; Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. ¶ 231.]

5. VENDOR AND PURCHASER — CONTRACTS—OPTIONS—PERFORMANCE.

A contract granted to a party thereto and his assigns the option to purchase land at a fixed price per acre, provided the party made a survey to ascertain the acreage at his own expense, and exercised the option to purchase within a specified time, and bound the owner to convey a good title in the event the right to purchase was exercised within the time. An assignee made a survey at his own expense within the time, and notified the owner of his intention to purchase. The parties believed that there was a cloud on the title by reason of an outstanding contract, and the owner orally extended to the assignee the time of the option, to permit him to procure an assignment of the outstanding contract. *Held*, that, assuming that the option was validly extended for a reasonable time, the assignee, on procuring the assignment of the outstanding contract, must complete the purchase without further delay, and where he delayed a month without taking any steps to complete the purchase, he forfeited his rights under the contract and extension.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ¶ 18.]

Appeal from Circuit Court, Perry County.

Action by Fields & Combs against the Vizard Investment Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Hogg & Johnson, of Hazard, Martin T. Kelly, of Pineville, and F. J. Eversole, of Hazard, for appellants. Wootton & Morgan, Bailey P. Wootton, and Jesse Morgan, all of Hazard, for appellee.

CLARKE, J. On May 25, 1903, Eli Brashear made a contract for the sale of his land to J. C. Heydrick at \$6 per acre, and acknowledged receipt of \$100 payment on the purchase price. On May 26, 1903, Wm. Fields entered into a contract for the sale of his land to J. C. Heydrick at \$4.50 per acre, and acknowledged payment of \$60 on the purchase price. A short time thereafter Wm. Fields sold his land to Eli Brashear, so that Brashear owned all of the land covered by the two Heydrick contracts. These Heydrick contracts were similar, and each contained the following paragraphs:

"This contract to be null and void if said land is not surveyed and paid for within twelve

months from this date, unless the grantor should fail or refuse to make a good deed, as hereinafter stated."

"It is further agreed by and between the parties hereto that the grantee has a right at any time to surrender this agreement upon the payment of the sum of \$25.00 which amount grantor hereby agrees to accept as a full consideration for the surrender of this agreement, and the grantee is thereupon released from all liability named in this agreement, and hereby forfeits the sum of \$100.00, this day advanced on this contract."

These contracts were both acknowledged and recorded in due time. On January 12, 1909, Eli Brashear entered into a contract for the sale of this same land with the North Fork Coal & Timber Company, which contract was recorded on August 9, 1909, and this contract made said company the agent of Brashear for the sale of the land. On April 26, 1910, Brashear made a contract for the sale of this land to M. Cox, and this contract was recorded on April 30, 1910, and contained a provision that, if it was not consummated within three months from date, it should be null and void. The price to be paid was \$11 per acre, and \$1,500 of which was acknowledged paid cash in hand. On September 2, 1910, appellants placed to record assignments made to them August 6, 1910, of the Heydrick contracts. On September 6, 1910, Brashear conveyed by deed all of this land to appellee, Vizard Investment Company. On October 11, 1910, appellants filed this suit against appellee, alleging that before the expiration of the three-month option in the Cox contract, and after its assignment to them, they notified Brashear of their intention to take and pay for the land under the Cox option, but, before the deal could be consummated, it would be necessary to get rid of the Heydrick contracts from Heydrick, and to complete the surveying would require more than the time provided in the Cox contract; that Brashear agreed with them that he would give them plenty of time for this purpose, and that they, as soon as the Heydrick assignments were procured and the survey of the land completed, demanded a deed from Brashear for the land, and offered to him the amount due him therefor under said contract, and that he refused and failed to make said deed to them. They allege that the appellee had full knowledge of the extension of the time by Brashear for the completion of the Cox contract assigned to them, and of the fact that they were making abstract and survey of the land for the purpose of completing said contract. All these allegations are denied by appellee.

To dispose of this appeal, it will be necessary to decide the three following questions: (1) Were the Heydrick contracts valid and in force when assigned to appellants? (2) Was the North Fork Coal & Timber Company contract with Brashear valid and in force when assigned to appellee? (3) Did appellants ex-

ercise their option under the Cox contract in time to entitle them to specific performance by Brashear?

[1] 1. The Heydrick contracts were for a valuable consideration, and bound Brashear to convey the land to Heydrick, and his assignees, upon demand and payment of the purchase price within one year, but did not bind Heydrick to take the land at any time. These contracts by their express terms, unless exercised within one year from date, were null and void, and were only options to purchase the land at a fixed price for a definite time, expiring on May 25 and 26, 1904, respectively, without force or effect thereafter. No effort was made by Heydrick or his assignees to exercise the option under these contracts for more than six years after their execution, until, on August 6, 1910, appellants procured assignments of them from Heydrick, and notified Brashear they were going to take the property under same. Appellants, therefore, acquired no right under the assignments to them of these contracts. *Heydrick v. Dickey*, 154 Ky. 475, 157 S. W. 915.

[2] 2. The contract between Brashear and the North Fork Coal & Timber Company is exactly the same kind of a contract as the one between W. T. Campbell and said company, set out and construed in *Chesbrough v. Vizard Investment Company*, 156 Ky. 149, 160 S. W. 725, and was simply a listing contract, revocable at any time by the grantor. See *Chesbrough Case*, supra, and cases cited therein. The Cox contract was executed and recorded subsequent to the execution of this company's said listing contract, and the evidence shows written notice of revocation was at that time given to said company by Brashear. It, therefore, results that the attempted assignment of this contract to appellee by said North Fork Coal & Timber Company after the recordation of the Cox contract and notice of revocation to it was a nullity, and appellee acquired and had no enforceable rights thereunder.

[3, 4] 3. The M. Cox contract was executed by Brashear on April 26, 1910, and by its terms was an option, granting to Cox and his assignees the right to purchase the land in question here at the price of \$11 per acre, provided said Cox made the survey to ascertain the exact number of acres in said boundary at his own expense, and exercised his option thereunder within three months from date thereof. By the terms of the option Brashear obligated himself to convey a good and sufficient title to said land in the event the right to purchase given thereunder to Cox, and his assignees, was exercised within the life of said contract, that is, on or before July 26, 1910. This contract was for a valuable consideration, and was binding upon the parties, and enforceable at the option of Cox or appellants, his assignees, if exercised by making a survey and paying the

purchase money within the time fixed by the contract, and, being for an interest in land and properly acknowledged, was a recordable instrument, and, having been recorded, appellee had notice thereof.

[5] Appellants claim, and the evidence shows, that they were the owners of the Cox option, and before its expiration made a survey of the land at their own expense of about \$200, and notified Brashear of their intention to take and pay for this land under said contract. The evidence further shows conclusively that Brashear, whose duty it was, under said contract, to clear his title, agreed orally with appellants that he would extend their time under said option a sufficient length of time to permit them to procure assignments of the Heydrick contracts so as to remove from the record what was considered by all the parties to be a cloud upon Brashear's title to the land, and then convey to them under either the Cox or Heydrick contract, but under which one is not clear. In pursuance of this agreement appellants did procure, on August 6, 1910, assignments to them of the Heydrick contracts.

Whether this verbal contract for an extension of the option was binding upon the parties for such time as was reasonably necessary to clear Brashear's title presents a question of considerable difficulty, since under the evidence it is not clear whether the parol agreement simply extended the time of performance under the Cox contract or modified this contract. 20 Cyc. 287. However, it is not necessary to decide this question, because even if we assume that the option was extended thereby for a reasonable time, we do not think appellants availed themselves of the opportunity thus afforded them. Their own testimony shows that the survey of the land had been completed, and that they procured the written assignments of the Heydrick contracts on August 6, 1910. It then became their duty to pay Brashear for the land and complete the trade without further delay.

The evidence shows that Brashear was 84 years of age; that he had been making diligent efforts since 1903 to sell this land; that he was impatient of the delay, and anxious to collect the money; that he was insisting that appellants take the land and pay for it according to the contract, and that they were putting him off in an effort to complete a sale of the land at a profit to a party in Detroit, Mich., so that he, rather than they, would furnish the money to pay Brashear; that after waiting on appellants for a month after they had procured the Heydrick assignments, Brashear, on September 6, 1910, conveyed the land to appellee, and returned to appellants the \$1,500 they had paid him.

It is true when Brashear conveyed to appellee, the party to whom appellants were

attempting to sell the land was having prepared an abstract of the title thereto, and that he might have furnished the money within a few days to enable appellants to have completed their trade with Brashear, but Brashear was under no obligation to await that contingency. The Cox contract, even if extended by the parol agreement until the assignments of the Heydrick contracts were procured, could not possibly be construed to give to appellants the further right to negotiate and consummate the sale of the land before they paid Brashear and took a conveyance from him. Appellants unquestionably lost all rights under the Cox option when they failed to make payment for the land immediately after they secured the Heydrick assignments on August 6, 1910; and upon the evidence before us here they would have been denied a specific performance by Brashear on September 6, 1910, the date upon which he conveyed the land to appellee.

Not being entitled to enforce specific performance by Brashear, it results, of course, that they could not enforce same against appellee, and that the chancellor properly dismissed their petition therefor. Wherefore the judgment is affirmed.

MILLER v. ALBANY LODGE NO. 206, F. & A. M.

(Court of Appeals of Kentucky. March 1, 1916.)

1. LANDLORD AND TENANT §90 — LEASES — COVENANTS TO RENEW — EXTENSION OF TERM.

Where a lease contains a covenant to renew, some positive act of the parties or notice by the lessee is required, but, where the lease confers on the lessee the privilege of extending his term, a mere holding over by him for a part of the extended term is, in the absence of a stipulation for notice, a sufficient notice, and is an election to hold for the extended term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.]

2. LANDLORD AND TENANT §90 — LEASES — EXTENSION OF TERM — "OPTION."

A lease for one year at an annual rental, "with option at same rate for five years," provides for a mere extension of the term, and the lessee holding over thereby elects to hold for the extended term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.]

Appeal from Circuit Court, Clinton County.

Action by the Albany Lodge No. 206, Free and Accepted Masons, against J. L. Miller. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

E. Bertram, of Albany, for appellant. O. B. Bertram, of Monticello, S. G. Smith, of Albany, and Cyrus B. Parrigin, of Albany, for appellee.

CLAY, O. On December 26, 1913, Albany Lodge No. 206, F. & A. M., leased to John

L. Miller a storeroom and lot in Albany for a period of one year from the 1st day of January, 1914, at an agreed rental of \$120 per annum, "with option at same rate for five years." Miller occupied the premises during the first year of the lease, and held over until January 23, 1915, when this action of forcible detainer was brought against him. The trial before a justice resulted in a verdict and judgment for Miller. On appeal the law and facts were submitted to the circuit court, which rendered a judgment restoring the property to the lodge. Miller appeals.

It is admitted that Miller held over after the first year of the lease, and the question is: Did he forfeit his right to the extended term by failing to give notice during the first year of the lease, or did his holding over constitute an election to extend his term?

[1] The courts make a distinction between a covenant to renew a lease and a provision conferring on the lessee the privilege of extending his term. In the former case some positive act on the part of the parties or notice by the tenant is required, while in the latter case a mere holding over by the tenant for a portion of the extended term is, in the absence of a stipulation for notice in the lease, a sufficient notice, and constitutes an election to hold for the additional or extended term. The reason for the rule is that the additional time is not a new demise, but a continuation of the old one. In such a case the tenant is not only bound for the additional or extended term as fully and completely as though that term has been originally included in the lease when executed, but is entitled to remain and occupy the premises during the additional or extended term, even though the landlord should wish to oust him. *Wood on Landlord and Tenant*, 678; *Taylor on Landlord and Tenant*, 278; *Brown v. Samuels*, 70 S. W. 1047, 24 Ky. Law Rep. 1216; *Kentucky Lumber Co. v. Newell*, 105 S. W. 972, 32 Ky. Law Rep. 396; *Plattsouth v. New Hampshire Sav. Bank*, 139 Fed. 631, 71 C. C. A. 507; *Hays v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Shamp v. White*, 106 Cal. 222, 39 Pac. 537; *Brandenburg v. Reithman*, 7 Colo. 323, 3 Pac. 577; *Hamby v. Georgia Iron & Coal Co.*, 127 Ga. 802, 56 S. E. 1033; *Montgomery v. Hamilton County*, 76 Ind. 362, 40 Am. Rep. 250; *Tersetteg v. First German Mut. Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Holley v. Young*, 66 Me. 520; *Kramer v. Cook*, 7 Gray (Mass.) 550; *Kimball v. Cross*, 136 Mass. 300; *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414; *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778; *Voegel v. Ronalds*, 88 Hun, 114, 31 N. Y. Supp. 353; *Kelly v. Varnes*, 52 App. Div. 100, 64 N. Y. Supp. 1040; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118; *Lipper v. Bouve*, 6 Pa. Super. Ct. 452, 41 W. N. C. 566; *Gilbert v. Price*, 18 Pa. Super. Ct. 359; *Henderson v. Schuylkill Valley Clay Mfg. Co.*, 24 Pa.

Super. Ct. 422; *Canonico v. Lucente*, 40 Pa. Super. Ct. 75; *Heffron v. Treber*, 21 S. D. 194, 110 N. W. 781, 130 Am. St. Rep. 711; *Carhart v. White Mantel & Tile Co.*, 122 Tenn. 455, 123 S. W. 747, 19 Ann. Cas. 396; *Racke v. Anheuser-Busch Brewing Ass'n*, 17 Tex. Civ. App. 167, 42 S. W. 774; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Slater v. Kimbro*, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19; *Cusack v. Gunning System*, 109 Ill. App. 588; *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642; *Chandler v. McGinning*, 8 Kan. App. 421, 55 Pac. 103; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392.

In *Brown v. Samuels*, supra, Samuels leased to Brown certain premises "for the period of five years with the privilege of five years more." The court, after pointing out the distinction between a privilege to renew the lease and the privilege of an additional term, held that Brown, by holding over after the first five years, exercised his privilege of five years more, and could not be dispossessed under a writ of forcible detainer.

[2] There is no substantial difference between a lease for one year "with option at same rate for five years" and a lease "for the period of five years with the privilege of five years more." The word "option" in the former case is synonymous with the word "privilege" in the latter case. The covenant is not one for the renewal of the lease, but for a mere extension of the term. We therefore conclude that Miller's holding over after the first year was an election on his part to hold for the extended term, and, that being true, he cannot be ousted by the lodge.

The case of *Connor et al. v. Withers et al.*, 49 S. W. 309, 20 Ky. Law Rep. 1326, does not announce a contrary doctrine. There *Connor & Sugg* rented to one *Harrison* a stable for one year at a certain price. The lease contained the following provision:

"The said *Connor & Sugg* agree to rent said stable to said *Harrison* for as many as five consecutive years from said 3d day of December, 1895, provided he wants to keep it at the price of four hundred dollars (\$400.00) per year, payable semiannually; and, in the event the said *Harrison* desires to give up said stable at any time and terminate this contract, he has the right to do so, upon giving the said *Connor & Sugg* 60 days' notice in writing."

During the first year *Harrison* and his assignees notified the lessors that they would exercise their option for the last four years. The court merely held that *Harrison* and his assignees had the right to exercise their option at any time during the first year, and by doing so the lease became binding for the four years. Neither the character of the covenant nor the effect of the lessee's holding over after the first year was before or considered by the court.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

**CHESAPEAKE & O. RY. CO. v. STEPHEN'S
ADM'R.**

(Court of Appeals of Kentucky. March 1,
1916.)

**1. RAILROADS — 398 — OPERATION — INJURY TO
PERSONS — ACTIONS — EVIDENCE.**

Evidence held insufficient to show that a railway company was negligent in causing the death of plaintiff's intestate, who was run over, while trespassing on a railroad bridge, by one of its trains, the crew of which had no knowledge of his presence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. ¶ 398.]

**2. RAILROADS — 369 — OPERATION — CARE RE-
QUIRED — TRESPASSER.**

No duty to keep warning lights and a lookout and give signals of the approach of a train exists as to trespassers on the track, and no liability for injury to such can exist until they are discovered in a place of peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. ¶ 369.]

**3. RAILROADS — 358 — OPERATION — INJURY TO
PERSONS — LIABILITY — "LICENSEE" —
"INVITEE."**

That a railroad did not prevent persons from walking across its bridge did not make them invitees or licensees so as to make the railroad liable for failure to exercise ordinary care, where it maintained warning signs prohibiting trespassing and there was no walk or other facility to aid in crossing the bridge.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. ¶ 358.]

For other definitions, see Words and Phrases, First and Second Series, Invitee.]

**4. RAILROADS — 395 — ACTIONS — EVIDENCE —
SUFFICIENCY.**

Recovery cannot be had under a petition alleging negligence of a railroad company upon proof of injury only, but the burden is on the plaintiff to show the negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1339, 1340; Dec. Dig. ¶ 395.]

Appeal from Circuit Court, Floyd County.

Action by B. S. Stephen's Administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff and order overruling a motion for new trial, defendant appeals. Reversed.

Harkins & Harkins, of Prestonsburg, Worthington, Cochran & Browning, of Maysville, and F. T. D. Wallace, of Ashland, for appellant. May & May, of Prestonsburg, for appellee.

HURT, J. On the 25th day of November, 1913, certain employes of the appellant were engaged in the construction of the Elkhorn & Beaver Valley Railway, which connects with the main line of the appellant's railroad, near where it crosses over Beaver, which is a tributary of the Sandy river, in Floyd county. The main line of appellant's road, which runs from Ashland up the Sandy river, passes over a bridge over Beaver, near to where it empties into the river. At this point, on the east side of Beaver, is situated a village, known as Allen. It is an incorporated town, and the railroad bridge over Beaver is with-

in the limits of the town. The railroad depot at Allen is about 200 yards east of the Beaver. The appellant has three tracks at this point, one of which is the main line and the others are used for side tracks and switching purposes. There is a switch about 100 feet from the east end of the bridge over Beaver. The main street of the town extends from Beaver alongside the tracks eastward and passes the depot, in that direction. Near Beaver, and on the opposite side of the railroad from the main portion of the town was a boarding house, and the inmates of this house crossed the railroad track at a point between the switch stand and the east end of the bridge in going to and from the boarding house into the main portion of the town. In former years, when the river was navigated by steamboats, there was a landing, to arrive at which persons passed over this crossing, but it seems not to have been used for this purpose since the building of the railroad 12 or 13 years ago, and the way is now obstructed by a gate across it, near the line of the right of way of the railroad. It does not appear from the record how many persons resided in Allen ordinarily, but, at the time mentioned above, the construction of the Elkhorn & Beaver Valley Railway being under way, and for other reasons, the population of Allen was near 500 persons. The record fails to show how far it is from the junction of the Elkhorn & Beaver Valley Railway, with the main line of appellant, to the west end of the railroad bridge over Beaver, but west of the junction, and about one mile west of the bridge, is a station, which is called Dwale; and along the railroad track, but at what distance it does not appear, to the west of the bridge over Beaver, are a storehouse, a dwelling, and a house of appellant's for its employes. A bridge erected by the county for the use of the traveling public over Beaver is in close proximity to the railroad bridge, but from the evidence it cannot be said that it had then been completed, or was fitted for travel, except that persons on foot could pass over it. Near this point there were places where the public had formerly, and to some extent at the time mentioned, forded Beaver in traveling, but these fords seem to have suffered from obstructions, and had passed into disuse to a large extent.

Because the railroad bridge was a more direct route of travel, the citizens of Allen, and many who had occasion to go to and from Allen over Beaver, used the railroad bridge as a footway, although the appellant had warnings posted at each end of the bridge, by which persons were forbidden to pass over the bridge and were warned not to do so. They, however, disregarded the wishes of the railroad authorities and continued to use the bridge as a footway, according to the evidence of the different wit-

nesses, in large numbers. No injuries seem to have been suffered by any one from this use of the bridge, until James Stephens lost his life, on the 25th day of November, 1913. He was a resident of Allen, and was a man of about 50 years of age. Industrious, ordinarily, he had been seen to be intoxicated on several occasions during the two weeks just preceding his death, and on the day of his death he was in the vicinity of a crew of appellant's employes, who were operating a train in the construction of the Elkhorn & Beaver Valley Railroad, and at a point about three or four miles up the Beaver from the junction of that road with appellant's main line, and was then in an intoxicated condition; and when, about 5 o'clock in the evening, they were proceeding to their camp near Allen, he got aboard their train, and was required by them to get off of it twice, because of their fear of him receiving injuries on account of his condition. One time he had, without permission, gotten upon the engine, and at another time was found by the brakeman sitting upon a car, with one foot upon a car and the other hanging down between the cars. About one mile from the junction was the last time he was seen by the employes of appellant upon their train. The train consisted of an engine, with next to it a caboose, and, following it, 10 or 11 empty coal cars of different types. When the train arrived at the junction it was after nightfall, and a number of camp cars were upon the track. The conductor sent a flagman in the direction of Dwale, and another in the direction of Allen, upon the main line. The train then pushed the camp cars out upon the main track, and in the direction of Dwale, until the train got upon the main track, when the conductor, with a lantern, took a position upon the rear car, and then the train was backed to the bridge and over it, but when the car, upon which the conductor was, had arrived at the east end of the bridge, the train was stopped, and the conductor went forward to the switch, which, as said, was about 100 feet away, and opened the switch, when the train was moved further backward, until the engine was between the bridge and switch. The brakeman, who had been sent ahead of the train, into Allen, had proceeded to the depot, and when the train arrived, he then joined the conductor near the switch stand, when the crew engaged for about an hour in placing cars upon the different tracks, and in so doing the engine and attached cars went forward toward the west several times and then back toward the depot, and in so doing passed across the bridge or over some parts of it. After this had occurred several times, the decedent was discovered in a mangled condition, with life extinct, lying beside the railroad track, upon the east end of the bridge. One arm and one leg were severed from his body, and he was otherwise bruised and mangled. Blood, particles of flesh

and clothing, and articles which were his property were found upon the ties of the bridge, from the body and extending back toward the western end of the bridge, for about half the width of the bridge. Upon the wheels of four of the cars blood and particles of flesh were observable. There were no signs of blood or anything to indicate that it had come into contact with the body upon the engine.

The only evidence given as to the portion of the train, which the cars occupied, which had blood upon the wheels, was that given by the fireman, who testified that they were in the rear of the caboose, which was next to the engine, and near the middle of the train. When passing over the bridge, the persons on the train testified to having felt a slight jar, as occurs when the wheels of a locomotive pass over a stick or clod upon the track, and that the fireman remarked that they had run over something upon the bridge. The witnesses, however—and there were two or three on the engine besides the engineer and fireman—disagree as to which trip it was across the bridge that this occurred, and it is not made satisfactory as to which time in passing over it, it occurred, and as to whether it was when the engine was going forward or backward. It does not appear that the persons operating the train gave any warning of its movements or approach by blowing the whistle or ringing the bell during the entire time of their operations. The headlight of the engine would enable the engineer to see objects upon the track in front of him for a distance of 100 feet. After the first time the train was backed over the bridge no light was exposed upon the car which was farthest to the rear of the engine, when the train was backed over the bridge, but the proof fails to show that the rear car ever passed off the bridge when the train was moving to the westward. No evidence is given which sheds any light upon the manner of decedent's death, except that his body was run over upon the bridge. No one pretends to have seen the decedent from the time the brakeman testifies to his getting off the train, about one mile from the junction, and going toward the rear of the train, until his body was found upon the east end of the bridge.

This action was instituted by the administrator of decedent to recover the damages alleged to have been suffered by his estate by reason of his death. The cause of action was based, in the petition, upon general allegations of negligence upon the part of the ones operating the train which caused decedent's death. Afterward, by an amended petition, it was specifically alleged that the decedent at the time of his death, was crossing Beaver, upon the bridge; that at that time and for years before the bridge had been used for travel on foot by a large number of citizens of Allen and the surrounding coun-

try, and with the knowledge and with the acquiescence of the appellant, and that it was a place at which the presence of persons traveling upon it was to be anticipated; that the place at which he was struck and killed was near a public crossing, at which the presence of persons upon the track was to be anticipated and expected at all times; that the servants of appellant negligently backed the train across the bridge and street crossing without giving any warning of its approach, and without keeping any lookout; and that said negligence caused decedent to lose his life. In the original petition it was alleged that the servants of appellant knew of the use of the bridge by the public, and knew of the presence of decedent upon it, or by the exercise of ordinary care could have known it. The appellant traversed the allegations of the petition and amended petition, and in addition alleged the contributory negligence of decedent as a defense. The trial resulted in a verdict by the jury and judgment of the court in favor of appellee. The appellant's grounds and motion for a new trial being overruled, it has appealed.

The grounds relied upon for reversal are:

- (1) The error of the court in overruling the motion of appellant for a direct verdict in its favor at the conclusion of appellee's testimony and at the close of all the testimony; and
- (2) the error of the court in giving to the jury instructions 1, 2a, 4, and 5. The first ground will be first considered.

[1, 2] There is no evidence which remotely tends to prove that the engineer, fireman, brakeman, conductor, or, for that matter, any one else, had any knowledge of the presence of decedent upon the bridge before the time the body was found lying upon the end of the bridge. The amended petition alleges that he was upon the bridge at the time the train came in contact with him, and all of the evidence tends to the same conclusion, and precludes the possibility of the train coming in contact with him at any other place. If those operating the train did not see him, nor have any knowledge of his being there, in a position of peril, in time, by the exercise of ordinary care upon their part to have prevented injury to him, or unless he had a right or was licensed to be upon the bridge, they nor their employes could be culpable, unless their want of knowledge of his presence arose from the neglect of some duty which they owed to him, or their neglect of some duty which they owed to him prevented him from escaping the injury. It is true, as contended for appellee, that it is the duty of those operating railroad trains to give warning of the approach of the train, to operate them at a reasonable rate of speed, and to maintain an adequate lookout for persons upon the track, whenever the presence of persons who used the tracks as a matter of right or as licensees must be anticipated. It is true that where the railroad tracks extend along or across the streets of towns and

cities and at crossings and at points on the road in towns, cities, and populous communities, where the public generally have been in the habit of using the tracks and right of way, with the knowledge and consent of the railroad company, are places where the presence of persons upon the tracks must be anticipated, and those operating the train owe the duties of regulating the speed of the train so as to have it under control, to give warning of its approach, and to maintain an adequate lookout for persons upon the track, so as to avoid injury to them, in such states of case, the rule applies that, owing such persons the duty of giving warning of the approach of the train and maintaining a lookout for them, and having the train under control, the ones operating the train are held to be negligent if they fail to see persons upon the track when, by the exercise of ordinary care, they could have seen them and known of their presence. A different rule has, however, uniformly been held to apply to persons who are not employes of the railroad, and have no business with the railroad, which requires them to do so, and who go upon a bridge of the railroad for their own convenience or pleasure. Such persons have uniformly been held to be trespassers, and the rules which apply to trespassers are applied to them. Those operating a railroad train do not owe the trespasser the duty to keep the train under control, to maintain a lookout for him, or to give signals or warnings of the approach of the train, or to take any precautions whatever for his safety, before his peril is seen and known by the ones operating the train. *Brown's Adm'r v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, 17 Ky. Law Rep. 145; *L. & St. L. R. Co. v. Woolfork*, 99 S. W. 294, 30 Ky. Law Rep. 569; *Prince v. I. C. R. R. Co.*, 99 S. W. 293, 30 Ky. Law Rep. 469; *C. & O. Ry. Co. v. Barbour's Adm'r*, 93 S. W. 24, 29 Ky. Law Rep. 339; *Smith's Adm'r v. I. C. R. R. Co.*, 90 S. W. 254, 28 Ky. Law Rep. 723; *Flint v. I. C. R. R. Co.*, 88 S. W. 1055, 28 Ky. Law Rep. 1; *Belser v. C. & O. Ry. Co.*, 92 S. W. 928, 29 Ky. Law Rep. 249; *Curd's Adm'r v. C., N. O. & T. P. Ry. Co.*, 163 Ky. 105, 173 S. W. 335; *Fields v. L. & N. R. R. Co.*, 163 Ky. 673, 174 S. W. 41.

[3] It is insisted, in the instant case, that many persons for several years had been accustomed to use the bridge as a footway, and had done so with the knowledge and acquiescence of the railroad company. It is not alleged or contended that the railroad company ever consented to such use of it. Upon the other hand, the proof shows that its use by foot passengers was against the wish of the railroad. There was no walk across the bridge suitable or constructed for travel by footmen. There was nothing in the construction or use of the bridge by the railroad company which could be construed into an invitation to the public to use it as a

highway. It has been held that people cannot acquire the status of licensees by continuous trespassing in walking over a railroad bridge, and that mere acquiescence by the railroad cannot be construed into a promise that the bridge might be used by foot passengers as a highway, so as to entitle them to lookout duty, or make them anything but trespassers. *G. & O. Ry. Co. v. Barbour's Adm'r*, supra; *Curd's Adm'r v. C., N. O. & T. P. Ry. Co.*, supra; *L. H. & St. L. R. R. Co. v. Woolfork*, supra. It could not, in the instant case, be said that the railroad company even acquiesced in the use of the bridge as a highway for footmen, because it had placed and maintained warnings to the public at each end of the bridge not to make such use of it. If a person had been injured by a train at the crossing between the bridge and the switch stand, or upon the track, along the street, after the train passed over the bridge, and his injury was caused by the failure to give warning of the approach of the train or to maintain a lookout, there would be no doubt of the liability of appellant, as the injured person would have been at a place where he had a right to be, but the train did not come in contact with the decedent at such place, but upon the bridge, where he had no right to be, and where the appellant was not required to anticipate his presence or to take any precautions for his safety. Hence appellee cannot rely for recovery upon the fact if true, that no warnings of the approach of the train were given nor any lookout maintained, because, not being required to take any such precautions for one trespassing upon the bridge, the failure to do these things were not acts of negligence to which decedent's death could be attributed. Hence, there being no evidence which conduced to show that the ones operating the train saw or knew of decedent's peril before or at the time the train came in contact with him, the action must necessarily fail.

[4] Further, it is well settled that a recovery for injury on an allegation of negligence cannot be maintained upon the proof of the injury alone, but there must be proof that the negligent act of another caused the injury, or there must be proof of facts from which the negligence can be inferred.

"If the injury may as reasonably be attributed to a cause that will excuse a defendant as to a cause that will subject it to liability, a recovery cannot be had." *Stuart's Adm'r v. N., O. & St. L. Ry. Co.*, 146 Ky. 127, 142 S. W. 232.

In the case at bar it can be surmised that decedent was walking upon the bridge, where he had no right to be, and was run upon by the train and killed, or that he had caught onto the train and was riding and fell from the car upon the bridge and was run over. From the facts in the record, one could fairly theorize that his death probably resulted in either of the manners suggested, but if his death resulted in either of the ways, the

inference must be necessarily drawn that his death was attributable to his own negligence rather than to that of appellant. From the facts proven the inference cannot be drawn that those engaged in operating the train saw decedent in a position of peril before or at the time of his death.

For reasons indicated, the court was in error in overruling the motion for a direct verdict.

The conclusion arrived at is likewise at variance with the instructions given in the case.

The judgment is reversed, for proceedings consistent with this opinion.

KENTUCKY RIVER HARDWOOD CO. v. NOBLE.

(Court of Appeals of Kentucky. March 1, 1916.)

1. COURTS \S 480—ENJOINING LEVY ON JUDGMENT OF OTHER COURT—STATUTE.

Where the execution, levy of which is sought to be enjoined, issued on a judgment regularly entered in justice court, the injunction action should be brought in such court, under Civ. Code Prac. \S 285, providing that an injunction to stay proceedings on a judgment shall not be granted in any other court than that in which the judgment was rendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1270-1278; Dec. Dig. \S 480.]

2. PLEADING \S 205—SPECIAL DEMURRER—JURISDICTION.

General demurrer to the petition in an action to enjoin levy of an execution, which the trial court treated as though it were a special demurrer, raised the question of jurisdiction of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 491-493, 495, 496, 498-510; Dec. Dig. \S 205.]

3. COURTS \S 480—ENJOINING LEVY ON JUDGMENT OF OTHER COURT—STATUTE.

Where the judgment, levy of execution to enforce which is sought to be enjoined, is void, or there is no judgment, so that the execution has no foundation on which to rest, Civ. Code Prac. \S 285, providing that an injunction to stay proceedings on a judgment shall not be granted in any other court than that in which the judgment was rendered, has no application, since proceedings under a void judgment may be enjoined in any court of competent jurisdiction; a rule applying to a case where there is no judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 1270-1278; Dec. Dig. \S 480.]

4. APPEAL AND ERROR \S 41—JURISDICTION OF COURT OF APPEALS—STATUTE—AMOUNT IN CONTROVERSY.

The Court of Appeals has jurisdiction to review the judgment of the circuit court in an action to enjoin levy of execution for \$75, despite Ky. St. \S 950, providing that an appeal may be taken to the Court of Appeals from the judgment of the circuit court, except from a judgment for the recovery of money or personalty, where the amount in controversy is less than \$500.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 127-155, 157, 158, 172, 178-184, 186-188, 190-194, 196, 197; Dec. Dig. \S 41.]

Appeal from Circuit Court, Breathitt County.

Action by the Kentucky River Hardwood Company against W. N. Noble. From a judgment dismissing the petition, plaintiff appeals. Judgment reversed, with directions.

Grannis Bach, of Jackson, for appellant. Adams & Holliday, of Jackson, for appellee.

MILLER, C. J. The appellant, the Kentucky River Hardwood Company, brought this action to enjoin a constable from levying an execution for \$75 upon the property of the plaintiff, upon the ground that no judgment had been rendered against the plaintiff in the justice's court from which the execution issued or elsewhere. A general demurrer was filed to the petition; and the court, treating it as a special demurrer to the jurisdiction of the court, sustained it and dismissed the petition. From that judgment the plaintiff prosecutes this appeal.

We are advised in the brief for appellant that the lower court sustained the demurrer upon the idea that, under section 285 of the Civil Code of Practice, an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction, in any other court than that in which the judgment was rendered, and that the only forum that had jurisdiction of this case was the justice's court from which the execution issued.

[1-3] We attach no importance to the fact that the court treated the general demurrer as though it were a special demurrer, since the general demurrer, in that case, raised the question of jurisdiction. If the execution sought to be enjoined had been issued on a judgment regularly entered in the justice's court, this action should, under section 285, supra, have been brought in that court. But where the judgment is void, or where there is no judgment, and the execution, therefore, has no foundation upon which to rest, section 285, supra, has no application. It was so expressly decided in *Willis v. Tomea*, 141 Ky. 435, 132 S. W. 1043, where the court said:

"For the convenience of the profession, we may say that there are two exceptions to section 285, which provides that an injunction to stay proceedings on a judgment shall not be granted, in an action brought by the party seeking the injunction, in any other court than that in which the judgment was rendered: (1) Where the judgment is void. (2) Where the court rendering the judgment has no civil jurisdiction."

The rule is well settled that proceedings under a void judgment may be enjoined in any court of competent jurisdiction, and not merely in the court rendering the judgment. See, also, *Combs v. Sewell*, 59 S. W. 526, 22 Ky. Law Rep. 1026.

The rule above announced equally applies to a case in which there is no judgment. In neither case is there a judgment. The pur-

pose of the Code was to give each court control over its judgment regularly entered, and to be free from the interference of other courts of co-ordinate jurisdiction. So, where the judgment is void, or where there is no judgment, as in the case at bar, proceedings thereunder may be enjoined in any court of competent jurisdiction.

[4] The fact that the execution was for only \$75 does not deprive this court of jurisdiction to review the judgment. This is not a money judgment; and being an action where the only remedy sought is by way of injunction, an appeal is not forbidden by section 950 of the Kentucky Statutes. *Shackelford v. Phillips*, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441, 24 Ky. Law Rep. 154; *Cincinnati, P., B. S. & P. Packet Co. v. Malone*, 92 S. W. 306, 29 Ky. Law Rep. 44. See, also, *Thompson Straight Whisky Co. v. Commonwealth*, 157 Ky. 396, 163 S. W. 201, and the cases there cited.

Judgment reversed, with directions to the circuit court to overrule the demurrer to the petition.

WHITE et al. v. WHITE'S GUARDIAN et al. (Court of Appeals of Kentucky. Feb. 29, 1916.)

1. WILLS — 531 — CONSTRUCTION — BENEFICIARIES TAKING PER CAPITA.

Under a devise to a brother of executrix of the use of property for a number of years, and then share and share alike to two brothers named and three nephews named, the nephews take per capita.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1143, 1144, 1148-1152; Dec. Dig. — 531.]

2. WILLS — 545 — CONSTRUCTION — LIMITATIONS.

Where property is devised to one for life with remainder to another, and, if the remainderman die without issue, then to a third person, the limitation as to dying without issue is restricted to the death of the remainderman before the termination of the life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. — 545.]

3. WILLS — 616 — CONSTRUCTION — ESTATES DEVISED.

Testatrix devising the use of property to her brother W. for a number of years, and then share and share alike to her brother W. and her brother R. and three nephews named and, "if any of them should die, to revert to the surviving one or ones." By codicil she gave to her brother W. a life interest, with power to sell and divide. He did not exercise the power of sale. Held that, where W. died before the others named, his estate terminated, whether he took under the original will, or under the codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. — 616.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action between Richard A. White and others and James Clark White's guardian and others for the construction of the will of Irene E. White, deceased. From a judgment, the former appeal. Affirmed.

Benjamin H. Sachs and M. A., D. A. & J. G. Sachs, all of Louisville, for appellants. J. W. S. Clements and Wm. F. Clarke, Jr., both of Louisville, for appellees.

OLAY, C. This appeal presents for determination the proper construction of the will of Irene E. White, who died a citizen and resident of Jefferson county in the year 1904. She left surviving her two brothers, Dr. William P. White and Richard Aylette White, and three nephews, Daniel P. White, Charles A. White, and James Clark White, sons of a deceased brother. Dr. William P. White died December 27, 1914.

That portion of the will and codicil material to this controversy is as follows:

Will.

"To my brother, William P. White, M. D., I give him the use of my home No. 1951 Sixth street, Louisville, Jefferson county, Kentucky, for nine years, he to pay the taxes and insurance the nine years, to remain as it is ready furnished, then share and share alike. I will it said house and lot to my brothers, William P. White, Richard Aylette White and my three nephews, Daniel P. White, Charles Aylette White and James Clark White. If any of them should die, to revert to the surviving one or ones. If my brother William P. White, M. D., thinks best to sell said house and lot and reinvest, I give him, said William P. White, the power to do so. I want what I leave my three nephews managed by William P. White or some trust company."

Codicil.

"I leave to my brother, William P. White, my house and lot No. 1951 Sixth street, Louisville, Kentucky, his life time, furnished as it is, if he sees fit to sell, if so I give him the power to sell and divide as above stated."

The questions presented are: (1) Do the nephews take per capita or per stirpes? (2) Do they take a remainder in fee or merely a defeasible fee? (3) Did Dr. William P. White own an interest in the property which at his death descended to his heirs?

[1] 1. Cases may arise, of course, where it is apparent from the will, considered as a whole, that the testatrix, although using the words "share and share alike," clearly intended that kindred of a more remote degree should be considered as a class, and should take only what their ancestor would have taken had he been alive. Here neither the clause in question nor the other portions of the will show any purpose on the part of the testatrix to treat her nephews as a class and to equalize them as a class with her brothers. While she makes certain devises and bequests to them in some instances as a class, in other instances she treats them as individuals, and discriminates between them as individuals. It follows that the other portions of the will throw no real light on the question. Therefore, in arriving at the intention of the testatrix, we are confined to the particular clause in question. In that clause she does not speak of the nephews as a class or use any language than

can reasonably be construed to mean that she intended that they, as a class, should take only per stirpes, or as the representatives of her deceased brother. On the contrary, she mentions the names of her nephews just as she does those of her brothers, and uses the words "share and share alike" with respect to all of them as individuals and as members of a single class. Under these circumstances we conclude that the nephews take per capita, and therefore the testatrix's surviving brother, Richard Aylette White, and her nephews, are each entitled to one-fourth interest in the property in question. *Wells v. Newton*, 4 Bush, 158; *Brown v. Brown*, 6 Bush, 648; *Purnell v. Culbertson*, 12 Bush, 870; *Hughes v. Hughes*, 118 Ky. 151, 82 S. W. 408; *McIntire v. McIntire*, 192 U. S. 116, 24 Sup. Ct. 196, 48 L. Ed. 369; *McFatrige v. Holtzelaw*, 94 Ky. 352, 22 S. W. 439, 15 Ky. Law Rep. 312; *Kaufman v. Anderson*, 104 S. W. 340, 31 Ky. Law Rep. 888; *Armstrong v. Crutchfield*, 150 Ky. 641, 150 S. W. 835; *Justice v. Stringer*, 160 Ky. 354, 169 S. W. 836.

[2] 2. It will be observed that under the original will Dr. William P. White was devised the use of the property for a period of nine years. After that time it goes "share and share alike" to Dr. White, Richard Aylette White, and her nephews, with the provision that, if any of them should die, to revert to the surviving one or ones. Dr. White is also given the power to sell and reinvest if he thinks best. By the codicil Dr. White's estate is enlarged into a life interest with power to sell and divide. He did not exercise the power of sale. It is the settled rule in this state that, if property is devised to one for life, with remainder to another, and if the remainderman die without issue, then to a third person, the limitation as to dying without issue is restricted to the death of the remainderman before the termination of the particular estate. *Birney v. Richardson*, 5 Dana, 424; *Harvey v. Bell*, 118 Ky. 521, 81 S. W. 671, 26 Ky. Law Rep. 881; *Bradshaw v. Butler*, 110 S. W. 420, 33 Ky. Law Rep. 531; *Reuling's Exrx. &c. v. Reuling*, etc., 137 Ky. 637, 126 S. W. 151; *Hughes v. Covington*, 152 Ky. 421, 153 S. W. 722. As the testatrix's brother Richard Aylette White and her three nephews survived Dr. William P. White, their estate became absolute.

[3] 3. Since, under the original will, Dr. White took only an estate subject to be defeated by his death, and since, under the codicil, he took a mere life estate, it follows that, whether the codicil be regarded as controlling or not, his entire estate terminated at his death.

It follows that the judgment of the chancellor, which accords with the views herein expressed, is proper.

Judgment affirmed.

DOYLE v. NEW JERSEY FIDELITY & PLATE GLASS INS. CO.

(Court of Appeals of Kentucky. March 2, 1916.)

1. INSURANCE — 528 — ACCIDENT INSURANCE — "IMMEDIATE AND CONTINUOUS DISABILITY."

An accident policy, providing for payment of death claim, declared that if death should result independently of all other causes within 90 days from the accident, though not necessarily causing immediate and continuous disability, the death benefit should be paid, while if injuries should, independently of all other causes, immediately, continuously, and wholly disable and prevent insured from performing all duties pertaining to his occupation, the death benefit should be paid in case of death occurring within 200 weeks of the date of the accident. Insured, a dentist, injured his finger with a burr, contracting blood poisoning in the wound, though for several days before he was forced to retire, he was able to go to his office and perform part of his ordinary duties. After a month in bed, he returned to his office and for over three months performed all of his regular duties, dying suddenly at the end of that period. *Held*, that insured's disability was immediate and continuous during the time between the infliction of the wound and the development of infection, and so recovery cannot be defeated on the ground that there was no continuous disability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1314; Dec. Dig. 528.]

2. INSURANCE — 528 — ACCIDENT INSURANCE — "IMMEDIATE AND CONTINUOUS DISABILITY."

In such case, as insured discharged all the duties of his profession as a dentist during the three months before he met his death, the accident cannot be held to have caused continuous and immediate disability up to the time of death, and therefore the question should not be submitted to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1314; Dec. Dig. 528.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Mary R. Doyle against the New Jersey Fidelity & Plate Glass Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Straus, Lee & Krelger and Hite H. Huf-faker, all of Louisville, for appellant. Hugh B. Fleece, of Louisville, for appellee.

CLARKE, J. Dr. Howard S. Doyle, a dentist in Louisville, on June 21, 1912, while operating upon a tooth for a patient, was injured by a burr, with which he was working, slipping against and wounding the knuckle of the second finger of his left hand. The finger about the wound became inflamed, and the doctor became ill, but for several days was able to go to his office and perform a part of his ordinary duties. His condition continued to grow worse until on the 26th or 29th of June, when he was forced to go to bed, and it developed that he was suffering from blood poisoning as a result of this injury to his finger. He was confined to his bed continuously until July 31st, when contrary to the advice of his physician, he returned to his office: and, from August 7th until November

4th, he was at his office regularly and performed at times substantially all of his accustomed duties, though feeling badly much of the time. On the night of November 4, 1912, about 4½ months after the injury to his finger, he was taken violently ill and died suddenly. At the time of this accident Dr. Doyle was insured under an accident policy issued by appellee, and his mother, the appellant, was the beneficiary thereunder. The appellee having refused, after receiving proof of the doctor's death, to pay to appellant the indemnity provided for death under said policy, she filed this suit. Upon the trial at the close of all the evidence the court sustained appellee's motion for a peremptory instruction, and entered a judgment dismissing appellant's petition, to reverse which judgment upon the ground that the peremptory instruction was erroneously given, appellant is prosecuting this appeal.

[1] The policy sued on provides for the payment of \$2,500 to the beneficiary upon the death of the insured under the conditions set out in the two following clauses:

"If any one of the losses named in this section shall result directly and independently of all other causes from such injuries within ninety days from date of accident, but not necessarily causing immediate and continuous disability, the company will pay the sum set opposite such loss, and in addition the weekly indemnity from date of accident;

"Or, if such injuries shall, directly and independently of all other causes, immediately, continuously and wholly disable and prevent the assured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability, and within two hundred weeks from date of the accident shall result in any one of the losses hereafter named in this section, the company will pay the sum set opposite such loss, and in addition thereto the weekly indemnity from date of accident to date of death, dismemberment or loss of sight."

The insured did not die for more than 90 days after the injury, and the first of the two above clauses has no application here except that it may be helpful to a correct understanding of the second clause under which appellee's liability is asserted. Appellee's defense is a denial that:

"Resulting directly, independently and exclusively of all other causes by reason of such wounding and simultaneously therewith, he was inoculated with septicemia or blood poisoning, due directly or at all to said bodily injury sustained while said policy was in force, and defendant denies that it resulted directly and independently of all other causes in his immediate, continuous, or total disablement so as to prevent him from performing any and every kind of duty pertaining to his occupation or that said injury resulted directly or indirectly, exclusively or independently, of all other causes in his death on the 4th day of November, 1912, and defendant denies that the death of said Howard S. Doyle was caused either directly or indirectly by said accident."

While it is not contended in this case that death from blood poisoning resulting from an accident was not covered by the policy

held by the insured, it is contended by counsel for appellee that the insured's disability was not immediate, total, or continuous during the period from June 21st to June 26th or 29th while the infection was developing, and therefore appellee was not liable. This contention has been allowed in some jurisdictions, authorities for which are cited for appellee, but this court, in the case of the Continental Casualty Co. v. Mathis, 150 Ky. 477, 150 S. W. 507, refused to follow that doctrine, and held that under a clause similar to the one before us now the insured suffered an immediate and continuous disability upon facts quite similar to those in this case, citing *Commercial Travelers v. Barnes*, 72 Kan. 293, 80 Pac. 1020; *Brendon v. Traders' & Travelers' Accident Co.*, 84 App. Div. 580, 82 N. Y. Supp. 860; *Hohn v. Interstate Casualty Co.*, 115 Mich. 79, 72 N. W. 1105; *Omberg v. U. S. Mutual Accident Association*, 101 Ky. 308, 40 S. W. 909, 19 Ky. Law Rep. 462, 72 Am. St. Rep. 413; *Cary v. Preferred Accident Insurance Co.*, 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, and note, 115 Am. St. Rep. 997, 7 Ann. Cas. 484; and *Central Accident Insurance Co. v. Rembe*, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155. And in the same case this court expressly disavowed the dictum in *General Accident & Life Assurance Corporation v. Meredith*, 141 Ky. 92, 132 S. W. 191, which is cited and relied upon by appellee here. In the Mathis Case the insured was a physician in whom blood poisoning developed as a result of an accident, and who, while the infection was developing, for three days attempted to attend to the duties of his calling. In the case at bar the insured, during a period of from five to eight days, made the same attempt under similar circumstances, and, being convinced that the reasoning and decision of this court in the Mathis Case are sound, we are unwilling to depart therefrom, and it results that this contention of counsel for appellee is untenable, as the trial court held.

[2] 2. The next question presented is whether or not the insured's condition, evidenced by his acts from August 7th until November 4th, as disclosed from the evidence, was such as warranted a determination by the jury of whether or not the insured's disability was continuous and entire, as claimed by appellant, or whether it was such as to warrant the court in sustaining appellee's motion for a directed verdict in its favor as contended by appellee. Upon this question there is also much contrariety in the authorities of different jurisdictions, depending upon whether a strict or a liberal construction is given to the words "continuously" and "wholly" when used in an accident insurance policy with reference to disability in a clause similar to the second clause in the policy before us here. In the case of the *National Life & Accident Ins. Co. v. O'Brien's Ex'r et al.*, 155

Ky. 490, 150 S. W. 1134, this court after an extensive review of the authorities from the different states upon this question, without attempting to harmonize the differences, adopted a liberal rather than a strict construction of such a clause, and in support of that conclusion cited the following authorities: *Young v. Travelers' Ins. Co.*, 80 Me. 244, 13 Atl. 896; *Lobdill v. Laboring Men's Mut. Aid Assoc.*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542; *Pennington v. Mut. Life Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306; *McKinley v. Banker's Aid Acc. Ins. Co.*, 106 Iowa, 81 75 N. W. 670; *Com. Trav. Acc. Assn. v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973; *Neafie v. Mfg's Acc. Indemnity Co.*, 55 Hun, 111, 8 N. Y. Supp. 202; *Am. Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *First National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Anderson v. Fitzgerald*, 4 H. L. Cas. 483. After citing the above authorities with approval, this court said:

"The clause of the policy under which appellant seeks to escape liability, though broad enough in its terms to give color to the meaning it attributes to it, should nevertheless be given a reasonable construction that would be as just to the assured as to the insurer. While the language of the policy here is that the disability entitling the assured to the indemnity provided, must be so total as to prevent him from 'performing every duty of any business or occupation,' it would do no violence to the language used or the rights of appellant to say that the words quoted, fairly interpreted, should be held to mean that the disability would be total, if of such a character as to prevent the assured from transacting any kind of business pertaining to his occupation. In other words, it is sufficient if the disability of the insured in this case was such as to prevent him from doing all the substantial acts required of him in his business. Giving the clause of the policy in question this meaning, it does not limit the liability of appellant as claimed by it. The appellant's defense is not rested upon any claim that the assured was not injured in the accident mentioned in the petition, but that the disability resulting therefrom was not total, and that it only continued from December 24, 1908, to January 25, 1909."

From the above questions from the *O'Brien* Case it will be seen that this court is committed to a "reasonable construction" of the clause in question "that is as just to the assured as to the insurer," and that that end is attained "if the disability of the insured is such as to prevent him from doing all the substantial acts required of him in his business." And while it is difficult to state a general rule of construction that will be applicable to all cases, we think we may safely state, as an elaboration of our views upon this subject, that a recovery should not be denied under such a clause as we have before us when the evidence shows that the insured was able to be up and about, and to do minor and trivial things not requiring his time or attention, or to direct his business and do some of the work himself, if his injuries are such that common prudence demands he desist from his labors and rest, so long as it is

reasonably necessary to effect a speedy cure, and he is unable to do the things which constitute substantially all of his occupation, or wholly disabled from doing all the substantial and material acts necessary to be done.

It may be admitted that some of the authorities seem to warrant even a more liberal construction of this clause than we have indicated, but the same justice that forbids a construction so strict, although justified by the literal meaning of the words employed, which would in practice relieve the insurer from liability in practically every case where death does not immediately ensue, and render the policy of no effect in many cases, in which it was evidently held out to afford indemnity, also demands that the construction shall not be so liberal as to render the company liable in every state of case in utter disregard of the contract made by the parties. Both of these clauses should be given a liberal and reasonable construction, when considered together and with reference to each other.

Under the policy before us, by the first clause copied herein, the insurer is liable if death occurs within 90 days after the accident, even though the disability is not immediate and continuous; but by the second clause quoted above, it is not liable if death ensues after 90 days and within 200 weeks from the accident, unless the disability occasioned thereby is immediate, continuous, and entire. From which it is apparent that the parties in executing this contract had in contemplation a limitation upon the beneficiary's right to recover for the death of the insured during said period, based upon a reasonable construction of the words of limitation used in said second clause.

We have endeavored to set out above what we deem to be a reasonable construction thereof. It now remains for us to apply that construction to the facts in this case.

The evidence may be fairly stated to show that from August 7th to November 4th the insured visited his office practically every day, remaining from one to six hours a day; that he had entire supervision of his business, examined patients, and directed his assistants as to what was necessary to be done; that in addition he frequently did the work himself required by patients; and it also may fairly be stated that the evidence for appellant not only fails to show that there was any substantial part of his work that he did not at times perform, but, on the other hand, shows that during all of this time he did not lose a single day from his business, and upon occasions throughout that period performed every substantial duty and service that could be performed by any one in said business, remaining a part of that period in his office and performing all sorts of work involved in his profession

as much as six hours a day. We are convinced from a careful reading of the evidence that it does not even tend to show that the assured's disability was such as prevented him continuously from performing all of the substantial acts required of him during the period from his return to his office about August 7th until his death on November 4th. To have so shown by the evidence was necessary to make out a case for appellant under the clause in the policy under which appellant claims as construed in the O'Brien Case, and in this case. It therefore results that the evidence did not present a case entitling appellant to a submission of the question to the jury, and that it was not error upon the part of the court in directing a verdict in favor of appellee.

Wherefore the judgment is affirmed.

DOYLE v. MARYLAND CASUALTY CO.

(Court of Appeals of Kentucky. March 2, 1916.)

1. INSURANCE — §457—ACCIDENT INSURANCE—CONSTRUCTION—"LIKEWISE."

In a policy of accident insurance by section 1, providing accident benefits for injuries, which, independently of other causes, continuously and wholly disable the insured from attending to his occupation, and which during such disability shall independently result in the losses specified, and that if within 90 days from the accident, irrespective of total disability, such injuries should independently result in any of the losses specified, the insurer would pay the fixed amount, and by section 6 "subject to its terms and conditions" covering death from poison, etc., "likewise in event of death or disability from * * * blood poisoning due directly to a bodily injury sustained while this policy is in force," the word "likewise" was used as a conjunction, so that the latter part of the clause was to be construed as if written, "likewise subject to its terms, limits and conditions."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1175; Dec. Dig. § 457.]

For other definitions, see Words and Phrases, First Series, Likewise.]

2. INSURANCE — §457—ACCIDENT INSURANCE—PROVISIONS—FRAUD.

The insertion of such clause was justified to commit the insurer to the construction usually placed upon such policies by the courts, and to satisfy the insured that the insurer would not contest its liability on such ground and could not be construed as a fraud or evidence of bad faith on the part of the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1175; Dec. Dig. § 457.]

3. INSURANCE — §457—ACCIDENT INSURANCE—CONSTRUCTION.

In a policy of an accident insurance called a "universal disability policy," providing "accident benefits," "illness benefits," and "indemnities for injuries," framed so that the several sections referring to those different classes of insurance were grouped, sections 1-3 being under the head of "Accident Benefits," a clause in section 3, relating to blood poisoning, referred to benefits payable for accidents as distinguished from sick benefits, etc., and the words "subject to its terms, limits and conditions," as used in such clause, referred to the terms, etc., in reference to accident benefits as stated only in sec-

tion 1 and to the sections applicable to all classes of insurance alike.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1175; Dec. Dig. § 457.]

4. INSURANCE § 146 — CONSTRUCTION AS A WHOLE.

The construction of a policy of insurance requires a reasonable interpretation of all the parts, so as to give effect to the apparent intention of the parties not at variance with the clear meaning of the language employed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 202, 294-298; Dec. Dig. § 146.]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division.

Action by Mary R. Doyle against the Maryland Casualty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Straus, Lee & Kreiger and Hite H. Huffaker, all of Louisville, for appellant. Barret, Allen & Attkisson, of Louisville, for appellee.

CLARKE, J. This appeal involves the construction of an accident insurance policy issued to Dr. Howard S. Doyle by the appellee, wherein appellant is named as beneficiary, and involves precisely the same facts as were involved in the case of Mary R. Doyle v. New Jersey Fidelity & Plate Glass Insurance Co., 182 S. W. 944, decided this day by this court, and not only are the facts the same in both cases, but the questions of law are also the same, except that in the policy now before us there is one clause involved not found in the other policy. That additional clause is as follows:

"Indemnity for Freezing, Hydrophobia, Septicæmia, Gas or Poison.

"6. Subject to its terms, limits and conditions this policy covers the assured in the event of death or disability due to freezing, hydrophobia, gas or poison (suicide, sane or insane, or any attempt thereat, not included); likewise in event of death or disability from septicæmia, or blood poisoning, due directly to a bodily injury sustained while this policy is in force."

And the clauses in this policy similar to those construed in the New Jersey Fidelity & Plate Glass Insurance Company Case are as follows:

"Accident Benefits.

"Schedule of Indemnities for Death, Dismemberment or Loss of Sight.

"1 (a) If such injuries shall, independently and exclusively of all other causes, continuously and wholly disable and prevent the assured from the date of accident from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability, shall independently and exclusively of all other causes result in any one of the losses specified in this section (1), the company will pay the sum set opposite such loss, and in addition weekly indemnity as provided for herein to date of death, dismemberment or loss of sight, as the case may be;

"(b) Or, if within ninety days from the date of accident, irrespective of total disability, such injuries shall, independently and exclusively of all other causes, result in any one of the losses

specified in this section (1), the company will pay the sum set opposite such loss."

Appellant in addition to the grounds urged in the New Jersey Fidelity & Plate Glass Insurance Company Case, is insisting, as a reason for reversal in the present case, that section 6 should be construed separate and apart from clauses (a) and (b) of section 1, as a distinct indemnity afforded by this policy, and as though the latter part of said section 6 read as follows:

"Likewise this policy covers the assured in event of death or disability from septicæmia or blood poisoning due directly to a bodily injury sustained while this policy is in force."

The appellee contends that this latter part of section 6 was meant to read, and should be construed as though written thus:

"Likewise subject to its terms, limits and conditions this policy covers the assured in event of death or disability from septicæmia or blood poisoning due directly to a bodily injury sustained while this policy is in force."

While we are convinced that the construction sought by appellant is shown to be untenable by a mere reading of the policy, still since her counsel argue earnestly in an elaborate and well-prepared brief that this is the correct construction, we will consider said section 6 from the following points of view: (1) The express meaning of the words used; (2) the relation of this section to other parts of the policy; and (3) the results of the construction urged by appellant.

[1] 1. *The Express Meaning of the Words Used.* It will first be noticed that clause 6 contains but one entire sentence, and that the latter portion thereof referring to blood poisoning begins with the word "likewise," separated from the preceding part of the sentence by a semicolon. We do not think it can be seriously contended that the word "likewise" is used here except as a conjunction, and that giving it its ordinary meaning as a conjunction makes the policy cover death or disability from blood poisoning resulting from a bodily injury in the same manner that it covers death or disability due to freezing, etc., that is "subject to its terms, limits and conditions." Moreover, this clause is manifestly a statement of an agreed construction rather than a separate and additional promise, since it states simply that the policy "covers" blood poisoning, etc., and does not pretend to do anything else with reference thereto. It seems to us that the express meaning of the words used in this clause clearly refute the construction contended for by appellant, and demand that claimed for them by appellee.

Nor in our judgment does this construction violate any of the rules of construction presented by counsel for appellant, all of which have been accepted by the courts and text-writers, and are approved by us; and we are fully aware of the fact that this policy without this clause would have been con-

strued to cover blood poisoning even if this clause had not been inserted in the policy.

[2] Neither do we think that its insertion can be said to be a fraud or evidence of bad faith upon the part of the company, but believe rather that its insertion was justified for the purpose of committing the company to the construction usually placed upon such policies by the courts, and to satisfy the insured that this company would not resort to the courts in a contest of its liability upon this ground, as was constantly being done by companies whose policies did not contain this provision; and that the insertion of the clause may fairly be said to give an added meaning to the policy under our construction without necessitating the construction claimed by appellant.

[3] 2. *The Relation of Section 6 to Other Parts of the Policy.* It is appellant's contention that, even if this section is construed as claimed by appellees, it refers to sections 13 to 24, inclusive, and not to section 1 of the policy, while appellee claims that it refers to section 1 and sections 13 to 24. As both parties agree that it refers to sections 13 to 24, it will not be necessary to consider its relation except to section 1.

This policy is called "universal disability policy," and provides "accident benefits," "illness benefits," and "indemnities for injuries to the beneficiary," and is so drawn that the several sections referring to each of these different classes of insurance are grouped together under appropriate headings. Sections 1 to 6, inclusive, are under the general heading of "Accident Benefits," so that from the arrangement and position of the several clauses in the policy these first six sections are shown to refer to and be parts of the conditions under which benefits are payable for accidents to the insured as distinguished from sick benefits and indemnities for accidents to the beneficiaries, which are covered by other sections of the policy not involved here. From which it is apparent that death and disabilities resulting from blood poisoning and other causes mentioned in section 6 are considered as resulting from an accident rather than an illness. This arrangement of the policy being in accord with the clear meaning of language in sections 1 to 6, inclusive, we conclude that the words "subject to its terms, limits and conditions," as used in section 6, refer to the terms, limits, and conditions of the policy in reference to accident benefits which are stated only in section 1, and to the sections applicable to all classes of insurance alike, which sections are 13 to 14 inclusive.

3. *Results of the Construction Urged by Appellant.* If the construction contended for

by her counsel is correct, appellant could recover under section 6 even though the disability of the decedent was neither continuous nor total, and without regard to how long after the accident death resulted; in fact, the beneficiary under such a policy would be entitled to recover upon proof of but three facts, namely: (1) That the death resulted to the insured (2) from blood poisoning (3) produced by an accident incurred during the life of the policy; and it would result that by such a contract the parties intended to and did agree that if death resulted after 90 days and within 200 weeks of the accident, the disability preceding death must be continuous and entire, unless death was occasioned by blood poisoning resulting from the accident, in which event the company would be liable without regard to whether the disability had been continuous or entire, or in fact whether there had been any disability, and without regard to how long after the accident death occurred; that death might be deferred from the time of the accident 1 month, 1 year, 10 years, or any length of time, and the company would still be liable therefor.

[4] And while under such a construction the company would be liable under conditions certainly never contemplated, upon the other hand the insured would be denied, by the same construction, the accumulations payable under the policy which, each year for 10 years, increased the indemnities under the several classes of insurance, and could recover no principal sum whatever if the blood poisoning should result in the loss of both hands or both feet, thereby absolving the company from liability under conditions manifestly contemplated to create a liability. The construction contended for by appellant would distort the policy, and render it wholly ineffective in many respects, and besides would be in violation, not only of the express meaning of the words used in this clause, but would be in violation as well of the fundamental rule requiring a reasonable interpretation of all the parts so as to give effect to the apparent intention of the parties not at variance with the clear meaning of the language employed. Such a construction would be unreasonable, strained, and unwarranted.

Having reached this conclusion, it results that the policy here was not different in effect from the policy in the New Jersey Fidelity & Plate Glass Insurance Co. Case, and, the facts being the same, that a peremptory instruction was correctly given, for the reasons stated in the New Jersey Fidelity & Plate Glass Insurance Co. Case.

Wherefore the judgment is affirmed.

NEWBERRY v. WINLOCK'S EX'X.

(Court of Appeals of Kentucky. March 3, 1916.)

1. TRUSTS ~~§~~365—ENFORCEMENT—TIME TO
SUE—STALE CLAIM.

Though the statute of limitations may not apply to express and continuing trusts, a court of equity will refuse to enforce an express trust where the acts of the parties by reason of lapse of time authorize a presumption unfavorable to the continuance of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. ~~§~~365.]

2. TRUSTS ~~§~~365—ENFORCEMENT—TIME TO
SUE—STALE CLAIM.

A trust alleged to have been created 18 or 19 years before bringing suit for its enforcement will not be enforced where the trustee died before suit, and where the court is unable to ascertain all the facts, and where the acts of the parties and circumstances tend to raise a presumption either that the trust never existed or was settled during the life of the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. ~~§~~365.]

Appeal from Circuit Court, Barren County.

Action by Willie Winlock Newberry against J. T. Winlock's executrix. There was a judgment denying relief to plaintiff, and she appeals. Affirmed.

J. P. Hobson & Son, of Frankfort, and W. L. Porter, of Glasgow, for appellant. Basil Richardson and Baird & Richardson, all of Glasgow, for appellee.

CLAY, C. This is a suit by Willie Winlock Newberry to enforce a trust against the estate of her father, Dr. J. T. Winlock. Being denied the relief prayed for, she appeals.

Dr. Winlock first married Josie Simmons. Willie Winlock, now Willie Winlock Newberry, was their only child. Josie Simmons Winlock inherited from her father personality of the value of \$433.65, which, on December 15, 1890, she loaned to her two brothers, S. S. and W. E. Simmons. She also sold to them her interest in her father's land for \$1,133.60, and took therefor their note, dated February 1, 1891, and payable to her. S. S. Simmons, one of the borrowers, testified that Mrs. Winlock was anxious for him and his brother to keep the money if they needed it, but they paid off the notes as fast as they could, and Mrs. Winlock said that Dr. Winlock could lend it down there as well. Mrs. Winlock also said that she wanted it held for Willie, who was then a child in school; that the doctor had plenty to educate her, and she wanted it kept for her, because in the course of time it might possibly be of benefit to her. To this Dr. Winlock agreed, and stated that he would hold the money for Willie and would have no trouble in lending it out. Mrs. Minnie Simmons, wife of S. S. Simmons, testified that when Willie was married she and her husband went to the wedding, and in the evening after Willie and her husband were gone Dr. Winlock said that now that Willie was married he would turn over to

her her mother's money; that he had always kept it for her and would have to turn it over to her. This was in 1890. She also stated that Mrs. Winlock was at her house several days before she died and, in the doctor's presence, spoke of the money and of her desire that it should go to Willie. Mrs. Docia Hodges testified that, about 7 years before she gave her deposition in 1913, the doctor was at her house and remarked that he would have to get up some money for Ivy, a niece for whom he was guardian, but that he would not have to get up Willie's, as she did not need hers and could do without it for a while. She further testified that she was present when Mrs. Winlock was building her home in 1888, and heard Mrs. Winlock say that she wanted things convenient, but not expensive; that she wanted to save her money for Willie, who was then a little girl about 10 or 12 years old.

It further appears that E. T. Winlock, a brother of Dr. Winlock, died in the year 1901, leaving a last will and testament, by which he devised all of his property to his niece, Willie Winlock, with the provision that it should go to the heirs of her body if she should have heirs, but if she should die without heirs, to his brothers, J. T. and J. R. Winlock. Dr. Winlock was appointed executor of his brother's estate. The personal property was appraised at \$867.11, which was turned over to Willie Winlock. At that time E. T. Winlock was indebted to Dr. Winlock in the sum of \$7,815.37, and possibly more. Evidently for the purpose of investing Willie Winlock with absolute title to the land which the testator owned, the doctor, instead of canceling his debts, permitted the land to be sold. It was purchased by Mrs. Newberry for the sum of \$6,428.26 and bond executed for the purchase price. Dr. Winlock and Mrs. Newberry, through her husband, had some kind of a settlement, and the doctor wrote the commissioner as follows:

"You will mark the sale bond in the above styled action satisfied by agreement between myself and T. P. Newberry and wife."

There was found among the doctor's papers a note for \$2,448.87, signed by T. P. Newberry and wife, dated May 8, 1909, and credited by payment of \$500, paid February 28, 1913, and \$350, paid September 17, 1913. There is further evidence to the effect that the doctor held a prior note for the same sum executed in 1906. It is also shown that plaintiff's husband, who transacted plaintiff's business, and Dr. Winlock frequently had business transactions. The relations between plaintiff and her father were very cordial, and her father occasionally made her presents.

Some time after his first wife's death Dr. Winlock married a second time. Of this marriage there were born five children. The doctor died in December, 1912, leaving a will

by which he devised his property to his second wife and her children. His will contains the following provisions:

"My oldest daughter, Willie Bell Newberry, has already been provided for out of my estate, as the settlement of the estate of E. T. Winlock will show, and it is my desire that she shall not share any further in my estate."

At the time of the doctor's death his estate was worth between \$25,000 and \$35,000. It also appears that Mrs. Newberry and her husband were worth between \$20,000 and \$25,000.

The argument for plaintiff is as follows: The evidence is sufficient to establish a trust. Being an express and continuing trust, the statute of limitation does not apply. The plea of accord and satisfaction is not sustained because Dr. Winlock's will very clearly shows that the property which he gave to his daughter in settlement of E. T. Winlock's estate was not paid in settlement of the trust, but was an advancement out of his own estate. In support of this contention the point is made that Mrs. Newberry in that settlement received only \$6,428.26, less a \$2,400 note, and as the trust fund at that time amounted to about \$3,000, she, in fact, received from her father's estate only \$700 or \$1,000, when her father said in his will that she had already been provided for out of his estate. As a matter of fact, however, the doctor's claims against E. T. Winlock's estate amounted to \$7,315.37. The personal property amounted to \$867.11. The doctor could have purchased the land himself and have not been out a single dollar. He does not state in his will that Mrs. Newberry had received her portion of the estate. He merely states that she had been provided for. As a matter of fact, she was enabled by the doctor's assistance to secure a farm, which, at the time of the doctor's death, was worth at least one-half, and possibly two-thirds, of the doctor's whole estate. Looking at the matter in this light, he had reason to feel that she had been provided for. Furthermore, as Mrs. Newberry and her husband had gone off together for the purpose of establishing their own home, Mrs. Newberry needed the trust fund then. She was paid a sum very much in excess of the trust fund, even if estimated at its value when paid. It is also clear that this arrangement was made pursuant to an agreement between Dr. Winlock and Mr. Newberry, who acted as agent for his wife. After that time Mr. and Mrs. Newberry executed their note to the doctor for \$2,400, and made certain payments thereon. There is no direct testimony as to what items were embraced in the settlement, but the subsequent execution of the note for \$2,400 was either inconsistent with the existence of the trust, or persuasive evidence that the trust had been fully settled.

[1] While it may be true that the statute of limitation does not apply to express and

continuing trusts, courts of equity will deny relief upon old and stale claims, where the acts of the parties authorize a presumption unfavorable to the continuance of the trust. *Taylor v. Fox's Executors et al.*, 162 Ky. 804, 173 S. W. 154; *Helm's Executor v. Rogers*, 81 Ky. 568.

[2] In the present case, we have a trust alleged to have been created between 1891 and 1894. The beneficiary lived with her father until 1899, when she became of age. A few months later she married. In 1906 the trustee enables her to get the benefit of a large estate by waiving his claims against the devisor. Though claiming that her father was then indebted to her in a sum in excess of that amount, she and her husband executed to her father in settlement a note amounting to \$2,400. The father died in December, 1912. The note is found among his papers with certain credits thereon. Not until after his death and his lips are closed is any attempt made to enforce the trust, which it is alleged was created 18 or 19 years prior to the time the suit was brought. Considering the lapse of time, the death of the trustee and the inability of the court to ascertain the whole truth, in connection with the acts of the parties and other circumstances tending to raise the presumption either that the trust never existed or was fully settled during the life of the trustee, we conclude that plaintiff's claim is too stale and uncertain to authorize its enforcement against her father's estate.

Judgment affirmed.

VAN METER v. VAN METER.

(Court of Appeals of Kentucky. March 2, 1916.)

1. HUSBAND AND WIFE \S 285½—SUIT FOR ALIMONY.

A wife may bring a suit for alimony alone.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1074; Dec. Dig. \S 285½.]

2. APPEAL AND ERROR \S 61—JUDGMENT FOR ALIMONY—STATUTE.

Ky. St. § 950, provides that no appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or to enforce any lien thereon if the value in controversy is less than \$500, and that in other civil cases that court shall have appellate jurisdiction over the final orders and judgments of the circuit courts if the amount in controversy exceeds \$200. In a wife's action for alimony only, with counterclaim for absolute divorce, the court ordered the defendant to pay \$4 per week alimony and plaintiff's costs, and, on appeal, it did not appear what amount, if any, had been paid, or would be paid, or that the court had not set aside or modified its order. *Held*, that the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 276-292; Dec. Dig. \S 61.]

3. HUSBAND AND WIFE \S 299—JUDGMENT FOR ALIMONY—CONTROL OF COURT.

Orders directing a husband to pay alimony are under the control of the court, and may

at any time in its reasonable discretion be set aside, or the amount directed to be paid may be increased or diminished; the order being an interlocutory and not a final order.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.]

4. APPEAL AND ERROR § 45 — REVIEW — AMOUNT IN CONTROVERSY.

From an order directing the payment at one time of alimony in the sum of \$200 or more, within the jurisdiction of the Court of Appeals, an appeal may be taken to that court, as such an order is a judgment for the recovery of money within Ky. St. § 950.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 152-155, 157, 158, 172-176, 178-184, 186-187; Dec. Dig. § 45.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Lillie M. Van Meter against Clinton B. Van Meter for alimony alone, with answer and counterclaim for absolute divorce. Judgment for plaintiff for alimony, and defendant appeals. Dismissed.

Henry W. Sanders, of Louisville, for appellant. Boyce Watkins, of Louisville, for appellee.

CARROLL, J. [4] The parties to this appeal are young people and husband and wife. They were married on January 22, 1914, and in September, 1914, the appellee brought this suit for alimony alone, charging that the appellant refused to live with her or make suitable provision for her support, and that the wife had the right to bring this suit for alimony alone is settled in *Hulett v. Hulett*, 80 Ky. 364, and many other cases. The appellant, in his answer and counterclaim, filed in October, 1914, denied that he had abandoned his wife or refused to support her, and sought a divorce from bed and board on the ground that she had failed and refused to live with him. After the issues had been made up, the evidence was taken, and it shows that the differences between this couple which caused their estrangement and this litigation were both childish and trivial. When the case was submitted, the chancellor entered the following order, on March 27, 1915:

"It is considered and adjudged by the court that the plaintiff, Lillie M. Van Meter, recover of the defendant, Clinton B. Van Meter, judgment in the sum of \$4 per week alimony and her costs herein expended, for all of which she may have execution."

[2-4] From this order the husband, as appellant here, prosecutes this appeal, and the question arises: Has this court jurisdiction of the appeal?

It is provided in section 950 of the Statutes:

"* * * But no appeal shall be taken to the Court of Appeals as a matter of right from a judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the value in controversy be less than \$500, exclusive of interest and costs. * * * In all other civil cases the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of the circuit

courts: Provided, however, that the Court of Appeals may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed; or when the construction or validity of a statute or the construction of a section of the Constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the Constitution or statute involved, if the value of the amount or thing in controversy, exclusive of interest and costs, is as much as two hundred dollars."

It has also been written in a number of cases that the amount in controversy, when the defendant appeals, is the amount of the judgment against him. But, in cases like this, where the court, by an order that is not final but remains under the control of the court, to be set aside or modified at discretion, directs the payment of a certain sum each week or month without fixing any time when the payment shall stop or fixing how long it shall continue, and no one of the sums ordered to be paid is large enough to give the court jurisdiction, it is obvious that the amount in controversy, if an appeal is to be allowed at all, cannot be determined by the statutory rules applicable when the judgment is final and fixes a definite amount to be paid, either at once or in installments, or fixes definitely the amount that is recovered.

It will be observed that the order in this case does not fix the time for which the \$4 a week shall be paid, and it is the well-settled practice in this state, and generally prevailing, that orders of court directing the husband to pay weekly, monthly, or quarterly a specific amount as alimony are under the control of the court and may at any time, in the reasonable discretion of the court, and for good cause, be set aside, or the amount directed to be paid may be increased or diminished. In short, it is an interlocutory and not a final order; and therefore, if the question were an open one in this state, it might well be doubted if an appeal would lie in any case from an order allowing alimony, although the amount allowed was sufficient to give this court jurisdiction.

But the question is not an open one, as it has been often written that, when the court enters an order directing the payment at one time of a sum within the jurisdiction of this court, an appeal may be prosecuted to this court, as such an order is a judgment for the recovery of money. It was so held in *Lochnane v. Lochnane*, 78 Ky. 467, where the court said:

"That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce."

In this case the opinion does not state the amount of alimony awarded, but the rec-

ord shows that it was a lump sum more than sufficient to give this court jurisdiction. But we have not been referred to any case, nor have we found one, in which the question of the jurisdiction of this court was challenged when the order definitely fixed the amount to be paid at a sum less than would give us jurisdiction to review it; and so the question is one of first impression in this court.

In *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347, the Supreme Court of the United States had before it a question similar to the one here involved. It appears from the opinion that the Supreme Court of the District of Columbia entered a decree awarding to the wife custody of an infant child born to the parties during the pendency of the proceedings and requiring the husband to pay to the wife \$75 per month for the maintenance of herself and the child, to forthwith pay to her the sum of \$500 for counsel fees, and also to pay the costs of suit to be taxed. From this decree the husband appealed to the Court of Appeals of the District, which reversed the decree, with direction to enter an order dismissing the appeal. From this judgment an appeal was taken to the Supreme Court, and in considering the question of its jurisdiction the court said that:

The statute gave it jurisdiction "in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000." Appellee challenges our jurisdiction on the ground that the matter here in dispute does not exceed the sum mentioned. Under the decree of the Supreme Court, the payments of \$75 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued (this opinion was handed down in January, 1918) would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance."

The court further said, in speaking of the effect of the statute under which the allowance was made:

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it, of course, ceases wholly upon the death of the husband. * * * Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated. The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed \$5,000, does not require that it shall be of such a nature as to constitute a technical debt of record."

If the rule laid down in this case should be applied here, we might, by assuming that all installments to this date, amounting to about \$190, had been paid or would be paid, and by assuming that other installments would be paid, and by assuming that the

court had not already set aside or modified the order, and by assuming that he would not do so, find an amount sufficient to give this court jurisdiction. But whether these weekly payments have been paid up to this time or not, or how much, if anything, has been paid on them, the record does not disclose; nor have we any way of estimating what will be paid in the future. Probably the appellant has paid all of them, and possibly he has paid none of them. Probably he may pay the allowance for many years, and possibly the court may have already set the order aside.

Under these conditions, it is obvious that the whole matter is in an unsettled state, and its disposition cannot be controlled by the rules that would apply if the order directing these payments was final or beyond the power of the lower court to modify or set aside. And, although we have high regard for the views expressed by the Supreme Court, we are not prepared to consent that they should be applied to this case. Nor do we think the life expectancy of these parties is a tenable ground on which to rest the jurisdictional control of this court to review the judgment, in view of the fact that there is only a bare possibility that the allowance will continue for the life of the husband or wife.

We recognize that it is difficult to determine in a satisfactory way when the jurisdiction of this court will attach in cases like this. If the amount awarded was a lump sum, or the first installment to be paid was sufficient to give this court jurisdiction, there would be, of course, no difficulty in holding that this court had jurisdiction of the appeal; but when the order appealed from makes the allowance payable in weekly or monthly installments, and no installment is sufficient in amount to give this court jurisdiction, and it does not appear what, if anything, has been paid or will be paid plainly, to take jurisdiction at all we must do so upon the theory that a sufficient number of installments have been or will be paid to make an amount sufficient to give this court jurisdiction, and this we are not inclined to do. We think that, before the husband can appeal to this court in a case involving an allowance less than the jurisdiction of this court, he must have paid, as shown by the orders of the lower court, an amount sufficient to give this court jurisdiction. If he has not paid the allowance ordered by the lower court, he is in contempt of court and is not entitled to an appeal. If he has paid it, he can easily secure an order of court showing this fact, and the burden is on him to show that this court has jurisdiction to review the ruling appealed from.

There seems to us no good reason why a party who is adjudged to pay alimony should have any greater right to an appeal before he has paid the requisite amount to give ju-

jurisdiction than any other person who pays by order of court a sum less than the jurisdictional amount. This rule may, of course, result in the party paying the alimony losing what he has paid before he can bring his case here for review, supposing that this court should hold that he should not have been required to pay any alimony; but this circumstance is not of sufficient weight to justify a departure from the statutory rule, and the appeal is dismissed.

COMBS v. ISON et al.

(Court of Appeals of Kentucky. Feb. 29, 1916.)

1. REFORMATION OF INSTRUMENTS 45 — MISTAKES—EVIDENCE.

Evidence, in a suit for reformation of a deed to the grantor's children, held insufficient to show omission by mistake of a reservation to the grantor of a life estate, but to show, at most, a supposition or undisclosed expectation, on his part, that he would have control during his life.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. 45.]

2. LIMITATION OF ACTIONS 37 — RELIEF FROM MISTAKE.

Action for relief from mistake must, by express provision of Ky. St. §§ 2515, 2519, be brought within 5 years after the accrual of the cause of action, the discovery of the mistake, and never more than 10 years after its commission.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. 37.]

3. DEEDS 59—"DELIVERY"—RECORDING.

The recording by the grantor of a deed of gift to his children is a sufficient "delivery."

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. 59.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

4. DEEDS 194 — ACCEPTANCE — INFANT GRANTEES.

An acceptance of a beneficial deed to infants recorded by the grantor will be presumed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. 194.]

Appeal from Circuit Court, Letcher County.

Suit by Susan Combs against Dora Belle Frazier, now Dora Belle Ison, and others for partition. From a judgment for intervenor, James S. Frazier, plaintiff appeals. Reversed with directions.

J. W. Hale, J. M. Cook, Hale & Cook, and Stephen Combs, all of Whitesburg, for appellant. David Hays and Ira Fields, both of Whitesburg, and E. E. Hogg, of Booneville, for appellees.

THOMAS, J. On October 3, 1895, James S. Frazier was the owner of a body of land consisting of several tracts, and on that day he deeded this farm, to his infant children, Dora Belle Frazier, Susan Frazier, Henry C. Frazier, Solomon Frazier, Little Lee Frazier, and Jonathan Frazier. On the 7th of October following the date of the execution of

the deed, by which he conveyed to the grantees an absolute title, he caused it to be recorded in the county court clerk's office of Letcher county. At the suggestion of the grantor, and by his procurement, the deed was prepared by one James Fitzpatrick, who seems to have been one of the leading attorneys at the time in Letcher county. After the deed was recorded it was taken by the grantor to his home and kept by him in his house until, it seems, about the time of the filing of this suit, which was some time previous to the 14th day of January, 1913, on which day a substituted petition was filed in lieu of the original one which had become lost; the record not showing the date upon which the original petition was filed. The suit was brought by Susan Combs (née Frazier) against her sister and her four brothers seeking a division of the land described in the petition in kind, which included, not only the land covered by the deed from James S. Frazier, of date October 3, 1895, but also an adjoining tract to that one which had been conveyed to the children of James S. Frazier by the Rockhouse Realty Company, by deed dated May 19, 1908. There was no interest whatever attempted to be conveyed by the deed of the Rockhouse Realty Company to James S. Frazier. On January 23, 1913, the father of the parties to this suit, James S. Frazier, being the grantor in the deed of October 3, 1895, filed in the cause his petition, which he asked to be made his answer and a cross-petition against the defendants and a counterclaim against the plaintiff. In this pleading he alleges that in making the deed of October 3, 1895, he made a mistake in conveying an absolute title to his children because, as he claims, it was his intention to convey to them only an interest in remainder after his death. In other words, that it was his intention to have reserved to himself in the land conveyed an estate for his natural life. It is furthermore alleged that a similar mistake was made when the deed from the Rockhouse Realty Company was executed on May 19, 1908, in that the understanding between himself and children was that he should be conveyed an interest in that tract for his life, with remainder to his children. His prayer is that these deeds be reformed so as to conform to his contentions and that the petition be dismissed. This pleading was by a reply traversed, and in another paragraph the statute of limitation was invoked to defeat the relief which he sought. After preparation and submission the court dismissed the petition and declined to order a division of the land as prayed for, and adjudged—

"that the defendant, James S. Frazier, is adjudged the control and possession of said property for and during his natural life."

From this judgment this appeal is prosecuted.

The proof shows that the petitioner, James S. Frazier, is the owner of other land besides that involved in this suit, but that at the time of the execution of the deed to his children in 1895, he lived on that tract and has continued to reside there since that time. At the date of the execution of that deed his oldest child, being a daughter, and since having married a Mr. Ison, was between 12 and 15 years of age, and his youngest child, being the defendant, Jonathan Frazier, was only about one year of age. In the meantime the two daughters had married and moved off the place. Two of the sons have taken up their residences on the tract purchased from the Rockhouse Realty Company and the other two reside upon the land conveyed by the deed of October 3, 1895. The wife of James S. Frazier died on April 27, 1895, and he has never married the second time, living most of the time with his different children who occupy with him the old residence, but during later years he has had the youngest son residing in the old homestead with him.

[1] The appellee James S. Frazier admits that he discovered the absolute nature of the deed which he executed to his children some time about 1905 or 1906, but that he made no effort whatever to have this corrected in any manner until the filing of his petition to be made a party to this suit. Even if he was in an attitude to have this deed corrected because of the alleged mistake, the evidence by no means satisfies us of the existence of such mistake. Upon this his testimony is:

"Well, I just took a notion that I wanted them to have it, and I didn't know how long I might live, and I just thought I would deed it to them, thinking I would get the benefit of it my lifetime. Q. Was you in as good health then as you are now? A. No, sir; not as good as I am now."

Being asked as to the instructions which he gave Fitzpatrick, the draftsman of the deed, he says:

"I told him I wanted him to write a deed for my children, and that I wanted control of it my lifetime, and he went to writing it."

In regard to the alleged mistake in the deed from the Rockhouse Realty Company, executed in 1908, he testifies:

"A. My understanding was that I was to have control of the I. D. Hall tract my lifetime. The mineral money was divided between the heirs after it was paid."

He then proceeds to testify that it was through his efforts that the deed from the Rockhouse Realty Company to his children was procured. It might here be stated that the parties own only the surface to the lands involved in this suit, the mineral being owned by the Rockhouse Realty Company. This mineral under the surface of the land covered by the deed of October 3, 1895, was purchased by said company from the children of James S. Frazier about the time that it executed the deed in 1908, in which latter deed it reserved the mineral in the tract

conveyed by it, and a part of the price for the mineral under the surface of the tract, conveyed by the deed in 1895, paid for the surface of the tract conveyed by the Rockhouse Realty Company in 1908. It will be seen from the testimony of the petitioner that the alleged mistake for which he seeks relief partakes more of a supposition, or an undisclosed expectation on his part, than of an actual mistake such as the law recognizes and such as under proper circumstances it will correct.

[2] However this may be, the plea of limitations as to the land conveyed by the deed in 1895 must prevail. Section 2515, Ky. St., limits the time within which an action may be brought for relief on the ground of fraud or mistake to five years after the cause of action accrued; and section 2519 provides that such actions shall not accrue until a discovery of the fraud or mistake, but in no event shall an action be brought for such relief after 10 years from the perpetration of the fraud or the commission of the mistake. It will be seen that there has more than 18 years elapsed since the commission of the alleged mistake with reference to the deed of 1895 and more than 7 years elapsed before the filing of the petition since such alleged mistake was discovered by the petitioner. Under such circumstances, this court has uniformly applied to sections of the statute supra, and denied relief. *Salve v. Ewing*, 1 Duv. 271; *Bennett Jellico Coal Company v. East Jellico Coal Company*, 152 Ky. 838, 154 S. W. 922; *Eversole & Co. v. Burt & Brabb Lumber Co., etc.*, 160 Ky. 477, 169 S. W. 846. Manifestly, then as to this particular tract, even conceding that the evidence justified the finding that a mistake did occur, the petitioner's right to the remedy which he invokes must be denied him because he seeks relief too late for recognition.

Concerning the alleged mistake in the execution of the deed from the Rockhouse Realty Company in 1908, we find no evidence in the record establishing it. On the contrary, it is convincing that all parties fully understood exactly how this deed was to be made, and that it was made in that way. Indeed, as we have seen the entire consideration for this tract was paid by the conveyance of the mineral under the tract conveyed to the children of petitioner by himself in 1895.

[3, 4] It is insisted, however, that the deed of 1895 was never delivered to, or accepted by, the grantees therein. We have seen that it was recorded by the grantor, who is the father of the appellant and the other appellees, and that they were all infants at that time. There is nothing in the record to show that any of them, since becoming of age, have in any manner repudiated or sought to repudiate that deed, nor have they, since the execution of the deed in 1908, done anything looking to the repudiation thereof. Under such circumstances the rule of law is that the recording of the deed constitutes a de-

livery, and, the grantees being infants, the law will presume an acceptance by them when the conveyance is beneficial to them. *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078, 12 Ky. Law Rep. 222; *Collings v. Collings*, 92 S. W. 577, 29 Ky. Law Rep. 51; *Mullins v. Mullins*, 120 Ky. 643, 87 S. W. 764, 27 Ky. Law Rep. 1048; *Atkins, etc., v. Globe Bank & Trust Co. (Ky.)* 124 S. W. 879. Other cases, as well as authority from text-writers, could be cited, but the rule is so thoroughly established as to put it beyond dispute. In the *Mullins Case*, the rule is stated thus:

"Appellee alleged in his petition that he made and executed this conveyance, and had it recorded in the proper office. These acts were positive evidence on the part of appellee that it was his intention to part with and pass the title to this land to his children. It did not require the actual manual delivery of the deed to his children to make it a legal conveyance. The children at the time being infants, and the conveyance being beneficial to them, equity implied an acceptance thereof on their part, but they had the right to reject the conveyance upon their arrival at age within a reasonable time. *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078, 12 Ky. Law Rep. 222; *Lockman, etc., v. Hoskins*, 69 S. W. 719, 24 Ky. Law Rep. 639; *Bunnell, etc., v. Bunnell, etc.*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. Law Rep. 800, 1101."

Without lengthening this opinion with extracts from the other cases referred to, it is sufficient to say that we are convinced that the proof falls, in the first place, to establish the mistake contended for; and, in the second place, as to the tract of land covered by the deed of 1895, the right to correct the deed because of such alleged mistake has long since become barred by the statute of limitation; and in the third place, that there has been a lawful delivery and acceptance of the deeds to the land in controversy. The court below should have dismissed the petition of James S. Frazier, and should have adjudged the right of plaintiff below to have the surface of the land described in the petition divided among the joint owners thereof as nearly equal as possible, quality and quantity considered, and to have appointed commissioners for this purpose and entered such other and further orders as might be necessary to carry into effect the judgment.

Having failed to do this, the judgment is reversed, with directions to proceed in accordance with this opinion.

OHIO VALLEY MILLS v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. March 1, 1916.)

1. STREET RAILROADS — 90 — OPERATION — CARE REQUIRED — DUTY TO KEEP LOOKOUT.

The duty to keep a lookout is imposed on the motorman operating a car, and where his view is obstructed, or insufficient, and his duty cannot be performed without assistance, he must have the necessary assistance; but the duty is

this, and he cannot be relieved of it by having it imposed on some other person.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 190-193; Dec. Dig. —90.]

2. STREET RAILROADS — 110 — COLLISIONS — PETITION — NEGLIGENCE.

A petition in an action against a street railway company for damages to an automobile in a collision at a crossing, which alleges that the street railway company improperly and unskillfully handled the car, raises the question of failure to keep a proper lookout.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 224; Dec. Dig. —110.]

3. DEPOSITIONS — 79 — ADMISSIBILITY IN EVIDENCE — STATUTORY PROVISIONS.

Civ. Code Prac. § 585, declaring that no deposition shall be read on a trial, unless before the commencement thereof it be filed with the papers of the case, prohibits the reading of a deposition which has not been filed before the commencement of the trial, but does not prevent a party from proving any fact in a deposition not filed in time, or not filed at all, by any other method permitted by law.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 202-207; Dec. Dig. —79.]

4. WITNESSES — 393 — IMPEACHMENT — PROOF OF CONTRADICTIONARY STATEMENTS.

Under Civ. Code Prac. §§ 597, 598, declaring that a witness may be impeached by contradictory evidence by showing that he has made statements different from his testimony, on a proper foundation being laid therefor, a witness may be impeached, on laying a proper foundation therefor by proof of contradictory statements, by the testimony of the stenographer taking the deposition of the witness, though the deposition has not been filed with the papers of the case before the commencement of the trial, as required by section 585.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1252-1257; Dec. Dig. —393.]

5. WITNESSES — 393 — IMPEACHMENT — PROOF OF CONTRADICTIONARY STATEMENTS.

The impeachment of a witness by proof of contradictory statements, as disclosed by the testimony of the stenographer taking the deposition of the witness, does not violate the rule prohibiting the reading of a deposition, though filed before the trial, unless the witness is absent, and the conditions of Civ. Code Prac. § 554, prescribing the conditions under which a deposition may be read, are fulfilled.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1252-1257; Dec. Dig. —393.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by the Ohio Valley Mills against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for further proceedings.

Thum & Roy, of Louisville, for appellant. Straus, Lee & Krieger, of Louisville, for appellee.

MILLER, C. J. This is a collision case. On January 29, 1914, an automobile owned by the Ohio Valley Mills, and operated by its president, D. E. Mapother, collided with a work car of the Louisville Railway Company at the intersection of Third and Walnut streets, in the city of Louisville. In this action by the Ohio Valley Mills, which will

hereafter be called the plaintiff, to recover \$1,500 damages to its automobile, there was a verdict for the defendant. The plaintiff appeals.

The car of the defendant was 36 feet long. It was what is commonly known as a flat car, or work car, with a cab about the center of the car, in which the motorman stood. The front of the cab contained a glass window about 18 inches high, through which the motorman looked in the direction he was traveling. There were four men upon the car, a motorman and a conductor, who were both in the cab at the time of the accident, and two day laborers, one seated on the rear end of the car, and the other, named Hall, was seated on the front end. The positions of these two day laborers upon either end of the car were selected by them for their own comfort or convenience, and not under any requirement or rule of the company. The car was carrying a load of cross-ties which were piled up in front of the cab about 4½ feet high; and underneath the cross-ties were some boards, which stuck out about 18 inches beyond the front end of the car.

At the time of the collision, the automobile, occupied by Mapother and two ladies, was proceeding north on Third street, while the work car of the defendant was proceeding east on Walnut street. The automobile was running at a speed of between 10 and 15 miles an hour, and Mapother testified that when he first saw the work car it was a short distance west of the Third street property line, and his automobile was just south of the Walnut street property line. The four street corners at Third and Walnut streets are occupied by brick buildings that come flush out to the sidewalk, thus obstructing the view across the corner lots.

Mapother testified that he did not slow up for Walnut street, and that when he saw the work car he put on full speed, increasing it to 25 or 30 miles an hour, and attempted to cross in front of the work car. The automobile was, however, struck by the front end of the work car, throwing Mapother and the two ladies who were occupying it to the ground, and partially crushing the car. Fortunately, no one of the occupants of the automobile was seriously hurt. Mapother did not claim that he had given any signal of his approach to Walnut street, and all the witnesses introduced by the railway company testified either that they heard no signal, or that none was given. On the other hand, Mapother heard no signal from the car.

The plaintiff asks a reversal upon three grounds: (1) Error of the court in failing to instruct the jury that there was a lookout duty incumbent upon the employes on the car other than the motorman; (2) error of the court in refusing to permit the plaintiff to impeach the testimony of the motorman; and (3) that the verdict and judgment are flagrantly against the evidence.

[1] 1. Following the decision of this court in *Louisville Railway Co. v. Gaar*, 112 S. W. 1130, where we said it was incumbent on the company to keep a lookout, but that it was not required to have its conductor and its motorman both to keep a lookout, the trial court instructed the jury that it was the duty of the motorman of defendant's work car, as he approached Third street, to have his car under reasonable control, to run it at a reasonable rate of speed, to give timely signals of his approach, to keep a proper lookout, and to exercise ordinary care to avoid a collision with other vehicles using the streets. Plaintiff insists that this was error, and that the trial court should have instructed the jury that it was the duty of the defendant to have suitable lookouts. In other words, the plaintiff insists that the court erred in confining the lookout duty to the motorman, and that the instruction should have placed upon the defendant the duty of having suitable lookouts, which would also require that duty of Hall, the man sitting upon the front of the car.

We have been cited to no authority, however, to sustain the view of the plaintiff upon this point. On the contrary, in *Louisville Railway Co. v. Gaar*, supra, the court not only placed the lookout duty upon the motorman, who was at the front end of the car, but said it was error to impose a like duty upon the conductor, who was at some other place in the car and engaged in other duties. The general rule applied in the *Gaar* Case is also given in 36 Cyc. 1477, as follows:

"A motorman, driver, or gripman in charge of the operation of a street car is ordinarily bound to anticipate the presence of vehicles and pedestrians on the street or highway in front of or near his car, and it is his duty to keep a diligent lookout to avert injury to persons, animals, or vehicles on the track or approaching thereto, and this duty is particularly applicable at street crossings, and on streets in densely populated neighborhoods or on crowded streets, and is sometimes prescribed by statute or ordinance."

This rule placing a lookout duty upon the motorman was followed by this court in *Louisville Railway Co. v. French*, 71 S. W. 486, 24 Ky. Law Rep. 1278; *South Covington & Cincinnati Street Ry. Co. v. McHugh*, 77 S. W. 202, 25 Ky. Law Rep. 1112; *Paducah City Ry. Co. v. Alexander*, 104 S. W. 375, 31 Ky. Law Rep. 1043; *South Covington & Cincinnati Street Ry. Co. v. Beese*, 108 S. W. 848, 33 Ky. Law Rep. 52, 16 L. R. A. (N. S.) 890; *Louisville Ry. Co. v. Bontellier*, 110 S. W. 357, 33 Ky. Law Rep. 484; *Louisville Ry. Co. v. Johnson*, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133; *Leach v. Owensboro City Ry. Co.*, 137 Ky. 292, 125 S. W. 708; *Louisville Ry. Co. v. Knocke*, 117 S. W. 271; *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278; *Walker v. Louisville Ry. Co.*, 158 Ky. 47, 164 S. W. 308; and *Louisville Ry. Co. v. Vessels*, 159 Ky. 664, 167 S. W. 924. In *Louisville Ry. Co. v. Gaar*, supra, the court said:

"The defendant had two agents on the car—the conductor and the motorman. The motorman had charge of the operation of the car. The conductor took up fares, and looked after the passengers in getting on and off the car. He had general charge of the car, but it was not a part of his duty to keep a lookout, and the jury, under the instructions of the court, might have found for the plaintiff on the ground that the conductor was not keeping a lookout. It was incumbent on the defendant to keep a lookout, but it was not required to have its conductor and its motorman both to keep a lookout."

In each of these cases the lookout duty was placed upon the motorman, who had charge of the movement of the car; in no case that we have found has that duty been placed upon any person not in actual charge of the car. We do not wish to be understood as saying that cases may not arise where the motorman in charge of the car should have the assistance of other persons in giving timely warning of the approach of the car. If the motorman's view should be obstructed or insufficient, by reason of his position on the car or otherwise, and his lookout duty could not for that reason be performed without assistance, he should have the necessary assistance; otherwise, he could not perform his whole duty. But the duty is his; from the very nature of the case he cannot be relieved of that duty by having it imposed upon some person not in charge of the operation of the car. If, by reason of his position, the motorman or person in charge of the operation of the car is unable to keep a reasonably efficient lookout, his company is negligent; but that is a question for the jury, under an instruction imposing the lookout duty upon the motorman or person in charge of the car. In placing the lookout duty upon the motorman the trial court did not commit an error; whether that duty was performed, or not performed for any reason, was for the jury to determine.

[2] 2. Appellee insists, however, that the question as to whether it failed to keep a lookout is not here, because, under the rule of pleading which confines the plaintiff to the acts of negligence specified, when, as here, he attempts to detail them, he cannot go into the question of appellee's failure to keep a lookout, because there is no charge in the petition that it failed in that respect. We are of opinion, however, that the allegation that the appellee improperly and unskillfully handled the car was sufficient to raise that question. *L. H. & St. L. Ry. Co. v. Osborne*, 149 Ky. 648, 149 S. W. 954.

[3, 4] 3. Section 585 of the Civil Code of Practice makes it a prerequisite to the reading of a deposition on a trial that it must have been filed with the papers of the case before the commencement of the trial. Before the trial of this case the deposition of Young, the motorman, had been taken; but it had not been filed with the papers of the case. Young testified on the trial that in approaching Third street his car was running at a speed of from 1 or 1½ to 2 miles an

hour. On cross-examination at the trial, he was asked if he had not stated in his deposition, theretofore given, that his car was going about 3 or 4 miles an hour. The defendant, however, objected to this question, and to the use attempted to be made of the fact shown in his deposition, upon the ground that it had not been filed in the case before the beginning of the trial. The court sustained the objection, whereupon the plaintiff saved the point by making an avowal that, if the witness were permitted to answer the question, he would state, and the same was true, that he did make the answer imputed to him by his deposition. Upon this ruling of the court, the plaintiff introduced the stenographer who took Young's deposition, and sought to have the stenographer, with her notes before her, contradict the witness, in the respect above mentioned; but, upon objection, this evidence was also excluded by the court. A proper avowal was then made.

The trial court seems to have rested its ruling upon the idea that the "best evidence" rule required a deposition to be produced to show what the witness therein said; and, as the deposition could not be read, because it had not been filed, it was incompetent for the plaintiff to show by the stenographer what the witness had said when he gave his deposition. We believe this ruling was, however, the result of a misapplication of the "best evidence" rule, since the purpose of the question was, not to prove some substantive fact relevant to the issues of the case, but to impeach Young, and thus affect his credibility as a witness to a relevant fact. Sections 507 and 508 of the Civil Code of Practice read as follows:

"Sec. 507. A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony."

"Sec. 508. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it."

This is a substantial statutory enactment of the common-law rule upon the subject, which permits the contradiction of a witness by other witnesses, on facts relevant to some issue in the case. 40 Cyc. 2563; 1 Greenleaf's Ev. (16th Ed.) §§ 461f and 462. If Young had stated in a conversation with one or more persons that he was running his car at 4 miles an hour, and had thereafter sworn at the trial that he was running the car at 2 miles an hour, can it be doubted that the testimony of the persons to whom he

made the statement would be competent to impeach his credibility as a witness by contradicting him? If a witness writes a letter which contradicts his testimony upon the trial, can it be said that the letter is not competent to impeach him, and thus affect his credibility upon the point in question?

If, instead of referring to the deposition Young had given, counsel had asked him if on that day (giving the date) and at Mrs. Avey's office and in her presence he had said that his car was running at a speed of 3 or 4 miles an hour, can it be doubted that Mrs. Avey would be a competent witness to contradict Young in case he had made the statement attributed to him? And if Jones, who heard Young's statement while sitting in the stenographer's office, is competent to impeach Young, why is not the stenographer likewise competent? And if a witness can be impeached concerning unsworn statements, how can it be said that he cannot be impeached because he has sworn to the statement attributed to him, thus making it competent to contradict the unsworn statements of the witness, but not competent to contradict his sworn statements, for the purpose of affecting his credibility? The effect of the trial court's ruling was to prevent the plaintiff from contradicting Young in any way, because his deposition had not been filed. But section 585 of the Code only prohibits the reading of a deposition, which was not filed before the commencement of the trial; it does not prevent a party from proving any fact shown in a deposition not filed in time, or not filed at all, by any other method permitted by law.

It is suggested, however, that the witness has rights, and that he should be protected against a practice which would permit him to be contradicted by an unfiled deposition. But, if that be a sound suggestion, why should he not also be protected from being contradicted under ordinary circumstances, where he makes unsworn statements in conflict with his testimony? Furthermore, a witness needs no protection of this character; he is only required to tell the truth, not on one occasion, but on all occasions. This question was before this court in *City of Louisville v. Laufer*, 140 Ky. 457, 131 S. W. 192. In that case the city took Laufer's deposition, but did not file it with the papers in the case, as is required by section 585 of the Code. In disposing of that case this court said:

"It appears that, prior to the trial, appellant took the deposition of appellee. While appellee was on the stand, appellant offered to introduce the deposition in evidence. The deposition, however, had not been filed with the papers in the case before the trial. In refusing to permit the deposition to be read the trial court simply followed the provisions of section 585 of the Code, which provides: 'No deposition shall be read on a trial unless, before the commencement thereof, it be filed with the papers of the case.' After the court refused to permit the deposition to be filed, appellant's counsel sought to impeach appellee by introducing the official stenographer,

who reported the deposition in question, and attempted to prove by him that, in giving the deposition referred to, appellee made statements inconsistent with his testimony on the stand. As appellant did not lay a proper foundation for this impeaching testimony by asking appellee if, at a certain time and place, and in the presence of certain people, he had not made certain statements, it follows that the court properly excluded the testimony sought to be introduced."

It is clear from the foregoing excerpt that the court excluded the impeaching testimony for the reason only that appellant did not lay a proper foundation for it by asking the appellee if, at a certain time and place, in the presence of certain people, he had made the statements attributed to him, and that it was excluded for no other reason. Of course, the rules of cross-examination, as well as section 598 of the Code, require that the witness must first be given an opportunity to admit or deny the statements attributed to him, before he can be contradicted. But no such question of practice appears in the case at bar; it is not claimed that the proper foundation was not laid.

Again, in *I. C. R. R. Co. v. Johnson*, 115 S. W. 800, a similar ruling was made. In that case it was sought to contradict a witness by what he had said on a previous trial, which had been taken down and appeared in the stenographer's transcript of the record, which had been used in the Court of Appeals. The trial court refused to permit counsel to use the transcript for the purpose of contradicting the witness; but, in reversing that ruling, this court said:

"Complaint is also made of the refusal of the trial judge to permit counsel for appellant in the cross-examination of appellee to ask him concerning statements made on a former trial. The purpose of the examination was to show that the statements of the witness on this trial were contradictory of those made by him on a former trial. The record does not give the reasons of the judge for refusing this line of examination. When a witness has previously testified, it is proper, on a subsequent trial of the same case, to inquire of the witness concerning statements made by him on a former trial, and to ask him if he was not asked certain questions and made certain answers—if the purpose of the examination is to impeach the credibility of the witness, or to test his memory. And if the evidence of the witness on a former trial has been preserved in the form of a stenographic bill of evidence, made by the official stenographer, it is competent to repeat the questions and answers contained therein, and to inquire of him if he was asked such questions and made such answers; and, when this is done, the stenographer who took the notes of the testimony on the former trial may be introduced as a witness for the purpose of contradiction, and may use the notes so taken for the purpose of refreshing his recollection as to the statements made by the witness on a former trial. *Beavers v. Bowen*, 80 S. W. 1165, 26 Ky. Law Rep. 291. Whether or not the official stenographer's transcribed report of the evidence, when certified to by the judge as a correct transcript, might not itself be used for the purpose of contradiction independent of the stenographer, it is not necessary to decide, as that question is not before us, although we can see no objection to this practice."

It will thus be seen that in the *Johnson Case*, as well as in the *Laufer Case*, the court

recognized that the usual and proper way to impeach a witness is to introduce the stenographer who was present when the contradictory statements were made, and to prove by the stenographer that they were made, with the privilege of refreshing his memory by his notes or the transcript.

In *Louisville Gas Co. v. Kentucky Heating Co.*, 142 Ky. 253, 134 S. W. 205, McDonald, a witness for the Heating Company, testified to what several witnesses had stated in their depositions, and on the witness stand, upon a former trial. The court, however, held that this was error as to the testimony of the witnesses who were not parties to the action. Of course, if they had been parties to the action, their statements made at any time would have been competent as admissions against interest; but as to those witnesses who were not parties McDonald's testimony was not competent, unless in the pending trial a foundation had been laid for impeaching them by asking them on the stand whether they had made the statements attributed to them. In other words, the ruling was similar to that in the *Laufer Case*, as appears from the following extract from the opinion:

"On another trial, however, the court will not permit McDonald to state what other witnesses than the defendants stated in their depositions or while on the witness stand, unless they are asked, when on the stand, if they did not make certain statements at a certain time and place, and, if they deny it, McDonald or any one may be permitted to show that they did; but the court should then instruct the jury that such testimony is to go only to the credit of the witness who denied making the statement."

In *Thompson, Ex'r, v. Thompson, Ex'r*, 155 Ky. 326, 159 S. W. 831, the stenographer was put on the stand to prove the contradictory admissions of Mrs. Thompson, and the point was made that the deposition itself could only be used for that purpose; but in overruling that contention this court said:

"It seems to us that there can be no serious question that these admissions made by Mrs. Thompson were competent in this litigation to show who had possession and control of the trust fund. If Mrs. Thompson had told A., B., or C. that she had at all times the possession and control of this fund, it could not be doubted that A., B., and C. would be competent witnesses in this litigation to prove these admissions. Mrs. Alvey took the deposition of Mrs. Thompson, in which the admissions were made, and reduced it to writing, and Mrs. Alvey testified that Mrs. Thompson made the statements appearing in her deposition. Although Mrs. Alvey did not have any particular independent recollection of these statements, it was proper to permit her to refresh her memory from an examination of the deposition of Mrs. Thompson, and to testify, after so refreshing her memory that Mrs. Thompson made the statements appearing in her evidence. The fact that these admissions were made by Mrs. Thompson in a deposition is wholly immaterial so far as the competency of the admissions is concerned. The important consideration is whether she made the admissions; when or where or how she made them is not a matter of much consequence. That she made them is not disputed."

Again, in *North River Insurance Co. v. Walker*, 161 Ky. 371, 170 S. W. 983, a suit

on a fire policy, where the defense was that the insured had burnt his property, it was held that the stenographer who had taken down the testimony in a criminal prosecution involving the same issue could testify as to what a witness had said in the prosecution, and refresh his recollection by the transcript. In that opinion the court said:

"It was proper for the stenographer to use the transcript for the purpose of refreshing her recollection and aiding her memory in testifying as to what Woods stated upon the examining trial mentioned. *Wilson v. Commonwealth*, 54 S. W. 946, 21 Ky. Law Rep. 1333; *Johnson v. Commonwealth*, 70 S. W. 44, 24 Ky. Law Rep. 842; *Thomas v. Commonwealth*, 20 S. W. 226, 14 Ky. Law Rep. 288; *Kean v. Commonwealth*, 10 Bush, 190, 19 Am. Rep. 63. Or to read direct from the transcript of the testimony so given. *Lake v. Commonwealth*, 31 Ky. Law Rep. 1232, 104 S. W. 1003; *Fuqua v. Commonwealth*, 118 Ky. 587, 81 S. W. 923, 26 Ky. Law Rep. 420. The trial court, therefore, erred in its ruling refusing to allow the witness mentioned to testify concerning the evidence given by Woods upon the examining trial of the Walkers. The issue upon that trial was substantially the same as upon this; i. e., Did the Walkers intentionally set fire to the house occupied by them, in which the insured goods were stored? And the testimony given by Woods upon that hearing was directly upon that issue and was sought to be used upon this trial as against the same parties against whom it was then given. Their interest and motive in sifting and testing Woods' testimony then given was the same upon that hearing as upon this; and their right and opportunity for cross-examination upon that occasion was unquestioned, and the witness was cross-examined by them on the issue."

Beavers v. Bowen, 80 S. W. 1165, 26 Ky. Law Rep. 292, was an action to recover damages for assault and battery, in which it was offered to introduce the report of the evidence taken on the examining trial, for the purpose of impeaching a witness who testified on the examining trial. The court, however, properly held that while the transcript of the evidence taken upon the examining trial was not competent to prove itself, and, standing alone, it nevertheless was competent to prove the facts by the stenographer who reported his testimony upon the examining trial, and thus contradict the witness. In that case the court said:

"But when the purpose is to impeach a witness by proving that on another occasion he has made a different statement from his testimony at the trial, the mere introduction of the notes by the shorthand reporter who took down the evidence of the witness on the other trial is not enough for that purpose. The extended notes of the reporter are evidence in one event only, and that is the one alluded to. The main purpose of such notes in circuit courts is to supply a part of what would otherwise be in the bill of exceptions made up for use solely of the appellate court. If they be taken and used in examining courts, and made a part of the minutes of the proceeding, their only purpose is to furnish the grand jury a clue to the witnesses, and what they will probably testify, as an aid in the investigation before that body. But where they are proposed in subsequent trials as impeaching evidence they can be used only as memoranda to refresh the recollection of the witness testifying to such statements. *Wilson v. Commonwealth* [54 S. W. 946], 21 Ky. Law Rep. 1333. And he must be able, after having his memory so refreshed, to testify to the matter as of his own

recollection. The extended notes, even then, are not themselves evidence."

[5] This practice does not violate the rule which prohibits the reading of a deposition, even though filed before the trial, unless the witness be absent and the conditions of section 554 of the Civil Code be fulfilled. *Willis v. Bank of Hardinsburg*, 160 Ky. 810, 170 S. W. 188. But this objection goes to the deposition as a deposition containing substantive evidence, and not when it is used for the purpose of impeachment. The same rule obtains in other jurisdictions. In *Chalmers v. United Railways Co.*, 153 Mo. App. 55, 131 S. W. 903, the court said:

"After the suit was instituted, defendant gave notice and took plaintiff's deposition before a notary public. Plaintiff's attorney appeared with his client at the taking of her deposition and participated therein. After the deposition was completed, it was read over to plaintiff and she affixed her signature thereto. The deposition was never filed in the cause, but defendant's counsel sought to cross-examine plaintiff with respect to certain statements she made therein. The use of the deposition for this purpose was objected to by counsel for plaintiff, on the ground that the deposition had never been filed in the cause, and because it was taken before a notary public who was an employé of defendant's general counsel. Counsel for defendant disclaimed any purpose to introduce the deposition in evidence, as it had never been filed in the cause in accordance with the statute, but insisted upon his right to cross-examine and confront plaintiff with respect to certain statements made therein as against her interests. The court, nevertheless, sustained plaintiff's objection and denied defendant's right to use the deposition even for the purpose of cross-examination to the end of contradicting material statements made by plaintiff at the trial. This was error. Though the deposition was not filed in the cause, it conclusively appeared to have been given by plaintiff and signed by her after hearing it read over, and any statements contained therein which tended to contradict material statements made by her at the trial were competent to be received in evidence. *Glasgow v. Met., etc., Ry. Co.*, 191 Mo. 347, 363, 368, 89 S. W. 915."

Likewise, in *Southern Kansas Ry. Co. v. Painter*, 53 Kan. 417, 36 Pac. 731, a deposition was tendered and parts of it were offered to be read to impeach the plaintiff, who was then on the stand, by showing that he had made statements in his deposition that were contradictory to his testimony upon the stand. The Kansas statute required every deposition intended to be read in evidence upon the trial to be filed at least one day before the day of the trial; and in this case the deposition had not been so filed. The trial court excluded the deposition for all purposes; but upon appeal that ruling was

reversed, the Supreme Court of Kansas saying:

"In support of this ruling of the court, counsel for defendant in error advances the following propositions: (1) That the deposition was not admitted to have been correctly written down, but was testified by plaintiff on the trial to having been incorrectly written down. (2) That it was not filed one day before trial. (3) That the deposition was not offered as a whole. (4) That the witness Painter was present in court and testified, and being so present, his deposition was not admissible. (5) That every of the portions offered did not contradict the testimony of Painter, and the deposition as a whole, taken together, was corroborative of Painter's testimony on the trial." None of these reasons are sound. In order to contradict a witness on the stand with his own words written at another time and place, it is not necessary that he should admit that they were correctly written down. The fact that they occur in the deposition to which his signature is appended is at least some evidence that they are his words. He should not sign a deposition without knowing what is contained in it. The second, third, and fourth propositions are upon the theory that the deposition was offered as a deposition. That is an error. The deposition was offered for the purpose of impeaching the plaintiff's testimony, by showing that at another time and place he had made statements, under oath, inconsistent with those made to the jury from the witness stand. While the deposition could not be used as a deposition when the plaintiff was present in court, and testified as a witness, like any other declaration of the witness to which his attention has been called, it could be used for the purpose of impeachment. It need not have been under oath. A letter stating the facts differently from the manner in which he testified to them would be admissible for the purpose of impeachment. So, too, would verbal statements out of court in the hearing of other witnesses, to which his attention had been called, be admissible for the same purpose. The use of such testimony is so common that it is hard to understand how an objection to it could be seriously urged."

We conclude, therefore, that the trial court erred when it refused to permit the plaintiff to contradict Young upon a fact which we think was relevant, and not merely collateral, to an issue in the case.

4. Finally, it is insisted that the verdict was flagrantly against the evidence, because it was negligence per se in the defendant to send a car through a crowded street with the motorman in the middle of the car, 18 feet from the front of the car, so loaded in front of him that he was unable, as is claimed, to give a proper lookout at street crossings. But this merely comes back to the original propositions, heretofore considered, as to whether the law imposes any lookout duty upon any one except the motorman, and further whether he performed that duty.

Judgment reversed, and action remanded for further proceedings.

STATE ex rel. GREAR v. ELLISON et al.,
Judges of Kansas City Court of Appeals. (No. 18997.)

(Supreme Court of Missouri. Dec. 22, 1915.
Rehearing Denied Feb. 9, 1916.)

1. COURTS \S 91 — APPELLATE COURTS — REVIEW OF DECISIONS—CONFLICT WITH RULING DECISION.

A holding by the Court of Appeals that a street railroad is not liable upon the humanitarian theory, where the motorman, who had kept a proper lookout on observing plaintiff's danger immediately threw off the power and applied the hand brakes, but did not reverse the power, being in doubt whether it would take effect at the speed at which the car was running, is not in conflict with a holding of the Supreme Court that where there is evidence that the motorman could have seen, and by ordinary care ought to have seen, the danger before he did, and with the appliances at hand could have stopped the car after he first saw the danger, there was no error in submitting the case to the jury upon the humanitarian theory.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. \S 91.]

2. APPEAL AND ERROR \S 1033—OPERATION—INJURIES AT CROSSING—CARE REQUIRED — "REASONABLE CARE"—"ORDINARY CARE."

One suing a street railroad for injuries at a crossing cannot complain that the degree of care by which defendant's duty was measured was "reasonable care," instead of "ordinary care," since the former term connotes in the mind of the layman a higher degree of care than the latter, though in law they are technically synonymous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4052; Dec. Dig. \S 1033.]

For other definitions, see Words and Phrases, First and Second Series, Reasonable Care; Ordinary Care.]

3. COURTS \S 91 — APPELLATE COURTS — REVIEW OF DECISIONS—CONFLICT WITH RULING DECISION.

A holding by the Court of Appeals that plaintiff was negligent as a matter of law in driving a smoothly shod horse on a dark morning, over a sleet-covered street, on a down grade, at a slow trot, to a point within 35 feet of a street car track, is not in conflict with a holding of the Supreme Court that a man is not required to look for danger when he has no cause to anticipate danger, or when danger does not exist except because of the negligence of another.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. \S 91.]

Woodson, C. J., and Blair and Revelle, JJ., dissenting.

In Banc. Original proceeding by certiorari by the State, on the relation of Harry L. Grear, against James Ellison and others, Judges of the Kansas City Court of Appeals, to quash a judgment of that court (177 S. W. 780). Writ quashed.

This is an original proceeding by certiorari, whereby relator seeks to quash the judgment of the Kansas City Court of Appeals in a case theretofore pending in that court, wherein relator Harry L. Grear was respondent and Ford F. Harvey et al., as Receivers of the Metropolitan Street Railway Company

were appellants, for that, as it was alleged, the opinion of the said Kansas City Court of Appeals in said cause failed to follow the last previous rulings of this court upon certain points of law.

The facts as respondents found them are thus stated in their opinion in the said case of Grear v. Harvey:

"The injury occurred at 6:30 a. m. January 11, 1913, at the intersection of Eighteenth and Cherry streets, in Kansas City, in a collision between a one-horse baker's wagon plaintiff was driving south on Cherry street with a west-bound trolley car on Eighteenth street. There was a single track in the middle of the latter street, upon which only west-bound cars were operated, and the distance between this track and the north curb was 14 feet 10 inches and between the track and the property line 21 feet. The width of Cherry street between property lines was 56 feet 6 inches, and between curbs, 34 feet. Cherry street was paved with vitrified brick, and from Seventeenth street south to Eighteenth was on a down grade of 3 or 4 per cent., but was practically level on the street intersection. It was dark, the morning was cold, and the pavement was covered with a thin coating of ice. The horse's shoes had worn smooth, and plaintiff drove at a slow trot down the street towards the crossing. There was a two-story building at the northeast corner of the streets, and plaintiff could not see the street car coming from the east until he emerged from behind that obstruction. At that time he looked and saw the car, which then was about 20 feet east of Cherry street, and was running at a speed, estimated by the motorman at 10 miles per hour. Plaintiff was standing in the wagon, and when he first saw the car he was about 35 feet north of the track, the horse, of course, being nearer. Realizing the danger of a collision he pulled on the lines to stop the horse, but tried to avoid 'pulling the horse off his feet,' and thereby causing him to slip and slide towards the tracks, and he applied the brake, but it did not hold. The horse began slipping and sliding towards the track, and plaintiff endeavored to prevent a collision by swinging him around towards the right, and succeeded in bringing him and the wagon to a place on the car track in front of the west property line on Cherry street, where the collision occurred, and plaintiff was thrown out of the wagon and injured.

"The motorman, who had another collision that evening and was discharged by defendants, was introduced as a witness by plaintiff, and testified that the car was of the single-truck type, and was equipped with a hand brake which was known by defendants to be in a defective condition when it left the barn; that the brakeshoe could not be brought into close contact with the wheels, and he had run beyond stopping places because of that defect; that as soon as plaintiff drove from behind the building he saw him, realized the danger of a collision, and immediately shut off the power and applied the brakes; that if they had been in good working order he would have stopped the car in 20 feet and avoided a collision, and that he did not attempt to reverse the power until he was 3 or 4 feet from the horse and it was too late to prevent a collision. The salient points of his testimony relating to his own conduct are that he saw the horse and wagon at the first opportunity, realized at once the peril of plaintiff, and acted energetically upon his best judgment to avoid injuring him. The only criticism of his conduct made by plaintiff is that he could have stopped the car in time if, knowing that the brakes were defective, he had immediately applied the power to reverse the motion of the car."

From these facts the respondents were of the opinion that plaintiff was guilty of contributory negligence which, as a matter of law, precluded his recovery, unless upon the last clear chance doctrine. We gather from the opinion of respondents that relator in his said action undertook to recover upon two theories, to wit: (a) That the servants of the railway company were negligent, but that relator was not negligent; or (b) that relator was in fact negligent, but should recover notwithstanding, on the theory that the servants of the railway company owed him the duty to see that he was in a place of danger, and, so seeing, to use ordinary care and diligence not to injure him. Respondents' ruling upon these points, together with such other facts as may be required to make clear relator's contentions, will be set forth in the opinion.

Reinhardt, Schibsbey & Muenich, of Kansas City, for relator. John H. Lucas and Lyons & Smith, all of Kansas City, for Harvey and Dunham, receivers of Metropolitan St. Ry. Co.

FARIS, J. (after stating the facts as above). [1] I. In the final analysis relator's first contention is that the respondents' statement of the last clear chance, or so-called humanitarian doctrine, is erroneous, or, at least, out of harmony with our last pronouncement upon this subject. Relator thus sets out this contention:

"And your relator charges that the said Court of Appeals in its said opinion further refuses or fails to follow the last controlling decision of the Supreme Court, in that the opinion is in conflict with the opinion in Lyons v. Metropolitan St. Ry. Co., 253 Mo. 153, 161 S. W. 726, Ann. Cas. 1915B, 508, in which this court held that where there is any evidence that, with the appliances at hand, the motorman could have stopped the car after reaching the point of discovery of peril and before reaching the point of collision, a case for the jury is made upon the humanitarian theory."

The case of Lyons v. Railroad, *supra*, but applied the fairly well-settled last clear chance doctrine, which the learned writer of the opinion therein summarized by tersely saying that:

"The mere negligence of the plaintiff, in approaching and crossing the track, would not justify the infliction of an injury, if, by the exercise of reasonable care and caution, it could be avoided"

—to the facts in that case. These facts, as this court found them and to which were so applied the rule of law set forth above, ran thus:

"In view of the fact that in this case the motorman testified, in substance, that he saw the horse before the plaintiff could see the car, and that he realized, from the horse's speed, that a collision was imminent, and that there is evidence he could have seen and, in the exercise of ordinary care, ought to have seen, the horse before he actually did see him, but that he was not keeping his eye upon the track, having turned to look into the car, and also evidence that with the appliances at hand he could safely have stopped the car after reaching the point from which

he says he first saw the horse and before reaching the point of collision, there was no error in submitting the case to the jury upon the humanitarian theory." Lyons v. Railroad, 253 Mo. loc. cit. 157, 161 S. W. 726, Ann. Cas. 1915B, 508.

Respondents, stating further facts as they found them in the record before us, and stating the conclusions reached by them as matters of law upon these facts, which conclusions led them to restate the duties arising from the last clear chance doctrine, said:

"Therefore, plaintiff's case on the demurrer to the evidence is reduced to this question: Is there any support in the facts and circumstances disclosed for a reasonable inference that the motorman was negligent in the effort he put forth to prevent the collision? It is conceded he was not remiss in maintaining a lookout, that he saw plaintiff and realized the danger as soon as plaintiff was visible, and that immediately he attempted to stop the car by the application of the hand brakes. But plaintiff argues that he erred, and that the error should be accounted as negligence in not immediately reversing the power, instead of trying to stop with the brakes which he knew were defective. He answered the question of counsel for plaintiff, 'If you had reversed the moment you threw off the power, how soon would you have stopped?' with the statement, 'In 5 or 6 feet if it had held.' An expert witness for defendants testified on cross-examination that a car of that type, going 10 miles per hour, could be stopped by reversing the power in 20 or 25 feet, at 5 miles per hour, could be stopped in 15 feet, and that at slow speed there was not much difference in the distance in which the car could be stopped, whether the method employed was the use of the hand brake or the reversal of the power."

"From the testimony of the motorman we have quoted, it appears he feared that at the speed the car was running the reversal would not hold, as he expressed it, and would not be efficacious until the speed had been reduced by the brakes. We think the characterization of his conduct is not to be determined by the answer to the question of whether or not he displayed sound judgment in adopting the course he did. As we held in Mathews v. Railway, 156 Mo. App. 715 [137 S. W. 1003], a mere error of judgment, committed under the stress of exciting and imminent danger in an honest and spontaneous effort to avoid injuring another, is not alone proof of negligence. A person in such situation may be actuated by reasonable, indeed, by the greatest, care for the safety of his fellow beings, and yet pursue the least effective of two possible courses, and to stigmatize him as a wrongdoer because he was not infallible in an exciting emergency would be an obvious perversion of the humanitarian doctrine, which requires a reasonable manifestation of humane impulses, not the possession and exercise of the utmost wisdom and coolness in the moment of danger."

In this we do not think respondents misstated the law, or stated it out of harmony with the Lyons Case, *supra*. The Lyons Case uses the expression "reasonable care and caution," in designating the measure of care enjoined as a duty under the last clear chance doctrine. So also do respondents, as will be seen from the excerpt quoted above. An examination of our cases which we have ruled here shows that we have not, by any means, been uniform in our holdings as to whether "reasonable care," or "ordinary care," was to be exercised to avoid injuring one who, by his own negligence, put himself in a position of danger. In a vast

majority of the cases in this court dealing with the last clear chance doctrine, we have defined the degree of care required to be observed as "ordinary care." *Riska v. Railroad*, 180 Mo. 168, 79 S. W. 445; *Degonia v. Railroad*, 224 Mo. 596, 123 S. W. 807; *Eppstein v. Railroad*, 197 Mo. 733, 94 S. W. 967; *Chamberlain v. Railroad*, 133 Mo. 557, 33 S. W. 437, 34 S. W. 842; *Rapp v. Railroad*, 190 Mo. 161, 88 S. W. 865; *Sinclair v. Railroad*, 133 Mo. 233, 34 S. W. 76; *Reardon v. Railroad*, 114 Mo. 405, 21 S. W. 731; *Reyburn v. Railroad*, 187 Mo. 574, 86 S. W. 174; *Hinzeman v. Railroad*, 182 Mo. loc. cit. 624, 81 S. W. 1134; *Felver v. Railroad*, 216 Mo. loc. cit. 213, 115 S. W. 980; *Kelley v. Railroad*, 101 Mo. loc. cit. 75, 13 S. W. 806, 8 L. R. A. 783; *Klockenbrink v. Railroad*, 172 Mo. 679, 72 S. W. 900; *Moore v. Railroad*, 126 Mo. 265, 29 S. W. 9; *Jennings v. Railroad*, 99 Mo. loc. cit. 399, 11 S. W. 999; *Bergman v. Railroad*, 88 Mo. loc. cit. 683, 1 S. W. 384; *Frick v. Railroad*, 75 Mo. 595; *Welsh v. Railroad*, 81 Mo. loc. cit. 473; *Guenther v. Railroad*, 108 Mo. loc. cit. 21, 18 S. W. 846; *Meyers v. Railroad*, 59 Mo. loc. cit. 231; *Donohue v. Railroad*, 91 Mo. loc. cit. 365, 2 S. W. 424, 3 S. W. 848; *Sullivan v. Railroad*, 117 Mo. 214, 23 S. W. 149; *Lloyd v. Railroad*, 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; *Roefeldt v. Railroad*, 180 Mo. 554, 79 S. W. 706; *Goff v. Transit Co.*, 199 Mo. 694, 98 S. W. 49, 9 L. R. A. (N. S.) 244; *Dyrcz v. Railroad*, 238 Mo. loc. cit. 42, 141 S. W. 361; *Ellis v. Railroad*, 234 Mo. 657, 138 S. W. 23; *Zander v. Railroad*, 206 Mo. loc. cit. 464, 103 S. W. 1006; *Waddell v. Railroad*, 213 Mo. loc. cit. 16, 111 S. W. 542; *McQuade v. Railroad*, 200 Mo. 150, 98 S. W. 552; *White v. Railroad*, 202 Mo. loc. cit. 563, 101 S. W. 14; *Scullin v. Railroad*, 184 Mo. loc. cit. 707, 83 S. W. 760; and a serried host of others too numerous to mention and set down.

The case of *Murphy v. Railroad*, 228 Mo. loc. cit. 83, and loc. cit. 79, 128 S. W. 481, quotes with apparent approval the rule that "due care in watchfulness" (*Riggs v. Railroad*, 120 Mo. App. 335, 96 S. W. 707), or "ordinary caution or watchfulness" (*Isabel v. Railroad*, 60 Mo. loc. cit. 481), is the rule by which to measure the quantum of diligence. Likewise the *Murphy Case*, supra, 228 Mo. at page 79, 128 S. W. 481, quotes apparently with approval the case of *Werner v. Railroad*, 81 Mo. loc. cit. 374, wherein the rule is enunciated that "reasonable care" is the measure of care enjoined. Wherefore the rule seems to be deduced that, the danger to one who is guilty of contributory negligence being noted, it is instantly incumbent upon him in charge of the threatening instrumentality to use "all prudent efforts" to prevent collision. *Murphy v. Railroad*, 228 Mo. loc. cit. 82, 128 S. W. 481. The case of *Dutcher v. Railroad*, 241 Mo. loc. cit. 160, 145 S. W. 63, seems to require "due care to preserve life," and to define such care as being "care according to circumstances." The *Dut-*

cher Case, supra, 241 Mo. at page 159, 145 S. W. 63, quotes with apparent approval, or arguendo at least, the rule of "ordinary care" as enjoined by *Reyburn v. Railroad*, supra, *Eppstein v. Railroad*, supra, *Reardon v. Railroad*, supra, *Sinclair v. Railroad*, supra, *Chamberlain v. Railroad*, supra, and *Degonia v. Railroad*, supra. Likewise there occurs in the same case of *Dutcher v. Railroad*, supra, a quotation from *Lynch v. Railroad*, 208 Mo. loc. cit. 1, 106 S. W. 68, where it is said the measure of duty is to use "reasonable care." The latter case and the cases of *Kinlen v. Railroad*, 216 Mo. loc. cit. 164, 115 S. W. 523, *Donahoe v. Railroad*, 83 Mo. 543, *Werner v. Railroad*, 81 Mo. 374, *Scoville v. Railroad*, 81 Mo. 441, *Dahlstrom v. Railroad*, 96 Mo. 99, 8 S. W. 777, *Dunkman v. Railroad*, 95 Mo. 244, 4 S. W. 670, and *Lyons v. Railroad*, 253 Mo. loc. cit. 158, 161 S. W. 726, Ann. Cas. 1915B, 508, seem to commit this court to the expression "reasonable care."

In the case of *Lyons v. Railroad*, supra, the rule announced is that the defendant must "use all reasonable effort" consistent with the safety of persons on board to avoid colliding with him who is seen to be in danger. There may be other cases ruled by us wherein "reasonable care" is said to be the measure of duty enjoined, but we have not found them, nor have we any hesitation in saying that the number of cases in which we or other courts have used the term "reasonable care" is negligible as compared to those in which the expression "ordinary care" is used. But this question of difference in verbiage is of no particular importance, since "reasonable care" is ordinarily held to be identical with "ordinary care"; in fact, the expressions are said to be interchangeable. 29 Cyc. 427; 3 *Bouvier's Law Dict.*; 7 *Words and Phrases*, 5455; 2 *Words and Phrases* (2d Series) 147; *Western Union Tel. Co. v. Vance* (Tex. Civ. App.) 151 S. W. 904; *Louisville, etc., Railroad v. Pointer's Adm'r*, 113 Ky. 952, 69 S. W. 1108; *Raymond v. Railroad*, 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94; *Cronk v. Railroad*, 3 S. D. 93, 52 N. W. 420. So, if we were to substitute the word "ordinary" for the word "reasonable," wherever in the excerpt we quote from the opinion of respondents, the latter word occurs, we do not find the rule out of harmony with what we have held and what we conceive to be the correct rule. For mark what respondents say:

"A person in such situation may be actuated by reasonable, indeed, by the greatest, care for the safety of his fellow beings and yet pursue the least effective of two possible courses."

[2] Respondents therefore, in our view, did not fail to follow us, but on the contrary so far followed us as to use, the writer thinks, an expression which is to an extent unusual, in defining the degree of duty enjoined, thus (in trying to follow us) violating the rule that in law "beaten paths of diction are best." Besides, recurring for a moment

and for the sake of argument only, to the merits, relator cannot complain that the degree of care by which the duty of defendant to him was measured was "reasonable care" instead of "ordinary care," for if in common parlance there be a difference in the degree of duty respectively enjoined by these expressions, there can be but little doubt that the term "reasonable care" connotes in the mind of the layman a higher degree of care than that called for by mere "ordinary care," although, as we have seen, these expressions are technically synonyms, each of the other.

Respondents do not tell us on which side of the street relator was driving when he first saw the car; obviously this fact makes a vast difference. But we are told that the car, running at the rate of 10 miles an hour, was only 20 feet west of the 56-foot street on which relator was driving, and that relator was at this instant, and when the danger was first seen by him, only 35 feet from the street car tracks. The car, running 10 miles an hour, would traverse a distance of approximately 15 feet each second. It would, as we suggest, make a vast difference as to which side of the street relator was on, because if he was on the west side his visible danger and his visible efforts to escape a collision occupied but a second or two of time.

The mutual rights of relator and the street car to the use of the street and the duties existing inter sese to maintain a lookout each for the other at a point where each might ordinarily be expected to be are thus set out in the case of *Felver v. Railroad*, 216 Mo. loc. cit. 213, 115 S. W. loc. cit. 985, where we said:

"At most the rights of the company and the rights of the citizen in a public street are mutual; and correlative rights to its use must be regulated by the exercise of due care. Says this court in the *Kennayde Case*, supra, through *Wagner, J.*: 'The unfortunate *Kennayde* had the same right to pursue his course that the defendant had to run the train on its track. The rights of the people of *Kansas City* to travel on and use their own streets and thoroughfares are not inferior or subordinate to those of the railroad company. They each have a right to exercise their privileges in a lawful manner, and each are equally bound to use caution, care, and diligence to avoid accidents.' Says *Brace, C. J.*, in banc, in *Rapp v. Railroad*, 190 Mo. 161, 162 [88 S. W. 865]: 'Plaintiff had as much right on the street as did defendant, and in pursuing his way to be on that part of the street over which the defendant's track was laid. It was his duty to pursue his way with due care for his own safety, and the safety of others, and if, negligent of the former, he went in the way of defendant's car in such close proximity thereto as that the servants of the defendant could not, by the exercise of ordinary care, prevent injury to him, he has himself only to blame for his injuries, and he ought not to recover.'

The concrete facts in a case like this illustrate the thought that the street car had a shade the superior right to be on the rails of its own track, to the extent, at least attributable to the limitation that it could run only upon its rails, while relator was not so hedged about, but could use the whole

street. Clearly the motorman had the right to assume that relator would not thrust himself into a situation of visible danger, and, so assuming, to pursue his way till the contrary reasonably appeared. If the rule were otherwise, if a street car upon a street at a place where two streets cross be required to halt as a duty fixed by law upon its operation, till all vehicles and pedestrians pass, who might, at the rate they are seen to be approaching, be able to get in front and get hurt, then such cars can no longer be run in our populous cities except at night.

It appears that in the brief time (evidently somewhere from one to five seconds), between the observing of relator in a position of danger and the actual collision with him, the motorman did two of the three things possible to be done: (1) He threw off the power; and (2) threw on the hand brake. The complaint is because he did not also do a third possible thing, viz., reverse the power. The respondents find that he did not reverse the power because he feared the reverse would not hold at the speed he was going. In short, in an emergency, in an instant of time almost, in five seconds at the very outside, possibly in but one second, after the assumption of intelligent action of relator was shattered, the motorman used two out of three possible methods to avoid a collision (*Burge v. Railroad*, 244 Mo. loc. cit. 102, 148 S. W. 925), and his explanation shows he exercised his best judgment in so doing. That a more cool employé using the very acme of good judgment might have done better and used all three methods is beside the question. If the relator, being himself primarily in fault, could exact the duty of requiring a servant to be in charge who would exercise the very best possible judgment in a crying emergency or be deemed negligent as a matter of law in failing so to do, then by the same token relator could demand a perfectly equipped car. The rule is that relator must take things as he found them. No privity whatever exists between relator and the street car company; no duty even is to be exacted from the company except the duty to use such care to avoid injury to relator as an ordinarily prudent and careful person would have used under the same or similar circumstances, after it saw, or could by the exercise of ordinary care have seen, him in a situation of danger. We think it clear, under this rule, relator could not, as respondents so sententiously observe, require on the part of the motorman "the possession and exercise of the utmost wisdom and coolness in the moment of danger." Arguendo, the respondents speak in their opinion of "stigmatizing the motorman as a wrongdoer because he was not infallible in an exciting emergency," and they further observe that:

"A man who is honestly and zealously doing his best to save another is not inhumane and should not be denounced as a wrongdoer."

In this, as we view it, the respondents were but speaking argumentatively and indulging in a bit of rhetoric to point a moral. So far as they had stated the rule, they had stated it as we have stated it, as exacting "reasonable care." If this was inaccurate—and we think it would be better to follow the ancient rule and speak of "ordinary care"—they but followed us, and for this we are not called on to quash their judgment.

Adverting to the theoretical phase of the question, we all know that liability for injuring one who by his own negligence moves himself from a place of safety to a place of danger is, in the last analysis, bottomed on the wanton and reckless disregard of human life and limb of him who, having at hand the means of avoiding hurt, yet does not use such means. Roenfeldt v. Railroad, 180 Mo. loc. cit. 565, 79 S. W. 706. In the Roenfeldt Case, supra, 180 Mo. at page 565, 79 S. W. at page 709, Vaillant, J., said:

"But the theory of the plaintiff's case, as shown in his petition, his evidence and the argument in his brief, is that, admitting that the plaintiff through his own negligence put himself in a position of peril, yet the case falls within the exception to the rule that one cannot recover for injuries received in consequence of his own contributory negligence. The exception to the rule is that when the defendant sees (or in some cases when by the exercise of ordinary care he might see) the plaintiff in a position of peril and, with the means then at hand, is able, by the exercise of ordinary care, to avert the injury, but neglects to do so, he is liable. Under those circumstances the defendant is adjudged guilty of such reckless or wanton disregard of human life or limb that he is not exonerated by showing that the plaintiff was also negligent. Is there anything in the evidence in this case to show such a reckless or wanton disregard of duty on the part of the defendant's servants in charge of this car? Is there any evidence tending to show that after the motor-man or motormen saw the plaintiff in peril they could have stopped the car in time to avert the catastrophe?"

Liability in such case cannot have, nor has it, any other basis in logic except wantonness and recklessness, even though in the legal application of the rule we have been compelled, for practical purposes of administering the law, to find and argue wanton and reckless disregard of life and limb from the facts of the case, when in truth these sentiments did not exist in the mind or intention of the actual tort-feasor. Theoretically the view subsists; practically we have had to explode it utterly. Dutcher v. Railroad, 241 Mo. 137, 145 S. W. 63. So long then as respondents misstate no rules of law, or follow us in stating a rule of law and merely go back to basic facts for argument's sake, we ought not to, nor will we, interfere. The Constitution does not make us arbiters of their rhetoric and diction. It follows that we ought to disallow the contention of relator that respondents failed to follow the *Klockenbrink* and *Lyons* Cases. It fairly follows also, we think, that these views dispose of relator's contention that the opinion of the respondents is in conflict with the

rule announced by us in *Wellman v. Railroad*, 219 Mo. 126, 118 S. W. 81. As respondents find and recite the facts, we do not think there is any substantial evidence to take the case to the jury.

[3] II. Relator's second contention is that the opinion of respondents' is in conflict with our ruling in the case of *Crawford v. Stookyards Co.*, 215 Mo. loc. cit. 414, 114 S. W. 1057. Specifically and in *hæc verba* the point of conflict is that we there held:

"That a man is not required to look for danger when he has no cause to anticipate danger."

As the *Crawford* Case recited the rule, it ran thus:

"As a general rule, a man is not required to look for danger when he has no cause to anticipate danger, or when danger does not exist except it be caused by the negligence of another." 215 Mo. loc. cit. 414, 114 S. W. 1057.

Expressing our continued allegiance to this rule in a proper case, we are utterly unable to appreciate its application to the facts in the instant case, or to find wherein the opinion of respondents has violated it. True respondents, upon the facts they recite and which we herein set forth, found that relator was guilty of contributory negligence, as a matter of law, in driving a smoothly shod horse, on a dark morning, over a sleet-covered street, on a down grade, at a slow trot (or any other species of the genus trot we may observe, which was so rapid as to preclude stopping if need arise), to a point within 35 feet (relator's horse was by the distance of the horse's head from relator, that much nearer the track) of a street car track on which cars were being operated. We are unable to see the relevancy of the rule invoked by relator under the facts recited, which, in our opinion, show a plain case of contributory negligence on relator's part. The rule which he says was violated connotes an absence on the part of relator of the duty to keep a lookout for danger when approaching a place of known danger, or to approach such place with his horse under control. If there had been no such duty incumbent upon relator under the facts here, then the rule invoked might apply to and save him. But he was approaching a street car track, a place of known danger, and the rule is, not that relator could placidly rely on the freedom of the place and situation from danger, but, on the contrary, that railroad and street car crossings, being places of known danger, must be approached by drivers and pedestrians with care. *Burge v. Railroad*, 244 Mo. loc. cit. 94, 148 S. W. 925. Touching this identical duty of approaching such places with care, *Graves, J.*, writing the opinion in the above case, 244 Mo. at page 94, supra, 148 S. W. at page 299, said:

"It is clear from the statement of facts that the deceased was guilty of negligence as a matter of law. A railroad crossing is within itself a signal of danger. The law imposes upon the traveler the duty of exercising caution at such places. He must make some effort to find out if there is an approaching train before he

drives upon the tracks. He can close neither his eyes nor his ears. The means of self-protection given him must be used. A failure so to do constitutes negligence."

It follows, we think, that this contention also of relator should be disallowed, which, being done, disposes of the points made by relator, and results in the conclusion that our writ herein was improvidently issued and should be quashed. Let this be done.

GRAVES and WALKER, JJ., concur.
BOND, J., concurs in result. BLAIR and REVELLE, JJ., dissent.

WOODSON, C. J. (dissenting). I dissent from the first paragraph of the majority opinion for the reason that the facts of the case, as stated by the Court of Appeals and by this court, do not show that the motorman in charge of the car was excited, confused, or frightened at the time he saw, or by the exercise of ordinary care should have seen, the plaintiff approaching the track, but, upon the contrary, his own evidence shows that he was cool and deliberate, and considered the various means he had at hand with which to stop the car, and weighed in his mind which were the best for that purpose. He went so far as to reason out the fact that if he should have applied the brakes while the car was running 10 miles an hour, they probably would not have taken hold and stopped the car, and for that reason he did not apply them; and therefore the rule of law applicable to cases where such facts are shown to have existed does not apply to cases like this, where they were not shown to have existed. Under the facts of this case the conduct of the motorman should have been considered and weighed without injecting into it the element of excitement and confusion.

I also dissent from paragraph 2 of the opinion for two reasons: First. Because, in my opinion, the rule announced in the case of Crawford v. Stockyards Co., 215 Mo. loc. cit. 414, 114 S. W. 1057, does apply to this case. That case in effect holds that a person is not required to look for danger when he has no cause to anticipate it, or where danger would not exist except when caused by the negligence of another. While it is true, as stated by my learned Associate, that a railroad track of itself is a signal of danger, and that those who approach it must take heed of danger when they attempt to cross over it, the danger there mentioned refers to the dangers that are incident to the running of the train in a careful and prudent manner, and not in a negligent or unlawful way. In the case at bar the presence of the railroad track of itself was no warning whatever to the relator that the brakes of the car which caused the injury were out of repair, and for that reason the motorman was unable to control its movements. He had the right to rely upon the presumption that the car was in

reasonably safe condition for the purposes for which it was being used, and was therefore, as held in the Crawford-Stockyards Case, supra, not required to look for the danger that was incident of the defective brakes, which, of course, was due to the negligence of the railway company. Not only that, but, according to the motorman's own testimony, he could have stopped the car in time to have avoided the injury after seeing the relator's horse approaching the crossing had the brakes been in good condition. Second. Because in my opinion the evidence made a prima facie case for the plaintiff, and the question of contributory negligence, a matter of defense, should have been submitted to the jury under proper instructions given by the court. In my opinion, this is one of those cases where reasonable men of ordinary prudence might reasonably differ regarding the conduct of the relator in approaching the crossing mentioned, under the facts and circumstances of this case as detailed in evidence.

I am therefore of the opinion that the judgment of the Court of Appeals violates the rulings of this court, as stated, and that its judgment should be set aside and for naught held, and that our writ should be made permanent.

McINTYRE v. CASEY et al. (No. 17537.)
(Supreme Court of Missouri, Division No. 2.
Jan. 6, 1916. Rehearing Denied
Feb. 15, 1916.)

1. DEEDS \S 118—SUFFICIENCY OF EVIDENCE—LAND CONVEYED—MEETING OF MINDS.

In ejectment to recover a part of a lot to which plaintiff claimed title under deeds from the defendant executed when the lot was divided by a 60-foot avenue, evidence held to show that the minds of the parties never met upon a sale of the entire lot, but only upon a sale of that part of it lying west of the avenue.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. \S 118.]

2. REFORMATION OF INSTRUMENTS \S 45—DEEDS—MUTUAL MISTAKE—EVIDENCE.

In such action, the defendant was entitled to relief in equity on the ground of mutual mistake by a reformation of the deeds in conformity with the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 157-193; Dec. Dig. \S 45.]

3. REFORMATION OF INSTRUMENTS \S 18—GROUNDS—"MISTAKE IN LAW."

A mistake of law will not afford an adequate ground for relief by reformation of an instrument, but the rule that ignorance of the law excuses no one is confined to mistakes as to the general rules of law, and has no application to mistakes of persons as to their own private rights and interests.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 72, 73; Dec. Dig. \S 18.]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Ejectment by Kate E. McIntyre against John Casey and others, with cross-bill for

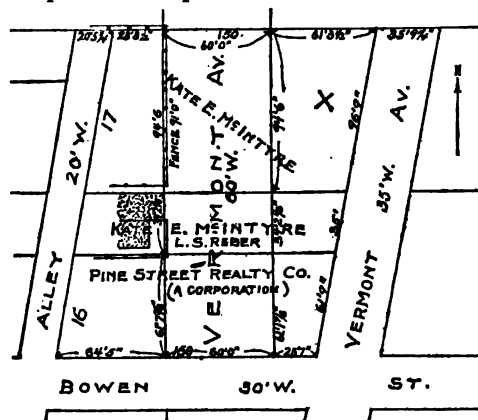
reformation of deeds. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

Hall & Dame and Wm. H. O'Brien, all of St. Louis, for appellant. Henry W. Allen, of St. Louis, for respondents.

WALKER, J. Ejectment to recover a part of lot 17 in the Auguste Gamache addition to the city of Carondelet, now a part of the city of St. Louis. This action was instituted in the circuit court of said city in 1911. Plaintiff claims title to the lot in controversy under deeds from defendant and wife made to her in 1896 and 1904. The lot as described in these conveyances is as follows:

"Lot seventeen (17) in Auguste Gamache's addition to the city of Carondelet and being in block No. twenty-nine hundred and twenty-eight (2928) of the city of St. Louis, fronting ninety-six feet, nine inches (96' 9") on the west line of Sixth street, which is now dedicated and open and sixty (60) feet wide, and running westwardly between parallel lines, from said west line of Sixth street, one hundred and fifty (150) feet, more or less, to a twenty (20) foot alley, bounded north by the north line of said lot 17, east by Sixth street, south by lot 16 and west by said alley."

For a clearer understanding of this description see map.



The plat of the Gamache subdivision showed certain numbered lots and streets. One of the latter was Sixth street, sometimes designated as Vermont avenue; it was 35 feet wide and located east of and adjacent to said lot 17. This street had not been used as a highway since 1883, if in fact it had ever been so used, and it was subsequently vacated; the reason for such non-user and vacation being that another street, known by the same number, but subsequently named Vermont avenue, which was 60 feet wide and bisected said lot 17 north and south, had been used as a public highway since 1881, and was dedicated as such in 1904. The property sought to be recovered is that part of lot 17 lying east of Vermont avenue as shown on the map. The controversy arises from the different constructions placed upon the description of the lot, due

primarily to the two streets having the same name. This will be developed in a recital of the facts.

The petition is in the usual form. The answer is a general denial and a cross-bill, which sets up an equitable defense and asks a reformation of the deeds in conformity with the intention of the parties. The material allegations of this pleading are in accord with the testimony; and a recital of same is therefore necessary to an understanding of the case.

[1] In the year 1855 the Gamache addition was laid out, and a plat thereof executed and recorded showing blocks and lots and dedicating to public use certain streets and alleys, including a street called Sixth street, 35 feet in width; among the lots was one numbered 17, having a frontage of 96 feet 9 inches, more or less, on said Sixth street and extending westward 150 feet to an alley; in 1889 John W. Casey, the defendant, purchased said lot, and at that time and for many years prior thereto the 35-foot street was not in use as a highway, but a street known as Sixth street, 60 feet in width, did exist and was used by the public, extending approximately through the middle of lot 17 in a northerly and southerly direction, and being an extension of an existing street of the same width north of said lot, which street and the extension later received the name of Vermont avenue. When the defendant bought the lot in 1889 it had a frame dwelling on the part east of Vermont avenue and fronting the same. These allegations of the answer are admitted in plaintiff's reply. The remainder plaintiff denied. They are as follows: The owners of lots similarly situated to that of defendant in all instances had their improvements fronting on the 50-foot street, and not on the 35-foot street of the plat.

In 1896 defendant sold to Reber, trustee for Kate E. McIntyre, that part of lot 17 lying west of said 60-foot street; the conveyance being in trust for the sole and separate use of said Kate E. McIntyre, free from the control of her husband, and the lot was described as in the description heretofore given in this statement. It was understood by and between defendant and plaintiff that the eastern boundary of the lot so conveyed as "lying west of said 60-foot street and described as Sixth street, which is now dedicated and opened 60 feet wide," was the 60-foot street actually opened, and not the 35-foot street shown on the plat of Gamache; that upon the making of this deed defendant surrendered to plaintiff possession of that part of lot 17 west of said 60-foot street, but continued in the possession of the part of same east of said street from that time to the present, and that the plaintiff and Reber, her trustee, had actual knowledge of said fact during all of said time from said conveyance to the present, and did not object thereto or claim any right or title therein;

that about the year 1900 defendant erected upon the portion of said lot lying east of said 60-foot street, of which he had been in continuous possession, a 2-story brick building, and that plaintiff and her trustee knew that said building was being erected by the defendant, and that he claimed to be the owner of the part of the lot on which the improvement was being made, but that they did not object thereto or claim ownership in such part of said lot; that in 1904, plaintiff's husband having died, she requested defendant to execute another deed for the purpose of correcting the deed of 1896 by changing the spelling of her name from "McEntyre" to "McIntyre," and to divest the record title out of Reber, trustee, and vest it in her; with that object in view the trustee, Reber, on or about September 2, 1904, executed a deed conveying the property to defendant as described in the deed made by defendant to plaintiff in 1896, and on the same day defendant executed a deed reconveying said property to plaintiff as described in the original deed; that both of said deeds were prepared by plaintiff, that defendant gave no consideration for the deed of the trustee to him, and that the same was never actually delivered, and that he received no consideration for his deed to the plaintiff; that defendant has been in the open, notorious, and adverse possession of the land described in plaintiff's petition for more than 10 years continuously last past, claiming title thereto in fee, and by reason thereof plaintiff is barred from maintaining this action against him, and that by reason of permitting defendant to remain in the possession of said lot for more than 10 years and to make valuable improvements thereon with plaintiff's knowledge and without objection or warning to defendant that she is stopped to claim any title therein or from claiming that the deed of 1896, or that in correction of same in 1904 conveyed any land to her east of said 60-foot street; and that the court reform the deeds of 1896 and 1904 so that the descriptions therein may properly convey the land actually granted and intended to be granted thereby.

If the presentation of other salient facts in evidence is deemed necessary to a fuller understanding of the matter at issue, they will be set forth in the opinion. The description of the property contained in the deeds made by defendant to plaintiff included all of lot 17.

The testimony, as well as the physical facts, indicate that when the deed of 1896, as well as that of 1904, was made, neither party intended to sell or buy more than that part of lot 17 lying west of Vermont avenue. At the time of the transfer, and for a number of years prior thereto, this avenue had been used as a public highway, and although it was not formally dedicated as such until 1904, persons owning property on either side of it had for a number of years before 1896 built their homes fronting on same. Possess-

ed of this knowledge, it is not reasonable that the defendant would have made a deed and the plaintiff would have accepted same, which included in the description a parallelogram carved out of said lot 17, and then occupied by said avenue, 94 feet in length and 60 feet in width.

Plaintiff says that for 40 years preceding the trial she had lived on a lot located on the west side of this avenue immediately south and adjacent to that part of lot 17 which she took possession of when the deed was made to her. For 28 years before the trial defendant had lived on that part of lot 17 lying east of Vermont avenue. Plaintiff, when the deed was delivered to her, took possession of the west part of said lot and never attempted to exercise acts of ownership or make a claim of any character to that part of the lot east of the avenue. During all the time that intervened between the making of the deeds mentioned and the institution of this suit she lived in plain view of the part of the lot occupied by defendant, and must have seen the daily exercise of acts of ownership by him thereon, not only in his occupying a house on said lot as a residence, but in the erection thereon, after the deed was made to plaintiff, of a brick building of a substantial character, as it is shown to have cost \$5,500. These facts justify the conclusion that neither party, despite the description in the deed, entertained the thought that the one had sold or that the other had bought more than the portion of said lot 17 lying west of Vermont avenue. No other conclusion is consonant with the ordinary conduct of men, or of women either, in transactions of this character. If plaintiff had intended to buy, or believed or thought that she had bought, the entire lot, she would, measuring her conduct by the usual course of human experience, have entered into possession of the property, or would have demanded its delivery to her by the defendant or would have required him to contract with her, or account to her for his occupancy. This she did not do, and in fact her testimony, taken altogether, shows that her claim was an afterthought. She says, answering a number of inquiries as to why she did not do any of the things usually indicative of ownership, that she "did not have any idea she was acquiring defendant's house, the house in which he was living at the time; that she did not have any idea about it, but she knew she had bought lot 17; that she knew defendant had erected a two-story brick building on a part of lot 17 east of Vermont avenue, but did not know the property belonged to her until the city condemned the 60 feet of ground for Vermont avenue in 1904, that was the first time she knew it."

[2] If it be true that plaintiff discovered what she now claims to be the extent of her rights under the deed in 1904, as she testifies,

she continued for 7 years thereafter, or until the institution of this suit, to sit supinely by, a daily witness of defendant's dominion over the property, without even notifying him of her claim. Facing this fact of which she gives express testimony, a comment upon credibility is superfluous. But let it be granted that she did discover in 1904 that under the deed she was entitled to the entire lot, the evidence all points to the conclusion that the minds of the parties never met upon a sale of the lot, but that they did meet upon a sale of that part of same lying west of Vermont avenue. This being true, we find the allegations of the cross-bill, the substance of which is set forth in the statement, omitting therefrom the phraseology of pleading, ample to afford relief in equity on the ground of mutual mistake.

[3] That a mistake of law pure and simple will not afford an adequate ground for relief is well settled; but the timeworn maxim that "ignorance of the law excuses no one" has its limitations and is confined to mistakes as to the general rules of law, but has no application to mistakes of persons as to their own private rights and interests. *Pom. Eq. Jur.* (3d Ed.) § 841 et seq. In recognition of this doctrine we have several times held that the mutual mistake of the parties to a deed as to the grantor's interest in the land at the time it was conveyed is one against which equity will afford relief. *Castleman v. Castleman*, 184 Mo. loc. cit. 445, 83 S. W. 757, and cases; *Meek v. Hurst*, 223 Mo. loc. cit. 696, 122 S. W. 1022, 185 Am. St. Rep. 581, and cases. See, also, the well-considered case of *Burton v. Haden*, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1038, which cites and discusses many earlier cases. An application of this doctrine is, in our opinion, appropriate here.

The fact that the plaintiff paid the taxes on the entire lot for the years of 1910 and 1911 does not lessen the force of the conclusion that the mistake as to the description of the lot in the deeds was not mutual. At best these payments, if made in good faith, were but circumstances manifesting acts of ownership, but exercised long after the contract of sale had been consummated and after plaintiff says she discovered she had bought the entire lot, they are possessed of little probative force.

In this view of the case it becomes unnecessary to discuss questions as to the intention of the grantor to be deduced from the deeds, or concern ourselves with the old learning as to whether monuments take precedence over courses and distances, or the plea of the statute of limitations as applicable to a grantor, who after conveyance holds adversely to his grantee. These are all foreclosed upon the finding herein that the deeds were based upon a mistake mutual to both parties, which results in an affirmance of

the judgment of the trial court with the direction that same be so modified that the deed heretofore made March 30, 1896, by defendant and wife to L. S. Reber as trustee for Kate E. McIntyre, and the deed made by defendant and wife September 2, 1904, to Kate E. McIntyre, be reformed so that the descriptions therein shall correctly set forth that part of said lot 17 lying west of Vermont avenue which was intended to be conveyed by defendant to said grantees in the original deeds; and it is so ordered. All concur.

STATE ex rel. ODELL v. JOHNSON et al.,
Judges. (No. 19015.)

(Supreme Court of Missouri. Feb. 9, 1916.)

MANDAMUS ~~§~~31—SUBJECT OF RELIEF—ACTS OF COURT—ASSIGNMENT OF CAUSES.

The alternative writ of mandamus, issued to a circuit judge to compel a special assignment of a cause for trial in violation of rules of court en banc, requiring assignments to be made in certain order, will be quashed and peremptory writ denied.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. ~~§~~31.]

In Banc. Mandamus by the State, on the relation of Ruby E. Odell, to compel a special assignment of relator's cause, by Frank G. Johnson, Judge of the Assignment Division No. 5 of the Circuit Court of Jackson County, and another. Heard on the report of the commissioner recommending denial of a peremptory writ and quashing of the alternative writ. Alternative writ quashed, and peremptory writ denied.

C. W. Prince and E. A. Harris, both of Kansas City, and J. E. Westfall, for relatrix. Clyde Taylor, John H. Lucas, and Charles A. Stratton, all of Kansas City, for respondents.

BOND, J. I. An original writ of mandamus was awarded by this court upon the relation of Ruby E. Odell, directed to the presiding judge of the circuit court of Jackson county sitting in the assignment division of that court by the authority of rule 18, adopted by the court, which imposed on him the duties of controlling the docket and assignment of causes. Our writ required said presiding judge to show cause why he should not make an immediate assignment and setting for trial of a certain suit pending in said court, brought by the relator against the Metropolitan Street Railroad Company and the Standard Oil Company. To this alternative writ the presiding judge at the time and his successor made returns praying for the quashing of our writ. Relator moved for judgment on said returns and thereafter filed an answer to them, wherefore a special commissioner was appointed to take the evidence and report his findings, and state his conclusions of law to this court. In compliance with

this reference, Commissioner Hon. Willard P. Hall has made his report and has recommended that the alternative writ of mandamus awarded herein be quashed, and the prayer for the peremptory writ be denied. Counsel for the respective parties having been heard in oral argument and upon a submission of briefs on the issues involved, and the evidence taken before the commissioner, the cause was thereupon submitted to this court en banc for decision.

II. It is urged on behalf of the relator in support of the writ that the presiding judge of the assignment division of the circuit court of Jackson county was under the legal duty to assign her cause of action for trial to one of the divisions of that court in its regular numerical order, and the failure so to do was in disregard of rule 22 adopted by that court in the following terms:

"Assignment of Causes. At least two weeks before the beginning of each term, and as often thereafter as may be necessary, the presiding judge shall cause to be posted on the bulletin boards in the assignment division and the circuit clerk's office a notice requiring attorneys to file with the clerk of the assignment division on or before the date fixed in said notice a memorandum of each case at issue of which a trial is desired, between the numbers stated in said notice. A separate memorandum shall be filed for each case, and such memorandum shall contain the number and title of such case, and the attorneys of record of each of the parties thereto. * * * The presiding judge shall, from time to time make and cause to be 'posted as above,' settings of the cases thus noted for trial. On the day that such cases are set for trial, they shall be placed in numerical order on the 'trial' list, and the first case on such 'trial' list shall be assigned to the next waiting division. * * *"

The transcript of the evidence filed by the commissioner shows that on the 20th of January, 1911, the foregoing rule was modified by the court en banc, and publication of such modification was made in the daily record, to wit:

"Notice. Beginning with the January term, a new plan will be inaugurated in the assignment of cases against the Metropolitan Street Railway Company. Twelve of the lowest numbered cases (no more than three cases in which plaintiffs are represented by the same attorneys) will be set down for each week. The court will expect plaintiffs to be ready when cases are reached for assignment and will expect defendant to keep three attorneys constantly available and ready to try any of such cases."

The report of the special commissioner further shows that in January, 1913, another change and modification was made in the foregoing rules, viz.:

"Metropolitan cases were separately listed without any limitation as to number except that the assignment judge would not set more cases for trial than thought proper, and enough cases would be set for trial to keep at least three divisions of the court always busy. And it was ordered that attorneys for plaintiffs in Metropolitan cases should receive twenty-four hours' notice of the setting of their cases for trial."

The authority of the circuit court of Jackson county en banc to make reasonable rules for the conduct of its business and modification thereof was inherent in its constitution

as a court of general jurisdiction, and specially conferred by a statute including that court and defining its powers. Section 3970, R. S. Mo. 1909, provides:

"In addition to the ordinary power of making rules conferred by the general law, the court en banc may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein."

Session Acts 1913, p. 212, provides:

" * * Members of the court en banc * * * shall have power to frame and enact such rules for the numbering of civil cases now pending, or hereafter brought therein, for the proper distribution of civil cases for trial and disposition among the nine divisions of said court at Kansas City, and for the transfer of civil cases to and from each of said seven divisions, and the Independence divisions, which rules may in like manner be changed from time to time, as may be found necessary. * * **"

See *Allen v. Calhoun*, 6 Cow. (N. Y.) 32; *Carpenter v. Jones*, 121 Cal. 862, 53 Pac. 842.

The foregoing rules and modifications thereof were in force when this writ was prayed. The facts as to the suit brought by plaintiff against the Metropolitan Street Railway Company and Standard Oil Company were these: Said suit was begun on the 26th of November, 1910. Its docket number was 54386. Owing to the pleadings filed by defendants and the efforts made by one of them to remove the case, and owing to the retracy of the original counsel for plaintiff, no issue was reached on the original petition, but an amended one was filed on the 9th day of April, 1914. To this amended petition separate answers were filed by the defendants on July 18 and August 21, 1914. In January, 1915, court en banc turned back in the listing of cases and made two calls, first, for the listing of cases for trial from No. 16 to 53997, and thereafter in the same month called for all cases from No. 54001 to 70000. On February 1, 1915, relator listed her case for trial under the last call. On June 7, 1915, relator filed a reply to the answers of defendants and at the same date filed a motion praying for cause of action be specially set or assigned for trial. This motion was overruled on the 9th of June, 1915, because in conflict with the rules then in force regulating the order of trials of causes to which action of the court relator duly expected.

If the replies filed by relator were essential to the joinder of issues on the answers to her suit against respondent, then her cause of action was not assignable for trial under the rules and amendments thereof, because it had not been previously listed. But waiving that technical point, and construing her replies to have been unnecessary for reason that in their essence the answers of the two defendants were only general denials, the question remains whether, under the record and the rules and the amendments thereof in the circuit court then in vogue, that court abused its discretion in overruling relators action.

III. In his finding as to the workings of the court rules as amended, the learned commissioner finds: That they were formed to expedite the trial of Metropolitan cases and have expedited the trial of all other cases as well; that the capacity of the nine divisions of the court does not suffice to keep pace with its docket, hence no cases are tried at the return term, and the court, when cases are reached which are returnable to the term preceding the one in session, generally turns back to the beginning of the docket. That in so doing it does not necessarily turn back on the two lists of cases (Metropolitan and general) at the same time, for one may be ahead of the other, since no case is listable until at issue, and every case bears, at all times, its original number, and, when listed, must be listed according to the date of its original number, and not the date when issue was joined.

Under this system of return calls of its docket from the beginning, the court also postpones the trial of cases listed under such calls to those which have been listed under previous calls and are undisposed of. These latter are assigned for trial before the cases newly listed. The application of this order of business to the matter in hand was that the court en banc called on November 5, 1913, for a listing of general cases, and on February 30, 1913, for a listing of Metropolitan cases—in both instances between the same numbers, to wit, 16 (that being the beginning of the docket) and 59986. During the year 1914, the court called for a listing of two classes of cases from 59986 to a higher number. In following the plan provided for in its rules as modified, the court did not again call for a listing of its docket from the beginning within numbers which would include relator's case until January 15, 1915, and it was after this call that her case (No. 54836) was listed on February 1, 1915, as previously stated. At the time relator's case was thus listed, there remained unassigned other Metropolitan cases of higher numbers previously listed under regular calls. Upon these facts the commissioner finds, viz.:

"Relator's case has been treated regularly and consistently in accordance with the system in force in the circuit court as herein outlined. No claim to the contrary is made for the relator. Relator's motion to assign her case for trial was, in effect, for a special setting of her case, and was denied for that reason and because in conflict with said system."

As the court overruled the motion of relator to set her case specially for trial because that would result in a violation of the orderly procedure prescribed for the calendar of its docket and the trial of the cases pending thereon, it necessarily follows that the legality of its action in so doing is the only thing to be considered. The theory of relator is that the modification of rule 22 (169 S. W. xi) wrought out a plan which gave the trial of cases listed generally a right of precedence over the list of cases against the

Metropolitan Street Railway Company in contravention of the Constitution, to wit:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Const. of Missouri, § 10, art. 2.

It has been uniformly held that this provision does not deprive the courts of general jurisdiction of their power to make reasonable rules governing the order of trial of cases and regulating their proceedings in their administration of the law; that the exercise of such inherent and necessary power on the part of the courts does not violate the above quoted clause of the organic law. *Toledo v. Preston*, 50 Ohio St. 361, 34 N. E. 353; *Ex parte Pollard*, 40 Ala. 77; *Stamey v. Berkley*, 211 Pa. 313, 60 Atl. 991; *Bruns v. Crawford*, 34 Mo. 330; *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496; *Rauchberger v. Street Ry. Co.*, 52 Misc. Rep. 518, 102 N. Y. Supp. 561; *Merchants' Bank v. Greenhood*, 16 Mont. 395, 41 Pac. 250, 851; *Maloney v. Hunt*, 29 Mo. App. 379; *Smith v. Keepers*, 5 Civ. Proc. R. (N. Y.) 66; *Honeywell v. Shaffer*, 9 N. Y. Supp. 540; *Jensen v. Fricke*, 133 Ill. 171, 24 N. E. 515; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027.

There being no constitutional objection to the rules of the circuit court and no evidence of their intrinsic unfairness, favoritism, or injustice under the facts stated in the record and reported by the commissioner, it follows that there is no error in the rule of the court declining to specially set for trial the case of relator against respondent contrary to the order in which it would be triable under the rules as amended.

IV. We have disposed of this question as to the validity of the rules of this court on the merits and without discussing its reviewability by a writ of mandamus issuing out of this court. We have done this on account of the importance to the court and litigants of a speedy determination of the legality of the rules for the exercise of the machinery of the court. We do not mean to concede by the course taken in this case that a precedent shall be established for the use of our writ of mandamus in such cases. That writ is never available to compel a court to render a particular judgment or ruling on a matter resting within its judicial discretion. The officer vested with a judicial discretion may be compelled to exercise it, but the manner of its exercise or decision to be made in so doing cannot be controlled by a writ of mandamus, for that would wrest from him the very official discretion confided by law. *State ex rel. v. Jones*, 155 Mo. 576, 56 S. W. 307. Nor is there any intimation to the contrary in any of the cases cited by the learned counsel for the relator in the present proceeding.

For the reasons stated in the preceding

paragraphs of this opinion, our alternative writ of mandamus is quashed, and the application for a peremptory writ is denied.

GRAVES and WALKER, JJ., concur. WOODSON, C. J., and FARIS, BLAIR, and REVELLE, JJ., concur in result.

STATE v. LEE. (No. 18991.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. LARCENY \Leftrightarrow 56—CORPUS DELICTI—EVIDENCE.

That accused, charged with hog theft, was found in possession of a hog which belonged to prosecutor, and which prior to that time had been running at large on the range extending from the home of the prosecutor to that of accused, was not alone evidence of the corpus delicti, under the rule that the possession of property does not of itself raise any presumption, nor is it any evidence that the property was stolen, and there must be other evidence of the corpus delicti.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 149; Dec. Dig. \Leftrightarrow 56.]

2. LARCENY \Leftrightarrow 55—EVIDENCE—SUFFICIENCY. Evidence held not to sustain a conviction of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. \Leftrightarrow 55.]

3. LARCENY \Leftrightarrow 77—EVIDENCE—INSTRUCTIONS.

Where accused, charged with hog theft, admitted that the hog was taken from the range and placed in his barn by reason of his orders to his two employés, and the issue was whether the animal was taken innocently or feloniously, an instruction on the question of presumption of guilt arising from recent unexplained possession of stolen property should not be given.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202-204; Dec. Dig. \Leftrightarrow 77.]

4. CRIMINAL LAW \Leftrightarrow 761—INSTRUCTIONS ASSUMING FACTS—THEFT.

Where on a trial for larceny the question whether the property alleged to have been stolen had been stolen, an instruction on the presumption of guilt arising from recent unexplained possession of stolen property which assumes that the property was stolen was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771, 1853; Dec. Dig. \Leftrightarrow 761.]

Bond and Revelle, JJ., dissenting.

In Banc. Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Albert Lee was convicted of larceny, and he appeals. Reversed, and defendant discharged.

Under an indictment charging the defendant with stealing six hogs, the property of one Walter Reynolds, the defendant was tried in the circuit court of Butler county, found guilty, and his punishment assessed at two years in the penitentiary. Defendant has duly perfected an appeal to this court.

The evidence upon the part of the state tends to show that Walter Reynolds, the prosecuting witness, lived on a farm about three-fourths of a mile north of the farm upon which the defendant lived, near Neely-

ville, in Butler county, Mo. Reynolds owned a small black sow. The sow was marked with a crop and split in the left ear, and an aluminum button, bearing the name of "Walter Reynolds" on one side and "Neelyville, Missouri" on the other side, was fastened in the sow's right ear. This button was about the size of a quarter. The sow was turned out on the range which extended up to defendant's place, and would come up to prosecuting witness' home nearly every day. During the last week in September, 1913, she failed to come up as usual, and Mr. Reynolds did not see the sow again until October 14, 1913, on which date he found the sow in defendant's barn. At that time she had five small pigs, and was fastened up in a stall in the barn with some other hogs.

It appears that on October 13th one Bradford and a Mr. Molloy went to defendant's place in search of some missing hogs. They told defendant that they had heard he had some hogs of theirs. Thereupon defendant said, "Come on and I will show you," and he took them to the barn and showed them the hogs that were fastened in the stall, but they did not find the hogs they were looking for. They noticed a black sow with five pigs in the stall at that time. Defendant said the hogs in the barn belonged to him. Later that same day Bradford and one McClain went back to the farm, but it does not appear that defendant was then present. On the next day, October 14th, Bradford, Molloy, and prosecuting witness and his mother went to defendant's farm, but it does not appear that the defendant was present or that they had any conversation with him. When they reached the barn, Reynolds examined the black sow, and, upon raking the mud from her ear, found the aluminum button bearing his name. Some time later, on that day, the prosecuting witness instituted replevin suit to replevin the sow, and returned to defendant's place with the constable and Mr. McClain. It appears that McClain and the prosecuting witness went to the barn, and that the constable went out into the field, where he found defendant at work. There the constable served the replevin writ upon the defendant, and the defendant said that the hogs did not belong to Reynolds. The officer told defendant that Reynolds had identified the black sow by the aluminum button in her ear, and defendant said: "If that black sow has got Walter Reynolds' button on her ear, I will eat it." Defendant then accompanied the officer to the barn, and they scraped the mud off of the sow's ear and showed defendant the button. It does not appear what defendant did or said after that. None of the state's witnesses knew who put the sow in the barn or how long she had been there. They testified that the pigs appeared to be about one week old. Some of the witnesses said that the pen in which the hogs were

fastened in the barn was boarded up about four feet, and that it was dark in there. Other witnesses described the pen as a stall with the opening boarded up about four feet. The prosecuting witness' mother testified that she accompanied the men to the barn when they found the sow and pigs in the barn with a lot of other hogs, one of Mr. Abington's, one of Mr. McClain's, and one that the witness did not know.

The defendant testified in his own behalf that on October 12th he owned a black sow which was running loose on the range, and that he was expecting her to have pigs. At that time he had two hired hands working for him, one a "hobo" called Shorty, and the other was Howard Rowe, whose home was somewhere in Arkansas. The defendant, before starting on a trip to Poplar Bluff, told these two hired hands that if the black sow came up that day to put her in the barn, because he was expecting her to have pigs. When he returned from Poplar Bluff the next day, the hired hands told him that they had put the black sow in the barn, and that during the night she had delivered pigs. When Bradford and Molloy came to his house on the 13th of October and inquired for hogs, he took them to the barn and opened the door and showed them the hogs in the barn. The defendant at that time saw the black sow and the pigs, and supposed they were his, but said that it was a little dark in there, and that he did not pay much attention to the hogs at that time, and that he did not know that the black sow was not his until the replevin writ was served on him the next day, at which time he went to the barn with the officer, and was shown the button in the sow's ear. He testified that his sow and the prosecuting witness' sow were about the same size, and that his sow had a crop in the left ear, and that nobody could have told that the sow he had in the barn belonged to the prosecuting witness until the mud was scraped off her ear, which was the first time that he had information that the sow did not belong to him. Defendant's sow finally came up two or three weeks afterwards without any pigs. He presumed that something had destroyed them. He testified that he did not know where "Shorty" went after he quit working for him, and that Rowe lived somewhere in Arkansas.

(It appears that defendant was not indicted until April 24, 1914, some 6 months after the occurrence of the alleged offense, and that the trial did not occur till April, 1915, 18 months after the date of the alleged offense.)

Defendant's wife corroborated him in regard to the two hired hands putting the hog in the barn while the defendant was away in Poplar Bluff. Defendant's son Willie also corroborated the defendant, and testified further that he had just come home from school and saw Shorty and the other hired hand driving the black sow around to the barn door, and that she did not have pigs at that

time. The son also heard "Shorty" tell defendant, at breakfast the next morning, that they had put the black sow up.

In rebuttal, the prosecuting witness testified that he never saw "Shorty" or Rowe about the place. Witnesses Molloy and Bradford testified that they had been around defendant's place about four times in October, but that at none of those times had they seen "Shorty" or Rowe working there. Upon cross-examination they admitted that "Shorty" and Rowe might have been working for the defendant on those occasions and they had failed to see them, and admitted that on one or two occasions they had been to defendant's place and had not seen him there.

Instruction No. 6 given on behalf of the state was as follows:

"If the jury believe from the evidence that soon after the commission of the offense charged in the indictment, if you believe from the evidence an offense was committed, the property taken at the time of the commission of the offense was found in the possession of the defendant, such possession is presumptive evidence of the defendant's guilt, and, if such possession of such stolen property is not satisfactorily explained by defendant, it will be conclusive evidence of his guilt; and the jury are further instructed that it devolves on the defendant to explain such possession."

El. R. Lentz, of Poplar Bluff, for appellant. John T. Barker, Atty. Gen., and S. P. Howell, Asst. Atty. Gen., for the State.

WILLIAMS, C. (after stating the facts as above). [1, 2] Appellant contends that there was not sufficient proof of the corpus delicti, and that therefore the evidence was insufficient to support the verdict. We think this point well taken. The facts shown by the testimony are stated fully in the foregoing statement, and it becomes, therefore, unnecessary to restate the same in detail here. In substance, the evidence discloses that the defendant was found in possession of a hog which belonged to the prosecuting witness, and which, prior to that time, had been running at large on the range which extended from the home of the prosecuting witness to that of the defendant. Defendant's evidence tended to show that the hog was similar in description to one of his own upon the range and was by his two employes placed in the barn under the mistaken belief that it was the property of defendant.

The mere fact that the hog disappeared from the range would not be sufficient proof that the hog was feloniously taken therefrom; this because it is a matter of common knowledge that stock running out upon the range, in common with other stock, may disappear therefrom by becoming mixed up with the other stock and following it off, or by being driven off by mistake, just as readily as it may be feloniously taken therefrom, and the mere proof of disappearance from the range would not, in and of itself, justify the presumption that it had been stolen. And the further fact that the hog was afterwards

found in defendant's possession would also fail to prove that the hog had been stolen. The possession by one of the property of another does not raise any presumption that the property was stolen. The correct rule in this regard is stated as follows:

"The possession of property does not of itself raise any presumption, nor is it, indeed, any evidence that the property was stolen. There must be other evidence of the *corpus delicti*." 8 Ency. of Evidence, pp. 99, 100, and cases therein cited.

The disappearance of the hog from the range and the subsequent finding of same in possession of the defendant would, no doubt, furnish material for links in a chain of circumstantial evidence if they were accompanied by other incriminating circumstances. But the necessary incriminating circumstances are here absent. The conduct of the defendant at each time he was questioned about the hogs was not that of a man trying to conceal, and therefore the conduct of a guilty man, but he showed at all times a ready willingness to have the hogs seen and examined. The facts disclosed are not inconsistent with the theory of defendant's innocence. Very appropriate to the situation here is the following language of the Court of Appeals of New York in *McCourt v. People*, 64 N. Y. 583, loc. cit. 586, 587, to wit:

"Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and for this reason it is that, the other constituents of the crime being proved, it must ordinarily be left to the jury to determine, from all the circumstances, whether the criminal intent existed. In some cases the inference is irresistible, and in others it may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a criminal purpose. But there are usually found in connection with an act done, which is charged to be criminal, attending circumstances which characterize it, and, if these are absent, or the circumstances proved are consistent with innocence, a conviction cannot be safely allowed."

It does not appear that the prosecuting witness had any conversation with defendant prior to the time the writ of replevin was served, and, judging from the conduct of defendant when questioned by Bradford and Molloy concerning the lost hogs of Bradford, it would appear that the prosecuting witness could easily have obtained possession of his hog had he gone to defendant and made his claim instead of going to the trouble of bringing a suit in replevin. While it is true that defendant's conduct does not necessarily establish his innocence, yet the same may be mentioned for the purpose of showing that it contained nothing incriminating. The bur-

den was upon the state to establish defendant's guilt, and not upon the defendant to establish his innocence. The evidence at most can only be said to raise a suspicion of guilt against the defendant, but suspicion alone is never sufficient to support a verdict. *State v. Jones*, 106 Mo. 302, 17 S. W. 306; *State v. Morney*, 196 Mo. 43, 93 S. W. 1117; *State v. Ruckman*, 253 Mo. 487, 161 S. W. 705.

After carefully considering the evidence in all of its phases, we have reached the conclusion that it falls short of the quantum of proof which would justify the triers of fact in finding, beyond a reasonable doubt, that the defendant is guilty. *State v. Counts*, 234 Mo. 580, 137 S. W. 871; *State v. Claybaugh*, 138 Mo. App. 360, loc. cit. 364, 122 S. W. 819; *State v. Bass*, 251 Mo. 107, 157 S. W. 782.

[3] II. The court erred in giving said instruction No. 6, on the question of the presumption of guilt arising from the recent unexplained possession of stolen property. In this case defendant admitted that the hog was taken from the range and placed in his barn, by reason of his orders to his two employes. The question at issue, therefore, was not the identity of the person who took the hog, but the intent with which the hog was taken—whether innocently or feloniously taken. Under such conditions this instruction, the function of which is to aid only in determining the identity of the felonious taker (*State v. Warden*, 94 Mo. 648, loc. cit. 652, 8 S. W. 233), should not have been given (*State v. Christian*, 253 Mo. 382, loc. cit. 396, 161 S. W. 736).

[4] The instruction is also subject to criticism in another respect, viz., in one portion of the instruction it assumes that the property was stolen. In a case where there was no dispute concerning the state's claim that the property in question had been stolen, this assumption would, perhaps, not be considered as harmful, but in a case like the present, where that issue is a contested one, the assumption of that fact in the instruction would, no doubt, work serious injury to the rights of the defendant.

The judgment is reversed, and the defendant discharged.

ROY, C., concurs.

PER CURIAM. The above cause coming into court in banc, the opinion therein by WILLIAMS, C., is modified and adopted.

WOODSON, C. J., and GRAVES, WALKER, FARIS, and BLAIR, JJ., concur. BOND and REVELLE, JJ., dissent.

STATE v. WEBB. (No. 18989.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. ASSAULT AND BATTERY \Leftrightarrow 58—FELONIOUS ASSAULT—STATUTORY PROVISIONS.

Under Rev. St. 1909, § 4483, punishing maiming, wounding, or disfiguring of one by another under circumstances constituting murder or manslaughter if death ensued, it is not necessary to charge or prove malice, or that the assault was made and the wounds inflicted with a dangerous weapon, or that the wounds inflicted were of a dangerous character, or such as were likely to produce death, and it is only necessary to show that the infliction of the wounds were under circumstances not excusable or justifiable, and which would constitute murder or manslaughter if death ensued.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 83, 84; Dec. Dig. \Leftrightarrow 58.]

2. ASSAULT AND BATTERY \Leftrightarrow 92—FELONIOUS ASSAULT — STATUTORY PROVISIONS — EVIDENCE.

Evidence held to justify a conviction of felonious assault punishable under Rev. St. 1909, § 4483.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. \Leftrightarrow 92.]

3. CRIMINAL LAW \Leftrightarrow 1159 — VERDICT — CONCLUSIVENESS.

A conviction, sustained by sufficient evidence, if believed, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. \Leftrightarrow 1159.]

4. ASSAULT AND BATTERY \Leftrightarrow 78—FELONIOUS ASSAULT—INFORMATION—REQUISITES.

An information, charging felonious assault punishable under Rev. St. 1909, § 4483, need not allege the particular means by which the maiming and wounding were done, as the same may be accomplished by any means.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 116-122; Dec. Dig. \Leftrightarrow 78.]

5. ASSAULT AND BATTERY \Leftrightarrow 80—FELONIOUS ASSAULT—INFORMATION—EVIDENCE.

A felonious assault, punishable under Rev. St. 1909, § 4483, may be charged in the information to have been committed by different means, and proof of any will sustain the information.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 126; Dec. Dig. \Leftrightarrow 80.]

6. ASSAULT AND BATTERY \Leftrightarrow 86—FELONIOUS ASSAULT—EVIDENCE—JUSTIFICATION.

That prosecutor, some hours prior to the felonious assault by accused on him, had, as superintendent of schools, chastised accused's son for infringement of school rules did not justify the felonious assault, committed by accused in violation of Rev. St. 1909, § 4483, punishing maiming, wounding, or disfiguring.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 94, 95; Dec. Dig. \Leftrightarrow 86.]

7. CRIMINAL LAW \Leftrightarrow 1170—EVIDENCE—HARMLESS ERROR.

Accused cannot complain of the exclusion or withdrawal of evidence, where the ruling is in his favor, because the evidence excluded or withdrawn tended to show an unlawful motive for the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. \Leftrightarrow 1170.]

8. ASSAULT AND BATTERY \Leftrightarrow 96—FELONIOUS ASSAULT—INSTRUCTIONS.

Where, on a trial for felonious assault, the evidence showed that accused assaulted prosecutor, and severely beat him over the head, eyes, and ears, where serious and permanent bodily injuries could be easily inflicted, that accused wore a heavy ring, and that he used such force as to injure his own hand, and that at the time of the assault the head of prosecutor was on hard, dry ground, a charge that the law presumes that a person intends the natural consequences of his acts, and that if accused assaulted prosecutor in a manner likely to cause death or great bodily harm, the law presumed that he intended to kill him or do him some great bodily harm, was warranted, in the absence of anything to indicate that accused did not intend to inflict the wounds which he did inflict, or that they were not the ordinary consequences of his acts.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 142-150; Dec. Dig. \Leftrightarrow 96.]

9. CRIMINAL LAW \Leftrightarrow 1172 — INSTRUCTIONS — ISSUES—HARMLESS ERROR.

Where an information charged in one count an assault with intent to kill or do great bodily harm, and in another count charged a wounding and maiming, an instruction applicable to the first count was not prejudicial to accused, convicted under the second count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. \Leftrightarrow 1172.]

Woodson, C. J., and Graves and Faris, JJ., dissenting.

In Banc. Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Melvin Webb was convicted of crime, and he appeals. Affirmed.

Prosecution by information filed in the circuit court of Audrain county, charging felonious assault upon D. E. Tugel. Trial; verdict of guilty; assessment of punishment at fine of \$200; appeal in regular form.

Evidence on the part of the state: The assaulted was, at the time of the difficulty, superintendent of public schools at Vandalla, in Audrain county, Mo., and defendant was an inhabitant of that town, having a son who attended the school over which prosecuting witness exercised superintendence. From record indicia it seems that the prosecuting witness had, in the morning prior to this assault, administered some punishment to the son of defendant, and that, after the noon recess, and as prosecuting witness was returning to the school, he was accosted by defendant, who said, "I want to see you." When close enough defendant seized prosecuting witness by the coat and vest and asked if he had slapped his boy. Upon receiving an affirmative reply, defendant struck the prosecuting witness, who with two packages of books, which he held, attempted to ward off and shield himself from defendant's blows. After being struck several times the prosecuting witness went to the ground, which is described as hard and dry and a road belabored with much traffic. Defendant then pounced upon and straddled the prosecuting

witness and beat him over the head, striking him frequently in the eyes, ears, and face. After prosecuting witness had twice stated in reply to defendant's two inquiries that if he had been wrong he would apologize to the son, defendant, either voluntarily or because of the interference of others (the evidence is not clear), desisted from further assault. With the aid of others the prosecuting witness was then placed on his feet and taken home, where an examination of his injuries disclosed the following: His eyes were bloody, bruised, sore, and badly swollen, and he was unable to recognize the parties who had escorted him to his home. The lid of one eye was cut entirely through, and he was unable to use his right eye at all, with very little use of his left eye. The teeth on the right side of his jaw were loose, and the left side of his back, face, and ear were bruised for considerable time thereafter. Even at the time of the trial his hearing was seriously affected. He felt unable, for a week and a half after the assault, to perform his regular duties, and for quite a while suffered from nervousness and pain. The evidence also discloses that defendant usually wore a heavy finger ring bedecked with sets, and that at the time of the assault this ring was on one of his fingers.

On the part of defendant the testimony tended to show that upon the return of his son from school at the noon hour he was informed that the prosecuting witness had punished him in school, and that soon thereafter he encountered the prosecuting witness on the street and asked him "why he had beat his boy over the head," to which the prosecuting witness replied, "I am running that school." After some little conversation on this subject, the prosecuting witness became angry and struck the defendant, whereupon a fist fight ensued. Upon being told by the prosecuting witness that he would apologize for the punishment that he had administered to the son, the defendant voluntarily withdrew from the difficulty.

Fry & Rodgers, of Mexico, Mo., and Pearson & Pearson, of Louisiana, Mo., for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

REVELLE, J. (after stating the facts as above). [1-3] I. Instructions on both common and felonious assault were given, but defendant insists that there is no evidence upon which to predicate the instruction on felonious assault, or the verdict which convicts him of that offense. The facts are fully set out in the preceding statement, and repetition would but incur. In disposing of this and other assignments it must be borne in mind that the information is bot-tomed, the cause was submitted, and the verdict based, upon section 4483, R. S. 1909, which is the maiming or wounding statute, and which prescribes a different and less of-

fense than that defined by either section 4481 or 4482. Under this section it is neither necessary to charge or prove malice, or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. *State v. Bailey*, 21 Mo. 484; *State v. Nieuhaus*, 217 Mo. loc. cit. 348, 117 S. W. 73; *State v. Janke*, 238 Mo. loc. cit. 382, 383, 141 S. W. 1136. This assault was clearly committed, if the state's evidence be given credence, under circumstances which would have made it murder or manslaughter had death ensued, and this notwithstanding that the wounding and maiming were done only with the fists. *State v. Hargraves*, 188 Mo. 337, 87 S. W. 491, and cases supra. That the prosecuting witness was wounded and received great bodily harm abundantly appears from the facts. *State v. Leonard*, 22 Mo. 449; *State v. Nieuhaus*, 217 Mo. loc. cit. 347, 117 S. W. 73. To support this charge it is not necessary to establish that the wounds inflicted were of a dangerous character, or such as are likely to produce death. *State v. Agee*, 68 Mo. 264; *State v. Bailey*, 21 Mo. 484; *State v. Nieuhaus*, 217 Mo. loc. cit. 347, 117 S. W. 73; *State v. Janke*, 238 Mo. 378, 141 S. W. 1136. The evidence is sufficient to sustain the verdict, and we cannot invade the jury's function.

[4, 5] II. Complaint is made of instruction No. 3, because it did not confine the means by which the assault was made to "a certain large finger ring and with hands and fists," which is the allegation in the information. In answer to this contention it suffices to say that, in the first place, it was not at all necessary to allege in the information the particular means by which the maiming and wounding were done, as this may be accomplished by any means; and, in the second place, it is well settled that an assault may be charged to have been committed by different means, and proof of any will sustain the allegation. *State v. Nieuhaus*, 217 Mo. loc. cit. 344, 117 S. W. 73; *State v. Hottman*, 196 Mo. 110, 94 S. W. 237; *State v. Myers*, 193 Mo. 225, 94 S. W. 242. Aside from this, and if it be conceded that the instruction is somewhat broad, we do not believe, in view of the theories and evidence upon which this case was submitted and the other instructions given, that the defendant was thereby prejudiced. In fact, the main insistence of defendant here is that the means alleged in the information and by which the proof discloses the assault was made is of such a character that a felonious charge cannot be bot-tomed thereon. This assignment must be ruled adversely to defendant.

[6, 7] III. It is also said that error was committed in withdrawing from the jury's consideration the record indicia that the

prosecuting witness had, some hours prior to the assault, and as superintendent of schools, chastised defendant's son for some infraction of school rules. It cannot be, and it is not, seriously contended that this could justify the assault. In the first place, had death ensued as a result of this assault the fact of this chastisement would not have reduced the crime from murder to manslaughter, for it constituted no lawful provocation as distinguished from just provocation, which is necessary to reduce. In fact, when we consider the time that had elapsed and the conduct of defendant after he had learned of the chastisement and before he made the assault, it can hardly be said that the punishment administered to his son amounted to even just provocation had death ensued, but this is unimportant; for even had his provocation been sufficient to reduce from murder to manslaughter, in the event of death, it is neither a defense to or in mitigation of this charge, because it is written that the offense is complete when committed "in cases and under circumstances which would constitute murder or manslaughter if death had ensued." The most that can be said of this evidence is that it tended to establish an unlawful motive for the assault; and, while it was insisted in argument that no person would commit murder or inflict great bodily harm because of this provocation, the records of this court and human experience establish the contrary. *State v. Heath*, 221 Mo. 565, 121 S. W. 149; *State v. Heath*, 237 Mo. 255, 141 S. W. 26. The exclusion or withdrawal of this evidence, if error, was error in defendant's favor, and of it he cannot complain.

[8, 9] IV. It is finally insisted that instruction No. 7 should not have been given. This instruction is as follows:

"The court instructs the jury that the law presumes that a person intends the natural and probable consequences of his acts, and if you believe from the evidence in the case that defendant assaulted D. E. Tugel in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or do him some great bodily harm."

No fault is found with its form, the complaint being that there was no evidence from which the jury could reasonably find that the defendant made the assault in a manner likely to cause death or great bodily harm. In this connection counsel for defendant say:

"He was not and there was no proof that he was greatly maimed, wounded, or disfigured. The glaring fact that the result of his fists did not cause death or great bodily harm refutes the presumption that defendant intended to kill or do great bodily harm."

With this we cannot agree. The evidence discloses, as heretofore stated, that defendant assaulted the prosecuting witness, violently struck and severely beat him over the head, eyes, ears, and other parts of the body where serious, great, and permanent bodily injury could be easily inflicted. On one of his fingers he wore a heavy ring, and his statements after the difficulty disclose that

he had used such force and violence as to injure his own finger and hand. Without going into detail as to the character of the injuries inflicted, it is sufficient to say that they constituted great bodily harm. Considering also the fact that at the time they were being inflicted the prosecuting witness' head was on hard, dry ground, it cannot be said that his acts did not warrant the conclusion that he intended to do great bodily harm. While it is true that this instruction is given generally in cases where a deadly weapon is used, yet it is not because of the use of such a weapon that the instruction is proper; it is because the use of such a weapon is one fact tending to show his intention, but this does not mean that such an intention cannot be reasonably inferred from other facts and other means of attack. There is nothing whatever in this record to indicate that defendant did not intend to inflict the wounds which he did, nor is there anything to show that such were not the natural and ordinary consequences of his acts. It is our opinion that the evidence is sufficient to warrant the giving of this instruction. In this connection it might be further said that the information contained two counts, and that the state was entitled to have the law upon both counts fully declared. The first count charged assault with intent to kill, or do great bodily harm; while the second count, as heretofore stated, charged a wounding and maiming. This instruction was perhaps given more particularly in connection with the first count, on which defendant was acquitted, and to that extent he cannot complain. In view of the disclosures that the prosecuting witness was in point of fact severely injured, and nothing appearing to indicate that these injuries were not intentionally inflicted, it cannot be said that this instruction was prejudicial or improper.

We have reviewed the entire record in this case, and are of the opinion that the defendant has had a fair trial, and that the verdict is warranted by the evidence. The judgment is therefore affirmed.

WALKER, J., concurs. FARIS, J., dissents.

PER CURIAM. This cause having been transferred to court in banc from Division 2, on the dissent of FARIS, J., and having been reargued and submitted, the foregoing opinion of REVELLE, J., is adopted as the opinion of the court.

BOND, WALKER, and BLAIR, JJ., concur. WOODSON, C. J., and GRAVES and FARIS, JJ., dissent. FARIS, J., dissents in separate opinion, in which WOODSON, C. J., and GRAVES, J., concur.

FARIS, J. I am unable to concur in the majority opinion herein for three reasons, which I briefly summarize thus:

First. The doctrine announced in this case breaks down the distinction between a common assault and battery and a felonious assault, whereby maiming, wounding, disfiguring, and great bodily harm ensues.

Second. Instruction numbered 7 under the facts here (the producing cause and nature of the battery regarded) is misleading, erroneous, and harmful.

Third. Instruction 3 is broader than the information, in that it fails to confine the jury in their consideration of the producing causes of the effects found to the causes pleaded in the information. I shall briefly set forth the reasons I have in mind for these views.

I premise what I shall say to the first objection by eliminating the question whether section 4483, under which this prosecution is had, can be violated by an assault with the fists, or by the fists aided adventitiously by a finger ring. It may well be legally possible, under circumstances of great advantage taken, or of great disparity of size, or of age, or of physical condition, and of the exhibition by the accused of ferocious brutality in the infliction of the injuries, to eke out a violation of this statute with these weapons of nature. 5 C. J. 732. But in such case the information ought to aptly charge the facts which go to distinguish such a battery from the ordinary battery. *Jennings v. State*, 9 Mo. 862. For it is said in that case that:

"It is essential, in an indictment under the thirty-fifth section (now section 4483), to aver the circumstances themselves which, if death had ensued, would have made the offense manslaughter."

This has not been done in this case; hence the question suggested is not before us, and we are relieved from the duty of ruling it.

I am impressed with the view that the majority opinion, by its application of the definition of a wounding under said section 4482, and within the purview thereof, has not only trespassed upon the zone of demarcation which separates and distinguishes an ordinary assault and battery from the more serious and felonious assault and wounding, but has wiped out the boundary between the two utterly. Attend to the reasons for this view: The majority opinion says succinctly that, within the purview of said section 4483:

"It is not necessary to establish that the wounds inflicted were of a dangerous character, or such as are likely to produce death."

From such view it would seem logically to follow that any wound is sufficient.

"A wound," says Cyc. is "any injury to the person by which the skin is broken." 40 Cyc. 2866.

So the fault I find is that there are left no landmarks under the majority view in this case which point out the difference between one assault with the fists which constitutes a felony and another assault with the fists which constitutes but a mere misdemeanor. The statute of this state defines

by preclusion and denounces a common assault and battery thus:

"Any person who shall assault, or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall," etc. Section 4484, R. S. 1909.

Under the definition of a wounding-as contained in the majority opinion, any breaking of the skin is a wounding within the purview of said section 4483, whether done by old or young, weak or strong, healthy or unhealthy, by a single blow of the fist, or by many such blows. Given, a blow by which the skin is broken and blood flows ever so little, a felony has been committed, if a prosecuting attorney so wills; because, forsooth he who is struck might have fallen (under circumstances not even required to presently exist) into a river, or over a cliff, or against a rock, or on the paved street, or upon a concrete gutter edge, or other adventitious but convenient foreign substance, and death thereby follow. Thereby I fear the line separating a misdemeanor from a felony is destroyed. And one engaging in a fist fight becomes a felon, if mayhap he be persona non grata to the prosecuting attorney, in whose hands is thus placed the arbitrary power to make a felony of that which was before but a misdemeanor of the minor sort. I characterize such a misdemeanor as minor because of the well-known hot passions of men which impel them to resent an ill word with a swift blow.

Discussing the expression "great bodily injury," which confessedly is in pari materia with, but stronger than, the phrase "great bodily harm" of section 4483, supra, of our statute, as well as another point important and germane to one phase of this case, the Supreme Court of Arkansas said:

"The phrase 'great bodily injury' is difficult to define, for the reason that it well defines itself. It means a 'great bodily injury,' as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault, something more than attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances, but, as such an injury may, under some circumstances, be committed, and still the offender not be guilty of a felony, it is therefore not accurate to define 'great bodily injury' as a felony committed on the person." *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. loc. cit. 468, 46 Am. St. Rep. 154.

It is a significant fact, though concededly not a wholly decisive one, that in all the suggested forms for indictments found in the excellent local treatise of Judge Kelley, *there is not one* but which connotes the use of some

instrument, or implement of attack of a deadly or dangerous nature. Of an indictment under section 4483, for the use of nature's weapons, there is no form given. Kelley's Crim. Law & Pr. 580. Likewise is it significant that there has never before been in this state a case wherein a prosecution was had for a battery accruing from the use of mere fists. At least, a fairly exhaustive search for such a one has not been rewarded. These are the cases and the instrumentalities: State v. Leonard, 22 Mo. 449 (a large stone, said to have been a "deadly weapon"); Johnston v. State, 7 Mo. 183 (a stick of timber); Jennings v. State, 9 Mo. 862 (a large iron auger); State v. Freeman, 21 Mo. 481 (an iron shovel); State v. Bohannon, 21 Mo. 490 (a rock, and that maiming occurred in that a thumb was bitten off); State v. Thompson, 30 Mo. 470 (a hoe handle); State v. Moore, 65 Mo. 606 (a knife); State v. Agee, 68 Mo. 264 (a pistol); Carrico v. State, 11 Mo. 579 (a large piece of wood); State v. Bailey, 21 Mo. 484 (a large block of wood); State v. Davis, 29 Mo. 391 (a knife); State v. Janke, 238 Mo. 378, 141 S. W. 1136 (by beating with the fists, choking with the hands, and stamping on and kicking with the boot-ed foot, and by striking with a hard but unknown weapon); State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73 (a rawhide whip three-fourths of an inch in diameter and a heated iron stove lifter, nine inches long, an inch thick, and weighing one pound); State v. Munson, 76 Mo. 109 (a pistol); State v. Van Zant, 71 Mo. 541 (a knife); State v. Vaughn, 164 Mo. 536, 65 S. W. 236 (a knife); State v. Havens, 95 Mo. 167, 8 S. W. 219 (a large, heavy stone); State v. McQualg, 22 Mo. 319 (a knife); State v. Feaster, 25 Mo. 324 (a large stick); State v. Herreford, 29 Mo. 399 (a knife, *semble*); State v. Ray, 37 Mo. 365 (a knife).

Moreover, the majority opinion seems to treat section 4483 as if the fact of wounding by a mere breaking of the skin is the only prerequisite, and as if there were five offenses denounced by said section, viz.: (a) *Maiming*; (b) *wounding*; (c) *disfiguring*; (d) inflicting great bodily harm; and (e) acts endangering the life of another. On the contrary, the three first words are obviously ejusdem generis, so they may all be charged in the conjunctive in the same count of a single indictment. If they are not ejusdem generis, and if they do denounce five separate and distinct crimes, then the information in the instant case, as well as all of the known and used forms of indictment under this section, have offended for duplicity (Kelley's Crim. Law & Pr. 580; State v. Janke, *supra*; State v. Nieuhaus, *supra*; State v. Munson, *supra*; State v. Van Zant, *supra*; State v. Brown, 60 Mo. 141; State v. Moore, *supra*; State v. McQualg, *supra*; and practically all, if not all, others cited *supra*), for *they charge in one count two, three, and more often four, of the alleged distinct crimes*; besides, it has

been specifically held that such an indictment (i. e., an indictment charging a *wounding, disfiguring, and the infliction of great bodily harm*) charges but one offense (State v. Herreford, *supra*). That there is one case wherein the contrary is held in an obiter dictum, after an ample reason for the holding there was apparent and was given, does not alter this view. The conclusion, therefore, is inevitable that the wounding connoted by said section 4483 is a maiming and disfiguring wounding, from which great bodily harm ensues, and not a mere breaking of the epidermis and a feeble flow of blood superinduced by a blow from the fist in an ordinary battery.

Comprehensively examined it is fairly manifest that section 4483 is a statutory "catch-all," designed to cover and forbid criminal acts, productive of hurt and harm to others where life was put in jeopardy, whether such acts were done with or without malice; that is, whether done intentionally or by culpable negligence. Thus it was designed to supplement, and not to supplant, other germane statutes, wherein the strict letter, for lack of specific averment, fell short of defining the acts which constitute the offenses aimed at in section 4483. It not only includes acts which in other jurisdictions are designated as "aggravated assaults," but also other acts, done with imputable, but not express, malice, with or without an assault. It is not necessary under this section that there should be any actual injury, if the life of another be intentionally endangered (State v. Agee, 68 Mo. 264), nor that life be actually endangered, if there be a wounding and disfiguring to the extent of inflicting, or from which great bodily harm ensues (State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73), or obviously if there be a maiming, or a wounding, or a disfiguring, from which great bodily harm ensues; provided, the circumstances are such that if death had occurred the tort-feasor would, for his acts, have been guilty of either murder or manslaughter. It is clear that an intentional assault whereby life is endangered, or whereby great bodily harm ensues, is already fully covered by sections 4481 and 4482; that an intentional assault which produces a maiming or disfiguring in designated serious aspects is likewise forbidden by section 4480, while a common assault and battery is covered by section 4485. But it is not so clear that assaults with deadly or dangerous instrumentalities resulting in wounding, maiming, or disfiguring from which bodily harm, greater in degree than a common battery, but lesser in degree than those denounced in sections 4482 and 4480 and lacking the specific purpose and malice of section 4481, are so included. It is clear that acts of culpable negligence, where injuries short of death are inflicted, are denounced by said section 4483; that the endangering of life intentionally, and that the infliction of great bodily harm either by wounding, or

maiming, or disfiguring are also included. So the conclusion is deducible that the section denounces but two crimes: (a) The endangering of the life of another; and (b) the infliction of great bodily harm, either by (1) wounding, (2) maiming, or (3) disfiguring. Any other view inevitably leads to the conclusion that the Legislature has done the unnecessary thing of making a single act punishable under more than one statute, and of making two separate and distinct crimes out of the same act.

I am not contending that under the "aggravated assault" features of said section 4483 it is impossible to offend by an intentional battery committed with the bare fists. I am conceding, as in the beginning I forecast, the possibility of doing this under a proper information, present proper facts. But I do contend that there is neither such a pleading nor such facts here, and that, absent such necessary concomitants, the ancient landmarks ought not lightly to be destroyed, merely because the acts of the defendant happen to be unusually reprehensible and the punishment richly merited.

But I pass to the second reason for my dissent, viz., the goodness vel non in a case like this of instruction 7, which reads thus:

"The court instructs the jury that *the law presumes that a person intends the natural and probable consequences of his acts*, and if you believe from the evidence in the case that defendant assaulted D. E. Tugel in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or do him some great bodily harm."

Here nothing was used but the fists, one of which bore a finger ring. Neither the fists nor the ring will be judicially noticed to be either a deadly or dangerous weapon as such is known to the law, absent specific proof of the fact. But in such state of the facts the jury are told that "*the law presumes that a person intends the natural and probable consequences of his acts*." It has been said that in a criminal case the law raises no such presumption. *State v. Stewart*, 29 Mo. 419 (wherein the instrument of assault was a walking stick). In this case Judge Napton said:

"But the instruction in reference to the intent of the defendant was calculated to mislead. The intent of the defendant in making the assault was a question of fact for the jury. The law raises no presumption about it, and it was error for the court to tell the jury that 'the law presumes that every man intends the natural, necessary, and probable consequence of his acts.'"

I do not contend that in a proper case the giving of a proper instruction involving the presumption of intent from the use of a deadly weapon upon a vital part of the body of him who is assaulted is forbidden by law. But that is not the question here. The human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon (*Little v. State*, 61 Tex. Or. R. 197, 135 S. W. 119), and therefore its use could not be judicially noticed (and presumptions are nec-

essarily bottomed on judicial notice) as being followed by the inevitable consequence of death or great bodily harm; for such consequences are neither the natural nor the probable sequelæ of such use of the fist as it is ordinarily used in a battery. Such consequences are but remote possibilities, because in human experience they occasionally happen—they do not always happen—and we repeat, if the fist or the manner of the use thereof in this case was such as to take it out of the category of ordinary use in a common assault and battery, the information ought to have said so. Moreover, if the jury were, even in this case, to be told anything about presumptions, this instruction omitting the part which I am especially criticizing, and which I italicize, told them all they were allowed to be told. The view urged in the majority opinion is fully met when the objectionable italicized words are entirely cut out of it. In short, these words were mere hurtful surplussage, even if we concede, for the sake of argument, the correctness of the view, on this point, of the majority opinion. Of course this instruction had specific reference to the first count, and not to the second count, on which the conviction was had, and which has been said to be a lesser offense. Though mindful of the excusing rule on this phase, I do not think it saved this error from being hurtful here, because it applied generally to the facts in the case, and was not a mere erroneous definition of a greater crime than that of which defendant was convicted.

Coming to the third objection: Instruction 3 is bad because it is broader than the information. It would be bad in a civil case. How much worse, then, is it in a criminal case, wherein we are enjoined that since the punishment of the citizen inflicts both pain and stain, rules of law in criminal cases are to be construed strictly. The pertinent part of the count in the information on which the conviction rests charged that defendant—"with a certain large finger ring and with his hands and fists, the said D. E. Tugel did then and there beat, bruise, and wound in and upon the head, neck, and body of him, the said D. E. Tugel, whereby the said D. E. Tugel was then and there greatly maimed, wounded, and disfigured, and received great bodily harm."

The instruction which I contend is bad for a too great broadness in pertinent phrase reads thus:

"The court instructs the jury that if you find and believe from the evidence that defendant, at the county of Audrain and state of Missouri, within three years next before the filing of this information in this cause, did unlawfully and feloniously assault D. E. Tugel and did then and there strike and beat said Tugel in a manner likely to produce death or great bodily harm, and did then and there inflict on said Tugel great bodily harm, then you will find the defendant guilty as charged in the second count of the information in this cause, and you will assess his punishment," etc.

If it be urged that this widening of the issues was harmless because of lack of evidence

of other sources of injury besides the fists and the ring-of defendant; the answer is that there is more than a suggestion in the evidence that the hardness of the ground on which Tugel lay contributed, to some extent, to the injuries which he is said to have sustained. This the majority opinion concedes arguendo, yet the information did not charge it.

For these reasons, and others which might be set forth but for the lack of space, I dissent from the majority opinion and the conclusion therein reached.

WOODSON, C. J., and GRAVES, J., concur in these views.

MANIACI v. INTERURBAN EXPRESS CO. (No. 17563.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. MASTER AND SERVANT — 329 — INJURIES TO THIRD PERSON CAUSED BY SERVANT — LIABILITY OF MASTER — PLEADINGS.

A count, in a petition in an action against an express company, which alleges that the company was engaged in the express business and maintained an office in charge of an agent, that the company as a carrier tendered to plaintiff a consignment of fruit, that plaintiff refused to sign a receipt therefor until the agent agreed to present a claim for a shortage, that subsequently the agent telephoned plaintiff to come to his office, that plaintiff met the agent, who demanded a receipt for the consignment, that plaintiff under protest started to comply with the demand, when the agent, acting within the scope of his employment, suddenly and without just cause shot plaintiff, states a cause of action as against a demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. ¶ 329.]

2. MASTER AND SERVANT — 329 — INJURIES TO THIRD PERSON CAUSED BY SERVANT — LIABILITY OF MASTER — PLEADINGS.

A second count in the petition, which sets out substantially the same facts, and in addition alleges that the agent was a person of violent temper and dangerous and unfit to hold the position of agent, that the agent's dangerous and unfit character and disposition were known to the company, states a cause of action as against a demurrer, though it is not alleged that the knowledge of the agent's character and disposition came to the company in time by the exercise of ordinary care to have removed him before the wrongful act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. ¶ 329.]

Woodson, O. J., and Blair and Walker, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Frank Maniaci against the Interurban Express Company. From a judgment for defendant rendered after sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded, with directions.

The above action was commenced in the circuit court aforesaid on March 16, 1912; and afterwards on the 18th day of October,

1912, and during the October term of said court, an amended petition in two counts was filed in said cause, which, without caption and signatures, reads as follows:

"Plaintiff states that defendant is and was at all times hereinafter mentioned a corporation duly incorporated under the laws of the state of Illinois and doing business in the state of Missouri; that on and about the 1st day of February, 1911, defendant was engaged in and carrying on an express business as a common carrier of freight; that defendant had and maintained an office in the city of Edwardsville, Ill.; that said office was in charge of one Harry Joiner, who was the agent and servant of defendant; that plaintiff was at said time a merchant in said city of Edwardsville; that several days previous to the said 1st day of February, 1911, defendant in its capacity as a common carrier delivered to plaintiff a consignment of fruit, and plaintiff refused to sign a receipt for same until the said Harry Joiner, the agent and servant of defendant, had agreed to present plaintiff's claim for an allowance for a shortage in the consignment; that upon the said 1st day of February, 1911, the said Harry Joiner, defendant's agent and servant, telephoned to plaintiff to come to the office of defendant for the purpose of discussing a settlement of the matter, and, in response to said message, plaintiff started to defendant's office as requested by defendant's servant; that near the office plaintiff met defendant's servant, the said Joiner, who demanded that plaintiff then and there sign a receipt for the said consignment of fruit; that plaintiff under protest started to comply with said demand, and was in the very act of signing the receipt when the said Harry Joiner, being at the time the employé, agent, and servant of the defendant company, and acting within the scope of his employment as such agent and servant, did suddenly and without warning draw a pistol and without just cause or provocation wantonly, maliciously, and unlawfully shoot plaintiff twice, wounding him in the breast and shoulder.

"Plaintiff states that, as a direct result of said injuries and assault, he suffered great bodily and mental pain, and was confined to a hospital by reason thereof for a long period of time, to wit, for the period of about one month, and thereafter was confined at his home to his bed and room for the period of about one month; that by reason of said injuries he was disabled and prevented from attending to his business and affairs for the space of about seven months; that he has suffered, and will continue to suffer, great bodily pain, annoyance, inconvenience, and expense; that as a direct result of said injuries and assault he was compelled to procure, and did procure, necessary medical attention and treatment, which were then necessary, and still are, and will continue to be, necessary for an indefinite period; and that on account of said services alone he has been put to the expense of about the sum of \$300.

"Plaintiff states that, by virtue of the premises, he has been injured and damaged in body, mind, health, pain, and suffering, and loss of time and necessary expenses, in the sum of \$10,000 actual damages, and \$10,000 punitive damages, for both of which amounts, together with the costs in this behalf expended, plaintiff prays judgment.

"2. For a second cause of action, plaintiff states that defendant is, and was at all times hereinafter mentioned, a corporation duly incorporated under the laws of the state of Illinois and doing business in the state of Missouri; that defendant on or about the 1st day of February, 1911, was engaged in the express business and was acting as a common carrier of freight; that for the purposes of its business

it maintained an office in the city of Edwardsville, Ill.; that defendant had as an agent and servant in charge and control of said office one Harry Joiner; that said Harry Joiner was a person of violent temper, quarrelsome disposition, and without control over his passions; that said Harry Joiner was a dangerous and unfit person to place in such a position; that said Joiner's dangerous and unfit character and disposition were well known to defendant; that on and previous to said 1st day of February, 1911, plaintiff was engaged in the city of Edwardsville, Ill.; that a dispute having arisen between plaintiff and defendant's servant and said Joiner, because plaintiff refused to sign a receipt of a consignment of fruit delivered to him by defendant, said Harry Joiner upon February 1, 1911, telephoned to plaintiff to come to the office of defendant in the city of Edwardsville; that plaintiff, in response to said request, started to said office, and when near there was intercepted by said Joiner, who demanded that plaintiff immediately sign a receipt for the said consignment of fruit; that plaintiff, under protest, started to sign said receipt, and, while he was so engaged, the said Joiner, the agent and servant of said defendant, acting within the scope of his employment as such agent and servant, did suddenly and without warning give way to a fit of passion and draw a pistol and without just cause or provocation wantonly, willfully, maliciously, and unlawfully shoot plaintiff twice, wounding him in and about the left breast and left shoulder.

"Plaintiff states that, as a direct result of said injuries and assault, he suffered great bodily and mental pain, and was confined to a hospital by reason thereof for a long period of time, to wit, for the period of about one month, and thereafter was confined at his home to his bed and room for the period of about one month; that by reason of said injuries he was disabled and prevented from attending to his business and affairs for the space of about seven months; that he suffered, and will continue to suffer, great bodily pain, annoyance, inconvenience, and expense; that, as a direct result of said injuries and assault, he was compelled to procure, and did procure, necessary medical attention and service and treatment, which were then necessary and still are and will continue to be necessary for an indefinite period; and that on account of said services alone he has been put to the expense of about the sum of \$300.

"Plaintiff states that by virtue of the premises he has been injured and damaged in body, mind, health, pain, and suffering, and loss of time and necessary expenses in the sum of \$10,000 actual damages, and \$10,000 punitive damages, for both of which amounts, together with the costs in this behalf expended, plaintiff prays judgment."

On October 21, 1912, respondent filed a demurrer to each count of said amended petition, which said demurrer, without caption and signature, reads as follows:

"(1) Now comes defendant and demurs to the first count of the plaintiff's amended petition on the ground that said count of said amended petition does not state facts sufficient to constitute a cause of action.

"(2) And defendant comes and demurs to the second count of plaintiff's amended petition on the ground that said count of the said amended petition does not state facts sufficient to constitute a cause of action."

At the December term, 1912, and on January 3, 1913, of said term, the demurrer aforesaid was sustained. On January 31, 1913, during said term, plaintiff declined to plead further, and final judgment was rendered on said date, and the cause was duly appealed to this court.

George H. Moore and Frank A. Thompson, both of St. Louis, for appellant. H. R. Small, of St. Louis (Fred Tecklenburg, of Belleville, Ill., of counsel), for respondent.

First Count of Amended Petition.

RAILEY, C. (after stating the facts as above). [1] Does this count contain facts sufficient at law to constitute a cause of action against defendant?

Turning to the amended petition, and analyzing same, we find that in substance it alleges the following facts: (1) That defendant is a corporation, organized under the laws of Illinois, and doing business in the state of Missouri; (2) that on or about February 1, 1911, defendant was engaged in the express business as a common carrier of freight; (3) that it had and maintained an office in the city of Edwardsville, Ill.; (4) that said office was in charge of one Harry Joiner, who was at the time agent and servant of defendant; (5) that plaintiff was at said time a merchant in said city of Edwardsville; (6) that several days prior to February 1, 1911, defendant in its capacity as a common carrier delivered to plaintiff a consignment of fruit, and the latter refused to sign a receipt therefor, until said Harry Joiner, the agent and servant of defendant aforesaid, had agreed to present plaintiff's claim for a shortage allowance in the consignment; (7) that upon said 1st day of February, 1911, said Harry Joiner, defendant's agent and servant, telephoned plaintiff to come to the office of defendant for the purpose of discussing a settlement of the matter; (8) that in response to said message plaintiff started to defendant's office as requested by defendant's servant; (9) that near the office plaintiff met defendant's servant, the said Joiner, who demanded that plaintiff then and there sign a receipt for the said consignment of fruit; (10) that plaintiff under protest started to comply with said demand, and was in the very act of signing the receipt, when said Harry Joiner, being at the time an employé, agent, and servant of defendant, and acting within the scope of his employment as such agent and servant, did suddenly and without warning draw a pistol, and without just cause or provocation, wantonly, maliciously, and unlawfully shoot plaintiff twice, wounding him in the breast and shoulder, etc. A demurrer to each count of said petition was sustained by the trial court, upon the theory that neither count states facts sufficient to constitute a cause of action.

Defendant strenuously insists that the words, "within the scope of his employment," is an allegation of a legal conclusion. The above language taken alone, without any reference to that which precedes or follows it, would state simply a legal conclusion, and the truth of same would not be admitted by a demurrer thereto. *State ex rel. v. Railway Co.*, 240 Mo. 35, 49, 50, 144 S. W. 1088; Gib-

son v. Railway Co., 225 Mo. 473-482, 125 S. W. 453; Shohoney v. Railway Co., 223 Mo. 649-671, 122 S. W. 1025; Mallinckrodt Chemical Works v. Nemnich, 169 Mo. loc. cit. 397, 69 S. W. 355; Sidway v. Land Co., 163 Mo. loc. cit. 374, 375, 63 S. W. 705; Clark v. Dillon et al., 97 N. Y. 370; Snyder v. Railway Co., 60 Mo. loc. cit. 419; Southern Ry. Co. v. King, 217 U. S. loc. cit. 536, 537, 30 Sup. Ct. 594, 54 L. Ed. 868; General Electric Co. v. W. E. & Mfg. Co. (C. C.) 144 Fed. 458; Railway Co. v. Lighthelser, 163 Ind. 247, 71 N. E. 218, 660; Fremont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096; Kennedy v. Railway Co., 72 N. J. Law, 19, 60 Atl. 40; Bullock v. Butler Exchange Co., 22 R. I. 105, 46 Atl. 273. Numerous other cases can be found in practically every state of our Union announcing the same principle, but we have been unable to locate any case which would warrant the court, in passing upon the above question, to ignore the well-pleaded facts upon which the conclusion of law was based. In other words, if the facts stated, aside from the language above quoted, are sufficient to stamp the acts and conduct of Joiner, at the time and place of shooting, as being within the scope of his employment, then the petition states a good cause of action, even if the language, "within the scope of his employment," be eliminated therefrom. Cases of this character present a mixed question of law and fact. It is a common, but appropriate, form of pleading, in cases like the one at bar, to set out the facts constituting the cause of action, and follow the same with the allegation that the agent at the time of the assault was acting within the scope of his employment. The demurrer goes to the count as a whole, and should not be determined upon isolated and disconnected portions of the petition.

As said in Snyder v. Railway Co., 60 Mo. loc. cit. 419, cited and relied upon by defendant:

"The facts being conceded, whether a given act is within the scope of a servant's employment is a question of law for the court."

It appears from the petition that defendant was a corporation, a merchant, and like wise engaged in carrying on an express business, in the town aforesaid, as a common carrier of freight. It is also averred that defendant maintained an office in Edwardsville, Ill., and that said Harry Joiner was the agent and servant of defendant, in charge of said office. It appears from the petition that defendant, as a common carrier, had delivered to plaintiff a consignment of fruit, and on account of the shortage of same plaintiff declined to receipt for said fruit unless Joiner, the agent, would present plaintiff's claim for an allowance on account of said shortage. While matters were in this shape, the agent, Joiner, called up plaintiff by telephone, and requested him to come to defendant's office for the purpose of discussing a

settlement of the matter. In response to said message, plaintiff started to defendant's office as requested, and, when near the office, plaintiff met Joiner. The latter demanded that plaintiff then and there sign a receipt for the said consignment of fruit. Up to and including above, Harry Joiner was the unquestioned agent of defendant, and was acting within the scope of his employment in endeavoring to obtain from plaintiff a receipt for said consignment, and a settlement of the controversy in respect to said shortage. It is insisted, however, by respondent, that Joiner was not acting within the scope of his employment when he shot plaintiff at the time and place mentioned in complaint. The petition, however, alleges that plaintiff, under protest, started to comply with Joiner's demand, and was in the very act of signing the receipt when Joiner, being at the time the agent of defendant, and acting within the scope of his employment, as such agent, did suddenly and without warning draw a pistol, and without just cause or provocation, wantonly, maliciously, and unlawfully shoot plaintiff, etc. Joiner was there at the time and place of shooting as the vice principal of defendant. The plaintiff was there upon the invitation of defendant for a legitimate purpose. He and Joiner were in the midst of the very business which had called them together, at the time said shooting occurred. In addition thereto, the petition alleges that plaintiff was in the very act of signing the receipt when he was suddenly shot, etc.

A large portion of the business of this country is conducted through agents of common carriers, and, in a large measure, the public is required to come in contact with these agents in dealing with public service corporations. Upon grounds of public policy, if for no other reason, the principal should not be permitted to withdraw from the business and turn the same over to agents who have no regard for the public welfare, and thereby escape responsibility which he would have to bear, if attending to the business in person.

It is not imposing too great a hardship upon either corporations or individuals, to require them to respond in damages to legitimate patrons, for unprovoked, wanton, and malicious assaults, inflicted upon them, while in the very act of settling their controversies with the agent of the carrier. The conclusion thus reached is fully sustained by the great weight of modern jurisprudence. Whiteaker v. C., B. I. & P. R. Co. et al., 252 Mo. 438, 160 S. W. 1009; O'Malley v. Construction Co., 255 Mo. loc. cit. 391, 392, 164 S. W. 565; Winn v. Railway Co., 245 Mo. loc. cit. 415, 416, 151 S. W. 98; Haehl v. Railroad, 119 Mo. 325, 24 S. W. 737; Perkins v. Railway Co., 55 Mo. 201-214; Garretzen v. Duencel, 50 Mo. 104, 11 Am. Rep. 405; Whimster v. Holmes, 177 Mo. App. 130, 164 S. W. 236; Thompson on Corporations, § 6298; Rich-

berger v. Express Co., 73 Miss. 161, 18 South. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522; Railway Co. v. Hackett, 58 Ark. 387, 24 S. W. 881; Tillar v. Reynolds, 96 Ark. 358, 131 S. W. 969, 30 L. R. A. (N. S.) 1043; Skipper v. Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509; Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. (N. S.) 506; Carlberg v. Splegels' House Furnishing Co., 178 Ill. App. 424; Ziegenheim v. Smith, 116 Ill. App. loc. cit. 82; D. & R. Gr. Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101-109, 13 Sup. Ct. 261, 37 L. Ed. 97; Forrester v. So. Pac. Ry. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 43 L. R. A. (N. S.) 1; 2 Cooley on Torts (3d Ed.) §§ 627, 631, 632; Wood's Law of Master & Servant (2d Ed.) §§ 307-309; 1 Shearman & Redfield on Negligence (6th Ed.) by Street, § 146, p. 356; Pierce on Railroads, pp. 277, 278; 2 Mechem on Agency (2d Ed.) §§ 1929-1960; Clark & Skyles on Law of Agency, §§ 491, 493, 494, 502; Leavitt's Law of Negligence, pp. 527, 528; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529; Ryder v. City of La Grande, 73 Or. 227, 144 Pac. 471; Hardeman v. Williams, 169 Ala. 50, 53 South. loc. cit. 796. Many other cases are cited in above authorities to same effect. A few quotations will illustrate the trend of the modern rule in dealing with this subject.

Haehl v. Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737, has not only become one of the leading cases in this state upon the question under consideration, but has been frequently cited with approval in text-books and opinions of other states. In the Haehl Case, suit was brought by plaintiff to recover damages, on account of the killing of her husband, by defendant's watchman in charge of its bridge across the Missouri river at St. Charles, Mo., in March, 1891. She recovered in the trial court a judgment for \$5,000, and it was affirmed by the Supreme Court. The bridge in charge of said watchman was a railroad bridge, and a public highway for foot passengers. At about 8 o'clock in the forenoon of March 17, 1891, deceased was seen crossing above bridge from the St. Louis county side towards St. Charles on the west. He had gone over the approach on the St. Louis side, the main bridge, and a part of the approach on the St. Charles side, when he was met by James W. Hill, defendant's bridge watchman, and his brother. The watchman motioned to him to go back, but the latter failed to do so. Hill went up to him and had some conversation with him, but no witness heard it. "It resulted, however, in the deceased starting back, when Hill struck him on the back or shoulder twice with a club or billy, and the deceased commenced running back towards the St. Louis side, followed by Hill. They thus proceeded until the deceased had recrossed the trestle on

the St. Charles side, the whole of the main bridge, and about one-half the approach on the St. Louis side, pursued by Hill, when they two being thus alone on that approach, Hill in the rear of deceased and distant about 15 feet from and pursuing him, a pistol shot was fired, the ball striking the deceased in the back of the neck a little to the left of the median line and on a line with the base of the ears," producing his death. With the above facts before it, this court sustained the judgment below, although the jurors in arriving at their verdict were authorized, if they found for plaintiff, to allow both compensatory and exemplary damages. In the Haehl Case, supra, the deceased was not lawfully upon the bridge and was retreating when shot. Here, the plaintiff was not a trespasser, but was transacting his and the company's business, with the defendant's agent, upon invitation, and, while in the very act of complying with the agent's request, was shot without warning, and without provocation.

In Richberger v. Express Co., 73 Miss. 161, 18 South. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522, the trial court sustained a demurrer to a petition, very similar to the one at bar, and its action in that respect was reversed by the Supreme Court and said petition held to be good. In the above case, plaintiff had been made to pay an overcharge on express matter by the local agent of defendant, and the general agent had been seen and said it would be arranged. Plaintiff saw the local agent about December 25, 1894, but was put off. The petition avers that about the 1st day of January, 1895, plaintiff went to the office of said Express Company, upon business with it. Said agent of defendant in charge of the office informed plaintiff that he then and there desired to refund to plaintiff said overcharge, "and then and there paid the same to plaintiff, and required plaintiff to sign a receipt for the same, and, when plaintiff signed and delivered said receipt to said agent, the said agent did then and there, immediately upon the reception of said receipt, and while plaintiff was there in the business office of said company, willfully, wantonly, oppressively, and wrongfully curse, abuse, insult, and maltreat plaintiff, because plaintiff had demanded and received from said company the overcharge aforesaid." Judge Whitfield, upon pages 171 and 172 of 73 Miss., upon page 924 of 18 South., 31 L. R. A. 390, 55 Am. St. Rep. 522, closed his opinion in the case just cited, with a quotation from the very able opinion of Judge Andrews of the New York Court of Appeals, in Rounds v. Railway Co., 64 N. Y. 134, 21 Am. Rep. 597, as follows:

"The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence

of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another."

In the well-considered case of *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. loc. cit. 39, 124 Pac. 707, 41 L. R. A. (N. S.) 529, Judge Lorigan, speaking for said court, said:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts, or other wrongful acts committed by such agent in and as part of the transaction of such business. Story on Agency, § 453; Shearman & Redfield on Negligence, § 65; Civ. Code, § 2338. After declaring this to be the rule, Story says: 'In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience, for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.'"

In *Pierce on Railroads*, at pages 277 and 278, the rule is tersely stated as follows:

"The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and, when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions, or even willfully."

In *Cooley on Torts* (3d Ed.) § 626, p. 1017, the greatest of all writers upon this subject, in clear and forceful language, said:

"The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond."

In 2 *Mechem on Agency* (2d Ed.) § 1929, the same principle of law is clearly expressed in the following language:

"It is obvious therefore that the question of the principal's or master's liability cannot always be determined merely by putting a label upon the motive. The motive is important, but it is important not so much for the purpose of determining how the act was done as to aid in deciding whose act it was. Certain it is, at any rate, that the tendency of the modern cases is to attach less importance to the motive with which the act was done, and to give more attention to the question as to whose business was being done and whose general purposes were being promoted."

The same author, in the same volume, under section 1960, p. 1523, sums up the law upon this subject as follows:

"In many cases no better definition can be given than the words themselves suggest. But, in general terms, it may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to

perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

We deem it unnecessary to quote further from the authorities upon this subject. The rule declared in the *Haehl Case*, supra, is in full accord with the recent utterances of this court, and is sustained by the decided weight of authority. We therefore hold that the first count of petition states a good cause of action, and that the demurrer thereto was improperly sustained.

[2] II. The second count of petition sets out, in a general way, substantially the same facts pleaded in the first count, and in addition thereto attempts to plead knowledge upon the part of defendant as to the temper, disposition, character, and unfitness of its agent who assaulted plaintiff. While it does not appear from the petition that such knowledge came to defendant in time, by the exercise of ordinary care, to have removed said agent before the assault was made, yet the other facts stated in said count, under the authorities heretofore cited, are sufficient to constitute a good cause of action. Hence the demurrer to second count was improperly sustained.

III. We have reached the conclusion that each count of petition states a good cause of action.

We therefore reverse and remand the case as to both counts, with directions to the trial court to set aside the judgment rendered upon each of said counts, to grant the plaintiff a new trial as to each count, and that the cause be proceeded with in accordance with the views herein expressed.

BROWN, C., not sitting.

PER CURIAM. The foregoing opinion by RAILEY, C., is adopted as the opinion of the court in banc.

GRAVES and BOND, JJ., concur. FARIS and REVELLE, JJ., concur in result. WOODSON, C. J., dissents in separate opinion, in which BLAIR, J., concurs. WALKER, J., dissents.

WOODSON, C. J. I dissent from the majority opinion in this case principally for the reasons stated by me in the dissenting opinion filed in the case of *Whiteaker v. Railway*, 252 Mo. 438, loc. cit. 462, 160 S. W. 1009; also for the reason that it is absurd to my mind to say that public service corporations of the country in employing men to conduct their business thereby authorize them to commit murder or other felonies, which constitute no part of the acts performed by them as such agents. No such idea ever enters the minds of the carrier, their employes or any of their customers; consequently, it is a non sequitur to say that such an agent or employe as Joiner, in

this case, was acting within the scope of his employment when committing the crime with which the petition charges him—one of the most heinous known to God and man. In other words, no such corporation could, by express authority, authorize one of its employees to commit a crime in the performance of his duty to the company, without he was acting within the scope of his employment. If such authority should be given, it would clearly be *ultra vires*, and not binding on the company; but should the officers of the company direct the agent to commit a crime, and he should perpetrate it, then he and they would be *partes criminis* in its commission, which in no manner could or would render the company liable to the injured party in damages; consequently, in order to render the company liable in such a case, the agent must be acting within the scope of his employment, that is, the crime committed must have been a part of or an integral element of the act he performed for the company under its contract with him authorizing him to perform the same; and in such a case it is wholly immaterial whether his authority to commit the crime was given in express terms or implied from the authority to perform the act of which the crime was a part. This is self-evident.

That being true, then let us for a moment briefly consider what services or acts the agent was employed to perform for the defendant. While the petition does not state them in detail, yet in general terms it charges that he was the agent of the company at Edwardsville, Ill., and that it was his duty to deliver to its patrons all goods transported by it to them at that point, and to take their receipts therefor. It is also charged that the goods which the company had transported to plaintiff at Edwardsville had been delivered to him by the agent ——— days prior to the day upon which the shooting occurred.

From this statement in the petition it is clearly seen that the act of delivering the goods in no manner caused or contributed to the injury; that service had been fully performed long before the shooting occurred. So this fact will be dismissed without further consideration. Consequently, if the company is liable to plaintiff, it must be for the reason that it authorized the agent to use violence if necessary toward the plaintiff in the performance of the service of the company in procuring the receipt for the goods delivered to him.

There is no charge in the petition that the defendant had given the agent express authority to commit the assault upon the plaintiff, and therefore, if the agent possessed that authority, it must be implied from the general authority given by the defendant to all of the agents, the plaintiff included, to take receipts from its patrons for goods transported for and delivered to them. So it is seen that the question has been narrowed

down to the single legal proposition: Was the crime committed by the agent a part of, or an integral element of, the act of the agent in demanding the receipt of the plaintiff for the goods previously delivered to him? That question, in my opinion, must be answered in the negative. The authority of the agent to demand and receive the receipt in no manner required the exercise of any force or violence on his part toward the plaintiff, nor was such a thing contemplated by any one in the performance of such a duty; and, if procured by violence, the receipt would be worthless for the purpose for which the company wanted it, namely, as evidence of the delivery of the goods. Its procurement by that means would amount to duress or robbery, which would render the receipt illegal and destroy it as evidence of the delivery, the design of the company in demanding it.

Clearly the case of *Haehl v. Wabash Ry. Co.*, 119 Mo. 325, 24 S. W. 737, does not support the propositions of law announced by our learned commissioner in this case. In that case the performance of the act of the agent for the defendant, which resulted in the death of Haehl, was authorized by the company, and, from the very nature of that act, force or violence was contemplated, if necessary, for its performance. There the agent was as a watchman, and among other things he was required to keep trespassers off of defendant's bridge, and while expelling Haehl therefrom the latter was killed by the agent. In discussing that case, the court, on page 340 of 119 Mo., on page 740 of 24 S. W., said:

"It is conceded that a part of the business which Hill was employed to perform as watchman was to keep trespassers off of defendant's bridge. This necessarily involved the duty of putting them off after they got on, if they were found unwilling to go. The evidence tended to show that Hill was engaged in the performance of this duty when he fired the fatal shot; that the business was not done; that it was not taking care of itself, but that the defendant's servant at the time was engaged in it and concerned about it; that he shot dum ferret opus, and, so far as evidence discloses, was concerned about, and engaged in, no other business."

In the case at bar, the duty of the agent to demand the receipt from the plaintiff did not involve the duty of using force or violence toward him. Nor does the case of *Whiteaker v. Railway Co.*, 252 Mo. 438, 160 S. W. 1009, lend any support to the opinion of the commissioner. In that case it was the duty of the conductor of the train to keep trespassers off of it. There the court held, as in the former case, that the act of expelling persons from the train necessarily implied the authority to expel them therefrom by force, if necessary, and that if more force was used than was necessary to accomplish his ejection, and he was thereby injured, then the company was liable. I dissented from the opinion in the latter case, not because it did not announce correct legal propositions, but for the reason that there

was not sufficient evidence upon which to base them, as will appear by the dissenting opinion filed therein.

But in both of those cases this court clearly recognizes the principles of law I am here contending for. In the first case this court, on page 339 of 119 Mo., on page 740 of 24 S. W., said:

"But if his (the master's) business is done, or is taking care of itself, and his servant not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has, and can have, no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is a purely personal wrong of the servant for which he, and he alone, is responsible."

The case of *Rounds v. Delaware Ry. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, is one of the best-considered cases in this country upon the subject, and clearly supports the views I have here expressed. At page 136 of 64 N. Y., 21 Am. Rep. 597, Judge Andrews puts the matter clearly:

"If he (the servant) is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service or for the purpose of executing his orders."

At page 137 of 64 N. Y., 21 Am. Rep. 597:

"It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. * * * But the court could not say from the evidence that the brakeman (baggageman) was acting outside of [and beyond] and without regard to his employment, or designed to do the injury which resulted, or that the act was willful within the rule we have stated."

In the case of *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922, Judge Story said:

"The moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress."

In the case at bar, as stated by counsel for respondent:

"The assault upon appellant was not committed upon the premises of the respondent, but

appellant assaulted him upon the public highway near the premises of the respondent, and after being intercepted by respondent's agent while he was on the way to respondent's office in response to a telephone message from the respondent's agent requesting him to come to the office."

"Plaintiff was not under the 'control' of defendant or any of its agents and so 'helpless and obliged to submit without any means of redress' within the reason of the rule."

Where the reason for the rule stated by Judge Story fails, the rule fails also, and therefore the defendant was not the insurer of the safety of the plaintiff against assaults made by its agents, except when acting within the scope of their employment.

Thompson on Corporations, in section 6298, states that the old rule that the master was in no case liable for the willful or malicious act committed by the servant is unsound. In section 6299, entitled "The True Test Suggested," he says:

"The modern rule is that, if a servant authorized to use force about his master's business uses excessive force, his master must answer in damage to the person thereby injured, wholly without reference to the state of mind under which the servant acted. If he is required to use force and is left to his discretion as to how much he shall use, the master will upon either view of the subject (i. e., whether with or without malice) be answerable if he uses too much force through negligence."

In section 6300:

"* * * It must now be conceded as a modern rule that the mere fact that the wrong complained of was willful or malicious, or that in doing it the state of mind of the actor was really that which is characterized by the use of the words 'malice,' 'hatred,' or 'ill will,' does not exonerate the corporation from liability. But, on the other hand, this very state of mind of the actor may be relevant evidence, and in some cases of the most cogent nature to show that when he did the act he was not acting for the corporation. * * *

"The actor may be the agent, and even a principal officer of the corporation, and he may even at the time of doing the wrongful act be intending to serve the corporation, and yet the act may be of such a character so extraordinary as to defeat any presumption that it could possibly be authorized by the corporation."

"Assuming in such cases that there is authority to use force in case of resistance or noncompliance with orders, may not the force used be so extreme—may not the weapon employed be so unusual as entirely to defeat the presumption of authority?"

In *Richberger v. Express Co.*, 73 Miss. 161, at page 171, 18 South. 922 (31 L. R. A. 390, 55 Am. St. Rep. 522) the court refers with approval to *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 136, 21 Am. Rep. 597, quoted in *Railroad Co. v. Latham*, 72 Miss. 32, 16 South. 757, to show when in this character of case the corporation would not be liable, and quotes at the end of the opinion from *Rounds v. Delaware, etc., R. Co.*, to show when liability exists.

(21) In 2 Cooley on Torts (3d Ed. by Lewis) §§ 627, 631, 632: In section 627:

"But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped

aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed from the nature of his employment to have authorized or expressed the servant to do."

Judge Cooley, from the Supreme Bench of Michigan, in a case of a boy, the servant of defendant, driving over plaintiff, approved an instruction that:

If the boy "drove in a careless and reckless manner, he would be acting within the scope of his master's employment; but that if he wantonly, willfully, and intentionally ran over the plaintiff, he would not be acting within the scope of his master's authority. But if he carelessly, unintentionally, and accidentally ran over the plaintiff, then the plaintiff should recover."

"This instruction," says Judge Cooley, "was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible." *Cleveland v. Newson*, 45 Mich. 62, 7 N. W. 222.

This opinion of Judge Cooley's was approved and declared to be the law of Michigan in 1911 in the case of *Ducre v. Sparrow-Kroll Lumber Co.*, 168 Mich. 49, 133 N. W. 938, 47 L. R. A. (N. S.) 959, opinion by McAlvay, a case where a salesman wantonly and willfully beat with a hammer a drunken person who came into the store.

"It was a wanton, willful, and intentional injury, committed without regard to consequences, and within a narrow margin of having resulted in the crime of manslaughter. Under the circumstances presented by this record, such act cannot be held to have been committed by this man while in the performance of duties for defendant within the scope of his employment; and our conclusion is that, as a matter of law, no liability attached to the appellant."

(22) *Woods' Law of Master and Servant* (2d Ed.) §§ 307-309: In section 307:

"The simple test is whether they were within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof and were such as may fairly be said to have been authorized by him."

In section 309, at page 585:

"He must have been authorized, either expressly or impliedly, to do the act in some manner, which he has improperly or wrongfully performed, and the fact that he was only authorized to do the act in a certain way does not save the master from liability."

At page 586:

"The rule may be stated thus: For a willful and malicious trespass of a servant not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master. But if the act of the servant was necessary to accomplish that purpose and was intended for that purpose, however ill advised, or improper, then it is implied in the employment, and the master is liable, though the servant may have executed it willfully and maliciously."

(23) In *Shearman & Redfield on Negligence* (6th Ed. by Street) § 146, p. 356, it is again said the master is liable for the acts of his servant in the course of the servant's employment. In section 148:

"The fact that the servant was at the time of the injury engaged in the service of his mas-

ter is not conclusive of the master's liability. * * * The act complained of must be within the scope of authority which the agent had from the master, or which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have, or which third persons have a right to infer from the nature and the circumstances of the employment."

(27) In *Clark & Skyles, on Law and Agency*, §§ 491, 493, 494, 502: Section 502, "Assault and Battery by Agent":

"In accordance with the principles heretofore considered, a principal may be held liable for an assault committed by his agent in the course of his employment and for the purpose of advancing the principal's interests. Hence, in cases where an agent is authorized to use force against another in order to carry out his principal's orders, the principal commits it to the agent to decide what degree of care he shall use," etc., and the principal is held liable for excessive force of wanton assaults. "If * * * he is not authorized to use force at all, and 'willfully and designedly, for the purpose of accomplishing his own independent malicious and wicked purposes, does an injury to another as by assaulting him, the principal is not liable therefor.'"

All such men should stand before the courts and jurors of their country in the nakedness of their crime, unveiled with the cloak of apparent authority from their employer, who never dreamed of such depravity, and receive the just punishment the law wisely prescribes for them. They are nothing but criminals disguised in sheep's clothing.

But it is said, what will become of the innocent and injured public who suffer at their hands? Answer: What becomes of the innocent and injured public who suffer at the hands of all criminals, regardless of their avocation in life? All such criminals should be swiftly tried and speedily punished for their violation of the law, regardless of the badge they wear, whether that of an individual, an agent, or an officer of the law; and in my opinion those who commit crime under the guise of real or apparent authority are more guilty than the individual who acts upon his own initiative and responsibility, for the latter knows that he must alone meet the charge and suffer the consequences thereof, whereas the two latter cowardly shield themselves behind their cloak of real or apparent authority to wreak their hellish designs upon others.

The score and a half or more authorities cited in the majority opinion in support of the company's liability, as well as the many more that might be cited, show to what extent this subterfuge has been resorted to as a cloak under which to commit wrong, knowing or supposing that the company, prompted by its financial interests, will defend the civil side of all such civil actions, and thereby at the same time extract from the crime the poisonous malignity which prompted it, and thereby stay criminal prosecution.

In my opinion, it would be for the better public policy to let all such criminals know that they, and they alone, must personally

stand responsible for such crimes; and at the same time give full force and effect to the letter and spirit of the contract of employment, namely, that the agent is to transact the business of the employer in an efficient, prudent, and careful manner, and not to commit crime against God and man under the cloak of its authority. The law is and always has been that, where the principal exercises ordinary care and prudence in the selection of an employé, he is not liable to a fellow employé because of injury inflicted in consequence of the unskillfulness of the former. That being true, then how much stronger is the reason for the law which universally holds that no person is liable for the crime of another without he is a party to it or a conspirator in its commission?

In the case at bar there is no evidence tending to show that the respondent employed Joiner to commit the crime charged in the petition, or that it was necessary for him to commit it in asking for the receipt, nor that the respondent conspired with him or knew of its commission until long thereafter. Public service corporations must, because of the very nature of their business, conduct the same through numerous agents, and the law presumes that they are men of good character and law-abiding; and never presumes that any one will commit crime, and under that presumption it does seem to me that it is a harsh and unjust rule which holds such a company liable for the crime of one of its agents, the commission of which was not contemplated, necessary, or within the scope of his employment, expressed or implied, but was wholly beyond the legal bounds of contractual liability. If liable, it is because the company was a party to the crime, of which there is no evidence. Of course, had Joiner injured the appellant while acting within the scope of his employment, the company should be held strictly liable, but not otherwise.

I am therefore of the opinion that the judgment of the circuit court should be affirmed.

BLAIR, J., concurs.

**MECHANICS' AMERICAN NAT. BANK OF
ST. LOUIS v. ROWELL.**
(Nos. 17581, 17578.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. GUARANTY — 32 — CONTRACTS — CONSTRUCTION.

The liability of a guarantor on a contract of guaranty cannot be extended beyond the language of the contract, and must be measured by its terms when taken in their ordinary and usual sense.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. — 36.]

2. GUARANTY — 32 — CONSTRUCTION — LIABILITY OF GUARANTOR.

The guaranty of a stockholder of a corporation who executed an instrument reciting that the corporation might apply to a bank for discount, that the stockholder guaranteed to the bank, its successors and assigns, the prompt payment of all loans made to the corporation by the bank, and of all notes, acceptances, and other paper discounted for the corporation, to a specified amount, and declaring that the guaranty was intended to be a continuing one, and should cover all loans and discounts and renewals made by the bank, imposed no obligation on the guarantor for any loans or discounts or renewals thereof made by any other bank than the one specified, and a bank, obtaining a large part of the assets of the specified bank, was not protected by the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 35; Dec. Dig. — 32.]

3. PRINCIPAL AND AGENT — 22 — EXISTENCE OF AGENCY — DECLARATION OF AGENT.

An agency cannot be created by the mere declaration of a person assuming to act as agent; and, to give a declaration of an agent any probative force, there must be independent evidence of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. — 22.]

4. GUARANTY — 32 — CONTRACT OF GUARANTY — EVIDENCE — CONSTRUCTION.

A stockholder of a bank executed an instrument whereby she guaranteed loans made by a bank to the corporation, and all notes, acceptances, and other paper which might be discounted by the bank for the corporation. A large part of the assets of the bank was transferred to a newly incorporated bank, and it and the officers of the corporation believed that the guaranty protected the new bank. The stockholder never saw any officer of the new bank as to any transaction between it and the corporation, and the officers of the corporation had no authority to act for the stockholders with reference to the guaranty. *Held*, that the new bank was not protected by the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 35; Dec. Dig. — 32.]

5. APPEAL AND ERROR — 801 — QUESTIONS REVIEWABLE — EXCEPTIONS TO REFEREE'S REPORT — RULINGS — REVIEW.

A party who takes exceptions to the report of a referee, which exceptions the court overrules, must give the court an opportunity to correct its errors, if any, by reasonable exceptions and by calling attention thereto in the motion for new trial, or the rulings will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. — 301.]

6. APPEAL AND ERROR — 984 — DISCRETION OF COURT — STATUTORY PROVISIONS — COSTS.

Rev. St. 1909, § 2266, providing that where there are several counts in any petition and any one of them be adjudged insufficient, or a verdict shall be found for defendant, costs shall be awarded at the discretion of the court, gives the court discretion to divide the costs of cases falling within the statute, similar to that possessed in suits in equity independent of statute, and the court on appeal will not disturb the discretion of the trial court, unless the discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881-3888; Dec. Dig. — 984.]

Woodson, C. J., dissenting.

In Banc. Cross-Appeals from St. Louis Circuit Court; W. B. Homer, Judge.

Action by the Mechanics' American National Bank of St. Louis against Carleton F. Rowell, administrator de bonis non with will annexed of Ellen S. Crane, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Leahy, Saunders & Barth, of St. Louis, for appellant. Campbell Allison, of St. Louis, for respondent.

BOND, J. In February, 1903, the J. H. Crane Furniture Company was incorporated for \$50,000, to take over the business of J. H. Crane, deceased. His widow, Ellen S. Crane, was allotted shares of stock of the par value of \$15,000. His son-in-law, A. K. Bonham, was president of the corporation, and J. H. Wilder was secretary and treasurer. In the fall of 1904, the Mechanics' National Bank took over the deposit account of the corporation from the trust company where it had been previously kept, and agreed, in consideration of the transfer, to extend a line of credit in the sum of \$25,000 upon the following guaranty, signed by Mrs. Crane:

"Whereas, the J. H. Crane Furniture Company may apply to the Mechanics' National Bank, St. Louis, Mo., for discounts: Now, for value received, and in consideration of one dollar paid to each of the undersigned, the receipt of which is hereby acknowledged, and other valuable considerations to them moving, I, Ellen S. Crane, jointly and severally for themselves, their executors and administrators, hereby guaranty to said bank, its successors and assigns, the prompt payment as they severally may mature, of all loans made or which may be made to said J. H. Crane Furniture Company by said bank, and of all notes, acceptances and other paper, which have been or may be discounted for the said J. H. Crane Furniture Co. to amount of fifteen thousand dollars (\$15,000) by said bank, whether the same be made, drawn, accepted or indorsed by said Ellen S. Crane, as well as any renewals thereof; and this is intended to be a continuing guaranty and shall apply to and cover all loans and discounts and renewals so made by said bank prior to notice in writing given to the cashier of said bank, that the undersigned will not be liable upon any such loans or discounts made by said bank after the receipt of such written notice.

"Whenever any such loans or paper, or any renewals thereof, shall become due and remain unpaid, the undersigned will, on demand, and without further notice of dishonor or protest, and without any notice having been given to the undersigned guarantors, previous to such demand, of the acceptance by said bank of this guaranty, and without any notice having been given to the undersigned guarantors, previous to such demand, of the making or renewing of any such loans or discounts, pay the amount due thereon to said bank, its successors and assigns, and it shall not be necessary for said bank, in order to enforce such payment, to first institute suit or exhaust its remedies against said J. H. Crane Furniture Co., or other parties liable on such loans or paper; and notice to the undersigned of the acceptance of this guaranty and of the making or renewing of such loans or paper, and any of them is hereby expressly waived by the undersigned.

"But all paper discounted for said Crane Furniture Company and all loans made to said Crane Furniture Co., when paid, shall be deemed to have been paid by said Crane Furniture Company, unless express notice in writing is

given to said bank at the time, by said guarantors, that it has been paid by them.

"Executed this 14th day of February, 1905.

"Accepted. Ellen S. Crane.

"Witness: John R. Myers."

Upon the delivery to it of the above agreement, the Mechanics' National Bank gave credit to the amount of \$25,000 to the J. H. Crane Furniture Company by discounting its three notes aggregating that sum. In May, 1905, the Mechanics' National Bank delivered the above guaranty and said notes to the Mechanics' American National Bank of St. Louis, which was incorporated on that date, and which sold its stock in exchange for a "large part of the assets" of the Mechanics' National Bank and another institution, viz., the American Exchange Bank. The Mechanics' National Bank did not surrender its charter, and was not discontinued as a consequence of this transaction, but has not since engaged in ordinary or general banking business other than to liquidate its unsold assets. These notes of the furniture company were included in the portion of its assets sold to the Mechanics' American Bank, and were partially secured by the above guaranty, and have been paid. The Mechanics' American National Bank, after its organization, took over the account of the J. H. Crane Furniture Company, and extended credit to it for several years in a fluctuating amount, ranging as high as \$43,000, and in so doing, relied upon said guaranty as a partial security. During this course of business, it also received notes indorsed by Mrs. Ellen S. Crane, one of which has not been fully paid. On the 6th day of April, 1907, the J. H. Crane Furniture Company was adjudged bankrupt. In that proceeding the Mechanics' American National Bank presented the notes held by it against said corporation for payment, accompanied by the affidavit of its cashier that it had no security therefor, except the indorsements thereon. After the deduction of dividends received from the trustee of the bankrupt, there remained due the Mechanics' American National Bank, on five notes executed to it by the bankrupt, the sum of \$13,644.87, on December 31, 1909. None of these notes were indorsed by Mrs. Ellen S. Crane. There also remained due to said bank a balance on a note for \$2,500, which was indorsed by Mrs. Crane. The present action was brought by the Mechanics' American Bank against Mrs. Ellen S. Crane in two counts. The first count was based upon the aggregate amount of the five notes of the J. H. Crane Furniture Company which were not indorsed by Mrs. Crane, upon the theory that they were partially secured by the terms of the guaranty which had been assigned to plaintiff, and relied upon by it when making the loans evidenced by said notes. The above guaranty was made an exhibit of this count of the petition. The second count of the petition prayed judgment for the balance due on the note for \$2,500, upon which Mrs. Crane was one of the in-

dorsers. The defendant, Mrs. Ellen S. Crane, after a general denial, in her answer set out therein *totidem verbis* the written guaranty executed by her, and alleged that it did not cover or secure any loan made by the plaintiff bank. Plaintiff demurred to that defense, and its demurrer was overruled. To the second count of the petition, Mrs. Crane answered, admitting the indorsement of the note; averring that it was a demand note which was matured by plaintiff on a certain date, and that she did not receive any notice of its dishonor; and averring, also, that without her knowledge or consent, plaintiff had extended time for payment of said note, wherefore she was released from any liability thereon. The reply denied the new matter alleged in the answer. The court on its own motion referred the cause to a referee to try all the issues, who thereafter reported the facts and his conclusions of law, and recommended judgment for defendant on the first count of petition, and for plaintiff on the second count of the petition. Cross-appeals were duly taken to this court.

[1] II. It is insisted, in support of plaintiff's appeal, that the guaranty given by Mrs. Crane to the Mechanics' National Bank, on February 14, 1905, per force its terms ran to the Mechanics' American National Bank when subsequently delivered to it. That view is untenable. The ingenious argument made in its support leaves out of view the clear and unequivocal words of the instrument, and seeks to alter their significance by the application of rules of construction which can never be employed where the contract is expressed in terms free from any ambiguity or uncertainty of sense and meaning. This contract discloses no basis for any misapprehension of its import. It was given to a particular banking corporation to secure it to a fixed amount, against loss or damage for loans and discounts to a furniture company, whose deposit account was thereafter to be placed with said bank. To accomplish that end, the obligation of the guarantor to answer for such loans was created in favor of the bank to whom the guaranty was given, and "its successors or assigns." And if any part of the credit which was given by the Mechanics' National Bank (the contractee) was not paid when that instrument was transferred by delivery to the plaintiff, the guarantor would have been liable for such unpaid amount to the transferee, just the same as she would have been liable to the bank with whom the contract was originally made. But the record discloses that the three notes totalling \$25,000, which expressed the credit given by the Mechanics' National Bank when the guaranty was made to it, had been paid when the present suit was brought. It is elementary that the liability of Mrs. Ellen S. Crane on the contract of guaranty made by her with the Mechanics' National Bank cannot be extended beyond the language of that

instrument, and must be measured by its terms when taken in their ordinary and usual sense. *Kansas City, to Use, v. Youmans*, 213 Mo. loc. cit. 165, 112 S. W. 225. Thus interpreted, they imposed no obligation on her to be responsible for any loans or discounts or renewals thereof, made by any other corporation than the particular bank to whom she gave the guaranty. We therefore conclude that there is no merit in the contention that the guaranty in question inured by its terms to the benefit of the present plaintiff.

[2, 3] III. It is next insisted that the parties to the suit placed such a construction on the contract as to "make it inure to the benefit of the plaintiff bank." We are unable to assent to that view, in the light of the facts disclosed in the record. It does appear that the plaintiff bank acted upon the assumption that the terms of the written guaranty entitled it to hold the guarantor for loans which it made, and that the president of the furniture company took a similar view, but it was not established by the evidence that the guarantor, E. S. Crane, so regarded her contract, or that she made any representation to the plaintiff that she desired it to be the beneficiary of her written guaranty given to another bank. Mrs. Crane never at any time had any interview with any person representing the plaintiff. She was never seen or spoken to by any officer of the bank as to any transaction between it and the furniture company. The president of the furniture company procured her guaranty in the first instance, and he, or the treasurer of that corporation, obtained her indorsement thereafter on certain notes. This is all that she empowered them to do, under the evidence in this record, and that falls short of proving any agency on the part of either of them to make any agreement as to the meaning of the language used by her in her written guaranty, or to substitute another for the promisee therein specified. It is too clear for citation of cases that an agency for another can never be created by the mere declaration of a person assuming to act in that capacity, and that, in order to give such declaration any probative force, there must be some independent evidence, tending to show that the declarant was the agent of the person for whom he undertook to speak. There is nothing in the instances of bringing a written guaranty or indorsed notes, which gave reasonable color to a representation by the persons performing these acts that they were authorized to modify or change the meaning or force of these written contracts. That the plaintiff bank may have acted upon the theory that the conduct of the officers of the furniture company was sufficient to bind Mrs. Crane does not supply the lack of proof of any authority given to them by her. No assumptions of agency by Bonham and Wilder could preclude Mrs. Crane from asserting her rights under

the terms of her guaranty, in the absence of proof of ratification of such acts after knowledge by her, or of facts creating an estoppel against her. None of these alleged preclusions were proven by the evidence before the referee, nor were they pleaded either in the petition or reply, filed in this case. Our conclusion is that the verdict on the first count is clearly correct.

[4, 5] IV. It only remains to dispose of the questions raised by defendant on the cross-appeal from the judgment in favor of plaintiff on the second count of the petition. It is assigned for error that the record shows that Mrs. Crane did not receive notice on the non-payment of the note after its maturity, and that plaintiff made an enforceable contract for delay for a definite period with the maker of the note without her knowledge or consent, and that in either event, she was released from liability as indorser. These complaints were grounds of exception taken by defendant to the referee's report. Those exceptions were overruled by the trial court. Defendant did not, in the motion for a new trial, complain of that ruling. The only reference thereto was a new motion in arrest of judgment, which was filed more than a month after the filing of the motion for a new trial. It has been uniformly held in such cases that nothing is left for review on appeal. It was the duty of the defendant to give the trial court an opportunity to correct its errors, if any, by seasonable exceptions, and by calling attention thereto in the motion for new trial. Otherwise, no basis is laid for a review in the appellate court. *State ex rel. v. Woods*, 234 Mo. 26, 136 S. W. 337; *Donnelly v. Trust Co.*, 239 Mo. loc. cit. 384, 144 S. W. 388.

[6] It is next insisted by defendant, that the court should have apportioned the costs as permitted by the following statute:

"Where there are several counts in any petition, and any one of them be adjudged insufficient, or a verdict, or any issue joined thereon, shall be found for the defendant, costs shall be awarded at the discretion of the court." R. S. 1909, § 2266.

That statute gives the court a discretion to divide the costs of cases falling within its terms, similar to that possessed in suits in equity independent of the statute. While it would have been entirely proper for the court, in rendering its judgment in this case, to have taxed the plaintiff with such proportion of the costs as accrued on the trial of the first count in the petition, yet we are not prepared to say that in failing so to do, the learned trial judge abused the discretion confided in him by the statute. We do not feel that we would be justified, under the facts in this record, in setting aside this discretionary act on the part of the trial court.

We therefore overrule this assignment of error, and affirm the judgment of the trial court on both counts. It is so ordered. All concur, except WOODSON, C. J., who expresses his views in opinion filed.

WOODSON, C. J. (dissenting). I fully concur in the law as stated in the majority opinion based upon the facts as stated therein; but, in my opinion, all of the material facts of the case have not been stated, and I will therefore be compelled to dissent to some of the legal propositions announced, as applied to the first count of the petition.

The following are some of the facts not stated in the majority opinion:

There is no dispute about the facts that A. K. Bonham was the son-in-law of the defendant, Mrs. Crane, the president and general manager of the J. H. Crane Furniture Company, at the time the guaranty mentioned in the evidence and the notes sued on were executed, and that he was the general agent of Mrs. Crane in the transaction of all of her individual business with the plaintiff, and one of its predecessors in business, the Mechanics' National Bank, until it and others was succeeded by the plaintiff bank and others.

The witness John R. Wilder, testified that he was the secretary of the Prunfrock-Litton Furniture Company of St. Louis, and at the time the guaranty and notes sued on were executed, was the secretary and treasurer of J. H. Crane Furniture Company; that during all of the time he knew Mrs. Crane, one of the defendants, and that she was one of the stockholders in said company; that he had indorsed notes of the said furniture company, at the Mechanics' National Bank and the Mechanics' American National Bank, which were shown to him and properly identified, and that he had had an interview with Mrs. Crane regarding her indorsement of some of the papers made to the plaintiff, which was on February 19, or June 19, 1906, but that he did not remember exactly which, that Mr. Bonham sent him to see Mrs. Crane regarding one of the notes mentioned, which was for \$5,000, and which fell due upon that date; that he had notice that the note was due, and that he made out a renewal note and gave it to Mr. Bonham, and asked him to have Mrs. Crane indorse it that evening when he went home; and that on the next morning he asked Mr. Bonham if he had her to indorse the note, and he said no. It was then he was sent to see Mrs. Crane regarding the matter.

"Q. Where was this? A. At Mr. Bonham's residence, on Maryland avenue. Q. In this city? A. In this city. I told her that we had notice from the bank of a note due that day, and they required her indorsement, and she stated that Mr. Bonham had agreed to have that note paid by the company, and was very much vexed because it was not done and I had come out to ask for her indorsement. I told her that we did not have the money to pay the note, and that it would have to be paid. She stated that the bank already had her guaranty for \$15,000, and she objected to giving any further guaranty, and after some little talking she did indorse the note. She stated that Mr. Bonham had been acting for her in the matters of the bank. Q. How long were you out there, Mr. Wilder? A. From 20 minutes to half an hour. Q. Where did this conversation occur? A. In the parlor of the

residence there on Maryland avenue. Q. Just wait a minute, until I finish the question. State whether or not she referred to Mr. Bonham, as Mr. Bonham. A. She generally said 'Archie.' (Question read.) A. That was with the bank—Q. I knew, but at this particular occasion, at this particular time, how did she refer to Mr. Bonham? A. Well I don't know whether she said 'Archie' or 'Mr. Bonham,' but she generally said 'Archie.' Q. What did you do after leaving Mrs. Crane on that occasion? A. Came back to the office with the note, and from there I went to the bank with the note. Q. And what did you do with the note at the bank? A. I went to the discount clerk—I don't know whether I went to the discount clerk or whether I went to Mr. Hilliard. Q. You stated that Mr. Bonham sent you out there to get Mrs. Crane to indorse this note; state whether or not you made any report to Mr. Bonham as to what Mrs. Crane said to you, at the store, when you returned to the store.

"By Mr. Allison: I object to that because we cannot be bound by that. * * * Q. Go ahead. A. I told Mr. Bonham just what Mrs. Crane had said, how she objected to indorsing the paper, and he said: 'Well, she signed it; I guess that all that's necessary. That ends it.' Q. Did you ever have any other conversation with Mrs. Crane in regard to her guaranty at the bank, or did Mrs. Crane ever make any statement to you in regard to her guaranty at the bank? A. There was one time I recall very distinctly. Q. Who were present? A. Mr. Bonham, myself, and Mrs. Crane only. Q. You mean Mr. A. K. Bonham, her son-in-law? A. 'Archie,' as she called him. Q. Will you state when that occurred, as near as you can fix it? A. Well, it was in the fore part of 1906; she came into the office and wanted to know how business was going along, and how much we owed the bank. Mr. Bonham stated the amount, or about what it was, I don't remember, and he said that by reason of her guaranty to the bank — * * * A. He stated by reason of her guaranty to the bank we were enabled to establish a credit there and borrow money, and she stated she understood that. Q. Did Mr. Bonham say anything at that time in regard to the amount of the guaranty? A. The amount was mentioned, the \$15,000 guaranty. Q. Who mentioned it? A. Mr. Bonham. Q. To whom did he mention it? A. We were all three of us sitting there together and talking between each other. Q. I hand you a paper marked 'Exhibit 1,' (the guaranty mentioned) which was filed with the petition in this case, and ask you to look at it and look at the signatures to it (handing witness said paper). A. That is Mrs. Crane's signature (indicating). Q. I notice that the witness to it is J. R. Myers. Do you know who J. R. Myers was? A. Mr. Myers was her attorney, and that is his signature. Q. Do you know where he is? A. He is dead. Q. Do you know when he died? A. I think he died in 1905. Q. Do you know who became her attorney after his death? A. Yes; Mr. Richey. Q. Mr. Frank E. Richey? A. Frank Richey. Q. I hand you herewith a paper marked 'Plaintiff's Exhibit 6,' and ask you to examine that; it has been offered in evidence; can you tell me who filled out the blanks in the body of Plaintiff's Exhibit 6, as being a statement made on a printed form 'To the Mechanics' National Bank of St. Louis, Mo.?'

"By Mr. Allison: What is the date of that?"

"By Mr. Saunders: It is dated March 2, 1906. A. This is all in my handwriting. Q. I call your attention to this clause in Exhibit 6, 'Specify any of above assets or liabilities pledged as or secured by collateral, and state the collateral. * * * That is printed; then below it, '\$20,000.00, Mechanics' American National Bank, guaranteed by Ellen S. Crane.' In whose handwriting is the handwriting there? A. That is in my handwriting. Q. How did you come to

put in that clause there which has just been read to you? A. By direction of Mr. A. K. Bonham. Q. Where did he give you that direction? A. In the office at my desk. Q. Well, in the office of what company? A. Of the J. H. Crane Furniture Company. Q. Will you state how you came to put in the figure '\$20,000.00' here? A. It was the \$15,000 guaranty and the \$5,000 indorsement. Q. Well, who stated that, if anybody? A. Mr. Bonham—Mr. Bonham told me that was the amount. Q. Do you know where Mrs. Crane lived while she was in the city of St. Louis during the last years of her life? A. She lived with Mr. Bonham. Q. Mr. A. K. Bonham? A. Yes.

Cross-examination by Mr. Allison:

"Q. Mr. Wilder, you are now connected with the Pruffrock Furniture Company? A. Pruffrock-Litton Furniture Company. Q. You were secretary of the Crane Furniture Company? A. Yes, secretary and treasurer. Q. After the Crane Furniture Company was organized, how long had it continued to do business before it opened an account with the Mechanics' American National Bank? A. We opened an account with the Mechanics' American National Bank in January, 1905—I think it was in January, 1905; in the fore part of 1905, anyway. Q. Then how long had the Crane Furniture Company been doing business prior to that time? A. I think about two years. Q. Now, you never heard Mrs. Crane say anything about this matter until the time you went up there to get an indorsement on a note; do you remember what that note was for, how much? A. You mean the guaranty? Q. Yes. A. Yes; she had mentioned it before in the office. Q. Well, when was it that you had this conversation with her up there at the house? A. It was when I went to get the indorsement on that note. Q. Do you know what the date of that was? What the date of that was? A. It was either February 19, 1906, or June 19, 1906; now, which of the two dates it was I don't know. Q. Was that the first note that Mrs. Crane had indorsed for the company? A. No; it was a renewal of the first note. Q. Now, Mr. Wilder, I wish you would—you are a bookkeeper, and you know what we mean by these statements, and try and pay attention to it and understand what the question is that is asked you—was that the first note that Mrs. Crane indorsed for the company? Now, forget about it being a renewal note; you weren't asked about its being a renewal note, but was that the first note that Mrs. Crane indorsed for the company? A. No. Q. When was the first note that she indorsed for the company? A. I think it was in 1905; I don't remember just when; the fore part of 1905, before the guaranty was given. Q. That was before the guaranty was given? A. I think it was pretty close to it, it might have been—Q. Well, now, this conversation that you had with her when you went up there to get that note, was how long before the guaranty was given? A. You mean that I speak of? Q. Yes; the one that you have mentioned. A. In the office. Q. I have asked you now nothing except the time when you say you went up to Mrs. Crane's house and she said she thought she had a guaranty with the bank of \$15,000. A. That was the fore part of 1906. Q. How long after the guaranty had been given? A. Probably a year, a year or thereabouts; it might not have been quite a year. Q. Will you look at that note and say whether that is the one? A. Well, I say it was June 19, or February 19, 1906. Q. Well, what is your recollection or memory? Is that the note that you took up there on that occasion when you told Mr. Saunders that you went up there and had this conversation with her? A. I say it was February or June; I don't know whether that was the one, or the one in February. Q. Well, her indorsement is on that note, isn't it? A. Yes, sir. Q. Now, is

that the indorsement that you got from her on that occasion? A. Well, I say I don't know whether it was February or June; it was one of those two dates. Q. How many times did you take notes up there to get her indorsement on? A. One time only. Q. Don't you know as a matter of fact that she didn't indorse any notes until that note of June 19, 1906? A. No; she did indorse notes. Q. What other notes did she indorse for the Crane Furniture Company? A. Five thousand dollar note. Q. When was that done? A. In February and October. Q. Prior to this, now? A. Prior to that; February, 1906, she indorsed one. Q. What was that for? How much was that for? A. \$5,000. Q. And then when was the other one? A. October the year previous. Q. 1905? A. 1905, for \$5,000, and June 19th for \$5,190. Q. 1905? A. 1905. Q. Do you know of any other notes she had indorsed besides these ones you have mentioned prior to the time when you took this, prior to June 19, 1906? A. Yes; she indorsed one for \$10,000. Q. She had been indorsing notes right along, had she? A. When we first opened the account she indorsed notes, after the guaranty was made. Q. After the guaranty was made did she indorse notes? A. She indorsed a note for \$5,000. Q. She indorsed notes right along? A. The \$5,000 note that was given in June, 1905. Q. Then she was on the— in June, after the guaranty was given in February, she indorsed notes for the company? A. Yes. Q. Were you present when this instrument of guaranty was delivered to the bank? A. No. Q. You have stated that Mr. John R. Myers was her attorney? A. Yes. Q. Now, will you repeat again the conversation that you had with her at that time when you took this note up there? A. I stated that the bank had sent us a notice that the—for the note that was due on that day, and the bank required her indorsement, and she objected very strongly. Q. Well, that was the \$5,000 note? A. That was the \$5,000 note, and she objected very strongly to indorsing it because she stated that Mr. Bonham had promised to have that note paid. Q. Mr. Bonham had promised to have that note paid, on behalf of the Crane Furniture Company? A. Well, he said he would have it paid. Q. Well, you understood that he was to have it paid on behalf of the Crane Furniture Company? A. Yes. Q. Now, what else did she say? A. She stated that Mr. Bonham had been acting for her in matters with the bank. Q. Is that all she said? A. Well, with reference to the note— Q. In reference to that note? A. In reference to that note, she made that conversation at the time that I was there trying to get her indorsement. Q. She said that Mr. Bonham had been representing her at the bank? A. Yes. Q. In what way did she say he was representing her? A. Didn't state—just acting for her with the bank. Q. But she indorsed that note? A. Yes; she did, after considerable talking about it. Q. And she also in June indorsed this note for \$5,000, didn't she? A. Yes; this is her indorsement.

"By the Referee: That is the same note that you last handed the witness; what's the date of that?"

"By Mr. Allison: June 19, 1906 (handing witness note dated June 19, 1906, for \$5,000). Q. What did you understand her to mean by Mr. Bonham representing her at the bank? A. In the transactions that she had had with the bank he was acting for her. Q. What transactions had she had with the bank? A. The guaranty and the endorsement of those previous notes when we first started with the bank. Q. Well, the guaranty was given to the old bank, wasn't it; to the Mechanics' National Bank? A. Yes. Q. Did Bonham represent her in that negotiation which led up to her giving that instrument of guaranty to the Mechanics' National Bank; did she say that? A. No, she said that she had given a guaranty to the bank;

didn't say who represented her. Q. She didn't say to what bank? A. To the Mechanics' Bank. Q. To the Mechanics' Bank? A. Yes, sir. Q. And she simply said that Bonham had agreed to have this note paid? A. Yes. Q. And you understood that it was a renewal of the note? A. Yes. Q. And she complained that the note hadn't been paid? A. Yes. Q. And didn't want to renew it? A. No. Q. But she did renew it? A. She did. Q. Now, when was the next time that you say there was a conversation between Mrs. Crane and Bonham and yourself at the bank when this instrument of guaranty was mentioned? A. My conversation with Mrs. Crane? Q. Yes? A. That was the last time when I went to get the indorsement on that note; it was out at her residence. Q. That is the last time you ever had a conversation with Mrs. Crane when the instrument of guaranty was mentioned? A. Yes, sir. Q. Now, you stated that you had another conversation with her when the instrument of guaranty was mentioned, didn't you? A. Yes. Q. When was that? A. That was in the office some time previous. Q. When was that? A. That was in the fore part of 1906. Q. Well, was it before this time that you went up there to get the note signed? A. Yes. Q. And you cannot tell what date that was? A. No; it was, perhaps, two or three, perhaps four, weeks; something like that. Q. It was along about the same time? A. It was before—that was in February or January, I couldn't fix the exact date. Q. What was the occasion of Mrs. Crane being in the bank at that time? A. She wasn't in the bank; she was in the office. Q. What was the occasion of her being in the office? A. When she was down town she would come down frequently. Q. What was the conversation that was had then? A. She asked—she said, 'Archie, how much do we owe the bank?' and he said, 'I don't remember.' Q. And what else did she state? A. And he said, 'By reason of your guaranty we are able to borrow money from the bank, and get credit there.' Q. And that guaranty, according to your idea, had been going on since February, 1905? A. Yes. Q. Isn't it true that this conversation you had was in February, 1905? A. No. Q. How do you know it was not? A. Because when I went to get the indorsement it was very forcibly put on me, the conversation we had such a short time before her objecting—objecting to indorsing the note. Q. Do you mean to say, Mr. Wilder, that she indorsed any notes after February or March, 1905, immediately after that? A. Only the \$5,000 notes. Q. Well, now, how long after this instrument of guaranty was given there was it that you went up there to get this note signed by her? A. It was 1906, the fore part of 1906. Q. How are you able to fix it in your mind that it was in 1906? A. The note that fell due in October, a year previous, I mailed away to her at Beloit, Wis. Q. How did you come to mail that note to her? A. Because she was there. Q. It wasn't her note, was it? A. It was a \$5,000 note, and required her indorsement. Q. You mailed it away to have her indorse it? A. Yes; and I marked on the note where she was to indorse it. Q. Was that the first note that she had indorsed? A. No. Q. What one had she indorsed before that? A. June 19, 1905. Q. She indorsed notes then? A. Yes, sir. * * * Q. Mrs. Crane was a woman of some business ability of her own, was she not? A. From what Mr. Crane said, no. Q. Well, she transacted her own business, didn't she? A. In what way? Q. Well, all the business she had to do? A. Mr. Bonham acted for her in the Crane Furniture Company, and the bank and the real estate agent collected the rents. Q. You say Mr. Bonham acted for her in the bank; how do you know that? A. She told me so. Q. When did she tell you that? A. At the time I went out to get that indorsement. Q. What did she say to you at the time? A. She said that Archie, or Bonham, had been

acting for her in the transaction at the bank. Q. You said a moment ago that that was in reference to the \$5,000 note; that she had agreed to take up, and hadn't taken up? A. I said she objected to indorsing— Q. Didn't you tell me a moment ago that that was in reference to that \$5,000 note? A. No; I did not. Q. What occasion did she have to tell you that? A. Because she objected to indorsing that note; because he had promised to have it paid. Q. Then what occasion did she have to tell you that Bonham was acting for her at the bank? A. Because the note had not been paid. Q. And then you understood that Bonham had agreed to have it paid— A. Yes. Q. And that— A. She did not want to increase her liability at the bank. Q. What she meant by Bonham acting for her was that he had agreed to have this note paid. That's what you understood it?

"By Mr. Saunders: I object to that— Q. Do you mean to say— (By the Referee: Objection overruled.) Q. —before this court that Mrs. Crane told you that Mr. Bonham was acting as her agent to transact business for her as her agent? A. She told me that Mr. Bonham was acting for her at the bank. Q. Answer my question? A. I am trying to. Q. Did she tell you that Mr. Bonham was acting as her agent? A. Yes. Q. Did she use the term 'agent'? A. No. Q. She didn't say anything about 'agent'? A. No. Q. Did she give you any reason for leading you to suppose that he was acting as her agent? A. Yes. Q. How did you get that from her? A. By reason of him acting for her in her transactions at the bank. Q. And what transactions at the bank did she refer to? A. She stated that she was already on a guaranty for \$15,000. Q. She was already on the \$15,000—everybody knew that? A. She objected to increasing her liability. Q. She did sign that? A. And she objected to signing that. Q. And the only transaction she had with the bank was this \$5,000 note aside from the instrument of guaranty? A. At that time; yes. Q. Then you didn't understand her to mean that she meant that Mr. Bonham had agreed to take that note up— A. What's that? Q. What did she say to you then, that gave you the idea that Bonham was acting as her agent? A. I have already told you that she said that he was acting for her in all transactions at the bank. Q. Did she say 'all' transactions at the bank? A. Yes. Q. Did she say 'all'? A. Yes. Q. Did she use the term 'agent'? A. Yes. Q. She did say that, didn't she? She said Bonham was her agent, didn't she? A. Oh, I don't know. Q. You haven't got a very friendly feeling towards Mrs. Crane, have you? A. Who? Q. You haven't got a very friendly feeling towards Mrs. Crane? A. Why not? I certainly have. Q. Have you a friendly feeling towards Mrs. Bonham? A. Yes. Q. And Mrs. Vail? A. Yes; I have; I know of no reason to have any unfriendly feeling. Q. Well, now, you went out there to get her to sign the note? A. To get her indorsement. Q. For \$5,000? A. Yes, sir. Q. And she complained that Bonham had agreed to take that note up? A. Yes. Q. And then you said that she said that Bonham was representing her at the bank? A. Yes. Q. Now, what occasion did she have for saying that Bonham was representing her at the bank, except that she said that he was representing her at the bank? A. She stated that she was already guaranteed with the bank for \$15,000, and she did not want to increase her liability. Q. You cannot tell what month that was in? A. As I said, it was either February or June; it was one of the renewals of that note. Q. Was that before you inserted this language in this statement that you gave at the bank at Bonham's dictation that this conversation with her occurred? A. Which conversation is that? Q. Well, the conversation I have been talking to you about several times? A. Yes; before

that. Q. It was before that? A. Before that statement was made. Q. Then did you put that statement in there on the strength of what she told you? A. No; Mr. Bonham told me to put that in there. Q. You just put in what Mr. Bonham told you? A. Yes, sir."

At the time of the trial, and for some time prior thereto, Bonham was residing in Chicago, but he was not produced as a witness in the case, nor was his deposition taken therein. That the following facts are practically undisputed, but not stated with sufficient clearness, viz.: That on and prior to May 1, 1905, the Mechanics' National Bank of St. Louis, Mo., and two other banking institutions of that city were, and had for a long time been, engaged in a general banking business; that on February 14, 1905, the defendant, Mrs. Crane, executed to the Mechanics' National Bank the guaranty mentioned in the evidence, and upon that guaranty the furniture company borrowed money from the bank and executed its notes therefor. That some time prior to May 1, 1905, the three banks mentioned entered into a lawful contract, agreeing, in substance, to discontinue their several banking businesses and to unite their forces and assets to organize the Mechanics' American National Bank, the plaintiff in this case, to transfer their assets to it and conduct a general banking business under that name. This agreement was carried out by the parties thereto; and that on or about May 1, 1905, as a part of said plan of consolidation, the Mechanics' National Bank assigned and transferred to the Mechanics' American National Bank the notes executed by the furniture company to the former bank, as well as the guaranty of Mrs. Crane given to secure their payment. That shortly thereafter, the Mechanics' National Bank began to liquidate its business for the purpose of going out of business, but had not surrendered its charter at the time of said transfer or at the date of the trial of this cause in the circuit court, if I correctly understand the evidence.

Opinion.

I. This evidence clearly tended to show that Mr. Bonham was the legally constituted agent of Mrs. Crane, in all of her business transactions with the plaintiff bank; and, there being no evidence whatever tending to show that his agency was limited, the law conclusively presumes that it was a general agency, if it existed at all, and that he represented to the bank that he was her agent and purported to act for her as such in all of her transactions involved in this suit there can be no question. Those facts, if true, clearly rendered Mrs. Crane liable to the plaintiff both upon the guaranty and the notes sued on.

II. This evidence not only tended to show that Mr. Bonham was the agent of Mrs. Crane in the transactions mentioned in paragraph 1 of this opinion, but it also tended

strongly to show that she had actual knowledge of the fact that the plaintiff bank held her guaranty, and that it was lending the furniture company money upon the strength of it; and the legal effect of that evidence is not destroyed by the claim of counsel that she had no notice of the fact of the consolidation of the two banks, or, more accurately speaking, that the plaintiff was the successor in business to the Mechanics' National Bank, as well as that of the other two mentioned. The latter bank within 2½ months after the execution of the guaranty by Mrs. Crane to it, went out of business, and thereafter she continued to do business with the plaintiff bank for a period of about 2 years, not only through her agent, Mr. Bonham, but also individually, acting for herself. She indorsed several notes for the furniture company, made by it payable to the plaintiff bank during those two years, after the Mechanics' National had ceased to do business, and the law presumes she read what she signed. Not only that, Mr. Wilder, the secretary of the furniture company, testified that one of those notes was sent to her at Beloit, Wis., where she indorsed it in person, and returned it to him who gave it to the plaintiff. She evidently read that note, which was for \$5,000, before signing and returning it. During this same time she objected and protested against indorsing various notes of the furniture company made to the plaintiff bank, because, as she stated, that the bank already held her guaranty for \$15,000, and that she did not feel like increasing her liability to it; also because, as she said, Archie, Mr. Bonham, had promised to pay off some of the notes she had previously indorsed, and he had not done so. All of this tends to show that she was keeping in touch with her transactions and liabilities to the plaintiff bank, and that it held the guaranty she had executed to the Mechanics' National Bank, and that the plaintiff bank was advancing money to the furniture company upon the faith of her said guaranty, and on its notes made to the plaintiff, indorsed by her. Upon this state of facts, even though it might be conceded that the guaranty did not inure by the assignment to the plaintiff (which I deny), yet clearly, in my opinion, she would be estopped from denying she was liable to plaintiff thereon. Moreover, none of this evidence was contradicted by her or any one else. To say the least of this evidence, it clearly presented a question of fact for the jury or referee to pass upon. All of the legal propositions I have stated are elementary, and need no citations of authorities to support them.

III. Finally, the evidence shows that the Crane Furniture Company was a corporation capitalized for \$50,000, and that Mrs. Crane was the largest stockholder, owning \$15,000 thereof at the time she indorsed the note in question. Being a party in interest,

she was not entitled to notice of protest. *Brooke v. Rutland & Co.*, 15 Ga. App. 26, 82 S. E. 590; *Mercantile Bank of Memphis v. Busby et al.*, 120 Tenn. 652, 113 S. W. 390. The same principle is announced in the case of *Mercantile Trust Co. v. Donk et al.*, 178 S. W. 113.

IV. There are other questions presented and discussed by counsel as to which I express no opinion.

But for the reasons stated, I dissent from the majority opinion in so far as it relates to the first count of the petition, and concur in it as to the second count; and, in my opinion, the judgment of the circuit court should be reversed as to the first count and affirmed as to the second.

STATE ex rel. TIFFANY et al. v. ELLISON et al., Judges of Kansas City Court of Appeals. (No. 18661.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. COURTS—§207—SUPREME COURT—JURISDICTION—QUASHING JUDGMENT OF COURT OF APPEALS.

The Supreme Court has constitutional authority to quash a judgment of the Court of Appeals where the judgment is the result of a refusal by the Court of Appeals to follow the last previous rulings of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 646; Dec. Dig. §207.]

2. CERTIORARI—§66—SUPREME COURT—CERTIORARI TO REVIEW JUDGMENT OF COURT OF APPEALS—PRESUMPTIONS.

The Supreme Court, on certiorari to quash a judgment of the Court of Appeals on the ground of the refusal by the Court of Appeals to follow the last previous ruling of the Supreme Court, will presume that the Court of Appeals, undertaking to state the facts, stated all the facts of record on the question in issue.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 178; Dec. Dig. §66.]

3. EVIDENCE—§220—ADMISSIONS—SILENCE.

That a defendant remained silent when a clerk of codefendant stated, in response to a question asked by defendant as to whether she had a record of a patient's case, that she had, and that the patient was the teacher that defendant dropped iodine in her eye and put it out, was not admissible as an admission against defendant, where the clerk was not in the actual presence of defendant or the third person hearing the conversation, but was on the floor above, and where the conversation was carried on either through a speaking tube or up the stairway, and where codefendant was absent, and defendant could consider his own interests in the controversy, the rule being that silence is not an admission where the physical situation of the parties did not demand a denial, or the relationship of the person making the statement relied on was an employé of a third person who might have adverse interests, or where the statement was not one called for, but was purely voluntary and impertinent, and where the party remaining silent, notwithstanding the statement, could consider his own interests, and for that reason alone decline to reply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. §220.]

Walker and Bond, JJ., dissenting.

In Banc. Original action in certiorari by the State, on the relation of Flavel B. Tiffany and another, against James Ellison and others, Judges of the Kansas City Court of Appeals, to quash a judgment affirming a judgment of the circuit court in the case of Mary Coffey against relators. Record of Court of Appeals quashed.

For opinion of Court of Appeals, see 182 S. W. 495.

Denton Dunn, Fred A. Boxley, and Scarritt, Scarritt, Jones & Miller, all of Kansas City, for petitioners. W. W. Williams, Atwood & Hill, and Park & Brown, all of Kansas City, for respondents.

GRAVES, J. Original action in certiorari, the purpose of which is to have quashed and for naught held the judgment of the Kansas City Court of Appeals affirming a judgment of the circuit court of Jackson county in the case of Mary Coffey v. Flavel B. Tiffany and Joseph W. Howard. In the circuit court the judgment was originally for \$10,000, but, for some reason not made clear by the record, the plaintiff voluntarily remitted principal and interest so as to make the judgment after remittitur just \$7,500. The appeal thereupon went to the Kansas City Court of Appeals. This is one of a series of cases in certiorari pending in this court about the time the case of State ex rel. v. Robertson, 264 Mo. 661, 175 S. W. 610, was set for hearing. As a result, in the Robertson Case, supra, we were accommodated with a wealth of briefs in an insignificant case, and among these were briefs and arguments from counsel in the case at bar. These, of course, went largely to the question of the jurisdiction of this court. We state this because we have in this case extended briefs upon the same question. The Court of Appeals affirmed the judgment of the circuit court, and in so doing it is charged that such court has ignored the last rulings of this court upon several questions therein involved. These questions we can take, so far as necessary, in proper order. The facts pertinent to each question had best be stated therewith.

[1] I. Since the case of State ex rel. v. Broadus, 238 Mo. 189, 142 S. W. 340, it has been the custom of counsel to attack that ruling at each change in the membership of this court. The briefs upon the question of jurisdiction in the case at bar were prepared at a time when a very vigorous attack was being made upon the right of this court to quash the record of the Court of Appeals in a case wherein their pronouncement upon a given question of equity or law was at variance with the last previous rulings of this court. This virulent attack was the occasion of bringing into prominence the very small matter in issue in case of State ex rel. v. Robertson, 264 Mo. 671, 175 S. W. 610. In that case the question of the right of this court to thus superintend the several Courts

of Appeals was fully, and we trust finally, settled. With the ruling in the Robertson Case, supra, we are satisfied, and this question, as argued in the briefs and oral arguments in the case at bar, is ruled against the respondents. We hold, as we did in the Robertson Case, supra, that this court has the constitutional authority to quash the judgment of the Court of Appeals in any case wherein such judgment has been the result of a refusal by such Court of Appeals to follow the last previous ruling of this court upon any matter of law or equity involved in such case. The members of this court may differ and be divided upon what we will consider in determining whether or not the Court of Appeals has failed to follow our last previous rulings, but we are firmly fixed upon the question of our constitutional authority to act, and, in the interest of harmony and unanimity of opinions in this state, it would be almost criminal negligence for this court to decline to use the authority expressly given, and perform the duty thus imposed. We can add nothing upon this question to what was said in the Robertson Case, supra, and pass the question with a re-affirmance of the doctrine announced in that case.

[2] II. In the disposition of this case, as I see the law, it will not be necessary to tread upon any disputed ground. In other words, we can confine ourselves to the facts found by the Court of Appeals in its opinion. By this we mean that, where the court has undertaken to state the facts, we can presume that it has stated all the facts of record upon the question in issue. This we can do because the court is presumed to have done its full duty. It may be a violent presumption (in fact), and a glance at the record in this case has convinced us of the violence of the presumption in the particular case, as we shall point out later. However, within well-defined legal rules, we are justified in saying that the presumption is that the Court of Appeals has fully stated the facts upon the question involved.

[3] During the course of the trial the process server, who served the summons upon Dr. Howard, was permitted to testify to facts, which the trial court considered tantamount to an admission of negligence by Dr. Howard. This evidence was duly objected to by both defendants. It was excluded as to Dr. Tiffany, and admitted as against Dr. Howard. The opinion thus describes the facts:

"She brought this suit August 18, 1909, six months after the injury. The summons was served by a deputy sheriff who was introduced as a witness by plaintiff, and testified to what occurred at defendant's office when Dr. Howard was served. Dr. Tiffany was not in, and after the papers were served on Dr. Howard he and the witness went downstairs (the offices were on two floors), when Dr. Howard called upstairs to the clerk who had received plaintiff, and asked if she had a record of the Mary Coffey case.' The clerk answered that she had,

and that plaintiff 'was the school-teacher that he dropped iodine in her eye and put it out.' Dr. Howard, who was standing by the side of witness, said nothing. Each defendant objected to this testimony and the court sustained the objection of Dr. Tiffany, but overruled that of Dr. Howard."

From the fact that this finding of facts does not say that the young woman spoken to was in the view and presence of Dr. Howard and the process server, Mr. Wofford, we are justified in the conclusion that she was not in the actual presence of either, at the time. We said that the actual records in case might make it appear to be a violent presumption to say that we would presume that the Court of Appeals had stated all the facts. As demonstrating that matter, and for no other purpose, we quote from the actual evidence of the process server:

"Q. You went up there to serve the writ at Dr. Tiffany's office? A. Yes, sir. Q. Who did you see there? A. Dr. Howard, at the first. Dr. Tiffany was not there. Q. Dr. Tiffany was not there the first time? A. No. Q. What did you say to Dr. Howard, or what did you give him, if anything? A. I served the petition and the writ attached. Q. Who else was there? A. Some young woman, acting as an office girl, or typewriter, or something, or bookkeeper. Q. Do you know her name? A. I heard Dr. Howard call it. It seems to me, 'Rose,' 'Miss Rose'; referred to her as 'Miss Rose.' Q. Miss Rose McAllen? A. I don't believe I heard him say 'Miss McAllen,' but 'Miss Rose.' Q. Did you give Dr. Howard a copy of this summons and the petition? A. I did. Q. What, if anything, did he say when you gave it to him?

"Mr. Scarritt: We object on behalf of Dr. Tiffany, as secondary evidence, as hearsay, and not as tending to sustain any of the issues raised by the pleadings, and irrelevant and immaterial.

"The Court: The objection, so far as Dr. Tiffany is concerned, will be sustained. (To which ruling of the court the plaintiff at the time excepted and still excepts.)

"Mr. Scarritt: We make the same objection on behalf of the defendant Dr. Howard.

"The Court: Objection overruled. (To which ruling of the court the defendant at the time excepted and still excepts.)

"A. He didn't say anything to me. Q. Did he say anything to anybody else? A. Not at that time. After we started to go downstairs he, the doctor, either called the young lady or spoke—

"Mr. Scarritt (interrupting): Same objection to this conversation that is now in process of being made on behalf of Dr. Tiffany that we made before.

"The Court: The same ruling as before. (To which ruling of the court the plaintiff at the time excepted and still excepts.)

"Mr. Scarritt: We make the same objection on behalf of the defendant Dr. Howard.

"The Court: Same ruling as before as to Dr. Howard. (To which action and ruling of the court the defendant at the time excepted and still excepts.)

"A. (continuing): After we started downstairs, he either called to her up the stairway or through a speaking tube, and asked her if she had any record of the Mary Coffey case, and—Shall I go ahead? Q. What did she say to him?

"Mr. Scarritt: We object on behalf of the defendant Dr. Tiffany, as being secondary evidence, and a declaration not made by the defendants or either of them, or by any one having any personal knowledge of the transaction referred to; it calls for a statement that was impertinent, under the circumstances, and it de-

serves no notice—that is, on behalf of Dr. Tiffany.

"The Court: It may be understood you will renew your objections to all of this testimony, and that I will make the same ruling without you doing so.

"Mr. Scarritt: This is a fuller objection. It is calling for a different conversation than the former question. That is the reason we make the objection now. It is calling for a statement, as I understand it, through a speaking tube.

"(Question read.)

"The Court: Where was Dr. Howard?

"The Witness: Standing on the steps.

"The Court: Did you see him?

"The Witness: Yes; I was right alongside of him.

"The Court: Did you hear her answer?

"The Witness: Yes.

"The Court: Objection overruled. (To which ruling of the court the defendants at the time excepted and still excepts.)

"A. He asked her if she had a record of the Mary Coffey case. She said she had; that that was the school-teacher that he dropped iodine in her eye and put it out."

It will be noted that the process server was not definite whether the alleged conversation was held by talking to the girl up the stairway or through a speaking tube. The "speaking tube" portion of the facts is omitted by the Court of Appeals, and in a close case might be of much importance, but, with the view that we have of the disclosed facts in the opinion, it is not so material in the instant case. We have already said we can presume that the court found all the facts in its opinion, and from that finding, as it does not specifically appear that the girl was in the actual presence of Dr. Howard and the process server, we will take it as a fact that she was not. The facts found show the girl to have been in the office, and they do not show her to have changed positions after the service of process and this alleged conversation. By the facts found, the girl being in the office, and the alleged conversation being on the stairway, the girl could not well have been in the actual presence of either Dr. Howard or the process server. Of course, the actual testimony of the witness makes this point clearer. This testimony, however, we have cited for illustration rather than use.

We start then with the proposition that it does not appear from the facts found in the opinion that the girl, who made the statement sought to be fastened upon Dr. Howard, as an admission, was in the actual presence of either Dr. Howard and the process server, Wofford, at the time. This is material in measuring the duty of Dr. Howard as to a denial of this voluntary statement of the girl. The question asked by Dr. Howard did not call for such an answer, and hence we say that the statement charged to the girl (and denied by her) was purely voluntary, and in no way called for by the question. Dr. Howard only asked if the girl in Tiffany's office had a record of the case. It should be borne in mind that Dr. Howard was only treating this patient for Dr. Tiffany, in his absence; in other words, that she was Dr. Tiffany's

patient, and the history of the case had been preserved by Dr. Tiffany's office girl. In other portions of the opinion it appears that this office girl arranged with plaintiff for Dr. Tiffany, as Dr. Tiffany's patient. Vide plaintiff's statement of the arrangement made over the telephone as found in the opinion.

Under these facts the questions are: (1) Was there error in the admission of this testimony as tending to show that Dr. Howard admitted his negligence? And (2) was such ruling violative of previously pronounced doctrines of this court upon like or similar questions? We have no hesitancy in saying that the admission of this evidence was error, nor have we any doubt that its admission contravenes the announced law by this court, as well as other courts. Under the facts and rules of law, Dr. Howard was under no obligations to engage (at long range and with party out of his sight and presence) in a dispute with the girl over a voluntary statement of hers, and one wholly irresponsible to the question asked. She was not asked what the record would show, but merely if she had kept a record. The Court of Appeals gets mixed upon the matter. They quote from the evidence and say that Dr. Howard asked the girl if she "had a record of the Mary Coffey case." This is the question that the Court of Appeals says he asked and this is borne out by the actual record. In undertaking to reason out a duty upon the part of Dr. Howard to deny this voluntary statement of the girl, that learned court later on says:

"The question asked by Dr. Howard called for information kept by her in the course of her employment for the benefit and future use of her employers, and her answer was in direct response to that question."

Here the argument of the court misstates the facts it had previously found, and upon this misstatement of the facts the competency of this evidence is made to turn. Howard at no time asked for the contents of the record, and his question in no way called for any such reply.

We do not deny the rule that under given circumstances an admission may be implied from silence, but what we do say is that no court has gone so far as to hold that a man must deny a mere voluntary statement made by a party out of his presence, when to deny it would require him to hurl his denial to a woman out of his presence and in the employ of a codefendant, and, further, when he would be required to hurl his denial up a stairway. In *State v. Hamilton*, 55 Mo. loc. cit. 522, it is said:

"It is not in all instances where declarations are made in the presence and hearing of a person that those declarations can be given in evidence against him; they frequently call for no reply, and sometimes they are impertinent and deserve no notice."

In *State v. Young*, 99 Mo. loc. cit. 674, 12 S. W. 879, one Craft said to Wilson, the marshal having Young, the defendant, in custody, in the presence of Young:

"You have got your right man; you don't have to go any farther to get him."

The evidence was held incompetent, and, among other things, the court said:

"The defendant had the right, therefore, to treat the remark of Craft as a mere impertinence, and best answered by silence."

So in the case at bar. The girl was not in the presence of Howard, and he was in no position to enter into any controversy with her. Her remark was a mere voluntary one, not called for by the question asked, and above all was made by the employé of his codefendant. It amounted to a charge of criminal negligence, it is true, but because Dr. Howard, situated as he was, chose to treat such a charge, coming from that particular source, with silent contempt, should not permit such remarks to go in as evidence of an admission of guilt.

In *State v. Young*, supra, this court has cited with approval the case of *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672. In that case Chief Justice Shaw with his usually analytical mind thus states the rule:

"If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to do it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: First, whether he hears and understands the statement, and comprehends its bearing; and, secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not, whether he is in such a situation that he is at liberty to make any reply, and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. *So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence.*"

This approved rule by this court contains several ideas of importance here. It shows that a person is not always called upon to speak. First, if the party making the statement is a stranger, he is not called upon to reply. The word "stranger," as here used, has reference to a party other than a party to the suit or controversy. There is also the further idea that the party need not act if he thinks his security will be best subserved by silence. In other words, the question of whether a person is called upon to make a reply is wholly dependent upon the circumstances, and we reiterate that this court and

no other court has ever held that it was required of a person charged with an act to answer a voluntary statement of the employé of a codefendant, when such employé was not even in the presence of the party, and when to reply he would have to hurl his reply up a stairway to a woman in the office of a codefendant, whose interest might be diverse to him. In *State v. Glahn*, 97 Mo. loc. cit. 694, 11 S. W. 264, it is said:

"The statement of the witness Lon Wheeler, that he thought the man could be found in the field who committed the murder, should be excluded. It is true this statement was made in the presence of defendant, but it was not such a statement as called for action or reply on the part of defendant. Silence did not, therefore, amount to an admission. 1 Greenl. Ev. § 197."

We cite this because it approves the rule stated in an older volume of *Greenleaf on Evidence*. It approves that rule, and makes it the rule of this court. Section 197 of volume 1 (14th Ed.) of *Greenleaf on Evidence*, so far as material, reads:

"*Silence and Acquiescence*.—Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from this passiveness or silence. (b) The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but also as would properly and naturally call for some action or reply from men similarly situated."

This rule emphasizes the matter of the circumstances of the alleged statement. This is one of the crucial questions in this case: Were there circumstances such as to call for a reply? We have outlined and the Court of Appeals have outlined them. The Court of Appeals wholly disregarded this rule as to the surrounding circumstances, when they held that Dr. Howard had to herald up a stairway a reply to a voluntary statement made by the employé of a codefendant, and especially the rule which allows to such a person to consider his own personal security in refusing to make a reply. In one of plaintiff's briefs in the case, it is stated that Dr. Howard stated in evidence that he used "dionin" in plaintiff's eye, and that "dionin" would produce congestion. If the girl did answer down the stairway, it may have been that Dr. Howard understood her to say "dionin" and not "iodine," as the process server claims to have understood it. We mention this only as a circumstance in the case, which circumstances should be considered with others before a court should permit such evidence to stand as tending to show an admission of negligence. The opinion shows that the very record book of which Dr. Howard made inquiry was put in evidence, and that it corroborated Dr. Howard as to the drugs used.

Our learned Brothers of the Court of Appeals failed to follow the rule approved by

this court in the cases *supra*, when they said that this evidence was competent under the circumstances and facts which they have set out in the opinion. In the very early case of *Phillips v. Towler's Administrators*, 23 Mo. loc. cit. 403, we recognized the extreme danger in admitting such testimony as was admitted in this case. In that case we said:

"The court erred also in allowing the remarks of Robert Towler, made in the presence of the intestate, to go to the jury. They were to the effect that 'the girl had burned plaintiff's stable, and confessed it.' The intestate, it seems, made no reply, and this was received as an admission of the fact on his part, implied from his supposed acquiescence in what was thus said in his hearing. In regard to these admissions, inferred from acquiescence in the verbal statements of others, on the maxim 'Qui tacet consentire videtur,' it has been most justly remarked that nothing can be more dangerous than this kind of evidence, and that it ought always to be received with caution, and never admitted at all unless the statements be of that kind that naturally call for contradiction—some assertion made to the party with respect to his rights, which by his silence he acquiesces in. *Moore v. Smith*, 14 Serg. & R. 392. A distinction is taken between declarations made by a party interested and a stranger, and it has been determined that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so. *Child v. Grace*, 2 Car. & Payne, 193. And we are also told that the silence of the party, even when the declarations are addressed to himself, is worth very little as evidence, when the party has no means of knowing the truth or falsehood of the statement. *Hayslep v. Gymer*, 1 Ad. & El. 162-165. The allowance of the proof here was palpably wrong."

We have underlined one clause peculiarly applicable. The courts draw the distinction, under the circumstances of the case, as between statements made by parties interested and strangers. If John Jones had a claim against me, and in a statement openly said I owed him for certain reasons, and I declined to make any reply, that is one case. But if some third person, having no connection whatever with John Jones, said to me, "You owe John Jones for certain reasons," that is another case. Between the two the books generally, and the cases in this state, draw a distinction. It is an impertinence for one not interested to tell me that I am liable to John Jones. Such impertinence requires, under our rules, no answer. It is likewise just as much of an impertinence for a stranger to the controversy to say to me, "You owe John Jones by reason of your negligence." There can be no distinction drawn between the two supposed cases. All considered, there are not less than two and perhaps three expressed rulings of this court set at naught by the ruling of the Court of Appeals in this case. These we have tried to outline, *supra*, thus: (1) The physical situation of the parties did not demand a denial; (2) the relationship of the girl to the codefendant, who might have adverse interests, did not demand a denial; (3) the statement, if made (a matter we seriously doubt), was one not called for by the

question, and was therefore purely voluntary, and in the highest degree an impertinence; (4) Dr. Howard, even if in a physical situation where a protest might seem to be expected, still had the right to consider his own interests in the controversy, and for that reason alone decline to reply. All these doctrines are recognized by this court, and all are ignored by the ruling of the Court of Appeals in this case. Thus in the very recent and most excellent work, 1 R. C. L. p. 478, it is said:

"Intimately connected with admissions that are implied by the acts or conduct of the party are admissions by silence or acquiescence. If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes no reply, it may be a tacit admission of the facts stated, depending upon whether he hears and understands the statement, and comprehends its bearing, whether the truth of the facts embraced in the statement is within his own knowledge, *whether the circumstances are such as to afford him an opportunity to act and speak freely, and whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit it.* So, if the matter is of something not within his knowledge, or if the statement is made by a stranger whom he is not called on to notice, or if he is restrained by fear, by doubts of his rights, or by the belief that his security will be best promoted by his silence, then no inference of assent can be drawn from silence."

Bear in mind that a stranger, as used in all these rules, means one not a party to the suit or controversy. Bear in mind that the circumstances surrounding the parties are material. Bear in mind that he can refuse to reply, because he may deem his security to be best subserved by silence. In either of such instances no inference of assent can be drawn from a failure to reply. The case at bar is stronger. The physical situation of the girl and Dr. Howard was not such as to call for a reply. The voluntary statement would justify silence upon the ground of self security. The relationship of the girl to a codefendant with apparent adverse interests would prompt silence. These doctrines of law are recognized by the rulings of this court, as we have pointed out. They were ignored by our learned brothers of the bench. It requires no "gray mule" case. It is only necessary for us to find that the general doctrines of law or equity as announced by this court upon similar questions have been contravened.

In fact, under the weight of general authority, evidence of this character is considered to be so weak in probative force that it is rarely ever admitted. The circumstances must point very clearly to the necessity for reply, before it can be admitted at all. The books look upon it (admission by his silence) as the weakest of all evidence in probative force, but yet as most dangerous to a defendant in the trial. That the verdict in this case could not have been obtained without this prejudicial evidence I have little doubt. That the unlettered (scientifically speaking) process server misunderstood "Iodine" for

"dionin" I have little doubt, if the talk took place at all. All the circumstances of the case point that way. However, these last few lines are beside the question, and only serve to show that even strict legal rules may at least sometimes work out righteous results. For the reasons aforesaid, the judgment of the Court of Appeals should be quashed.

III. It is urged with much force that the facts found fail to show any causal connection between the injury proven and the acts of the defendants or either of them. There is much substance in the contention, and if we had in the Court of Appeals opinion all of the facts upon the issue I would feel constrained to discuss it, notwithstanding our ruling in paragraph 2, *supra*. That ruling disposes of the judgment of the Court of Appeals, and leaves the case so that such court will have to award a new trial nisi, and this coupled with the further fact that on such new trial further evidence connecting the acts of the defendants with the injury may be introduced, we personally prefer not to give expression to our view upon the rectified facts in the opinion upon that question. In this case we are confining ourselves to the facts stated in the opinion, although we have read the whole record, and have our own impressions as to the facts therein.

Let the record of the Court of Appeals be quashed. It is so ordered.

WOODSON, C. J., and FABIS and BLAIR, JJ., concur. WALKER, J., dissents in opinion filed. BOND, J., dissents, because he thinks this court without jurisdiction. REVELLE, J., not sitting.

WALKER, J. I do not concur in the majority opinion. The limiting of the review of this case in the majority opinion to an examination of the opinion of the Court of Appeals is in accord with the qualified power granted by certiorari to the Supreme Court under the Constitution (article 6, § 6, amendment of 1884) to supervise the rulings of such courts and is not subject to objection. The field of operation of the writ under the power granted by the Constitution is much more limited than at common law. This court would have no power to quash a judgment of a Court of Appeals on account of its non-conformity with our last previous ruling, if it were not for the constitutional provision which authorizes a review only under the conditions therein prescribed. The sole source of the Supreme Court's power in this regard being in the provision of the Constitution referred to, and same relating only in any given case to the judgment of the particular Court of Appeals, we must look to the opinion of said court upon which the judgment is based, and which of necessity contains the rulings and the reasons for the rendition of the judgment, to determine whether cause exists for the issuance of the writ. To extend our examination further

would be to question the integrity of the judgment of the Court of Appeals, the appellate jurisdiction of which, except as to the question of excess, is complete in the class of cases to which the one under review belongs. More than this, it would constitute an usurpation of appellate jurisdiction by the Supreme Court properly belonging to the Courts of Appeals, and render them intermediate courts of review, instead of tribunals of final jurisdiction within the meaning of the Constitution. As we have indicated, the review in the case at bar in the majority opinion being confined to proper constitutional limits, other matters may appropriately engross our attention.

It is urged that the office attendant was not personally present when she made the damaging statement to Dr. Howard in response to his inquiry, to which he made no reply; that she was not his employé, but that of his codefendant, Dr. Tiffany; that her statement was not in response to Dr. Howard's inquiry, and hence was a mere impertinence; and that he was not called upon to reply thereto. In view of all of which it is held that the ruling of the Court of Appeals in approving the admission of testimony in regard to this matter was error, and authorizes a review by this court of the opinion of said court, provided, of course, its opinion is not in accord with the last previous ruling of this court on the subject. Visual and immediate physical presence is not necessary to authorize the application of the rule which renders testimony in regard to a damaging statement competent, and construes silence under a proper statement of facts, to be an admission of the truth of such statement.

So far as the matter of personal presence is concerned, proximity within a distance sufficient to permit the hearing and understanding of what is said is all that is required. The person making the statement, therefore, should be so situated that the one in whose hearing it was made and whose duty it may be to reply to same may be enabled to hear and understand the statement and thus comprehend its meaning. It is not contended that Dr. Howard did not hear and understand the statement. If this fact were not conceded, the circumstances would justify no other conclusion. He made the inquiry in regard to the case he had treated and of which she had kept the record. She heard and understood him, because she replied thereto, designating the patient. That he heard and understood her is evident from the testimony of the deputy sheriff, who was in his immediate presence when the reply was made, and who not only heard, but comprehended, what she said. In the face of these facts, what did it matter whether the attendant was within the sight and touch of Dr. Howard when she made the statement, or in Dr. Tiffany's office in another room? The cases may be examined in vain for an author-

ity holding that a damaging statement of the character here under consideration is not admissible, because not made in the immediate presence of one whose duty it may have been to deny the same. This is true because, as we have stated, hearing and understanding are the tests of admissibility and not mere proximity.

The fact that the office assistant was not an employé of Dr. Howard, but of his codefendant, is urged in the majority opinion as a reason why he was not required to deny her statement. The rule regulating the admission of evidence of the character here under consideration does not in reason, and should not, require that the person making the damaging statement shall bear any relation to the person whose duty it may have been to deny the statement to avoid the implication which the law permits that silence indicates acquiescence. The test of admissibility is not the relation of the parties, although this may and often does afford opportunities for an understanding of the matter not otherwise obtainable; but did the person making the statement, irrespective of any relation, have such a knowledge of the subject as to enable him or her to speak understandingly in regard thereto. Let it be conceded that the office assistant was the employé of Dr. Tiffany. Dr. Howard, on account of his professional relation, must have had a general knowledge of the case concerning which he made the inquiry. She must have had a particular knowledge of same, on account of her custody and keeping of the records of the office. Her knowledge and understanding of the matter, therefore, could in no wise have been different or more complete had she been in his employ instead of that of Dr. Tiffany. In addition, the inquiry made by Dr. Howard is, in itself, proof of her possession of such information in regard to the case as to render testimony concerning the statement, as preliminary to showing his silence, clearly admissible. If she did not possess this knowledge, for what purpose was the inquiry made, especially in view of the doctor's general knowledge of same and his connection therewith?

The specific inquiry which evoked the statement around which this controversy centers was made by Dr. Howard to the office assistant in his asking her "if she had the record in the Mary Coffey case." She replied "that she had, and that the patient was the school-teacher that he had dropped iodine in her eye and put it out." It is announced in the majority opinion that this reply was not responsive to the inquiry, and hence it was not incumbent on the doctor to deny same. A statement may be irresponsible so far as it relates to the inquiry which prompted it, but this does not measure the duty as to the denial of same by one whose rights are thereby affected, and whose silence may import an admission as to the truth of the statement. The measure of duty demanding

a denial depends upon whether the rights of the person concerning whom the statement is made is affected thereby. If such statement is adverse, and is made by one who is enabled from knowledge of the facts to speak understandingly, then a denial is incumbent upon the person referred to. Here the statement was not made by a stranger, but by one who, on account of her relations, was familiar with the case. The statement had reference to a matter with which the doctor was also familiar; otherwise, he would not have made inquiry for further information in regard to same. In addition, and of prime importance in determining whether or not the statement may be regarded as an impertinence, it is evident that it had reference to the doctor's rights, and, if unchallenged, could not be construed otherwise than as adverse to his interest. His duty, therefore, to deny same was plain. The Court of Appeals pertinently says in regard to this phase of the case:

"Had the charge come from an impertinent stranger, no admission of its truth could be implied from the silence of the accused. It did not come as an impertinence, but in answer to a question asked by the accused of the young woman who was a sort of factotum in the office of defendants, received their patients, inquired into their business, and kept the office record of cases treated by defendants. The question asked by Dr. Howard called for information kept by her in the course of her employment for the benefit and future use of her employers, and her answer was in direct response to that question. It purported to give him the facts relating to the history of the case as she had received them from him, and it would have been most unnatural for him not to deny such a charge if it were false, no matter who was present. It was just as though she had said: 'You told me you put out the woman's eye, and that is the history of the case in this office.' A charge of that kind, if false, would bring a denial from any man under any circumstances. The evidence was properly admitted."

In *Commonwealth v. Kenney*, 12 Metc. (Mass.) 237, 46 Am. Dec. 672, it is announced that, where a damaging declaration is made in one's hearing and he makes no reply, his silence may be held to be a tacit admission of the truth of the declaration under these conditions; that he heard and understood the declaration and comprehended its meaning; that the truth embraced therein was within his knowledge; that he was at liberty to make a reply; that the declaration was made under such circumstances and by such a person as to demand a reply if he did not intend to admit it. We realize that we are not required to go beyond our own cases to determine the admissibility of testimony in a case submitted for our determination as is the one at bar. But to avoid citations to numerous authorities we have found it most convenient to employ the summary found in the Massachusetts case, as embodying all the essentials of our own rulings. In no other case have we found a clearer or more concise statement of the conditions which must be present to authorize the admission

of testimony in regard to a statement demanding a denial. A comparison of the facts in the case at bar discloses the presence of all the conditions declared to be necessary in the case cited.

The following cases are either discussed in the majority opinion or are cited by the petitioners for the writ herein as in conflict with the rulings of the Court of Appeals in the admission of this testimony: *State v. Hamilton*, 55 Mo. 520; *Phillips v. Towler's Adm'r*, 23 Mo. 401; *State v. Young*, 99 Mo. 666, 12 S. W. 879; *Adams v. Railway*, 74 Mo. 553, 41 Am. Rep. 333; *Wojtylak v. Coal Co.*, 188 Mo. 260, 87 S. W. 506; *State v. Mullins*, 101 Mo. 517, 14 S. W. 625; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260. We will review them in their order to enable it to be determined, from a fair statement of the facts in each, whether they contravene the ruling under review.

In *State v. Hamilton*, supra, the remarks received in evidence were not, as in the instant case, directed to the defendant, and hence did not charge him with any offense. The *Hamilton* Case is referred to and distinguished by the Court of Appeals as presenting a different state of facts from those in the case at bar.

In *Phillips v. Towler's Adm'r*, supra, a remark was made in the presence of the owner of a slave that the slave had burned the building in controversy and had confessed, to which the owner made no response. It was not shown that the owner had any personal knowledge of the transaction, and, of course, the remark made no charge against him. His silence under these circumstances, being the silence of one not personally accused, could in no sense be held to be an acquiescence in the truth of the statement.

In *State v. Young*, supra, the remark charged to have been made in the presence of the accused was while the latter was under arrest and therefore in no position to make a denial. Further than this, the remark was made by a mere stranger, who is not shown to have had any knowledge of the case, and, while made in the presence of the accused, it was not addressed to him, and was therefore no more than an impertinence, which did not require a denial.

Adams v. Railroad, supra, instead of containing a ruling adverse to that of the Court of Appeals, is an authority in support of same. The *Adams* Case holds that the declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of the inquiry in the suit in which they are offered. The office attendant, so far as the case in controversy is concerned, was engaged in the transaction of Dr. Howard's business, and was therefore his agent when she was asked by him if she had the record in the Coffey case, and her

reply was made in response to this inquiry; that the inquiry was a part of the entire transaction is evident from the fact that the deputy sheriff had just served a summons upon Dr. Howard in the suit brought by the plaintiff for the injury about which the inquiry was made.

In *Wojtylak v. Coal Co.*, supra, there is no ruling which by remote inference can be said to sustain the petitioners' contention.

In *State v. Mullins*, supra, the declaration charged to have been made was in a judicial proceeding, and hence not within the rule.

In *State v. Glahn*, supra, it is held that the rule in regard to admissions inferred from acquiescence in the verbal statements of others has no application, except when the statement calls for action or reply on the part of the defendant. With this statement of the rule we have no fault to find, but we question the propriety of its application to the facts at bar, except to sustain the ruling of the Court of Appeals. If there ever was a case calling for action or reply, it was in the one now under consideration. Dr. Howard was familiar with all the facts; he had been the principal actor in the case; he knew from the service of the summons then made by the officer that the plaintiff had asserted in a court of law her right to damages for the injuries he was alleged to have inflicted; when, therefore, the declaration as to his liability was made by the attendant that he had dropped iodine in the eye of the school-teacher (meaning plaintiff) and put it out, his duty, to avoid the application of the rule as to the inference the law permits to be drawn under such circumstances, became imperative to deny the truth of the declaration.

The decision of the Court of Appeals admitting the testimony in question did not contravene any previous ruling of this court on the subject. More than this, it is in accord with the strong current of authority elsewhere. There is, therefore, no authority for the exercise of our supervisory power. 2 Wigmore on Ev. § 1071; 2 Chamberlayne, Mod. Ev. §§ 1418-1433; 2 Jones Com. on Ev. § 289; and 5 Wigmore on Ev. § 1071, containing references to latest cases.

In view of the reasons stated and the conclusions flowing therefrom, it follows that our writ should be quashed, which will result in an affirmance of the judgment of the Court of Appeals.

DUDGEON et al. v. HACKLEY et al.
(No. 17286.)

(Supreme Court of Missouri. Feb. 9, 1916.)

1. JUDGMENT ⇐715—CONCLUSIVENESS—MATTERS DECIDED.

A testator, who directed that his property should be equally divided among his children

and one grandson, devised to one son a large parcel of land for life and at his death to his bodily heirs. The will further declared that as such son had, with the land, received a greater share than other children, he should make payments to other children, so that the shares should be equal. A judgment directing sale of such land to satisfy the charges was affirmed on appeal; the sale directing that all interests in the land, and not merely the son's life estate, should be sold. Held, that the judgment was a conclusive adjudication that the entire parcel of land was subject to the charges, and so the son was entitled to buy in the land at judicial sale.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1246; Dec. Dig. ⇐715.]

2. LIFE ESTATES ⇐10—OUTSTANDING TITLE—ACQUISITION.

In such case the son's purchase at judicial sale was not the acquisition of a paramount outstanding title, which would inure to the benefit of reversioners, who might take in default of his bodily heirs, and the son acquired the fee free from claims of reversioners.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 14; Dec. Dig. ⇐10.]

3. LIFE ESTATES ⇐10—CREATION OF TRUST.

In such case, the fact that the son, who had only a life estate, purchased the land at judicial sale, does not create a trust in favor of those reversioners who would take in default of bodily heirs, for the order of sale destroyed relations of confidence between the parties.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 14; Dec. Dig. ⇐10.]

Bond, J., dissenting.

In Banc. Appeal from Circuit Court, Howard County; A. W. Waller, Judge.

Action by William A. Dudgeon and others against May Hackley and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

With a very few verbal corrections we adopt the statement of facts as found in the divisional opinion. This statement reads:

"The plaintiffs are the sole surviving heirs of Alexander Dudgeon, Sr., deceased, who died in 1882, after having devised 267 acres of land to his son, Alexander Dudgeon, Jr., for life, with remainder to the heirs of his body, and charging certain advancements against the land devised to Alexander Dudgeon, Jr., and another devisee. The other heirs brought an action in March, 1883, to determine and enforce the amount thus payable, so as to equalize themselves. Such proceedings were had in that suit as resulted in a decree of the circuit court, affirmed by this court, charging the sum of \$3,737.50 as an equitable lien against the said 267-acre tract devised as aforesaid. A special execution was issued for the enforcement of that judgment, whereunder the property so devised to Alexander Dudgeon, Jr., was sold, and he became the purchaser at such sale for the sum \$4,492.80, being the amount of the aforesaid lien and costs accrued in its enforcement. In order to provide the purchase money the said Alexander Dudgeon, Jr., borrowed \$4,800 and secured it by his deed of trust executed upon said 267 acres. The petition in the present case alleges: That by reason of these premises the said Alexander Dudgeon, Jr., acquired the legal title to the said tract of land, subject to the purchase mortgage, in trust, for the benefit of the contingent remainderman, to wit, the heirs of his body, as provided in said will, and in default of such heirs, for the benefit of plaintiffs as reversioners. That

in June, 1891, said Alexander Dudgeon, Jr., borrowed \$5,236 and executed his deed of trust to secure the same upon the 267-acre tract aforesaid, and used the money thus acquired to pay off and discharge the prior mortgage given by him on said land. That on the 3d of December, 1904, the said Alexander Dudgeon, Jr., conveyed a part of said tract, to wit, 107 acres, and received \$5,000 from the purchaser, and applied this sum in part to pay off and discharge in part the aforesaid mortgage, leaving a balance due of about \$2,900. That the holder of said indebtedness assigned it to the defendant Joseph Megraw. That Alexander Dudgeon, Jr., and his wife died—the wife in August, 1910, and the husband in June, 1911, without heirs of their body surviving. That said Alexander Dudgeon in his lifetime duly made and published his will, which was admitted to probate after his death, whereby he devised the unsold portion of the 267 acres, to wit, 160 acres, to his nephew, May Karl Hackley, and nominated Paul Hackley to be the executor of his will, both of whom are alleged to claim some interest in said land. The petition then charges that May Hackley took the legal title to said tract of land, to wit, 160 acres, subject to the balance of the debt secured by mortgage thereon, and now holds the same in trust for the benefit of these plaintiffs, who are reversioners thereof in default of any heirs of the body of Alexander Dudgeon, Jr., deceased, and who are willing and ready to contribute to the estate of Alexander Dudgeon, Jr., or his devisee, their just part of the purchase price of said land paid by the said Alexander Dudgeon, Jr. The plaintiffs ask for relief on the equity side of the court, and for a decree determining the respective rights of the plaintiffs and defendants May Hackley, Paul Hackley, and Joseph Megraw, and for general relief.

"May Hackley answered by his guardian ad litem, admitting in substance the allegations of the petition which related to heirship, the devise to Alexander Dudgeon, Jr., the amount of the advancements charged against Alexander Dudgeon, Jr., and enforced as an equitable lien against said 267 acres, the death of the said Alexander Dudgeon, Jr., and his wife, the devise by him to defendant May Hackley, and the existence of an unpaid balance of the mortgage on the land. The defendants further pleaded the statute of 10 years' limitation, and that plaintiffs have been guilty of laches. On the trial, the evidence disclosed that the will of Alexander Dudgeon, Sr., who died in 1882, contained the following provisions:

"Second. I will that my property be equally divided amongst my children, viz., Archie Dinwiddie, my grandson, who is entitled to one share; Bernard F. Dudgeon, Martha Settle, Alexander Dudgeon, William A. Dudgeon and John Dudgeon, after their paying to my estate what I have them charged with on my cash book.

"I give to my son, John Dudgeon, 80 acres the E. $\frac{1}{2}$, etc., and to my son, Alexander Dudgeon, the home place containing 267 acres as follows, 107 acres, E. part, etc., to my grandson Archie Dinwiddie, 70 acres S. part, etc. My son, Alexander Dudgeon, Jr., and my grandson, Archie Dinwiddie, received larger advancements than the rest of my children, including the land I have given them in my will and they are to advance to the other children to make all equal.

"The 267 acres I have given to my son, Alexander Dudgeon, is to him and his wife, during their lifetime and at their death to my son Alexander Dudgeon's bodily heirs."

"There was other evidence sustaining the allegations of fact made in the petition, and it was also shown that prior to the execution of a mortgage upon the tract of 267 acres purchased by Alexander Dudgeon, Jr., at the sale made by the sheriff, he, Alexander Dudgeon, Jr., obtained a quitclaim deed from all the present plaintiffs, except Archie F. Dinwiddie, and applied

for a farm loan on said land, rating it at about \$14,000, and that the original mortgage was given to secure that loan. The trial court dismissed the bill, and plaintiff Dinwiddie appealed."

The foregoing statements suggest that this court had ruled upon the construction to be given to the will of Alexander Dudgeon, Sr. Further facts should be stated. This court did affirm the judgment of the Howard county circuit court in the construction of this will. *Dudgeon v. Dudgeon*, 87 Mo. 218. It should be added that the appellant Dinwiddie in this case was a party to that suit, and was the appellant in that suit. It should be further stated that the only serious question upon appeal in that case was whether or not the charge against the 267 acres of land mentioned in the will of Alexander Dudgeon, Sr., should be limited as a charge against the life estate of Alexander Dudgeon, Jr., or whether it should be construed as a charge against the land, and thereby against all the estates and interests therein. The appellant Dinwiddie, in this case, was the appellant in that case, and was trying to protect his prospective reversionary interest by urging that the charge provided for in the will should be declared only as against the life estate, and against no other interests in that 267 acres of land. This court denied the contention of Dinwiddie, and said that all interests in this land should be sold to carry out the intent of the will maker. All interests were sold and Alexander Dudgeon, Jr., became the purchaser at execution sale. This sufficiently states the case.

W. M. Dinwiddie, of Columbia, and E. W. Hinton, of Chicago, Ill., for appellants. A. W. Walker, of Fayette, and W. M. Williams, of Boonville, for respondents.

GRAVES, J. (after stating the facts as above). [1, 2] When clearly considered, this case narrows down to a very small compass. In *Dudgeon v. Dudgeon*, 87 Mo. 218, this court construed the will of Alexander Dudgeon, Sr. We then said:

"The plaintiffs in this case are four of the children of the decedent, and allege substantially in their petition that the total value of the estate, including the value of the land devised and advancements made by deceased in his lifetime, amounted to the sum of \$19,425; that, to make each one of the six devisees equal, each one would be entitled to the sum of \$3,237.50; that each one of the plaintiffs had received by way of advancement much less than the above amount; and that defendant Alexander, adding the value of the land devised to the advancement made him, would receive the sum of \$3,737.50 in excess of said amount of \$3,237.50. The object of the suit is to charge this excess upon the 267 acres of land devised to Alexander Dudgeon and wife during their lives, and after their death to the bodily heirs of said Alexander; and the petition concludes with a prayer asking that said excess be decreed to be a charge upon the land so devised and that it be sold for its payment. The court made a decree in conformity with the prayer, the propriety of which is challenged by the appeal to this court.

"It is conceded that, to make the children and

devisees equal sharers in the estate of the decedent, each one should receive the sum of \$3,237.50. It is also conceded that each one of the plaintiffs had not received this sum, but a much less sum, by way of advancement. It is also conceded that the value of the 267 acres of land devised, when added to the advancement of \$300, made to Alexander in his father's lifetime, would exceed the amount of \$3,237.50 in the sum of \$3,737.50. But it is contended that, inasmuch as Alexander, the son, only took a life estate, with remainder in fee to his bodily heirs after his death, the said excess of \$3,737.50 could only be charged against the life estate, and not against the fee. Such a construction as is contended for would not execute the manifest purpose of the testator, but would, on the contrary, defeat it. It is clearly shown by the second clause of the will that the testator intended that all of his children should share equally in the distribution of his estate, and that no one of them should have any advantage in this respect over any other. In order to insure this result he provides that each shall account for the advancements made by him in his lifetime, and being conscious of the fact that the devise of the 267 acres of land to Alexander and his bodily heirs after his death would make the advancements to him larger than those made to the rest of his children, he expressly declares: That his son, Alexander, and his grandson, Dinwiddie, shall advance to the other children to make them equal. To charge the excess received by Alexander, Jr., on his life estate, and sell such interest to pay it, would be, not only practically to disinherit him, but would fail to bring about the equality in the distribution of the estate, which was the sole purpose of the testator as expressed in the will.

"It is manifest that the devise of 267 acres of land to Alexander, Jr., created an inequality in the distribution of decedent's estate, and in view of this fact, which was in the mind of the testator, as a part of the consideration for the devise, Alexander was required to restore the equality by payment to the other children of the excess given him by devise, and in such case the law attaches an equitable lien on the land for the sum required to be paid. *Clyde v. Simpson et al.*, 4 Ohio St. 445. If the land devised was worth the sum of \$3,750, which seems to be admitted, after the payment to the other children of the sum of \$3,737.50, the amount of the excess, to make each of their shares equal, \$3,250, there would still be left to Alexander and his children, in the event of his having any, the like sum of \$3,250; he having received an advancement of \$300 in his father's lifetime. The construction put upon the will by the trial court in its decree brings about the above result, and gives to each child the same amount, thus effectuating and carrying out the intention of the testator. On the other hand, if it be construed, as counsel contend it ought to be, that it was the intention of the testator to make the payment either a personal charge on Alexander or his life interest only, it would require the payment of more than his life interest was worth, and the will, instead of giving him anything, or conferring a benefit on him, would bring him in debt. If solvent, he would be required to pay more in cash than he is given by the testator in consideration of such payment. If, on the contrary, he is insolvent, then the plaintiffs would be deprived of a large part of the provision intended for them. We cannot accept a construction bringing about such results. *Allison v. Chaney*, 63 Mo. 279; *Decker's Ex'r v. Decker's Ex'r*, 3 Ohio 157.

"The judgment of the circuit court is affirmed, in which all concur."

The appellant in the case at bar was the appellant in that case. He was then urging that the life estate given Alexander Dudgeon, Jr., be made to bear the charge, against this

267 acres of land, created by the will. Alexander Dudgeon, Jr., was contending against that construction of the will, and this court sustained him. We affirmed the judgment nisi, which created a lien against the land and all interests therein, for the charge created by the will. Under this decree of such a lien the land (not any particular interest therein, but all interests therein) was sold. This was a lien placed there by the very terms of the will, as we construed that will. It was a lien placed there by the party having all the interests and title in and to the land. It was placed there by the very instrument which gave this appellant his contingent reversionary interest. It covered that interest, and he took his contingency subject to this lien. When the court directed the land to be sold, it was but putting into effect the terms of the will. It is urged here that when Alexander Dudgeon, Jr., bought at this judicial sale, he was buying an outstanding title, and he bought it for the benefit of the reversioners, who might come in and contribute their portion of the outlay. We are not impressed with the idea that such rule has application to the facts of this case. In other words, this is not an outstanding paramount title within the meaning of that generally accepted and righteous rule. In this case the very title of Dinwiddie himself was being sold under the judgment of this court; not an outstanding title in the sense of the rule invoked. Not only was Alexander Dudgeon, Jr.'s, title and interest being sold, but that of Dinwiddie as well. An outstanding paramount title, within the meaning of this rule, has no reference to the title of the very party himself. Here Dinwiddie's title was decreed to be sold, and was sold. This court had held that Alexander Dudgeon, Jr., was under no legal obligation to discharge this debt. We held that all interests were bound for this obligation.

That question is *res adjudicata* here. It is urged in this case that it was the duty of the life tenant to protect the estate from this lien. That is just what we held in 87 Mo. 218, that he did not have to do. The whole fallacy of appellant's contention lies in the fact that he overlooks our holding in 87 Mo. 218. Under that ruling every interest in this land was directed to be sold. Dinwiddie's interest, as well as Alexander Dudgeon's, was obligated to discharge the charge against the land. It is true that Dudgeon's interest therein was subjected to the charge, as was also the interest of Dinwiddie, whatever that was. If this will have specifically directed the executor of the will to sell this land in the event that the charge was not discharged, and the executor has sold the same, there would be no question as to Alexander Dudgeon's right to buy at that sale. A court of equity only did what was authorized by the will. Such a sale stands more in the line of a partition sale. Its very

purpose under the will was to equalize the interests of the parties in the estate. We so said when the question was here.

[3] This reversioner was not closer on the theory of a trust relationship than are tenants in common. Thus in *Snell v. Harrison*, 104 Mo. loc. cit. 191, 16 S. W. 152, this court said:

"But this rule would be inapplicable when one tenant in common buys in the independent interest of another tenant in common—similarly situated as himself."

This is peculiarly applicable here. The court had directed that all interests in this land be sold. It was the order of a court, not the procurement of a party having an interest in the land. *Dinwiddie and Alexander Dudgeon, Jr.*, were similarly situated. They both had interests in the land to be sold. The sale was not by the procurement of either, but the result of the will of the ancestor, under a direction of a court of equity. Under these circumstances Dudgeon had as much right to buy *Dinwiddie's* interest as would a stranger. *Walker, J.*, in the very recent case of *Becker v. Becker*, 254 Mo. loc. cit. 684, 163 S. W. 865, thus disposes of the question:

"Following this rule to its legal conclusion, the heirs of an intestate, upon his death, take the land of which he died seised in common, and their duties, which are reciprocal, immediately arise. The fact must not be lost sight of, however, that the estate does not vest in them absolutely, and it may be divested entirely if the land is taken into the custody of the courts and subjected to the payment of the debts of the deceased; the appropriation of the title of the land in such an instance being as it came directly from the ancestor, and not as it came from the heirs. An order of a court for the sale of land for the payment of debts will sever the relation of cotenancy, and one who purchases at a sale under such order thereby acquires the entire title, regardless of the equity of redemption or the incumbrance. This is true for the reason that the order of the court for the sale of the land takes precedence over the cotenancy, and subordinates the rights of the cotenants to the paramount right to appropriate the property for the payment of debts. This was what was held by this court in *Aubuchon v. Aubuchon*, 133 Mo. 260, 34 S. W. 569. An appropriate illustration, deduced from the reasoning in the *Aubuchon Case*, is that 'the right of one heir to purchase for his exclusive benefit is analogous to that of a tenant in common to purchase at a sale of the property under an order of sale in partition,' a right which is recognized in *Stephens v. Eills*, 65 Mo. 456, in which it was held that a sale under an order of partition dissevered the cotenancy. In such a case, says the court, 'all the world is invited to bid, and among others the cotenants, or any one of them. A bid from one of them occupies the same footing as a bid from a stranger.'"

The appellant in this case overlooks some vital questions when he undertakes to invoke rule of a trust relation; i. e.: (1) This court held that there was no obligation upon Dudgeon to discharge this charge against the land placed in his possession by the will; (2) that the effect of the decree was to sever the trust relations, if in fact any had been created by the will; (3) that this was a judicial sale, at which all parties ought to

stand upon an equal footing. Had a stranger bought in the property, no question could have been raised. If, as this court held, Dudgeon owed the reversioners no duty to protect this land from the charge, then Dudgeon would at least stand as a stranger at this sale. Mr. Justice Lurton thus outlines the law in *Starkweather v. Jenner*, 216 U. S. loc. cit. 528, 30 Sup. Ct. 384 [54 L. Ed. 602, 17 Ann. Cas. 1167]:

"But it is said that Jenner's relation as tenant in common to appellant and those associated with him as owner of the property sold to pay off this paramount lien forbid his purchase. That there is such a community of interest between those who hold a common title as to forbid one such cotenant from acquiring any benefit from the acquisition of an outstanding superior title is undeniable. That a court of equity upon timely application will convert such a purchasing tenant into a trustee for the common benefit is true. The doctrine is considered and applied in *Rothwell v. Dewees*, 2 Black, 613 [17 L. Ed. 309], and *Turner v. Sawyer*, 150 U. S. 578 [14 Sup. Ct. 192, 37 L. Ed. 1189]. For much the same reason one tenant may not hold adversely the common property against another, though he may do so, if he act openly, and, in that event, the statute will run in his favor. *Elder v. McClaskey*, 70 Fed. 529, 542 [17 C. C. A. 251]. But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion, nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public. Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about, and which sale he in no way controls. *Twin Lick Oil Company v. Marbury*, 91 U. S. 587 [23 L. Ed. 328]; *Allen v. Gillette*, 127 U. S. 589 [8 Sup. Ct. 1331, 32 L. Ed. 271]."

This is applicable to the facts of this case. Dudgeon, Jr., was dragged by the ears into the case of *Dudgeon v. Dudgeon*, 87 Mo. 218, supra. He made no effort to acquire any outstanding title. When judicial sale of the property was ordered under the will, he bought at such sale, as under the law he had a right to do.

The judgment should be and is affirmed. All concur, except

BOND, J. (dissenting). I. The learned majority opinion overlooks certain facts shown by the record on file in this case and undisputed in the argument and briefs of counsel. These are: That on May 12, 1886, the life tenant, William A. Dudgeon, procured an agreement of its agent for a loan by the Connecticut Mutual Insurance Company of \$4,800 on the land in question upon an appraisal of its value at \$14,685; that after this was agreed to, and on the 10th day of June, 1886, the said life tenant bid the amount of the equitable lien on said property, to wit, \$4,492.80, and on the next day received a sheriff's deed conveying it in fee, and on the succeeding day the life tenant conveyed said property in trust to secure

his note for the loan made by the insurance company. It thus appears that he bought the property, not at its value, but merely for the amount of the *lien* thereon, and paid this with the money borrowed on the land. In other words, he simply substituted a deed of trust on the property for the equitable lien theretofore existing against it. The only change that took place thereafter was the making of a second mortgage to pay off the first, which latter mortgage was shown at the trial to have been reduced by the payment thereon of \$5,000 as the proceeds of a sale by the life tenant of 107 acres of the land, leaving the status of the property at that time to be 160 acres of land now claimed by the devisee of the life tenant subject to a balance due on the second mortgage.

The residuum of the whole matter, therefore, now is that the life tenant, or since his death his devisee, now has the *legal* title to the remaining 160 acres of land subject to the incumbrance of the balance due on the second mortgage, and that this state of affairs has been brought about without the expenditure of a dollar by either. That this end was specifically designed by the life tenant is demonstrated by the documents in the record showing the *anticipatory* plan and the executing thereof, whereby the land was conveyed to the life tenant by the sheriff *after* he had arranged to borrow the money thereon to pay a bid to the amount of the equitable charge.

Another fact disclosed in the record is that the present plaintiff, from whom the life tenant did not obtain a quitclaim deed, as he did from the other reversioners, had no part or lot as beneficiary in the equitable lien in the land; for this plaintiff was a defendant in the suit to establish the lien, and averred therein to be *indebted* to the other devisees for an advancement, and hence had no share and interest in the excess advancement of \$3,750.50 shown to be due from the life tenant and for which the court established a lien against the property conveyed to the life tenant under the will.

These facts apparent in the record are not recited or discussed in the learned majority opinion. If these facts had been thoroughly grasped, I take it the conclusion reached in that opinion would have been impossible, for under fixed principles coeval with its birth "equity regards not the circumstance, but the substance of the action." Francis, Maxims, 13. And it is this maxim which is the support of the whole system of equitable estates and liens. Pom. Eq. Jur. § 380.

II. Again, the view of the learned majority opinion that "an outstanding paramount title within the meaning of this rule [disabling a life tenant to acquire such title against a reversioner who is willing to contribute to the purchase] has no reference to the title of the very party himself. Here Dinwiddie's title was decreed to be sold and

was sold"—confuses the holders of the outstanding title and the owner of the reversion. These are radically distinct in this case, both as to the nature of their respective interests and the persons themselves. Here the outstanding title was in the plaintiffs in the former suit to equalize advancements, not in the defendants in that suit, Dinwiddie and Dudgeon, for each of them were chargeable with an advancement to the plaintiffs to bring about equality—Dinwiddie in \$1,012.50 and Dudgeon in the sum of \$3,737.50. Neither of them were entitled to any part of what the other owed the plaintiff in that suit. They were debtors in the respective sum of the excessive advancements made to them by their father. Hence it is clear to a demonstration that the establishment of the claim of the plaintiffs in that suit of \$3,737.50 against Dudgeon was a matter in which Dinwiddie, a defendant in that suit and the plaintiff in the present action, had not a particle of interest. The only possible effect of the former suit was to create an outstanding title in the plaintiffs in that action against the whole estate in the land conveyed to Dudgeon, life estate, contingent remainder, and reversion, and this entire estate was sold, and the legal title thereto was conveyed to the life tenant, Dudgeon, and that fact is the basis of the present suit by the reversioner. It is evident, therefore, that so much of the above quotation as says that "the rule [referring to outstanding titles] has no reference to the titles of the very party himself," when read in connection with the following words, "Here Dinwiddie's title was decreed to be sold and was sold," shows that the fact was not observed that Dinwiddie had no interest or claim whatever to the outstanding title (the equitable charge), but that his sole rights were those of a reversioner after the lapse of the life estate in Dudgeon and the failure of the contingent remainder in his bodily heirs. Had this distinction been noted, the inaccurate language of the learned majority opinion, referring to the title of Dinwiddie as reversioner and as having some part or lot of the outstanding title, with which he had no concern, doubtless would not have been used.

III. It is too clear for extended comment that the character of the decree in the former suit to enforce a specific sum, \$3,737.50, against the entire estate in the lands devised to Alexander Dudgeon, Jr., was the establishment of an outstanding title in favor of those plaintiffs alone. In reason and upon authority an outstanding title or incumbrance exists wherever the evidence shows an adverse and paramount right or claim to be validly vested in another or others than the person or persons holding the title or estate subject thereto. Black's Dictionary. In the case at bar such "adverse claim" was made and established in the plaintiffs in the suit brought to adjudge its superiority to the entire title in the lands conveyed to the

life tenant, Dudgeon, to his bodily heirs, and the reversioner, Dinwiddie. *Dudgeon v. Dudgeon*, 87 Mo. 218.

Neither Dudgeon, nor the contingent remaindermen, nor Dinwiddie, the reversioner, had any title or interest in such claim which was in the strictest sense "adverse" to their respective estates, and this conclusion cannot be avoided in reason or upon authority under the record in this case. The equitable charge created by the decree being in its essence an outstanding incumbrance on the title to each and all the persons to whom the land had been devised, the only question is whether the present plaintiff, Dinwiddie, can assert in this suit his right to compel the representative of the life tenant, May Paul Hackley, upon satisfaction of the remaining mortgage on said land, to convey the same, or on default to be divested of the legal title? It must be remembered that a reversioner or remainderman stands on a different plane as to a preceding life tenant from that occupied by tenants in common of real estate. In the latter instance it was ruled upon a review of the cases requiring one cotenant to protect the estate of the others, that such rule did not apply where the cotenant only purchased upon the foreclosure of a mortgage *after the refusal* of the other to participate or to take any steps to protect the common title. *Becker v. Becker*, 254 Mo. loc. cit. 684, 163 S. W. 865.

On the other hand, a stricter rule governs the purchase by a life tenant of an outstanding charge which is based on the fact that no unities of title and possession exist between him and the remainderman or reversioner. On the contrary, the estate of a life tenant is distinct in time, quality, possession, and obligations from that subsequently created. *Bradley v. Goff*, 243 Mo. loc. cit. 102, 147 S. W. 1012; *Hall v. French*, 165 Mo. loc. cit. 438, 65 S. W. 769; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Hildenbrandt Trustee v. Wolff*, 79 Mo. App. loc. cit. 334. For which reasons the law imposes upon him the full duties of a fiduciary or trustee with respect to the owner of the future estate in the land. 16 Cyc. pages 616, 617. This universal rule has been recently stated by Woodson, J., referring to purchase of outstanding titles, to wit:

"This question has been before this court frequently, and the uniform ruling has been that the purchase of land at a foreclosure sale under a mortgage or deed of trust by a life tenant will be deemed to have been made for the benefit of the remaindermen, if they contribute their portion of the purchase money within a reasonable time. *Cockrill v. Hutchinson*, 135 Mo. 67 [36 S. W. 375, 58 Am. St. Rep. 564]; *Stitt v. Stitt*, 205 Mo. 155 [103 S. W. 545]; *Rutter v. Carothers*, 223 Mo. 631 [122 S. W. 1056]; *Hinters v. Hinters*, 114 Mo. 26 [21 S. W. 456]; *Allen v. De Groodt*, 105 Mo. 442 [16 S. W. 494, 1049]; *Id.*, 98 Mo. 159 [11 S. W. 240, 14 Am. St. Rep. 626]. * * * For stronger reasons the same rule should and does apply between the life tenant and remainderman, because the former not only bears the confidential relation to the latter

that one cotenant bears to another, but also has the exclusive possession, care, control, and enjoyment of the entire estate, which in a large measure excludes the remainderman from protecting his own rights and interest in and to the land; whereas, in a case between cotenants all of them stand upon an equal footing." *Peak v. Peak*, 228 Mo. loc. cit. 552, 128 S. W. 985, 137 Am. St. Rep. 638.

The facts of the instant case bring it peculiarly within this distinction. Here the life tenant, Alexander Dudgeon, Jr., was in complete control and possession of the land in question in which his bodily heirs were entitled to a contingent remainder in fee. The plaintiff did not belong to that class, and his expectancy was a mere possibility of reverter, depending, first, upon the expiration of a life estate; second, on the lapse of a contingent remainder in fee; and, third, upon his own survival after the happening of these contingencies. In the ordinary course of things and under normal conditions, such a bare expectancy would never become a concrete reality, and hence did not make it the duty of the plaintiff to take any action with reference to the removal of an incumbrance on the land prior to the time when his right to possession should accrue by the lapse of all the preceding estates.

With respect to the life tenant the case was wholly different. Having an estate certain, with contingent remainder in fee to his bodily heirs, and being in possession, he set about the task of obtaining the fee simple to the estate in himself by borrowing enough money thereon to pay the equitable charge against it, and accomplished that object as heretofore shown. The equitable charge enforced against this property could not have more binding force than if a mortgage for the same amount had been given by the testator in his lifetime. Such a conveyance would have been a lien upon the entire estate in the lands, of equal force and dignity with the provision in his will charging the lands with a lien. No distinction on principle can exist between the cases. The authorities are, however, conclusive that in the former cases (a lien created by contract) the life tenant could only acquire a fee by purchase on the foreclosure of such lien and subject to be divested upon the payment by the remainderman or reversioner of a just proportion of the amount expended by the life tenant in removing the paramount lien. *Morrison v. Roehl*, 215 Mo. 545, 114 S. W. 981; *Cockrill v. Hutchinson*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; *Meads v. Hutchinson*, 111 Mo. 620, 19 S. W. 1111; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049; *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584; *Phelan v. Boylan*, 25 Wis. 679; *Keller v. Fenske*, 123 Wis. 435, 101 N. W. 378, 1055; *Davies v. Myers*, 13 B. Mon. 511.

To my mind the conclusion is irresistible that the manipulations of the title by the life tenant would not have defeated the contingent

remainder in fee nor cut off the reversion to the plaintiff after the falling in of the life estate and the lapse of the remainder over. I cannot give my consent to the result of the learned majority opinion, whereby the tenant for life, by the simple plan of borrowing on the security of the land a small fraction of its value and applying the same to the extinction of a prior incumbrance, can acquire a fee-simple title as against the terms of a will creating only a life estate in him and vesting a reversion in fee thereafter in other persons.

I therefore dissent to the views expressed in that opinion.

OLDS v. AVEN et al. (No. 1607.)
(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. CHATTEL MORTGAGES \S 72—FRAUDULENT REPRESENTATIONS—RIGHT TO RELY UPON.

Where defendants counted the beds in a rooming house which they purchased, ascertaining that there were eight or nine, and were informed that they were rented at from 25 to 50 cents a night, they were not entitled to rely on the seller's representation that he made from \$15 to \$25 per day out of the establishment, and such representations afford no ground for relief in an action to enforce a chattel mortgage to secure a note for the purchase price.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 142, 143; Dec. Dig. \S 72.]

2. PRINCIPAL AND AGENT \S 111—AUTHORITY OF AGENT.

That an agent had possession of a note and mortgage for collection does not show that he had authority to compromise the claim, and independent evidence of such authority is necessary to support a compromise.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 326-331, 376; Dec. Dig. \S 111.]

3. CHATTEL MORTGAGES \S 80 — ACTIONS — EVIDENCE.

In an action to enforce a chattel mortgage to secure a note for payment of the purchase price of a rooming house, the question whether the seller made fraudulent representations as to the character of the house on which defendants relied to their damage *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 142; Dec. Dig. \S 80.]

4. JUSTICES OF THE PEACE \S 100—ACTIONS—PLEADING.

As there are no formal pleadings in justice court, defendants in an action to foreclose a chattel mortgage to secure payment of a note for the purchase price of a rooming house may, under the direct provisions of Rev. St. 1909, \S 7456, show that the seller made false representations as to the character of the house on which they relied to their damage, and that therefore there was a partial failure of consideration.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 336-341; Dec. Dig. \S 100.]

Appeal from Circuit Court, Webster County; C. H. Skinner, Judge.

Action by E. P. Olds against J. T. Aven and another, begun in justice court and appealed by defendants to circuit court. From

a judgment there for plaintiff, defendants appeal. Reversed and remanded.

Val Mason, of Springfield, and Barrett & Moore, of Ozark, for appellants. S. E. Bronson, of Ozark, and Hamlin & Hamlin, of Springfield, for respondent.

FARRINGTON, J. This is a suit in replevin brought by E. P. Olds against J. T. Aven and Nellie Aven, in which the plaintiff prays judgment for the recovery of certain chattels on which it is alleged was given a chattel mortgage to secure the payment of a note for \$275. The suit was instituted in a justice court and no pleading was filed by the defendants. A judgment was rendered in favor of the plaintiff, from which an appeal was taken to the circuit court of Christian county, and from there it was taken by change of venue to the circuit court of Webster county, where the plaintiff again prevailed, and it is from that judgment that defendants appeal to this court.

From the instructions asked by the defendants which were refused by the court, we see that the theories of the defense were: First, that the defendants charge plaintiff with cheating and defrauding them in the sale of a rooming house on Campbell street in the city of Springfield, Mo., for which the note secured by the chattel mortgage was given; and, second, that the agent of the plaintiff in possession of the note and mortgage, having the same in his hands for collection, agreed with the defendants that on returning certain of the chattels secured in the mortgage (which were in Springfield and were the household goods sold with the rooming house) the mortgage and note would be canceled and returned to the defendants. The property sought to be recovered in this action is live stock and corn situated in Christian county and covered by the mortgage along with the household goods which were purchased to secure the purchase price of the rooming house. The court at the close of all the evidence directed the jury to find for the plaintiff, and it is from the giving of that instruction and the refusal of two instructions asked by defendants on the theories above set out that complaint is made in this court.

[1] On the question of the alleged fraud practiced on defendants by the plaintiff, the defendants undertook to show that when they bought the rooming house from the plaintiff he represented to them that it was a money-making establishment and that he had been running a reputable rooming house and making from \$15 to \$25 per day, and that it was on the strength of these representations made concerning what the plaintiff was making and doing with the rooming house, coupled with what they saw the furnishings and furniture in the house was worth, that they entered into the contract

of purchase and gave the note and chattel mortgage. On cross-examination the defendant Nellie Aven admitted that she counted the beds in the rooming house, and that there were some eight or nine; and also admitted that plaintiff told her that he rented the beds at from "25 to 50 cents apiece." Further, that she did not know but what he filled the beds every night; that she did not know how he made from \$15 to \$25 a day renting eight or nine beds at from 25 to 50 cents each; and that she did not figure it, as she had not had anything to do with anything like that before, and was a stranger. It is in evidence that both defendants could read and write and went over the articles in the house making a list thereof. It is inconceivable that any one of ordinary intelligence and perception could be deceived by the statement which it is claimed the plaintiff made, that he was making from \$15 to \$25 per day renting eight or nine beds at from 25 to 50 cents each, and Nellie Aven's explanation that she thought maybe he filled the beds every night and that she was a stranger fails to account for her being really deceived by such a statement. It is one of the elementary principles of law that, in order for a person to recover on the theory that he has been defrauded by a misrepresentation, he must show that the misrepresentation was at least such as would mislead or confuse a person of ordinary intelligence. With the facts which she stated the plaintiff told her, she was in no position to claim that she was misled. In order for a buyer to recover damages for misrepresentations, he must show reliance on the representations, that they were adapted to deceive a buyer of ordinary prudence, and an intention to deceive. *Alvin Fruit & Truck Ass'n v. Hartman*, 146 Mo. App. 155, 123 S. W. 957. The buyer must have relied on the representations in the exercise of ordinary prudence. *Stratton v. Dudding*, 164 Mo. App. 22, 147 S. W. 516.

[2] Wilson is the father-in-law of the plaintiff, and defendants testified that when he came to collect the note when it was due he agreed with Nellie Aven that if she would turn over the furniture and rooming house to him he would cancel the indebtedness. There is no proof made by the defendants that Wilson as plaintiff's agent had any authority to do anything except to collect the note, and his possession of the note and mortgage was not sufficient to give him authority to make any arrangement other than to receive payment. This has been expressly held in the case of *Knoche v. Whiteman*, 86 Mo. App. loc. cit. 573.

The trial court therefore properly held that there was a failure of proof on the question of misrepresentation as to the amount Olds was making out of the rooming house and on the defense that Wilson had agreed to release the indebtedness in full if Nellie Aven would turn over the furniture.

[3] However, the defendants' testimony and one theory developed in instruction No. 1 asked by them show that they were relying on defeating this action because of a fraudulent representation as to the character of the house Olds was selling them. It will be borne in mind that the amount owing from the defendants to Olds, secured by a chattel mortgage, was evidenced by a note given for the purchase price of the rooming house, and that the purpose of the writ of replevin was to get possession of the personal property covered by the mortgage in order that it might be by foreclosure subjected to the payment of the purchase-money debt; and the court in its judgment gave Olds the possession of the personal property, or at his election a money judgment for \$259, the amount still due on the purchase price. There was evidence introduced by the defendants that Olds represented to Nellie Aven that the house had a good reputation. She testified that she knew nothing of the character of the house except what Olds told her. Quoting from her testimony:

"He told me he was running a nice decent house, and I believed it; but I afterwards found out by experience, and not what I heard, what kind of a place he had been running. * * * I did not make anything there from the time I first run it until I quit. When I took charge of the house, there were men came up there, several men, sometimes there would be a half dozen in a bunch, and sometimes one or two; anyway, they would come up there and call for women every time they would come. No men called for Mr. Olds. At the time I took charge of this place, Olds didn't turn me over any regular boarders or roomers. There was just one young man there rooming; as Mr. Olds said, they didn't keep boarders. I tried to keep as good a class of people as I could. Men would come up there and ask for a room, I would tell them I had rooms and would show them my rooms. Then they would want to know whether I had girls, and I would tell them I kept no girls, and they would say: 'Why don't you? Mr. Olds kept girls here.' They would ask for girls, and I would tell them no, and they would go away without taking any room. This happened more than once. I didn't know who the men were. After I went into possession and before Wilson presented the note, I found out the general reputation of that place, which was bad for keeping women and selling whisky."

The landlord had given Olds notice to quit about the time he sold out, and, though the landlord testifies that he does not know what was the reputation of the house Olds was running, he does say, "I gave Olds notice to quit on account of the kind of house he was running."

The city police matron of Springfield, after stating what her duties were, testified:

"I was acquainted with the general reputation of E. P. Olds' place, the Star Rooming House, the reputation generally of the Star Rooming House on South Campbell street in the year 1913, especially in the fall, for morality, and would have to say it was bad."

She also testified that she was acquainted with some of the women who stayed there, and that their reputation was very bad.

[4] We are of the opinion that there was sufficient evidence from which a jury might

reasonably find that the character of the house sold by Olds to the defendants was not as he represented, and there is nothing in the record to show other than that Nellie Aven relied on these representations. If the jury should find this to be true, it would amount to a fraud on her in the purchase of the rooming house for which the note forming the foundation of this action was given. There is no attempt by the defendants to recover a judgment by way of counterclaim or set-off. The cause having arisen in a justice court where no formal pleadings are required setting up a defense which goes to bar the action (*Yount v. Spain*, 180 S. W. 17), the evidence was admissible and the issue triable whether or not there was a total or partial failure of consideration (section 7456, R. S. 1909). The jury should have been instructed that if they should find that there were fraudulent representations as to the character of the house inducing the signing of the note, and that by reason thereof the defendants were damaged, they should deduct such damages arising therefrom as they found to exist from the balance of the note sued on.

The judgment is reversed, and the cause remanded.

ROBERTSON, P. J., and STURGIS, J., concur.

POWERS v. CONRAN et al. (No. 1462.)
(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. NOVATION ~~§~~9—ASSENT OF PARTIES—ALLOWANCE OF CREDIT.

Where the plaintiff gave an order to the defendants requiring them to pay her debt to a bank, and they accepted the order and agreed to pay it, they could not, in her action for the moneys due her from them, have a credit for the amount of such order, unless they had paid as agreed, since the transaction, in the absence of acceptance as a discharge of plaintiff by the bank, did not operate to release or extinguish plaintiff's debt.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 9; Dec. Dig. ~~§~~9.]

2. EXECUTORS AND ADMINISTRATORS ~~§~~453—FORM—PARTIES—CAPACITIES.

Where the plaintiff sued certain persons as administrators of the estate, the judgment could not run against them individually with an award of execution, but should have run against them in their representative capacity.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1884-1908; Dec. Dig. ~~§~~453.]

Appeal from Circuit Court, New Madrid County; Frank Kelly, Judge.

Action by Carrie M. Powers against Matt J. Conran and J. K. Robbins, administrators of the estate of James V. Conran, deceased. Judgment for plaintiff, and defendants appeal. Affirmed as amended.

Thomas Gallivan, of New Madrid, for appellants. Brewer & Riley, of New Madrid, for respondent.

STURGIS, J. The petition in this case is in two counts, each seeking to have a judgment against the estate of James V. Conran, deceased. In a general way, it is charged that James Conran in his lifetime had charge of plaintiff's business affairs, managing her property and collecting and disbursing funds belonging to her, both in her individual capacity and as administratrix of the estate of her former husband. It is claimed that said Conran had not accounted for and paid over to plaintiff various items and amounts coming to his hands and belonging to plaintiff. The court appointed a referee, who heard all the evidence and made report on March 16, 1914, finding that plaintiff was entitled to judgment on the first count of her petition in the sum of \$3,643.96 and on the second count for \$2,575.30. Exceptions to this report were filed by defendants which were heard and overruled November 12, 1914, the referee's report then confirmed, and judgment entered for the total sum of \$6,219.26, with interest at 6 per cent. from March 16, 1914, the date of the referee's report. The defendants thereupon appealed to this court.

[1] The only errors suggested in this court relate to the allowing of interest, which objection was withdrawn at the time of arguing the case, and the failure of the court to give defendants credit for the amount of the following order:

"New Madrid, Mo. July 16, 1912. To M. J. Conran and J. K. Robbins, Administrators of the Estate of J. V. Conran, Deceased: You will please pay Farmers' Bank of Portageville, Missouri, the amount of the note they hold against me in the sum of \$2,500.00 and interest from January 1st, 1912, out of the funds due me from you. [Signed] Carrie Girvin Powers. "We, the undersigned administrators of the estate of J. V. Conran, hereby accept the order of Carrie Girvin Powers, and agree to pay whatever money that may be due her up to and including, in the event same may be due her, the amount of said order to the Farmers' Bank of Portageville, Missouri. August 22, 1912. Matt J. Conran, J. K. Robbins, Administrators."

This therefore is the only matter for our consideration. It is conceded that defendants, as administrators or otherwise, have not paid this order or anything thereon. Had they paid the order, or should they yet do so, out of moneys due the plaintiff, they doubtless would be entitled to credit for the amount paid, as same would be paid at plaintiff's direction and consent in discharge of a valid debt owing by her. But we know of no principle of law, and no authority is cited by appellants, authorizing a credit to be given before and in the absence of actual payment. The mere acceptance by a third person of a promise made to pay a debt to such third person from another will not operate to release or extinguish the debt of such other person. To have such effect there must be a clear agreement to accept the latter promise in dis-

charge of the first. *Briscoe v. Callahan*, 77 Mo. 134; *Lumber Co. v. Moffert*, 59 Mo. App. 437.

[2] It results that, so far as the amount is concerned, the judgment should be affirmed. But it is pointed out that as to form the judgment is against the defendants personally with an award of execution.

Following the precedent of *Lapperd v. Jeffries*, 181 Mo. App. 106, 185, 168 S. W. 934, it is adjudged by this court that the plaintiff have and recover of the defendants, as administrators of the estate of James V. Conran, deceased, the sum of \$6,216.26 with interest at 6 per cent. from March 16, 1914, as well as her costs herein expended, and that such judgment be certified to the probate court of New Madrid county, Mo., for classification against and payment by the said estate of James V. Conran.

Finding no error, the judgment of the circuit court of New Madrid county, Mo., is affirmed as herein amended.

ROBERTSON, P. J., and FARRINGTON, J., concur.

PERLIN v. WATERS-PIERCE OIL CO.
(No. 14851.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. MASTER AND SERVANT ⇨148—LIABILITY FOR INJURIES—NEGLIGENCE OF FOREMAN—SCOPE OF AUTHORITY.

Where a foreman had direct charge of and supervision over a driver, and the driver reported to him and received orders and directions from him, the foreman's negligent direction to him to apply turpentine to the anus of a horse if it balked was not outside the scope of his authority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 290; Dec. Dig. ⇨148.]

2. MASTER AND SERVANT ⇨222—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé did not assume the risk of injury from obedience to his foreman's direction that he apply turpentine to the anus of a horse if it balked, where the foreman was negligent in giving such order, since a servant does not assume the risk of perils and dangers arising from the master's negligence, but only those risks naturally incident to the employment, when conducted by the master with reasonable care on his part.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. ⇨222.]

3. MASTER AND SERVANT ⇨216—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

While an employé did not assume a risk caused by the negligence of a vice principal, the vice principal's negligence did not relieve him of the consequence of his own negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 567-573; Dec. Dig. ⇨216.]

4. MASTER AND SERVANT ⇨289—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by an employé, who applied turpentine to the anus of a horse, as directed by his foreman, and was kicked by the horse, evidence as to his ignorance of the effect the tur-

pentine would have held to make a question for the jury as to his contributory negligence, though he admitted the foreman told him the turpentine would make the horse "go like the devil."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. ⇨289.]

5. TRIAL ⇨156—DEMURRER TO EVIDENCE.

In passing upon a demurrer to the evidence, the evidence is to be viewed in the light most favorable to plaintiff, giving plaintiff the benefit of every inference which may be fairly and legitimately drawn therefrom in his favor, and the demurrer can be sustained only when the cause of action is unsustained by any material evidence or by any inference reasonably to be drawn from the facts proved.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 354-356; Dec. Dig. ⇨156.]

6. MASTER AND SERVANT ⇨288—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Where an employé who applied turpentine to the anus of a balky horse, as directed by his foreman, and was kicked by the horse, testified positively that he knew nothing of the properties of turpentine, or of the danger of following the foreman's directions, and this appeared inferentially from the fact that he inquired of other employes as to the propriety and safety of doing as he was told, and was informed that it would be "all right," this positive testimony, and the legitimate inferences in his favor, was not overcome so as to justify the sustaining of a demurrer to the evidence by the inference unfavorable to him, arising from his admission that the foreman told him the turpentine would make the horse "go like the devil."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. ⇨288.]

7. ACTION ⇨12—LIABILITY FOR INJURIES—VIOLATION OF LAW.

Where an employé, who applied turpentine to the anus of a balky horse and was kicked by the horse, acted without criminal intent or design, in ignorance of the effect of turpentine, he was not guilty of a violation of Rev. St. 1909, § 4627, as to torturing horses, etc., so as to be barred from recovering.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. ⇨12.]

Appeal from St. Louis Circuit Court; Karl Kimmel, Judge.

"Not to be officially published."

Action by David Perlin against the Waters-Pierce Oil Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

See, also, 182 Mo. App. 727, 165 S. W. 816.

James M. Rollins and Joseph Reilly, both of St. Louis, for appellant. Fordyce, Holliday & White, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries, sustained by plaintiff while in the employ of the defendant as its servant. Plaintiff was kicked and injured by a horse, which he was driving while in pursuit of defendant's business, and alleges that the injuries thus sustained by him resulted proximately from the negligence of defendant's foreman in the premises. At the close of his case plaintiff suffered a nonsuit, and upon

the court's refusal to set aside the nonsuit he appealed.

The petition alleges that on December 14, 1909, plaintiff was in defendant's employ as the driver of a team of horses, attached to a wagon used for the delivery of oil, and that plaintiff in this capacity was under the supervision and control of a foreman of defendant, upon whom he relied for instructions as to his work. The petition further proceeds as follows:

"Plaintiff further states that on the morning of the 14th day of December, 1909, aforesaid, before starting on his route for the delivery of oil, he informed the foreman of the defendant that one of the horses which plaintiff was to drive that day was of a stubborn and balky disposition, and had balked on previous trips; that defendant's foreman thereupon gave to plaintiff a bottle containing turpentine, and ordered plaintiff that if the horse again should balk and refuse to go forward, to apply some of said liquid to the anus of said horse; that later on said day, when plaintiff was endeavoring to go on with his duties delivering oil, the horse balked and refused to go forward; that plaintiff, then ignorant of the effects turpentine would have, applied some of the turpentine to the anus of the horse as ordered by the said defendant's foreman, and mounted to his seat upon the wagon.

"Plaintiff further states that the turpentine, applied as aforesaid, produced in the horse a stinging, burning, and irritating sensation, which caused said horse to violently kick plaintiff on the right leg, between the ankle and the knee thereof, with such force as to break the bone of plaintiff's right leg.

"Plaintiff further states that the defendant and its foreman knew, or by the exercise of ordinary care would have known, that turpentine, because of its burning, stinging, and irritating effect on the flesh, when applied as ordered by the defendant's foreman, as aforesaid, would cause the horse to become violent and apt to kick, and that the life and limbs of plaintiff would thereby become endangered, and that, notwithstanding, defendant and its foreman negligently ordered plaintiff to use said liquid on the horse, and neglected and failed to inform plaintiff the effects it would have on the horse, and to warn him of the danger of being kicked and injured in using said turpentine as ordered by defendant's foreman.

"Plaintiff further states that on account of his injuries, sustained as aforesaid, he was confined to hospital for a long time, and has suffered great pain in body and mind, and has spent for medical attention the sum of \$100 and more; that he is permanently injured and crippled; that his right leg below the knee is crooked and shortened, all to his great damage in the sum of \$7,500, for which plaintiff prays judgment with his costs herein expended."

On a former appeal from a final judgment upon a demurrer sustained to the petition, we held that the petition stated a cause of action. See *Perlin v. Oil Company*, 182 Mo. App. 727, 165 S. W. 816. The evidence adduced in plaintiff's behalf went to support the allegations of the petition. It went to show that defendant's foreman gave plaintiff a bottle of turpentine and directed him to use it upon the horse, in the manner averred in the petition, in case the horse became balky during the day; that plaintiff did so apply the turpentine to the horse, with the result that the latter kicked him while he was sitting upon the seat of the wagon,

whereby he sustained the injuries for which he sues. It does not appear to be disputed that plaintiff's evidence supported the allegations of the petition, which we held to state a cause of action. The point is made, however, that the alleged negligent act of the foreman was beyond the scope of his authority. And it is contended that the trial court properly sustained the demurrer to the evidence, for the reason that under the facts disclosed the risk was one assumed by plaintiff, and, further, that plaintiff was guilty of contributory negligence as a matter of law. It is also said that plaintiff was shown to have violated section 4627, Rev. Stat. 1909, relating to cruelty to animals, and for this reason cannot recover.

[1] We think that there is obviously no merit in the contention that it appears from plaintiff's case that the alleged negligent act of the foreman was one entirely beyond the scope of his authority. He had direct charge of and supervision over plaintiff in the performance of the work in question. Plaintiff reported to him, and received his orders and directions from him. Upon the occasion in question, according to plaintiff's evidence, the foreman, anticipating that the horse would give trouble during the day by balking, and stating that he had on hand no extra horse nor any means of sending relief to plaintiff in case this horse became balky, directed plaintiff to follow the directions alleged. Manifestly the foreman's directions as to the manner of handling and dealing with this balky horse was a matter directly within the scope of his duties.

[2, 3] The contention that plaintiff assumed the risk of being kicked and injured by the horse, in the event that he applied the turpentine to him as directed, may be dismissed with a few words. It is now thoroughly and definitely settled in this state—whatever may be the state of the law elsewhere—that a servant does not assume the risk of perils and dangers arising from negligence of the master, but assumes only those risks naturally incident to the employment when conducted by the master with reasonable care on his part. Where the action is predicated on the master's negligence, a recovery cannot be denied the servant on the ground of assumption of risk, though he may be precluded by reason of his contributory negligence. See *George v. Railroad*, 225 Mo. 364, 125 S. W. 196; *Patrum v. Railroad*, 259 Mo. 109, 168 S. W. 622; *Moore v. Express Co.*, 186 Mo. App. 593, 172 S. W. 410; *Crader v. Railroad*, 181 Mo. App. 526, 164 S. W. 678, and cases cited.

It cannot be doubted that the evidence was ample to make out a *prima facie* case of negligence on the part of the foreman, the alter ego of the master. This does not appear to be seriously disputed, if at all. The demurrer to the evidence could not rightfully have been sustained upon the theory that plaintiff assumed the risk of dangers attend-

ant upon obedience to the foreman's directions, for such risks were entailed by the negligence of defendant's vice principal. But plaintiff is not relieved from the consequences of his own negligence, if any, and it remains to be seen whether or not plaintiff may lawfully be convicted of contributory negligence as a matter of law. We conclude that it must have been on this theory that the trial court forced plaintiff to a nonsuit.

[4] Relative to the question of plaintiff's own negligence, some further details of the evidence should be stated. Plaintiff's testimony is that on the morning of the day during which he was injured—a cold day with snow upon the ground—the foreman told him that he would have trouble with this balky horse. He says that he told the foreman that if he had trouble, he would call up defendant's office by telephone, and a man could be sent to him with another horse, but that the foreman told him not to do this, saying that there was neither an extra horse nor an extra man to send; that plaintiff thereupon asked the foreman what to do, and the latter procured the bottle of turpentine, gave it to plaintiff, and told him to saturate a piece of "waste" with it and apply it as alleged in the petition in case the horse balked. And plaintiff says that he inquired, not only of the foreman, but of other men in defendant's yard, as to the propriety and safety of doing this, and was told that it was "all right," and that the foreman assured him that the turpentine would not hurt him, and, to demonstrate this, poured some upon plaintiff's hand. Plaintiff testified that he had never heard of turpentine before and was entirely ignorant of its properties. Plaintiff is an ignorant foreigner, who had been in this country about nine years. He admitted that the foreman told him that if he used the turpentine as directed, the horse would "go like the devil." Plaintiff further testified that, during the day mentioned, the horse balked, and after repeated efforts to make him go forward plaintiff stepped upon the "tongue" of the wagon and applied the turpentine as directed, and resumed his place upon the driver's seat, whereupon the horse began to kick violently, striking plaintiff and injuring him. There is one statement made by plaintiff in testifying which would make it appear that he was kicked immediately upon applying the turpentine; but later plaintiff explained that he was kicked immediately upon resuming his seat upon the wagon, and repeatedly stated that he was thus seated when injured, and for the purposes of the demurrer this must be taken as true.

Plaintiff had been driving this horse for about 18 months. The horse frequently balked and refused to pull. On cross-examination plaintiff said that the horse did not kick but "jumped around on his hind legs."

When asked if he did not know it to be dangerous "to fool with a horse when he is balky," plaintiff said:

"When he is balky he is not dangerous; he just won't go; let him set and wait a while and sometimes get all right, and sometimes I take him out from this side and hook up on the other side and maybe he will go."

Plaintiff admitted, however, that in his testimony at the trial of a former suit brought by him he stated that the horse kicked and got crosswise in the traces when he balked. We are constrained to hold that plaintiff cannot be declared guilty of contributory negligence as a matter of law, under the circumstances appearing in evidence. Were the case one where it conclusively appeared that plaintiff was injured while in the very act of applying the turpentine, knowing that the horse was one of vicious propensities, we should have a different case to deal with, one as to which we need not now express any opinion. But such is not the case made by plaintiff's evidence, when viewed for the purposes of the demurrer. It is contended, however, that the evidence shows that plaintiff, in any event, must have known of the danger attendant upon following the directions of the foreman, and was guilty of contributory negligence as a matter of law in so doing. The argument, in brief, is that, though plaintiff testifies that he was wholly ignorant of the properties of turpentine, he admits that he was told that the substance given him, if applied as directed, would make the horse "go like the devil," and that from this, if not otherwise, he must have known that the substance was one that would irritate or burn the horse and cause him to kick. But upon well-settled legal principles we do not believe that the court's ruling upon the demurrer may properly be upheld on this ground.

[5] It is a trite doctrine that, in passing upon a demurrer to the evidence, the evidence is to be viewed in the light most favorable to plaintiff, giving plaintiff the benefit of every inference which may be fairly and legitimately drawn therefrom in his favor. A demurrer to the evidence can be sustained only—

"when the cause of action pleaded is unsustained by any material evidence or by any inference reasonably to be drawn from the facts proven."

See *Enloe v. Car & Foundry Co.*, 240 Mo. 448, 144 S. W. 852, and cases cited. In the leading case of *Buesching v. Gaslight Co.*, 78 Mo. 219, 39 Am. Rep. 503, the principles by which a trial court should be guided in passing upon a demurrer to the evidence are well stated by Hough, J., as follows:

"In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor, and if, when received in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. *Wilson v. Board of Education*, 63 Mo. 137. But the court is not at liberty, in

passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff. That would clearly be usurping the province of the jury." (Italics ours.)

[6] The doctrine of the Buesching Case has been repeatedly reasserted and applied by our courts. Its application to the case in hand, we think, disposes of the question under consideration. Before plaintiff can be convicted of negligence as a matter of law, it must conclusively appear that he knew of the danger attendant upon following the directions of the foreman, and that with this knowledge the risk was one which an ordinarily prudent man would not have incurred. But plaintiff's knowledge that turpentine would, to such extent, irritate or burn the horse as to be likely to cause him to kick and endanger plaintiff appears only by way of an inference to be drawn from the facts disclosed. Plaintiff's positive testimony is that he knew nothing of the properties of turpentine, had never heard of it, and knew nothing of the danger attendant upon following the foreman's directions. And this further appears inferentially from the fact that, according to plaintiff's testimony, he inquired particularly with respect to this matter. Plaintiff's positive testimony, therefore, and inferences in his favor, go to show a want of knowledge on his part of the danger; and his knowledge thereof appears only by an inference to be drawn from the fact that the foreman told him that to apply the turpentine would make the horse "go like the devil." It must be conceded, we think, that this would be to permit an inference unfavorable to plaintiff to overcome both positive testimony and legitimate inferences in his favor. We are not prepared to say that we can take judicial knowledge of the meaning to be ascribed to the expression, "go like the devil," as used. But apart from this, the fact that the foreman used these words can do no more than raise an inference unfavorable to plaintiff, which cannot be allowed to overthrow contrary inferences—not to say positive testimony—tending to sustain plaintiff's case. It cannot be said, under the circumstances, that plaintiff knew as much about the properties of turpentine, and the danger in using it as directed, as did defendant's foreman, though turpentine is a substance in common use. In this connection, see *Omans v. Packing Co.*, 151 Mo. App. 557, 132 S. W. 283; *Cunningham v. Railroad*, 156 Mo. App. 617, 137 S. W. 600. On the contrary, the evidence affirmatively tends to show plaintiff's utter ignorance of the nature of the fluid furnished him. That he knew that the application thereof was for the purpose of causing the horse to pull, or stimulating him to exertion, is not conclusive as to his knowledge that the substance would burn the horse or otherwise cause severe pain. The

latter is a legitimate inference which the jury may properly draw, if they see fit, to defeat a recovery; but, being merely an inference from the facts shown in evidence, it was not, in our opinion, within the province of the court to raise and utilize it in passing upon the demurrer.

[7] The point made that plaintiff was guilty of a violation of section 4627, *supra*, and for this reason should be denied a recovery, needs, we think, but passing notice. If plaintiff's evidence be true, he acted without criminal intent or design, in ignorance of the true facts, in following the directions of his superior, who, if any one, was guilty of the criminal offense denounced by the statute.

Our conclusion is that the case made was one for the jury. The judgment will accordingly be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

BANK OF NEELYVILLE v. LEE et al.

(No. 1505.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. PRINCIPAL AND SURETY \S 104 — ACTION AGAINST SURETY—DEFENSES — EQUITABLE ESTOPPEL.

Where appellants were sureties, though they signed a note as makers, plaintiff, the holder of the note, having assured appellants that it had in its possession sufficient funds of the principal debtor to satisfy all claims, and having extended the note without their consent, is, where appellants were by such assurances prevented from paying the note and seeking redress against the principal debtor, who at that time was solvent, estopped from later asserting appellants' liability; the principal debtor having become insolvent.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186-190, 193-195, 197-200; Dec. Dig. \S 104.]

2. ACTION \S 25—FORM—EQUITABLE DEFENSES IN ACTION AT LAW—EFFECT.

As courts of law recognize estoppel in pais, such defense does not convert an action at law on a note into one in equity.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 124-145; Dec. Dig. \S 25; *Equity*, Cent. Dig. \S 4.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by the Bank of Neelyville, a corporation, against Albert Lee, S. E. Fisher, and another. From a judgment against the last-named defendants, they appeal. Reversed and remanded.

Abington & Phillips, of Poplar Bluff, for appellants. David W. Hill, of Poplar Bluff, for respondent.

ROBERTSON, P. J. A companion case to this was here, and the opinion therein is reported in 182 Mo. App. 185, 168 S. W. 796. What we there suggested (182 Mo. App. 192, 168 S. W. 796) might have been involved, but

was not, and that which we expressly stated we did not decide evidently led to a belief in behalf of plaintiff that, if that question were involved, it should be decided in its favor. We referred in that opinion to the question as to whether, if a note signed by more than one as maker, yet, as a matter of fact, some or one of the parties signed as surety, under the Negotiable Instruments Law (sections 10089 and 10161, R. S. 1909), this latter fact constitutes a defense. Since then we have had that question before us (*Long v. Shafer*, 185 Mo. App. 641, 171 S. W. 690), which, by a divided court, was decided adversely to the contention now made by the plaintiff in the case at bar.

As we learn the facts in the case now before us, we will see that there is little difference between it and the companion case, except now we must decide if the trial shall proceed according to the principles of law or be governed by the procedure applicable to courts of equity. This action is on a note for the principal sum of \$400, dated December 18, 1910, payable to the order of plaintiff 90 days after its date, and signed by all of the defendants. The defendants other than Lee filed an answer, after which plaintiff filed a motion for judgment because of the alleged reason that it did not state facts sufficient to constitute any defense to the note. The motion was sustained, and judgment entered against these appealing defendants. Lee is not mentioned in the judgment.

The answer is as follows:

"Now come the above defendants S. E. Fisher and W. R. Buster, and for their answer to the petition filed herein say that they deny each and every allegation in said petition contained, except what is hereinafter specifically admitted, averred or denied.

"Defendants admit that on the day charged in plaintiff's petition they made and executed, as sureties for their codefendant, Albert Lee, and delivered to the plaintiff bank, the note filed with plaintiff's petition and marked Exhibit A.

"Defendants, further answering, state that they had good reason to believe, and did believe, that upon the maturity of said note, to wit, on March 18, 1911, that the same was paid off and discharged by the principal on said note, Albert Lee. Defendants further state that, upon the contrary, said note was not paid on maturity, but was permitted by the plaintiff bank, its agents and officers, to be automatically renewed. Defendants further state that knowledge of the fact that said note still remained in the hands of the plaintiff bank, unpaid by its principal, Albert Lee, did not come to their possession until during the month of January, 1912; that immediately upon acquiring such information, and while the said Albert Lee was solvent, being seised and possessed of real and personal property aggregating in value many thousands of dollars above his exemptions and liabilities, defendants were proceeding to take such steps as might be necessary to protect themselves from loss as sureties of the said Albert Lee on said note as aforesaid, and communicated such intention to the officers, agents, and employees of the plaintiff bank, who thereupon informed these defendants that the plaintiff bank had in its possession securities sufficient to cover all of Albert Lee's indebtedness to the bank, including the note sued on herein, and stated, promised, and agreed that the bank would look to said securities, and not these de-

fendants, for the payment of the note sued on herein in the event the same was not paid by said Albert Lee. Defendants state that, relying upon said statements, agreements, and promises of the plaintiff, through its officers, agents, and employees, and being deceived thereby, they refrained from proceeding to secure themselves from loss as sureties on said note of the said Albert Lee. Defendants further state that afterward the plaintiff bank, through its officers, agents, and employees, without the knowledge or consent of these defendants, carelessly, negligently, and wrongfully allowed and permitted the said Albert Lee to dispose of by sale and otherwise the subject-matter of whatever security it had to insure the payment of all of the indebtedness, including the note in suit of the said Albert Lee to the plaintiff bank.

"Defendants further state that shortly after the statements, promises, and agreements of the officers, agents, and employees of the plaintiff hereinabove referred to, and while defendants were relying upon the same, that the said Albert Lee, without the knowledge of defendants, became and still is hopelessly insolvent.

"Defendants further allege that but for the statements, agreements, and promises of the officers, agents, and employees of the plaintiff bank, made as aforesaid, while the said Albert Lee was solvent and responsible as aforesaid, that defendants could have, and would have, proceeded to secure themselves against loss as sureties of said Albert Lee as aforesaid; but by said acts, promises, and agreements of plaintiff's officers and agents they were lulled into a belief that they would not be proceeded against by plaintiff as sureties on said note until it was too late to protect themselves as sureties on said note and until said Albert Lee became hopelessly insolvent as aforesaid; and defendants now and here plead the statements, promises, and agreements of the officers, agents, and employees of the plaintiff bank as an estoppel prohibiting plaintiff from collecting the amount due on the note sued on herein for these defendants.

"Wherefore defendants, having fully answered, pray to be dismissed hence, with their costs in the behalf expended."

[1] The defense of estoppel upon which these defendants rely will defeat plaintiff's recovery, if proven, even if under our laws as now framed one signing a note as maker cannot by the mere showing of his real relation to the payee be treated as a surety.

"Equitable estoppel, or estoppel in pais, is that condition in which justice forbids that one speak the truth in his own behalf." *De Lashmutt v. Teetor*, 261 Mo. 412, 440, 169 S. W. 34, 41.

"Equitable estoppel in the modern sense arises from the 'conduct' of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 *Pomeroy's Equity Jurisprudence* (8d Ed.) p. 1416, par. 802.

When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle:

"When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts or

omissions, has rendered the injury possible." *Id.* p. 1421.

On the same page and in the succeeding paragraph the author sums up and gives for the first time what he calls his definition, as follows:

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

[2] The appellants had as among themselves and against Lee certain rights concerning which they could legally protect themselves by obtaining security from Lee, and this would have been true even if they should be treated as comakers with Lee, and, since the plaintiff, according to the allegations of the answer, lulled the appellants into that sense of security which caused them to desist from doing that which would have prevented the loss plaintiff is now endeavoring to inflict upon them, justice unquestionably demands that we say that as to the parties so misled the note is paid. The rule announced in *West v. Brison*, 99 Mo. 684, 693, 13 S. W. 95, cited and quoted from in our previous opinion, is equally applicable here. It matters not what the nature of the contract of appellant is with the plaintiff; the result must be the same. The answer, we therefore hold, constitutes a defense, and the only other question we must decide, in view of a trial, is whether it shall be as at law or according to the course of courts of equity. This question will arise if either party demands a jury.

In *Pitman v. 16 to 1 Mining Co.*, 78 Mo. App. 438, 440, and in *Kansas City Star Publishing Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 18, 99 S. W. 765, it is held that estoppel in pais is applied as well in courts of law as in courts of equity.

"The doctrine of equitable estoppel is preeminently the creature of equity. It has, however, been incorporated into the law, and is constantly employed by courts of law at the present day in the decision of legal controversies." 2 Pom. Eq. Jur. (3d Ed.) p. 1417, par. 802.

That an action at law may be converted into one in equity by an answer setting up equitable matter in pais is the law in this state (*Bouton v. Pipplin*, 192 Mo. 469, 473, 91 S. W. 149), but the answer must be one that alleges facts entitling the defendant to affirmative equitable relief and must ask for such relief (*Pitts v. Pitts*, 201 Mo. 356, 359, 100 S. W. 1047). In the case at bar the relief sought is not different from that granted upon proof of payment. The defense is founded on a doctrine that may have had its origin in equity, but, as sought to be applied here, requires no application of any of the

principles peculiar to procedure in equity to make it effective. If we announced the law otherwise than that this case can be proceeded with as one at law, we would be upholding a doctrine that would convert all actions at law into suits in equity whenever the doctrine of equitable estoppel becomes involved. Our conclusion is that the action remains one governed by the procedure applicable to actions at law.

The only objection made to the answer is that the defense of estoppel is not available; but, as we hold the contrary, the judgment must be reversed, and the cause remanded.

It is so ordered.

FARRINGTON and STURGIS, JJ., concur.

EARLS v. EARLS et al. (No. 1518.)
(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. APPEAL AND ERROR \S 1175, 1176—RENDITION OF PROPER JUDGMENT—REMAND WITH DIRECTIONS.

Where, pending plaintiff's motion for new trial after entry of judgment for defendant on his counterclaim, defendant remitted the sum awarded him, but the judgment as entered was not set aside nor was any new judgment entered on denial of new trial, the court on appeal could enter a proper judgment, in the absence of any error in the record, or reverse the judgment and remand with directions for entry of proper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4573-4596; Dec. Dig. \S 1175, 1176.]

2. APPEAL AND ERROR \S 171 — THEORY OF TRIAL COURT.

The court on appeal will review a cause on the theory adopted by the parties and the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. \S 171.]

3. LIMITATION OF ACTIONS \S 53, 195—OPEN, MUTUAL, CURRENT ACCOUNT—EVIDENCE.

Where parties have dealings with each other consisting of transactions of entirely different character, there must be some evidence of an intention on their part to make the transactions part of a running account before they will be so treated in determining the question of limitations, and the party asserting that the transactions form a part of a running account has the burden of proving it, and, where there are charges and credits, it must be shown that the items are morally connected with one another, so that each separate item is not meant to constitute a new and independent contract, or that the conduct of the parties makes it fairly inferable that it was their intention to have a future adjustment of their transactions as one account.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 285-294, 711-716; Dec. Dig. \S 53, 195.]

4. LIMITATION OF ACTIONS \S 53—ACCOUNTS—TRANSACTIONS.

A merchant, as shown by his book account, sold goods on credit to a customer. He also sold hogs to the customer and at one time took up a check for him, and also sold the customer hay and pasture. None of the items except the mer-

chandise were ever made a matter of written record by the merchant. *Held*, that the parties did not intend to carry the various items in an open account within the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 285-294; Dec. Dig. § 53.]

5. LIMITATION OF ACTIONS §155—ACCOUNTS—PAYMENTS.

Plaintiff was indebted to defendant for merchandise. Defendant at plaintiff's request sold merchandise to a third person, but charged the amount thereof to plaintiff's account. The third person paid for the merchandise delivered to him after plaintiff had requested defendant to collect it from the third person. *Held*, that the payment by the third person was not such a payment as amounted to an acknowledgment by plaintiff of the indebtedness, so as to stop the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.]

6. LIMITATION OF ACTIONS §157—ACCOUNTS—PAYMENTS.

Where one indebted on an account for merchandise and surety on a note executed by the merchant made a payment on the note to the holder thereof, the payment was not on the account and did not stop the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 631-634, 636; Dec. Dig. § 157.]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by W. L. Earls against G. W. Earls and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Watson & Livingston and C. C. Bland, all of Rolla, for appellant. J. J. Crites and Holmes & Holmes, all of Rolla, for respondents.

FARRINGTON, J. The plaintiff (appellant) is the son of defendant W. J. Earls, the brother of defendant G. W. Earls, and the uncle of defendant G. W. Earls, Jr.; the defendant last named being a son of defendant G. W. Earls. The plaintiff brought suit for the sum of \$637.55, which amount he alleged he was required to pay to J. B. Ray for the benefit of the defendants. He averred that as surety for the defendants he signed a promissory note payable to J. B. Ray, that the same was not paid by defendants, and that he as surety for the defendants was required to pay that amount for their benefit. The answer of W. J. Earls and G. W. Earls, Jr., was a general denial. The separate answer of G. W. Earls contained a general denial followed by counterclaims to which we will presently refer. Plaintiff testified to having paid the balance on the note for the benefit of the defendants, as did J. B. Ray, the payee in the note, and none of the defendants when on the witness stand denied plaintiff's statements as to his cause of action; indeed, defendant G. W. Earls practically admits that plaintiff paid this money on the note for him as alleged. The contest

centers around the two counterclaims set up in G. W. Earls' separate answer, the testimony being conflicting and confusing as to the correctness of the items charged in the counterclaims and as to the credits entered on the account on which the counterclaims are based. The case was tried before a jury which returned the following verdict:

"We, the jury, find the issues for the defendants, and assess him one hundred dollars \$100.00."

[1] A judgment was entered on September 9, 1914, to the effect that defendants have and recover of the plaintiff the sum of \$100 together with costs. On September 10, 1914, a motion for a new trial was filed by plaintiff which was continued to the December term, 1914. On December 19, 1914, before plaintiff's motion was acted upon by the court, the defendants came into court and remitted the \$100 awarded them in the verdict and judgment. As stated, the judgment was entered of record in September, and it was never set aside, nor was any new judgment entered in December, after the motion for a new trial had been passed upon, to conform to the remittitur made. If this were the only error in the record, we could enter a proper judgment here, or reverse the judgment and remand the cause with directions to the circuit court to enter a proper judgment. See *White v. Reitz*, 129 Mo. App. 307, 108 S. W. 601. But as we do find that substantial error was committed, we shall, as was done in the case above cited, treat the appeal as properly here, and, in the interest of justice and expedition, point out the error so that it may be avoided in another trial.

The counterclaims filed in the separate answer of G. W. Earls are as follows:

"Further answering and by way of counterclaim, this defendant says that the plaintiff W. L. Earls is justly indebted to him in the sum of \$912.11 in the following items, to wit, which have been a running account between the plaintiff and this defendant since the 8th day of September, 1907, with part payments from time to time thereon, as follows:

W. L. Earls to G. Earls, Dr.	
September 8, 1907, to six head hogs	
at \$8 per head..	\$ 48 00
September 8, 1907, to 57 head hogs at	
\$6 per head....	342 00
....., 1907, to the payment of	
1 check paid to	
Ernest Lenox	
for W. L. Earls	65 00
October 3, 1908, to one lot of hay	
and pasture	
agreed on.....	450 00
October 25, 1908, to one lot of merchandise sold	
and delivered to	
W. L. Earls,	
gross price	
agreed on.....	387 20

Total \$1,292 20

"The defendant further answering states that on the 25th day of October, 1909, one Marion Bailey paid for the plaintiff W. L. Earls to this answering defendant, on account, the sum of \$83.09, and that on the 21st day of May, 1909,

the plaintiff W. L. Earls paid the National Bank of Rolla for this defendant answering the sum of \$500 on account, and that on the 7th day of June, 1912, W. J. Earls paid to this answering defendant the sum of \$105 for the plaintiff; that the total amounts paid by the plaintiff to this defendant answering, on account, was \$683.09, leaving a balance due this defendant so answering, on the running account aforesaid between plaintiff and defendant, the sum of \$804.11.

"This defendant further answering says that the plaintiff W. L. Earls was justly indebted to one W. J. Earls in the following items, to wit: June 7, 1912, amount paid G. W. Earls for W. L. Earls at the instance and request of the said W. L. Earls, \$105; September 27, 1912, to two mare colts sold by W. J. Earls to W. L. Earls, \$100; —, 1913, to cash borrowed from W. J. Earls by W. L. Earls, \$108—making a total indebtedness due the said W. J. Earls of the sum of \$308.

"This defendant further answering says that about the 1st day of February, 1914, for a valuable consideration he purchased the account the plaintiff W. L. Earls owed to the said W. J. Earls, amounting to the sum of \$308, and is now the owner of said indebtedness against the plaintiff W. L. Earls; that the total amount the plaintiff W. L. Earls now owes this defendant here answering is \$912.11, for which amount, together with the costs of this suit, this defendant prays judgment against plaintiff."

The plaintiff did not file any pleadings in answer to the counterclaims, but the case was tried throughout by both sides as though a general denial had been filed to the counterclaims and as though a special plea of the five-year statute of limitations had been filed. This is shown by two instructions given by the court, which are as follows (the first one quoted being given at plaintiff's request, and the second at the request of the defendants):

"The court instructs the jury that the defendant G. W. Earls cannot recover on any of the items of his counterclaim if such items did not accrue within five years before filing this action."

"The court instructs the jury that, although you may find from the evidence that some of the items of defendants' counterclaim accrued more than five years prior to the filing of this suit, yet if you further find from the evidence that the plaintiff or any one by his direction has made any payments upon any of the items of such counterclaim within five years before the filing thereof, then in such case the item or items upon which said payments were made would not be barred by the statute of limitations."

[2] We shall therefore review the case on the same theory as that adopted in the trial court, by not only the trial judge, but by both appellant and respondents as well. See *Manzke v. Goldenberg*, 149 Mo. App. loc. cit. 22, 129 S. W. 32; *Hume v. Hale*, 146 Mo. App. 659, 125 S. W. 871; *Riggs v. Street Ry. Co.*, 216 Mo. 304, 115 S. W. 969; *McMurray v. McMurray*, 258 Mo. loc. cit. 416, 167 S. W. 513; *Williams v. Railroad*, 233 Mo. loc. cit. 676, 136 S. W. 304; *Taylor & Sons Brick Co. v. Railroad*, 213 Mo. loc. cit. 728, 729, 112 S. W. 59; *National Tube Works Co. v. Ice Machine Co.*, 201 Mo. loc. cit. 64, 98 S. W. 620; *Bettes v. Magoon*, 85 Mo. 580; *Guntley v. Staed*, 77 Mo. App. 163; *Price v. Town of Breckenridge*, 92 Mo. loc. cit. 387, 5 S. W. 20.

It appears on the face of G. W. Earls' counterclaims that some of the items were barred unless saved by payments made by the plaintiff. On an examination of these counterclaims, the statement of his running account shown in the first counterclaim, it can be seen, bearing in mind that his counterclaims were not filed until May, 1914, that all the items charged against plaintiff in the years 1907 and 1908 are barred under the five-year statute of limitations, unless the plaintiff has by some act on his part stopped the running of the statute, and it is only claimed that the account is alive by reason of certain credits shown thereon as payments made by the plaintiff.

[3] Before discussing these credits, we will examine the charges made in the statement against the plaintiff in the first counterclaim of G. W. Earls. There is no evidence in this record showing, or tending to show, that the parties ever treated the various amounts charged as constituting items of an open, mutual, and current account within the meaning of section 1593, R. S. 1909. Where parties have dealings with each other consisting of transactions of entirely different character, there must be some evidence tending to show an intention on their part to make such transactions part of a running account before they will be so treated, and this burden is on the party asserting that the transactions form part of a running account. And where there are charges and credits, it must be shown, as said in some of the cases cited below, that the items are morally connected with one another so that it is clear that each separate item is not meant to constitute a new and independent contract, or that the conduct of the parties makes it fairly inferable that it was their intention to have a future adjustment of their various transactions as of one account. It is held in the case of *Thompson v. Brown*, 50 Mo. App. 314, that whether there was an agreement, expressed or implied, to keep an account open, is a question for the jury, and that in the absence of evidence there is no presumption that all the items of an account constitute one demand; that there must be some evidence to establish this. See, also, *Loeffel v. Hoss*, 11 Mo. App. 133; *Vogel v. Kennedy*, 127 Mo. App. loc. cit. 235, 104 S. W. 1151; *Chadwick v. Chadwick*, 115 Mo. loc. cit. 586, 22 S. W. 479; *Gibson & Bro. v. Jenkins*, 97 Mo. App. loc. cit. 36, 70 S. W. 1076; *Ring v. Jamison*, 66 Mo. loc. cit. 428; *Ring v. Jamison*, 2 Mo. App. 584; *Chapman v. Hogg*, 135 Mo. App. 654, 116 S. W. 492; 1 R. C. L., 205.

[4] Defendant G. W. Earls had been at one time a merchant; for how long is not shown by this record, but at least covering a period extending from April 1, 1908, to possibly October 25, 1909, as shown by the copy of his book account, which contained charges and credits for merchandise sold and delivered to plaintiff. From his statement

in his first counterclaim and his testimony, in 1907 he owned some hogs which he states he sold to the plaintiff. He also testified that he took up a check for the plaintiff in the amount of \$65 in 1907, and that on October 3, 1908, he sold to plaintiff some hay and pasture. None of the items just mentioned, except the merchandise furnished out of the store, were ever made a matter of written record by the defendant by memorandum or otherwise. He made no written charges on his book account against the plaintiff for these items, although he was keeping a book account showing the items he was selling plaintiff out of the store, and although he now claims that all of these items were due him prior to October 25, 1908, he did on that date, according to his evidence, close his book account and agreed with the plaintiff on a balance of \$387.20. We hold therefore that in view of the different character of the transactions—being in no way morally connected—and the conduct of the parties, the defendant fails to make it fairly inferable that they intended to carry such items in an open account. See *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 86 S. W. 150.

[5] We will now take up the item of \$387.20, which was a balance due for merchandise as shown by the books of defendant G. W. Earls. It is not claimed that the plaintiff ever personally made any payment on this account, and unless the payment of \$83.09 which was made by one Marion Bailey on October 25, 1909, can be held as a payment such as would keep the statute alive until the counterclaims were filed in May, 1914, this item is also barred. The facts with reference to this credit are as follows: Marion Bailey, according to defendant G. W. Earls' testimony, was in the employ of the plaintiff and needed some merchandise. The plaintiff told G. W. Earls to deliver the merchandise to Bailey and to charge the amount up to plaintiff's store account, and this was done. G. W. Earls testifies that some time before Bailey paid it he went to the plaintiff about the account, and that plaintiff told him he ought to collect off of Bailey the amount due him, charged to plaintiff's account, which represented the goods delivered to Bailey, and that he told plaintiff he would do it, and that when Bailey did pay it on October 25, 1909, he gave plaintiff's account credit for the \$83.09. The credit of \$83.09 on the store account, which was the payment made by Bailey, cannot be considered as a general payment on the plaintiff's account such as would avoid the bar of the statute of limitations. G. W. Earls could only, and in fact did only, apply this payment to the specific items of the account which were furnished to Bailey. The following rule applicable here is laid down in *Wood on Limitations* (3d Ed.) § 97, p. 247:

"In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt, and paid to, and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder."

See, also, *Boughton v. Boughton*, 77 Conn. 7, 58 Atl. 226, where it is held that payments made by a subtenant did not stop the statute as to amounts due from the original tenant to the landlord; *Hammond v. Hammond*, 76 Vt. 437, 58 Atl. 724. Bailey was not authorized to make such a payment as would acknowledge an indebtedness of the plaintiff other than the one he (Bailey) was obligated to pay, and hence his act did not affect the status of the account between the plaintiff and G. W. Earls. *Payne v. Slate & Gardner*, 39 Barb. (N. Y.) 634. The payment of his account was wholly disconnected with the transactions between plaintiff and defendants, and hence does not constitute a credit on plaintiff's running account at the store. *Compton v. Johnson*, 19 Mo. App. 88. It is held in *State ex rel. Shipman v. Allen*, 132 Mo. App. 98, 111 S. W. 622, that payments made on a renewal note by a principal and accepted by the payee as a payment on the second or renewal note will not be allowed to extend the statute of limitations on the original note as to a surety thereon, even though he (the surety) be estopped from asserting that the renewal note was ever delivered and accepted as a payment of the original note; and this, because the principal and payee in the renewal note treated such payments as applying to the renewal note, and hence there was manifested no intention to make a payment on the original note. See, also, *Regan v. Williams*, 185 Mo. loc. cit. 630, 84 S. W. 959, 105 Am. St. Rep. 600; 25 Cyc. 1373; *Hammond v. Hale*, 61 Iowa, 33, 15 N. W. 585. We hold, under these authorities, that the sum due for items alleged in the counterclaim to be owing on the store account is barred by the statute of limitations.

The evidence as to the payment of \$105 by the father, W. J. Earls, shown in the counterclaim to have been paid on June 7, 1912, is very unsatisfactory in this record. It is not at all clear that he ever actually paid any sum whatever, and the evidence certainly fails to show that, if paid at all, it was paid at plaintiff's instance and request, or that he ever ratified it after it was paid. A retrial will probably clear this up, and it is quite unnecessary to go into the details of that transaction in this opinion.

What is said with reference to this item applies as well to the charge of the same amount, \$105, shown in the second counterclaim alleged to have been purchased by the defendant G. W. Earls from his father, W. J. Earls.

[6] With reference to the \$500 credit paid to the National Bank of Rolla for defendant, there is no evidence that it was ever con-

templated by the plaintiff that he was paying this on a running account. On the other hand, it is shown that he was a surety on a promissory note made to the bank wherein defendant G. W. Earls was principal.

That the defendant knew that plaintiff was not recognizing an open account between them is shown in his cross-examination, which is, in part, as follows:

"Q. You don't deny signing this note at the bank, do you, so you let this run on from 1908 until you were sued on this note that your brother claims he paid for you to Ray before you said anything about it, didn't you? A. Well that was my first chance that I ever had to collect it. Q. Why didn't you have a chance? A. Well it was—they claimed it was outlawed. Q. Why did you let it become outlawed? A. Through carelessness."

The testimony of G. W. Earls on cross-examination also shows that the \$105 credit claimed to have been paid by the father in 1912 was agreed on to be paid between G. W. Earls and his father in the year 1908. With the latter date in mind, G. W. Earls' further cross-examination sheds some light on the question of an open account. It follows:

"Q. Have you had any business with your brother, Dock, since that settlement, wherein your father agreed to give you \$105 that you owed him if you and Dock would settle your business? Now, what business have you had with him since that? A. None to amount to anything. Q. And didn't have any until he paid his note at the bank for you, did you? A. That is about the first, I believe."

This disposes of the first counterclaim.

As to the second counterclaim which defendant G. W. Earls avers he bought from his father shortly before the institution of plaintiff's suit, we have hereinbefore mentioned the \$105 item which appears in the first counterclaim as a credit and in the second counterclaim as a charge. The evidence concerning an indebtedness to the father of \$100 for the purchase of two mare colts, and \$103 for money borrowed, is very conflicting and confusing. It is, however, for the jury to determine whether plaintiff owes these two items, and on a retrial the facts can probably be more fully developed.

For the reasons herein appearing, the judgment is reversed, and the cause remanded for a new trial.

ROBERTSON, P. J., and STURGIS, J., concur.

CITIZENS' STATE BANK OF BIRCH TREE v. MARTIN. (No. 1641.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. FIXTURES §18—PURPOSE OF ANNEXATION—RIGHT OF MORTGAGEE.

Where the purchaser and mortgagor of a lot in effecting the purpose of his purchase to install a mill in a building thereon readjusts the building and permanently attaches the machinery thereto and to soil, such machinery becomes

a part of the freehold and passes to the mortgagee on foreclosure.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 32-46; Dec. Dig. §18.]

2. FIXTURES §35—RIGHT OF MORTGAGEE OF LAND AND MORTGAGEE OF MACHINERY—EVIDENCE.

In an action to determine the rights of a mortgagee of land and the mortgagee of machinery permanently attached thereto by the owner and mortgagor of the land for mill purposes, evidence held insufficient to support a finding in favor of the chattel mortgagee.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 67-79; Dec. Dig. §35.]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by the Citizens' State Bank of Birch Tree against M. A. Martin. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. W. McClellan, of Eminence, G. S. Sizemore, of Webb City, and L. O. Nieder, of Mansfield, for appellant. S. A. Cunningham, of Eminence, for respondent.

ROBERTSON, P. J. This is a replevin suit in which plaintiff obtained a judgment below based on a verdict of a jury finding that plaintiff was entitled to the possession of a boiler, engine, planing machine, molder, automatic tool grinder, rip saw, resaw, and all fittings situated in and about a building in which said property had theretofore been placed with the machinery necessary to make a complete planing mill. The defendant has appealed. The property was located on a lot in Birch Tree in Shannon county.

May 1, 1913, the defendant, a carpenter and contractor, sold and conveyed said lot to one C. H. Rich, who paid a part of the purchase price and gave a deed of trust thereon to defendant to secure the balance. At the time Rich bought the lot, none of the property here involved was on it but the building in which they were afterwards placed was thereon, and defendant testified that Rich bought the lot for the purpose of installing in said building a planing mill and the defendant so understood the intentions of Rich. The building was about 22 by 40 feet and about 20 years old. A portion of it had been used for a paint shop and part of it for a chicken house prior to the time Rich bought the lot; however, it was what the witnesses called "a good substantial building, with sills and sleepers" and a rock foundation. Soon after Rich bought the lot, he purchased the property here involved and installed a planing mill in said building, using this and other property therefor. In order to install the machinery, a portion of the walls of the building and of the foundation were taken out. The boiler was set on a solid foundation and bricked in under a shed on the outside of the building, but was connected with and used to run the machinery inside. Rich later left the state and left the planing mill in charge of his brother-in-law. Rich owed

plaintiff a note, and by a chattel mortgage he conveyed the property involved here to plaintiff to secure said note, and it is upon this mortgage plaintiff bases its judgment. The defendant foreclosed his deed of trust, bought the lot at the sale, and was in possession thereof when plaintiff brought this suit.

At the close of the testimony, the court, at the request of the plaintiff, instructed the jury, in substance, that, unless Rich placed the machinery in the building with the intention that it should there remain permanently as a fixture to be used therein ever afterwards as a part of said building, then plaintiff was entitled to it under its chattel mortgage.

The defendant requested two instructions which, under the facts in this case, were equivalent to a directed verdict in his behalf.

In the case of *Thomas v. Davis*, 76 Mo. 72, 76, 43 Am. Rep. 756, the opinion in which was written over 30 years ago, it was said that an attempt to reconcile the authorities on the subject of fixtures "would be futile, and to review them would be an endless task." Considering the ability of the author of that opinion, the learning of the judges who concurred in it, and what has been added since then, we feel constrained to decide the case at bar upon the facts disclosed by the record, relying only upon decisions of the Supreme Court, the authorities binding on us, for our law. In the opinion of the Supreme Court to which we have just referred, a controversy arose between parties situated not materially different from the parties contending in the case at bar. That the defendant in the case at bar and Rich, at the time the property was placed upon the lot owned by Rich, occupied the position of mortgagee and mortgagor, stands conceded, and we must also concede that while that relation existed the property in controversy was placed in the building already on the land and formed a part of the planing mill. The rights which defendant had to the property must be determined with reference to the relation existing between him and Rich, because while that relation existed defendant acquired whatever interest he has in the property involved here. At page 76 of the *Thomas Case*, supra, it is said that in considering the question of fixtures, as between mortgagor and mortgagee, the same rule must be applied as obtains between heirs and executors or administrators, and then follows this quotation:

"When the absolute owner of land in fee, for the purpose of better using the land, erects upon and affixes to the freehold certain machinery, such as is in use in making coal, and in mines, it will go to the heirs as part of the real estate."

Even in regard to manufacturers, all articles affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, will descend to the heir, or pass by conveyance of the land; that the rule of law by which fixtures are held less strictly, when erected for manufacturing pur-

poses, has no application to fixtures erected by the owner of the land in fee."

Also (76 Mo. 77) it is stated that in New York it is held that:

"As between mortgagor and mortgagee, whatever is annexed or affixed to the freehold, by being let into the soil, or annexed to it, or to some erection upon it, to be habitually used there, particularly for the purpose of enjoying the realty, or some profit therefrom, is a part of the realty."

That case involved machinery placed in a building for the purpose of smelting lead, and a judgment for the mortgagee based upon a trial of the facts was upheld.

In the case of *Progress Press Brick & Machine Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 501, 517, 52 S. W. 401, 405 (74 Am. St. Rep. 557), after quoting with approval from the opinion in the *Thomas Case*, supra, it is said:

"Much confusion has been caused by courts paying too much regard to the relative value of the house and of the machinery which is placed in the house. There can be no rule or principle deduced from such considerations. In nearly all manufacturing establishments the machinery costs many times as much as the house in which it is located, for palaces are not generally suitable as work shops. The intention of the owner is the first and best criterion, and the adaptability of the machinery to the uses and purposes to be subserved is the next best test, in determining all cases of this character."

In that case was directly involved the question as to whether or not a brick plant and its machinery became a part of the land upon which they were erected. The landowner prevailed below, but the Supreme Court reversed the judgment and remanded the cause, with directions to enter judgment for the plaintiff.

[1, 2] In the case at bar there was no testimony tending directly to prove that Rich intended to retain any of this property as personality, so that there is absent in this case the first and best criterion spoken of in the opinion of the Supreme Court to which we have just referred. Then passing to the next best test, we find all of the facts and circumstances supporting defendant's contention that the machinery became, as between him and Rich, a part of the freehold. Rich bought the lot for the purpose of installing a planing mill in the building thereon. After he bought, he so rearranged and readjusted the building for the reception of the mill machinery as that it would lose its original form and usefulness if the machinery is removed. The machinery was permanently attached to the lot and to said building, and thus adapted these to the purpose for which he bought the lot and installed the machinery. All of the facts and circumstances in this case prove only that the property plaintiff seeks to recover is a part of the freehold now owned by the defendant, and therefore there was no issue of fact to submit to the jury in behalf of plaintiff. The evidence of this case does not authorize a judgment in behalf of

the plaintiff, and the one it has obtained is reversed.

It is so ordered.

FARRINGTON and STURGIS, JJ., concur.

SWIFT & CO. v. EPPS et al. (No. 1629.)
(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. APPEAL AND ERROR \S 212—SCOPE OF REVIEW—SUFFICIENCY OF EVIDENCE—WAIVER.

Where the plaintiff did not ask a directed verdict as against one defendant, but voluntarily treated the testimony as raising an issue for the jury as to his liability by procuring an instruction thereon, the court on appeal could not consider the issue of sufficiency of evidence, since Rev. St. 1909, \S 2081, provides that no exceptions shall be taken on an appeal, except such as shall have been expressly decided by the circuit court; no express decision in such case having been made as required by the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1302; Dec. Dig. \S 212.]

2. APPEAL AND ERROR \S 882—SCOPE OF REVIEW—SUFFICIENCY OF EVIDENCE—WAIVER.

In such case, the court cannot review a denial of new trial on the ground that the verdict is against the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by Swift & Co. against Anderson Epps and Ben Epps, as partners doing business under the firm name of Epps Bros. Judgment against Ben Epps on directed verdict, and for defendant Anderson Epps, and plaintiff appeals. Affirmed.

Sheppard & Sheppard, of Poplar Bluff, for appellant. Abington & Phillips, of Poplar Bluff, for respondents.

ROBERTSON, P. J. Plaintiff sued defendants on an account for goods alleged to have been sold and delivered to them as partners. Defendant Anderson Epps answered, denying under oath the existence of a partnership at the time of the alleged sales; the plaintiff replied, alleging the once existence of the partnership and that the defendant Anderson Epps permitted himself to be held out as a partner at the time of said sales.

The testimony showed that the defendants, who are brothers, formed a partnership October 3, 1913; that they bought a meat shop, which they conducted in Poplar Bluff until December 8, 1913, when they dissolved, the defendant Anderson Epps retiring and moving to his farm, and the other defendant, Ben Epps, continued the business. While they were conducting business as partners they bought goods of defendant through its agent, who lived at Poplar Bluff, and who called on defendants at their place of business every Friday and Monday. Every Monday they paid this agent in cash, and Anderson Epps testified that he was always there when the

agent called. Defendants had the name "Epps Bros." on the front window of their shop, and it so remained after the dissolution. They also used letter paper with the same name printed thereon; after the dissolution Ben Epps continued using it. Between May 25, 1914, and June 4, 1914, the goods to recover the price of which this suit is brought were sold to Ben. Many sales, other than the ones here involved, were made to him, which he paid by his individual check. It will thus be seen that plaintiff's agent was at this place of business, after the dissolution, about 40 times, and during all that time the absence of defendant Anderson Epps must have been noticeable, as was also the fact that the remaining partner was giving his individual check, whereas, before the departure of Anderson Epps, they had been paying cash.

At the close of the testimony the court, at the request of plaintiff, instructed the jury to return a verdict against defendant Ben Epps. At the request of plaintiff the jury was instructed, after hypothetically submitting the testimony about the alleged holding out and stating, if the finding thereon was for plaintiff, to return a verdict for plaintiff if it "relied on these facts, and did not know of the dissolution of the firm, and gave credit to Ben Epps and Anderson Epps." The jury returned a verdict against Ben, as directed, and for defendant Anderson Epps, upon which judgment was entered and plaintiff has appealed.

[1, 2] The plaintiff urges here only the point that there is no evidence to justify the verdict in favor of Anderson Epps, and insists that the judgment based thereon should be reversed. We are precluded from considering this contention, because the plaintiff has voluntarily treated the testimony as raising an issue for the jury by procuring an instruction thereon. *Gloyd v. Franck*, 248 Mo. 468, 476, 154 S. W. 744. We are prohibited by section 2081, R. S. 1909, from entertaining on appeal any exceptions "except such as shall have been expressly decided" by the trial court. Here the trial court was not given an opportunity to pass upon the question of the propriety of directing a verdict for plaintiff as against Anderson Epps, and therefore we cannot consider the question. Even if plaintiff had requested a directed verdict, and the court had refused it, there would yet be nothing here to review, since the instruction was given at its request, on the assumption that there was testimony sufficient to make an issue for the jury. *Everhart v. Bryson*, 244 Mo. 507, 516, 149 S. W. 307.

Neither can we hold that the trial court should have granted plaintiff a new trial on the ground that the verdict is against the weight of the evidence, because appellant has bound itself to the proposition that there was

substantial testimony to go to the jury, and it is not the province of the appellate court to interfere under such circumstances. *Reid v. Insurance Co.*, 58 Mo. 421, 430; *Gate City National Bank v. Boyer*, 161 Mo. App. 143, 150, 142 S. W. 487; *Dorset v. Chambers*, 187 Mo. App. 276, 280, 173 S. W. 725.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

NORRID v. GARNER et al. (No. 1574.)
(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. LANDLORD AND TENANT §202 — RENT — WAIVER OF LIEN—QUESTION FOR JURY.

In an action by a landlord against a purchaser of a portion of the crop to enforce a lien for rent, evidence held to present a question for the jury whether the landlord authorized his tenant to sell the crop to defendant free of lien.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 955, 969, 1049-1058; Dec. Dig. §262.]

2. PRINCIPAL AND AGENT §105—AUTHORITY OF AGENT—RECEIVING PAYMENTS.

Ordinarily the power to sell property includes the right to receive payments.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 298-310, 374; Dec. Dig. §105.]

3. LANDLORD AND TENANT §254 — RENT — WAIVER OF LIEN.

Where a landlord gave his tenant the right to sell a portion of the crop and collect the price, he waived his lien for rent, though the purchaser knew nothing of the arrangement.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 986, 1034-1044; Dec. Dig. §254.]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by Farris Norrid against Levi Garner and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Fort & Green, of Bloomfield, and W. E. Edmonds, of Bernie, for appellants. Geo. Munger, of Dexter, and Wammack & Welborn, of Bloomfield, for respondent.

ROBERTSON, P. J. The plaintiff owned a 240-acre farm in Stoddard county which he leased to Harry O. Stewart for an annual rental of \$900. While the plaintiff, as now claimed by him, was entitled to a landlord's lien upon the crops on said land, under section 7888, R. S. 1909, for the rent due for 1913, the defendant, in December, 1913, or January, 1914, purchased 1,000 bushels of corn from said Stewart grown on said land, knowing it had been grown on demised premises, and paid him therefor. By this action plaintiff seeks to recover from defendants the value of said corn. Proviso of section 7896, R. S. 1909. A jury trial resulted in a directed verdict for plaintiff for the amount the jury believed the value of the corn to be.

Judgment was entered on the verdict, and defendants have appealed.

There is a material conflict in the testimony. Stewart testified that before selling the corn to defendants he talked with plaintiff about it. At that time the question of Stewart paying the rent was talked about, and he says, referring to plaintiff, "I told him I would sell the corn to Garner and pay the rent," to which plaintiff replied, "and said that was a good place to sell it." Stewart says that, in pursuance of that talk, he did sell the corn to defendants, and they paid him for it, but he did not pay it over to plaintiff. He sold all that season's corn. Plaintiff's version of the conversation about which Stewart testified is that Stewart told him he had enough corn to pay his rent, and that he was going to sell the corn to defendants at 65 cents per bushel, and then plaintiff said, "Well, that is a good price, and a good place to sell it." Plaintiff further testified that it would make no difference to him who Stewart sold the corn to just so he got his money. He says about the entire crop: "I supposed he would dispose of it and turn the money over to me." The following appears in the record:

"Q. Mr. Norrid, at any time did you object to this tenant on your farm selling the stuff he raised? A. No, sir; I didn't."

And again:

"Q. Tell the jury if you ever told anybody else that Mr. Stewart sold anything that was grown on those premises that year. A. No, sir; I always got the money every time it was sold. Q. Tell the jury— He turned over the money to you whenever he sold it, except this time, didn't he? A. Yes, sir; to Blankenship. Q. That was the reason why you was willing for him to sell it this time, was it not? A. Yes, sir."

The Blankenship referred to was an agent of plaintiff, who appeared to be looking after the farm, and he testified about a talk with Stewart in which he told Stewart he could sell if he would have the checks made to him or plaintiff; but it will be noticed that the plaintiff, the principal, in the testimony we have noticed, attached no such condition to the authority of Stewart to sell. There is other testimony of the plaintiff which tends to contradict that which we have quoted.

[1] We think that the inference can be drawn from the testimony in this case that plaintiff conferred upon Stewart the authority to sell the corn to defendants, and undertook to impress upon him the duty of applying the proceeds of the sale upon his rent. It is evident, according to Stewart's testimony, that all this time he was refraining from selling the corn, for the very reason that he did not want to dispose of it without the express consent of plaintiff; otherwise he would not have conferred with plaintiff. The testimony tends to prove plaintiff authorized the sale and relied solely upon Stewart to pay the purchase price on the rent. If Stewart was not authorized to sell the corn free of the

lien and collect the purchase price, he could not have carried out the arrangement which the testimony tends to prove plaintiff made with him. If this agreement was made, it was the plaintiff, and not the defendants, whose duty it was to see that the funds reached the proper party. Plaintiff, as may be found under the testimony, told Stewart to sell, which necessarily meant to sell clear of lien, collect the purchase price, and pay it to him; so, when defendants bought, they took the property clear of any lien. There was no duty resting on them to see that the purchase price reached plaintiff, as plaintiff had assumed that responsibility.

[2] Ordinarily the power to sell property includes the right to receive payments. *Rice v. Groffmann*, 56 Mo. 434; *Birch Tree State Bank v. Brown*, 152 Mo. App. 589, 599, 133 S. W. 860; *Hodkinson v. McNeal Machinery Co.*, 161 Mo. App. 87, 93, 142 S. W. 457.

[3] If plaintiff gave Stewart the right to sell the corn to defendants and collect the purchase price, he necessarily, as we have observed, intended to waive his lien; hence there was a waiver, even though defendants know nothing of plaintiff's arrangement with Stewart. *Fulkerson v. Lynn*, 64 Mo. App. 649, 652; *Griffith v. Gillum*, 31 Mo. App. 33, 41.

From what has been said it is evident that the court committed reversible error in directing a verdict for the plaintiff. The case should have been submitted to the jury, and defendants' instruction No. 2 should have been given. However, we think that instruction would be more readily understood by the jury if the words "defendants appointed and constituted the said Stewart his agent to sell said corn" is changed to read that "defendants authorized said Stewart to sell said corn," and thereafter where the words "as such agent" occur they be omitted, as well as the word "agent" where it thereafter appears just before the word "Stewart."

The judgment is reversed, and the cause remanded.

FARRINGTON and STURGIS, JJ., concur.

EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES v. DE LISLE et al. (No. 1821.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. PLEDGES \S 55 — PERSONAL LIABILITY — FAILURE OF COLLATERAL.

That, under a mistake of law as to the ownership of collateral which was pledged as security, a loan was made under the belief of all that no personal liability would be enforced, because of the value of the collateral, does not have the effect of relieving, on failure of title to the collateral, those personally obligated by the loan contract to repay.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 140-151; Dec. Dig. \S 55.]

2. INSURANCE \S 179½ — LOAN ON POLICY — PERSONAL OBLIGATION.

An agreement between a life insurance company and insured and his wife and children, reciting that it loans a certain amount to them, and that they agree to repay the same to it; that in consideration of the loan they assign to it their interest in the policy; and that, on default in payment of the loan, it may cancel the policy and apply the cash surrender value to payment of the loan and interest—imposes on the parties of the second part a personal obligation to repay.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. \S 179½.]

3. INSURANCE \S 179½ — LOAN ON POLICY — PAYMENT.

There is no payment of a loan made by a life insurance company, because of attempt of the company to apply the surrender value of the policy to such payment, as authorized by the pledge thereof; nothing thereby passing to the company, because of the surrender value having vested in the trustee in bankruptcy of insured before the attempted pledge.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. \S 179½.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by the Equitable Life Assurance Society of the United States against Olive De Lisle and others. From an adverse judgment, plaintiff appeals. Reversed and remanded with directions.

Douglas W. Robert, of St. Louis, and Riley & Riley and J. R. Brewer, all of New Madrid, for appellant. Thomas Gallivan, of New Madrid, and R. L. Ward, of Caruthersville, for respondents.

STURGIS, J. The plaintiff sues in separate counts on three loan agreements signed by the defendants. The defendant Olive De Lisle is the assured, and the other defendants are the beneficiaries, in the three separate insurance policies involved here, all issued by the plaintiff. The loan agreements sued on were given May 18, 1908, in connection with a pledge of these policies, each pledging the corresponding policy as collateral security. On the date mentioned, these policies were all alive, with the premiums paid up, and each possessing a considerable reserve value, forming a basis for a surrender or loan value.

The instrument sued on in the first count reads as follows:

"\$225.

"This agreement, made this 19th day of May, 1908, between the Equitable Life Assurance Society of the United States, party of the first part, and Olive De Lisle, and Ida De Lisle, wife, and Norval De Lisle and Richard De Lisle, children, parties of the second part.

"Witnesseth: The party of the first part agrees to loan and does hereby loan to the parties of the second part, the sum of two hundred fifty-five dollars, the receipt of which by the parties of the second part is hereby acknowledged; and the said parties of the second part agree to repay the same to the said party of the first part, at its office, 120 Broadway, New York City, on the 19th day of May, 1909.

"In consideration of said loan the parties of

the second part hereby assign, transfer and set over all their right, title and interest, including the right to exercise any and all options and privileges, in policy No. 894473 on the life of Olive De Lisle, issued by said party of the first part, together with all money which may be payable under the same to said party of the first part, as collateral security for the repayment of said loan.

"In the event of default in the payment of said loan upon the date hereinabove mentioned, the party of the first part is hereby fully authorized and empowered, without notice to and without demand of payment by the parties of the second part, to cancel said policy and to apply the cash surrender value of such cancellation to the payment of said loan and any unpaid interest; and upon the maturity of said policy, either by death or lapse of time, the party of the first part is hereby authorized and empowered to exercise any right or option and accept and extend any privilege or other benefit held, possessed or enjoyed by the parties of the second part, or any of them, under the terms and conditions of said policy, including the right to commute any amount due in installments, whether provided for in the policy contract or not. Should the surrender value of said policy exceed the amount of above loan with interest at five per cent. thereon, then, and in that case, the excess value above the loan and interest shall be due and payable to the legal owner or owners of the policy on demand.

"Olive De Lisle. [Seal.]

"(Name of Insured.)

"Ida De Lisle. [Seal.]

"Richard De Lisle. [Seal.]

"Norval De Lisle. [Seal.]

"(Names of Beneficiaries.)"

The agreements sued on in the other counts are similar in form, but describe and pledge different policies of insurance, the second being for \$510 and the third for \$1,363. The court rendered judgment for plaintiff against the defendant Olive De Lisle on each of the three counts for a total amount of \$2,873, and for the other defendants on each of such counts. The plaintiff has appealed, claiming that it is entitled to judgment against all the defendants.

The petition alleges, and the facts show, that because the insured, Olive De Lisle, had been adjudged a bankrupt prior to the attempted pledge of these policies as collateral security, the title to the same proved to be in the trustee in bankruptcy, and such pledge entirely failed; that defendants failed to pay the amount of said loans respectively at the time the same became due; and judgment is asked for such amounts.

The defendants filed somewhat lengthy answers, and, while admitting the execution of the instruments sued on, averred that plaintiff's agent, a Mr. Avery, at St. Louis, with whom the loans were negotiated, represented that defendants were not binding themselves personally to a repayment of these loans; that the only purpose in requiring these parties, especially the beneficiaries, to sign the loan agreements was to waive their respective rights in the policies, and consent to the loans being made on the same to the insured; that defendants were assured that there would be no personal liability on them to repay the loans; that plaintiff's agent by mis-

take so wrote the loan agreements as to make them personally binding on all the defendants. There was then a prayer to have such loan agreements corrected and reformed so as to express the real intent and agreement of the parties, and to make the same the obligation of the insured only.

These allegations of the answer were the ones to which most of the defendants' evidence was directed, but the same need not be considered further here, for the reason that defendants now concede that the evidence does not make a case for them on the ground that these instruments or their execution were obtained by fraud or misrepresentation and warranting relief along this line. The defendants conceded in their evidence that no artifice, trick, or fraud was used to prevent their reading and knowing the contents of the instruments they signed, and that, tested by the rules determining the validity and binding force of written instruments signed and executed by persons under no disability or infirmity, these defendants cannot be released from the legal effect of the instruments sued on.

[1] In reading the evidence in this case, it is apparent that all the parties, inclusive of plaintiff's agent, believed that there would be no personal liability enforced against these parties on these loan agreements; but such belief arose from the fact that the insurance policies pledged as collateral security for the loans were unquestionably of a value sufficient to pay the loans at maturity. Had the defendants been signing a plain promissory note with these policies pledged as security, their belief as to there being no personal liability would have been the same, and arising from the same cause. It is also true, doubtless, that the plaintiff was making these loans, as is generally done, solely on the value of the security, and with no care for or thought of the personal liability or worth of those signing the loan agreement. It is well known, however, that many loans on real and chattel security are made in the same way; but no court, so far as we know, has ever ruled that such belief or intent of the parties would be given legal effect, so as to relieve one of the binding force of an obligation he had thus signed.

The whole defense in this case arose from a mistake of law as to the ownership of the policies of insurance attempted to be pledged as collateral security for these loans. The insured, Olive De Lisle, had been adjudged a bankrupt prior to making these loans, and attempting to pledge the policies as collateral security, the legal effect of which was that his property, including the surrender value of these policies of insurance, had vested in his trustee in bankruptcy. Having no title to the policies, the attempt to pledge the same as collateral security for these loans was of no validity. The trustee in bankruptcy, some time later, asserted his right to the

surrender value of these policies, by a suit in the federal court, and his right was thereby confirmed. *Equitable Life Assurance Co. v. Miller, Trustee*, 185 Fed. 98, 107 C. C. A. 316. In so doing the Circuit Court of Appeals followed the law as declared by the Supreme Court of the United States in *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771.

It is true that defendants were not parties to that suit and not technically bound thereby, but the trustee's title to these policies is not, strictly speaking, the result of or dependent upon that suit. The judgment in that case confirmed the trustee's title to these policies, but did not create it. The trustee's title to these policies is derived from the law relating to bankruptcy, and dated from the adjudication of bankruptcy, and not from any court judgment. The judgment of the federal court merely compelled the plaintiff to recognize the trustee's title. This court has no disposition, even if it had the power, to question the correctness of that ruling.

[2] The defendants insist that the loan agreements sued on here, when properly interpreted in the light of the facts and circumstances under which they were given, should not be construed as importing a personal obligation; that the legal effect of these instruments should be held to be that the loans are payable solely out of the proceeds of the policies; and that the loan agreements merely pledged the policies to that purpose, without personal liability on the pledgors. This same question came before this court in *Gillen v. Insurance Co.*, 178 Mo. App. 89, 98, 161 S. W. 667, where the question was examined and the authorities collected. The cases of *Christensen v. Insurance Co.*, 160 Mo. App. 486, 496, 141 S. W. 6, *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 197, 134 S. W. 102, *Smith v. Insurance Co.*, 173 Mo. 329, 340, 72 S. W. 935, and *Bank v. Insurance Co.* (C. C.) 81 Fed. 935, are there cited and quoted from, as holding that loan agreements similar to the ones sued on here, and given for the same purpose, are personal obligations to repay the borrowed money, in addition to pledges of the policies as collateral security. In the *Gillen Case* the court said:

"We think therefore that the loan transaction and agreement had between the insured and the defendant created a personal obligation on the insured to pay the amount of the loan with interest, and, as the pledge of the policy was invalid in so far as it authorized, or rather attempted to empower defendant to compel, the use of the net value of the policy in discharging the loan, such loan was, so far as this case is concerned, nothing but a personal obligation of the insured and plaintiff to the defendant."

The plaintiff in that case was the beneficiary in the policy, who had signed a loan agreement along with the insured. Such also is clearly the holding of the Supreme Court in the *Smith Case*, supra, and that case is binding on this court.

We might remark also that a comparison of the loan agreements sued on here with the ones under consideration in the cases above cited will show that the personal obligation features are here made prominent and unmistakable. In some of the cases mentioned above, especially the *Paschedag Case*, the personal obligation was an implied rather than an express one; but in the present case, not only do the parties call the transactions "loans" and charge interest thereon, but in express terms "the said parties of the second part (defendants) agree to repay the same to the said party of the first part at its office 120 Broadway, New York City, on the 19th day of May, 1909."

[3] The answer also contains the following defense to each loan agreement:

"And defendants, for further answer and defense, say that said notes have been fully paid and satisfied; that policy No. 894473 was appropriated and converted by the plaintiff to its own use and benefit, and that said policy, at the time it was so appropriated was more than sufficient to pay off said loan; that the loan value of said policy at said time exceeded the amount of said note, and that said policy at said time was exempt to the defendants herein, and that these defendants were not parties to any proceedings in which the proceeds of said policy were paid to R. J. Miller, trustee, and are not bound thereby."

In support of this contention of discharge by payment, the defendants rely on the fact that the plaintiff attempted to foreclose the loan agreements as provided by the terms of the pledge, and marked each of these policies "canceled" on a specified date. A large number of authorities are cited to the effect that payment includes any method of discharging an obligation for a consideration, and that payment need not be in money, but that any arrangement whereby something of value is given and accepted in discharge of an obligation constitutes payment, and that this may be true even if the thing so received afterwards proves of no value. Defendants say that this principle is especially applicable where the real obligation of the parties is that of sureties only, and that such is the obligation of all the parties here other than the insured, Olive De Lisle, who alone was interested in obtaining this loan. It is shown, however, that the loan agreements here were made out on the regular printed forms used by plaintiff in making all such loans, and that plaintiff, for obvious reasons, never made loans on policies except to the insured and beneficiaries jointly; also that the checks in payment of these loans were made to all the defendants jointly. It is doubtful, therefore, if any of the defendants sustained the relation of surety on these loan agreements. We think, however, that such fact is in no way material, for the reason that there was no payment of these loan agreements in any sense of that term. It is not contended, and could not be, that the mere pledge of the policies as collateral security was itself a payment. The loan agreements provide that

payment may be made out of the collateral security in this manner:

"In the event of default in the payment of said loan upon the date hereinbefore mentioned, the party of the first part is hereby fully authorized and empowered, without notice to and without demand for payment by the parties of the second part, to cancel said policy and to apply the cash surrender value of such cancellation to the payment of said loan and any unpaid interest."

The pledge or attempted pledge of the policy as collateral security is in reality the pledge or attempted pledge of the cash surrender value, such cash surrender value following, of course, the ownership of the policy. It is, however, this cash surrender value of the policy which, by section 70 of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1913, § 9634]), on an adjudication of bankruptcy, ipso facto and of that date, vests in the bankruptcy trustee. *Hiscock v. Mertens*, supra. Any attempt, therefore, of the plaintiff to apply this surrender or reserve value in payment of this loan was utterly void, and absolutely nothing passed from the insured to the plaintiff in payment of the loan. Such surrender value had vested in the trustee in bankruptcy before either the attempted pledge or the attempted foreclosure thereof.

Such is the effect of the decisions heretofore noted as holding that the loan agreement imported a personal obligation in addition to a pledge or attempted pledge of the policies as collateral. Such pledge, or attempted pledge, as we have just seen, is in reality a pledge or attempt to pledge the reserve or surrender value of the policy; and in all the cases above mentioned, *Gillen v. Insurance Co.*, *Smith v. Insurance Co.*, etc., the court held the attempted pledge void and of no effect, because in contravention of our statute prohibiting any such pledge except in payment of loans for past-due premium payments. In the *Christensen Case*, supra, the court said:

"The fact that the attempted pledge of a portion of the net reserve available to the purchase of extended insurance was invalid is, of course, without influence as to the indebtedness itself."

In each of the cases mentioned the court treated the attempted pledge and attempted cancellation of the policy in foreclosure of the pledge as being void and without effect on the personal obligation contained in the loan agreement. Nothing has been shown here which can have the effect of payment or discharge of the personal obligation of any of the defendants.

The case is therefore reversed and remanded, with directions to the trial court to enter judgment against all the defendants as prayed for.

ROBERTSON, P. J., and FARRINGTON, J., concur.

LA FONT v. HOME INS. CO. (No. 1666.)

(Springfield Court of Appeals. Missouri.

Feb. 15, 1916.)

1. INSURANCE — 115 — FIRE INSURANCE — CONTRACTS — VALIDITY.

A husband who had conveyed to his wife an undivided half interest in his property may not thereafter insure the entire property in his own name and collect the insurance thereon, and insurer cannot legalize the insurance by waiver or conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. — 115.]

2. INSURANCE — 378 — FIRE INSURANCE — APPLICATIONS — ESTOPPEL.

Where the agent of insurer incorrectly filled out an application for a fire policy from facts given him by the applicant, who could read, but who signed the application without reading it after being given to understand that it was properly filled out, insurer was estopped from showing any breach of warranty as to the incorrectly filled in matter; the agent having knowledge of all the facts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. — 378.]

3. INSURANCE — 500 — FIRE INSURANCE — APPLICATION — POLICY.

A husband, who had conveyed to his wife an undivided half interest in his property, applied for a fire policy, and procured one which on its face insured him against loss to a specified sum. A mistake as to ownership was caused by insurer. The husband paid for the full insurance, and he believed that only his interest was insured, and insurer intended only to insure his interest. *Held*, that Rev. St. 1909, § 7020, providing that an insurer may not deny that the property insured was worth, at the time of the issuing of the policy, the amount insured thereby, was applicable, and insurer was liable on the policy in the event of a loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. — 500.]

4. INSURANCE — 669 — FIRE INSURANCE — ACTIONS — EVIDENCE — INSTRUCTIONS.

Where, in an action on a policy insuring a dwelling at \$2,500 and household furniture and furnishings at \$1,000, it appeared that insured, about a year after the issuance of the policy, stated that the value of his interest in the dwelling was worth only \$1,500 and the personalty owned by him about \$50, a charge which did not permit the jury to assess the amount of the loss by determining the depreciation, if any, in the property insured, was erroneous; for Rev. St. 1909, §§ 7020, 7021, 7030, declaring that in case of total loss the measure of damage shall be the amount for which the property was insured less depreciation in value, and declaring that no insurer shall take a risk on any property at a ratio greater than three-fourths of the value of the property insured, and when taken the value shall not be questioned, were applicable, and if the proof showed that there was in fact no depreciation, destruction, or loss of property, the conclusion that there was an incorrect valuation in the first place would be justified and insured protected against any deduction in the event of a total loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. — 669.]

5. INSURANCE — 179, 669 — FIRE INSURANCE — CONTRACTS — CONSTRUCTION.

A fire policy insuring a dwelling at a specified sum, household furniture and furnishings at another specified sum, vehicles at another specified sum, and another building at another specified sum, is a divisible or severable contract

as to each group, and in an action on the policy the court should submit separately the questions of loss and depreciation as applied to each group.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 384-390, 1556, 1771-1784; Dec. Dig. ¶¶ 179, 669.]

6. INSURANCE — 602 — FIRE INSURANCE — NONPAYMENT OF LOSS—PENALTY.

Rev. St. 1909, § 7068, as amended by Laws 1911, p. 282, providing that in an action on a policy the court or jury may allow insured damages where insurer vexatiously refused to pay the loss, does not penalize an insurer for resisting a claim, a material part of which it has good reason to believe is not due insured, who contended for and undertook to collect a sum in excess of what, according to his own testimony, he is entitled to recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. ¶¶ 602.]

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Action by L. F. La Font against the Home Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fyke & Snider, of Kansas City, for appellant. R. L. Ward, of Caruthersville, and Thomas Gallivan, of New Madrid, for respondent.

ROBERTSON, P. J. This is an action upon a fire insurance policy wherein plaintiff claims the amount due him to be \$3,600, with interest, and in which a jury returned a verdict for \$3,640, principal and interest, and found that the defendant had vexatiously refused to pay for the loss and assessed his damages at \$360 and a \$300 attorney's fee, making a total of \$4,300. Judgment was entered upon the verdict, and the defendant has appealed. The policy is for \$4,000 and was issued in consideration of a premium then paid of \$18 and an installment note of \$72 payable \$18 on February 1st of each year thereafter until paid. The policy insured the defendant from January 29, 1913, to January 29, 1918, and also stated that the warranties made in the assured's application was a part of the consideration for its issuance. It is also stated in the policy that the property covered by the policy was owned by the insured and was situated on one acre of land in New Madrid county. The items are designated in the policy as follows:

"\$2,500 on two-story frame dwelling house.
"\$1,000 on household and kitchen furniture and furnishings of all kinds belonging to assured, or members of his family, all while contained in the above-described dwelling house and summer kitchen.

"\$150 on shingle-roof frame building and its additions occupied as a private barn.

"\$200 on vehicles while contained in above-described dwelling barn and additions.

"\$75 on smokehouse.

"\$75 on provisions and produce therein."

The application for the policy signed by the plaintiff stated that he was the owner in fee simple of said property. On December 25, 1914, the fire occurred totally destroying

the dwelling house and its contents, except about \$50 worth of household goods, smokehouse, and its contents. The contents of the dwelling house plaintiff testified was worth about \$2,100, but on cross-examination he testified, after having been reminded of his schedules filed in bankruptcy, as follows:

"Q. So at the time of the fire your household goods and furniture, household stores, wearing apparel, and ornaments of person belonging to you were worth \$50? A. That is what I figured them, that is what I figured they would bring if they were sold."

In his schedule filed in the bankruptcy court, and sworn to on December 13, 1913, he stated that his interest in the acre of land was at that time worth \$750. At the time the application for the insurance was signed by the plaintiff, when the policy was issued, and at the trial, the plaintiff owned only an undivided half interest in the land upon which the buildings were located. He had previous to the application deeded the other half to his wife. He testified and alleged in his answer that the agent for the defendant prepared the application; that he (the plaintiff) told the agent that his wife had a conditional deed to a one-half interest; that she owned a half interest; that the agent asked if they were living together, and the plaintiff told him they were; and that the agent said, "That is all right, her property is the same as yours." "He wrote the application, and I gave him the money." The plaintiff signed the application without reading it. The agent of the defendant was a witness and denied this testimony of the plaintiff.

At the close of the testimony, the defendant requested and was refused an instruction directing a verdict in its behalf. For the plaintiff the court instructed the jury (No. 1) that if the finding was for the plaintiff, and he was allowed any damages, they should be for "the amount expressed in policy for which said property was insured and which was destroyed by fire, less the value of any and all property saved and not destroyed by fire, in a sum not to exceed the sum of \$3,600, and you may allow him interest at the rate of 6 per cent. from the 30th day of March, 1915." This instruction also authorized the damages and attorney's fee in the event the jury believed from the evidence defendant vexatiously refused to pay the loss.

Instruction No. 2, given in behalf of the plaintiff, told the jury if they found from the evidence that the plaintiff had preformed all of the duties required of him by said policy, detailing said conditions, they should find for the plaintiff, provided they found that the defendant waived the condition in the policy that it should be void if the plaintiff was not the sole, unconditional, and absolute owner of the property insured as set out in other instructions.

Instruction No. 3, given for the plaintiff,

was based upon the theory of waiver, and in substance told the jury, that if the agent wrote the application, that the plaintiff made the statements to him at that time to which we have stated the plaintiff testified, that the plaintiff relied upon said agent writing the answers correctly and did not thereafter read over the application, that the plaintiff paid the premium provided for in the policy, and the defendant retained and had not handed back the same to the plaintiff, that then the defendant has waived the statement in the policy and the answer in the application that the plaintiff was the sole and absolute owner of the property, and that the defendant could not defeat the action on that defense.

In behalf of defendant, the court instructed the jury that the burden of proving waiver rested upon plaintiff, and also that if the defendant had reasonable cause to believe, and did believe, that it had a good defense to all or any part of plaintiff's claim, then no penalty or attorney's fee should be assessed against it.

The court of its own motion instructed the jury that they should not assess his damages at more than one-half of the insurance on the buildings unless that interest exceeded in value one-half the insurance thereon, in which event recovery must be limited to one-half the value of said building, unless the jury found a waiver. Also, the court of its own motion instructed the jury that it was the duty of the plaintiff, "if he could read and write," to have read the application, and if he did not read it, and was not prevented from doing so by some act of defendant or its agent, then he was presumed to know the contents of said application and is bound by the statements contained "therein unless there was a waiver therein made by defendant." These two instructions given by the court of its own motion are the same as instruction No. 6, requested by the defendant and refused with the addition of the provision concerning the waiver.

[1] At the very outset, we are met with the insistence in behalf of the defendant that the plaintiff should not, as a matter of public policy, be allowed to insure the undivided one-half interest in the property owned by his wife and collect the insurance thereon, and that no waiver or conduct on the part of the defendant could legalize such insurance. We concede that proposition to be true, and we have held that a party cannot collect insurance upon property in which he has no insurable interest. *Wisecup v. American Ins. Co. of Newark*, 186 Mo. App. 310, 172 S. W. 73, and *Rutherford v. Sample*, 186 Mo. App. 469, 171 S. W. 578.

[2] The defendant also contends that as the defendant was able to do so, but did not read the application, therefore he is bound by its contents, citing the opinions of this court in *Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 169 Mo. App. 550,

563, 154 S. W. 827, which lays down no such rule, and *Colley v. National Live Stock Insurance Co.*, 185 Mo. App. 616, 623, 171 S. W. 663, in which it is stated that the mere claim of signing without reading an application cannot relieve from the effects of statements therein contained. Other cases cited to this point by appellant are as equally wide of the mark.

Beginning with *Combs v. Hannibal Savings & Insurance Co.*, 43 Mo. 148, 150, and 151, 97 Am. Dec. 383, there is a long array of opinions of the Supreme Court and of the Courts of Appeal holding that where the agent of the insurance company incorrectly fills out an application from facts given him by an applicant who can read, and the insured signs the application without reading it, after being given to understand that it was properly filled out, relying upon the statement of the insurance agent, the defendant is estopped from showing any breach of warranty, as to such incorrectly filled in matter, if such application was prepared by its agent with full knowledge of the facts. *Parsons v. Knoxwell Fire Ins. Co.*, 132 Mo. 583, 588, and 589, 31 S. W. 117, 34 S. W. 476; *Rissler v. American Central Ins. Co.*, 150 Mo. 366, 376, 51 S. W. 755; *Thomas v. Hartford Ins. Co.*, 20 Mo. App. 150, 156; *Shotliff v. Modern Woodmen of America*, 100 Mo. App. 138, 149, 73 S. W. 326 et seq.; and *Floyd v. Modern Woodmen of America*, 166 Mo. App. 166, 168, 148 S. W. 178.

[3] If the facts are as plaintiff testified concerning the application, he told the defendant's agent the truth concerning his title, and, if the agent wrongly interpreted the facts and incorrectly filled out the application, the defendant cannot now be heard to say that the policy is void on account of the present alleged misrepresentation of title. We uphold the contention of the defendant that the plaintiff could not insure the interest of his wife in the property, but in so holding we do not necessarily conclude that the policy is void because the plaintiff and defendant mistakenly thought the entire interest in the property was going to be covered by the policy. There is no effort made to reform the policy. The plaintiff had an insurable interest in the property, and the defendant issued its policy, knowing all the facts, and the policy upon its face insures the plaintiff against loss to the extent of \$2,500. When the policy was issued, if the plaintiff is believed, the defendant intended to insure only plaintiff's interest, but it misinterpreted the interest which plaintiff had in the property and erroneously stated that interest both in the application and in the policy, but nevertheless the policy does insure plaintiff against loss on the dwelling to the extent of \$2,500 and for that amount of insurance he paid. Section 7020 provides that the defendant shall not be permitted to deny that the property insured thereby was worth at the

time of the issuing of the policy the full amount insured therein on said property. The property insured by this policy was and could be only the interest of the plaintiff therein, and under that section defendant could not be heard to deny that at the time of the insurance the property was worth less than \$2,500; but the defendant could show a depreciation in value. The fact that an undivided interest in property is insured does not exempt the policy from the provisions of this section. The policy is unambiguous and insures the plaintiff against loss of the property therein mentioned. The mistake therein as to ownership was caused by the defendant. Plaintiff's money has been paid for the full insurance, and the policy comes within the spirit, as well as the terms, of the statute. In *Nixon v. German Insurance Co.*, 69 Mo. App. 351, the plaintiff was allowed, under facts similar to the ones involved here, to recover the full amount of the policy. See, also, to the same effect, *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *O'Brien v. Greenwich Insurance Co.*, 95 Mo. App. 301, 303, 68 S. W. 976; *Clark v. Knoxville Fire Insurance Co.*, 61 Mo. App. 181. The plaintiff cites our opinion in the case of *Rutherford v. Sample*, supra, as holding that a mortgagee had an insurable interest in the property and could retain \$900 insurance collected, notwithstanding his mortgage secured only an indebtedness of \$500. This is a misconception of that opinion. That was a contest between mortgagor and mortgagee; the latter had collected the full amount of the insurance and, if he had procured it to protect his interest, we held he could retain it. Certainly the mortgagor could not take it from him, although the insurance company might have defeated his recovery of the excess—a point we did not then consider and are not now deciding with reference to the facts in that case. We hold that, if the testimony of the plaintiff is true, then the policy was valid to the amount of \$2,500 and covered his interest in the buildings to that extent, governed by the provisions of said section; but we must reverse the judgment and remand the cause for errors occurring in the course of the trial.

[4] In the first place, plaintiff's instruction No. 1 is erroneous, in that it does not permit the jury to assess the damages by determining the depreciation, if any, in the property insured. The "valued policy" provision of section 7020 is, by the latter part of section 7021, limited to insurance of real property; but section 7030, R. S. 1909, applies to personal property in the same way. *Spickard v. Fire Ass'n*, 164 Mo. App. 1, 4, 146 S. W. 808; *Weston v. American Ins. Co.*, 191 Mo. App. 282, 284, 177 S. W. 792. The instruction should have been so framed that the jury could have considered the testimony as to what defendant stated the value of the real property to be when he filed his schedule in bankruptcy, almost one year after the policy

was issued. It is to be presumed that his interest was worth \$2,500 when the policy was issued, and, if it was worth only \$750 at the time he swore to the schedule, the jury, in the absence of further showing, had a right to conclude that the difference represented depreciation. We start with the proposition that on the day the policy was written the buildings were worth \$2,500 and the personal property a sum of which the amount expressed in the policy was three-fourths, then we are confronted with the fact that about one year later the entire interest in the building was worth only \$1,500 and the personal property owned by the insured was worth about \$50, and we think that these bare facts would justify the conclusion that the difference was due to depreciation. If the proof shows that there was in fact no depreciation, destruction, or loss of property, then the conclusion that there was an incorrect valuation in the first place would be justified, and this is one thing the statute protects the insured against. If the plaintiff's testimony above quoted about the value of his interest in the household goods is to be believed, the amount of the recovery, on account of depreciation, should have been reduced over \$1,000. This instruction withdrew from the jury any consideration of this phase of the testimony. There is some confusing testimony about part of the household effects, other than what plaintiff valued at \$50, belonging to members of his family; but, as we understand his testimony, the jury may have properly found that he was, when he filed his schedule, claiming to own all of the household effects and that he fixed the value of all of it at \$50. This can be made clearer if there is a retrial.

[5] Appellant also calls attention to this instruction as being defective because it does not submit separately the questions of loss and depreciation as applied to each group of property in the way mentioned in the policy. It is held in *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 86, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523, that a policy of this kind constitutes a divisible or severable contract as to each group. In *Crossan v. Pennsylvania Fire Ins. Co.*, 133 Mo. App. 537, 540, 113 S. W. 704, it is held error to instruct on the measure of damages as fixed by the total of these various sums. The instructions can easily be so framed, if there is another trial, as to meet the rules laid down in those opinions. It is useless for us to discuss this question as applied to the facts here.

[6] We are also of the opinion that, in view of the facts and circumstances in this case, the jury should not have been authorized to assess any penalty or attorney's fee, because it is shown in this case that the plaintiff has been contending for and undertaking to collect far in excess of what, according to his own testimony, he is entitled to recover, and it was not the intention and

purpose of section 7068, R. S. 1909 (as amended Laws 1911, p. 282), to penalize an insurance company for resisting a claim, a material part of which it has good reason to believe is not due the plaintiff. *Weston v. American Ins. Co.*, 191 Mo. App. 282, 285, 177 S. W. 792; *Patterson v. American Ins. Co.*, 174 Mo. App. 37, 44, 160 S. W. 59; *Kahn v. London Assurance Corporation*, 187 Mo. App. 216, 219, 173 S. W. 695. At the time the plaintiff submitted his proof of loss, which was about two months after the fire and after he had discussed the matter with defendant's agent, he claimed the full \$1,000 for household, kitchen furniture, etc. At that time evidently the defendant was aware of the sworn statements made by the plaintiff in his schedules filed in bankruptcy, and from that they had good reason to believe that the value of the personal property lost in the fire did not exceed \$50 and that there had been a depreciation in value of the real estate. We assume, in the absence of a showing to the contrary, that the plaintiff was insisting upon full payment, and that the defendant would have had to pay the full amount due or submit to litigation. It is true the defendant denied all liability in response to plaintiff's demands, but this would not make its refusal to pay vexatious until the plaintiff demanded practically no more than was unquestionably due and the defendant refused to pay that amount.

The instructions which were given by the trial judge, and which were evidently modifications of instructions requested by the defendant, should not upon a retrial, if objected to by the plaintiff, be given, because neither of them, for the reasons heretofore stated, properly declare the law.

The judgment is reversed, and the cause remanded.

FARRINGTON and STURGIS, JJ., concur.

CUNNINGHAM v. CHICAGO & A. R. CO. (No. 14100.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916.)

1. CARRIERS ⇐228—CARRIAGE OF LIVE STOCK —ACTIONS—NEGLIGENCE—BURDEN OF PROOF.

One claiming negligent delay in the shipment of live stock has the burden of proving that fact, negligence being a positive wrong.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. ⇐228.]

2. CARRIERS ⇐228—CARRIAGE OF LIVE STOCK—ACTIONS—DELAY.

Mere proof that plaintiff's shipment of cattle when it reached a division point was delayed several hours, so that it did not reach the point of destination until about ten hours later than the usual time, unaccompanied with any showing that defendant could have transported the shipment by an earlier train, or that the delay was unreasonable under the circumstances, will not support a judgment for damages for unreasonable delay.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. ⇐228.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by W. E. Cunningham against the Chicago & Alton Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. C. Whitson, of Mexico, Mo., and Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., for respondent.

NORTONI, J. This is a suit for damages said to have accrued through delay in the transportation of a carload of cattle. Plaintiff recovered, and defendant prosecutes the appeal.

It appears that plaintiff, a farmer in Audrain county, purchased 65 head of stock cattle at the National Stockyards, East St. Louis, with a view of feeding and fattening them on his farm. The cattle were delivered to defendant, a common carrier, and loaded in the car for transportation at East St. Louis, Ill., about 5 o'clock in the afternoon of October 29th, but did not reach Laddonia, in Audrain county, Mo., the point of destination, until 4:30 or 5 o'clock the following afternoon—October 30th. The evidence tends to prove that in the usual course the shipment should have arrived at Laddonia about 6 o'clock on the morning of October 30th, whereas it actually arrived some 10 or 11 hours later. The cattle were considerably gaunted, it is said, and three of them limped, though no scars, abrasions, or bruises indicating rough treatment are mentioned in the evidence. The suit proceeds on the grounds of negligence, in that it is averred defendant negligently breached its obligation to transport the cattle within a reasonable time, and thus entailed loss upon plaintiff.

[1, 2] It is argued the court should have directed a verdict for defendant because there is no substantial evidence of negligence in the record, and we are persuaded to this view. Negligence is a positive wrong, and the burden rests upon the party averring it to establish the fact through direct evidence or by giving in evidence such facts and circumstances as will afford a reasonable inference to that effect. See *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636. In the instant case there appears to be no showing with respect to this matter save a mere delay in the transportation. Indeed, the evidence is that plaintiff and his neighbor, Mr. Bailey, accompanied the shipment of cattle from East St. Louis to Roodhouse, Ill., which is a division or junction point on defendant railroad. There is no complaint as to delay in the transportation prior to the shipment reaching Roodhouse. But at Roodhouse the shipment was delayed from some

thing near midnight until about 7 o'clock the following morning awaiting a train on defendant's main line to transport them forward to Laddonia, Mo., the point of destination. It is said that on the shipment arriving at Roodhouse from 11 to 12 o'clock at night the car of cattle was switched to the side track and permitted to stand the remainder of the night, and about 5 o'clock in the morning plaintiff left them there and took a passenger train for home. Defendant's local freight train took the cattle in the morning and transported them on to Laddonia, where they arrived, say, about 4:30 or 5 in the afternoon of that day. There is not a word in the evidence tending to show that defendant had other trains for the transportation of live stock either regular or extras moving on its road between Roodhouse and Laddonia after the cattle reached Roodhouse and prior to the train on which they were carried forward in the morning; that is to say, there is nothing to show that defendant omitted to send the cattle forward on the first train available for that purpose. Moreover, there is nothing to indicate delay in the transportation at any place other than Roodhouse, which was a junction or division point, where the car of cattle was set on the side track awaiting a train from the east going to Laddonia. It is true that in *Libby v. St. Louis, I. M. & S. R. Co.*, 137 Mo. App. 276, 117 S. W. 659, we heretofore declared that a delay of 21 hours in a short haul, where some three separate unusual delays of the shipment were had en route, all of which were wholly unexplained, was sufficient to raise an inference of negligence authorizing a verdict for plaintiff. But nothing of that kind appears here. Mere delay alone, unless unusual and extraordinary, will not suffice to authorize an inference of negligence in cases of this character. See *McDowell v. Mo. Pac. R. Co.*, 167 Mo. App. 576, 152 S. W. 435; *Decker v. Mo. Pac. R. Co.*, 149 Mo. App. 534, 131 S. W. 118; *Hunt v. St. Louis, I. M., etc., R. Co.*, 187 Mo. App. 639, 173 S. W. 61; *Dalton v. St. Louis, I. M., etc., R. Co.*, 187 Mo. App. 691, 173 S. W. 77.

Although it be true that the obligation of common carrier is to transport live stock within a reasonable time, and though it appears the shipment here involved was delayed at Roodhouse so that it arrived some 10 hours later, there is not a word in the evidence tending to show such was an unreasonable delay in the circumstances of the case, for that it may be defendant's trains were prevented from running through some unfortunate circumstances over which it had no control. We take it that at least something should be shown tending to prove that defendant's railroad was being operated at the time, and that trains were moving thereon so that it may have sent the stock forward from Roodhouse. The showing of a mere delay at Roodhouse, the junction point where the

stock awaited a train from the east to take them forward to Laddonia, is insufficient to authorize a reasonable inference that defendant omitted to exercise due care in the circumstances of the case toward carrying the shipment forward and completing the transportation within a reasonable time.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

BAILEY v. CHICAGO & A. R. CO.
(No. 14101.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916.)

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by W. C. Bailey against the Chicago & Alton Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. C. Whitson, of Mexico, Mo., and Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., for respondent.

NORTONI, J. The facts concerning the subject-matter in judgment in this case are identical with those involved in *Cunningham v. Chicago & Alton R. Co.*, 182 S. W. 1033 (decided to-day), and it is submitted on a stipulation to abide the result in the cause referred to. It appears plaintiff here shipped a carload of cattle from the stockyards at East St. Louis, Ill., at the same time and on the same train as that in the *Cunningham Case*, and it suffered the same delay at Roodhouse, but reached Laddonia, Mo., on the same train as the *Cunningham* shipment.

The judgment should be reversed in the view and for the reasons stated in the *Cunningham Case*, supra. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

PATTERSON v. CHICAGO & A. RY. CO.
(No. 14098.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916. Rehearing Denied
Feb. 24, 1916.)

1. CARRIERS ⇄ 228—CARRIAGE OF LIVE STOCK—DELAY.

Mere delay in delivering live stock at destination, unless very extraordinary or altogether unreasonable, does not give rise to an inference of negligence of the carrier, but it must be shown either directly or inferentially that the delay resulted from negligence of the carrier, or its agents and servants.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. ⇄ 223.]

2. CARRIERS ⇄ 228—CARRIAGE OF LIVE STOCK—DELAY.

No negligence can be imputed to a carrier because of a delay over night at a division point in making connection with a train on the carrier's branch line.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. ⇄ 223.]

3. CARRIERS ⇄ 228—CARRIAGE OF LIVE STOCK—CONDITION OF STOCK PEN.

Evidence that a carrier's stock pen at a division point was muddy, that a shipper's cat-

tie were compelled to drink muddy water, and had difficulty in getting sufficient water, and could be fed only by throwing the hay upon the ground, without any showing of injury to the cattle, is insufficient to sustain an action against the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. ¶228.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by W. M. Patterson against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, without remanding.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., for respondent.

ALLEN, J. This is an action for damages alleged to have been sustained by the plaintiff by reason of defendant's negligence in respect to the transportation of certain cattle delivered by plaintiff to defendant for shipment. There was a verdict and judgment below in plaintiff's favor for \$112, and the defendant appeals.

It appears that on the afternoon of September 5, 1912, plaintiff "billed out" 72 head of cattle at the National Stockyards, Ill., for shipment over defendant's line of railway to McCredie, Mo. The latter station is on a branch line of defendant's railroad, connecting with the main line thereof at Mexico, Mo. Plaintiff's evidence tends to show that, in the usual course of things, cattle shipped from the National Stockyards prior to 3 o'clock in the afternoon would arrive at McCredie at about 9 o'clock the following morning; whereas the shipment in question arrived at the latter place about 10 o'clock on the morning of September 7, 1912. Plaintiff's evidence is that the cattle arrived in Mexico about 4 or 5 o'clock on the afternoon of September 6th, where they were unloaded from the cars and placed in a cattle pen to be fed and watered, and that they were reloaded on the following morning and transported to McCredie.

According to plaintiff's evidence, therefore, there was a delay of perhaps 25 hours in delivering these cattle at destination. It does not appear that there was any delay in starting the shipment from the National Stockyards, nor is there any evidence of an unreasonable delay en route. In fact, the only specific delay en route shown was that at Mexico, a junction point, where the cattle were held during the night to await the departure of the next train on defendant's branch line of road running from Mexico to McCredie.

On behalf of defendant the evidence tends to show that stock delivered to defendant at the National Stockyards, Ill., in the forenoon, in time to be taken out on a train

leaving at 11 o'clock, would arrive at Mexico, Mo., in time to make a connection with the train on defendant's said branch line leaving Mexico the following morning, but that stock delivered to defendant at the National Stockyards, Ill., in the afternoon would not reach Mexico earlier than noon of the following day, and would necessarily be detained there until the next succeeding morning. It appears that on the branch line from Mexico to McCredie there was but one freight train each way per day; this leaving Mexico about 7 o'clock in the morning, and returning late that afternoon.

On behalf of plaintiff there was further testimony tending to show that the stock pen in which plaintiff's cattle were kept at Mexico was in part muddy, and that defendant did not provide adequate and reasonably suitable facilities for feeding and watering the cattle.

[1] The only assignment of error which need be noticed is that pertaining to the action of the trial court in overruling defendant's demurrer to the evidence. It is well established that in cases of this character mere delay alone, i. e., a mere showing of a delay beyond the time in delivering stock at the point of destination, unless perhaps it be very extraordinary and altogether unreasonable, does not give rise to an inference of negligence on the part of the carrier. It must be shown, either directly or inferentially, that the delay was one resulting from the negligence of defendant or its agents and servants. See *Dalton v. Railroad*, 187 Mo. App. 691, 173 S. W. 77; *Hunt v. Railroad*, 187 Mo. App. loc. cit. 648, and authorities cited, 173 S. W. 61; *McDowell v. Railroad*, 167 Mo. App. 576, 152 S. W. 435; *Decker v. Railroad*, 149 Mo. App. 534, 131 S. W. 118; *Cunningham v. Railroad*, 182 S. W. 1033.

[2] It has been frequently held that slight evidence of negligence is sufficient to support a finding that delay in transportation is unreasonable. *Hunt v. Railroad*, supra, 187 Mo. App. loc. cit. 647, 173 S. W. 61, and cases cited. It has been said to be enough for the plaintiff "to disclose circumstances sufficient to raise a fair inference of negligence." *Gregory v. Railroad*, 174 Mo. App. 550, 160 S. W. 830. And it has been held that unreasonable delays at points en route, appearing upon their face to be entirely unnecessary, and being wholly unexplained, suffice to raise an inference of negligence which will take the case to the jury. *Libby v. Railroad*, 137 Mo. App. 276, 117 S. W. 659; *McFall v. Railroad*, 181 Mo. App. 149, 168 S. W. 341; *Hunt v. Railroad*, supra. But nothing of the sort here appears; for, as said, the only delay shown en route was that at Mexico, a division point, where a delay might inevitably occur in making connection with the train upon defendant's branch line running from Mexico to McCredie. No negli-

gence can be imputed to the defendant because of such delay.

It is true that the evidence suggests that in the ordinary course of things this shipment would have reached Mexico about noon of September 6, 1912, whereas it did not reach that place until about 4 or 5 o'clock in the afternoon of that day. But there is nothing tending to raise any inference that such delay was caused by the negligence of defendant; and the evidence is that, had the cattle reached Mexico at any time after about 7 o'clock in the morning of September 6th, they could not have gone forward on the branch line to McCredie until the following morning.

[3] It is unnecessary to discuss the evidence relating to the condition of defendant's stock pen at Mexico at the time in question. Plaintiff's evidence, controverted by that of defendant, tended to show that his cattle were compelled to drink muddy water, and had difficulty in getting sufficient water, and that they could be fed only by throwing their food (hay) upon the ground. However, the evidence does not, and perhaps in the nature of things could not, show what, if any, injury or damage was thereby occasioned to plaintiff's cattle. No distinct loss occasioned in this manner was shown, and the action cannot be sustained upon the theory of negligence on the part of defendant in this respect.

The judgment must be reversed without remanding the cause; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

WINN et al. v. CHICAGO & A. R. CO.
(No. 14097.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916.)

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by R. W. Winn and others against the Chicago & Alton Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., for respondents.

PER CURIAM. The parties in this cause, in submitting it on appeal, filed with us a stipulation, signed by their respective counsel, wherein it is agreed that the appeal is to abide our opinion and judgment in the case of W. M. Patterson, Respondent, v. Chicago & Alton Railway Company, Appellant (No. 14098) 182 S. W. 1034. In the last-mentioned case we reversed the judgment of the circuit court in an opinion and judgment therein filed; and therefore, in accordance with the aforesaid stipulation, and the terms of the submission of this cause to us thereunder, the judgment herein will accordingly be reversed.

It is so ordered.

HARRISON v. CHICAGO & A. R. CO.
(No. 14099.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916.)

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by John Harrison against the Chicago & Alton Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., for respondent.

PER CURIAM. The parties in this cause, in submitting it on appeal, filed with us a stipulation, signed by their respective counsel, wherein it is agreed that the appeal is to abide our opinion and judgment in the case of W. M. Patterson, Respondent, v. The Chicago & Alton Railroad Co., Appellant (No. 14098) 182 S. W. 1034. In the last-mentioned case we reversed the judgment of the circuit court in an opinion and judgment therein filed; and therefore, in accordance with the aforesaid stipulation, and the terms of the submission of this cause to us thereunder, the judgment herein will accordingly be reversed.

It is so ordered.

DINUBA FARMERS' UNION PACKING CO.,
Inc., v. J. M. ANDERSON GROCER
CO. (No. 14240.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916. Rehearing Denied Feb. 24, 1916.)

1. COMMERCE \Leftrightarrow 40—SALES—FOREIGN CORPORATIONS—COMPLIANCE WITH LAW OF STATE—"INTERSTATE COMMERCE."

A foreign mercantile corporation did not maintain any business establishment in Missouri. It neither stored, nor paid for the storage of, goods nor carried any stock on hand in Missouri save an occasional car of merchandise on consignment to its broker in Missouri for sale by the broker on its account. Its broker in Missouri received an offer from a retailer for merchandise, and the order was confirmed by a nonresident selling agent of the corporation, and the merchandise was shipped under a bill of lading made to the order of the corporation, to notify the broker, who should receive a commission on the sale for its services, including the collection and remittance of the price. Held, that the transaction was "interstate commerce," and the corporation could sue the retailer without complying with the law regulating foreign corporations.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. \Leftrightarrow 40.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. EVIDENCE \Leftrightarrow 457 — PAROL EVIDENCE — MEANING OF TRADE TERMS IN CONTRACTS.

Trade terms in a written contract may be defined by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. \Leftrightarrow 457.]

3. PRINCIPAL AND AGENT \Leftrightarrow 129—CONTRACTS—RIGHT OF PRINCIPAL.

The rights of an agent under a contract of sale inure to the benefit of the principal for whom he acted as a selling agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 451-457; Dec. Dig. \Leftrightarrow 129.]

4. FRAUDS, STATUTE OF § 116 — EXECUTION OF INSTRUMENT—BROKERS.

A broker effecting a sale is the agent of both the buyer and the seller, when executing the memorandum of sale, and thus may bind the party to be charged within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.]

5. FRAUDS, STATUTE OF § 115 — SIGNATURE OF PARTY TO BE CHARGED.

The signature of the party to be charged under the statute of frauds is not confined to the actual subscription of his name, but the name may be either in writing, or in print, or by stamp, and may be in the body of the writing or at the beginning, or at the end thereof.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115.]

6. FRAUDS, STATUTE OF § 116 — SIGNATURE OF PARTY TO BE CHARGED.

The signature to a memorandum within the statute of frauds may be made by an agent, though he writes his own name instead of that of the principal, where he intended that the principal should be bound.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.]

7. FRAUDS, STATUTE OF § 115 — SIGNATURE OF PARTY TO BE CHARGED.

A broker effected a sale of merchandise. He executed a memorandum of sale which at the beginning contained his name and the name of the buyer, followed by a description of the merchandise and terms of sale. The broker delivered a copy of the memorandum to the buyer who accepted and retained it. *Held*, that the memorandum was sufficient under the statute of frauds, requiring the name of the person to be charged to be signed to the memorandum.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"To be officially published."

Action by the Dinuba Farmers' Union Packing Company against the J. M. Anderson Grocer Company. From a judgment overruling a motion to set aside an involuntary nonsuit, plaintiff appeals. Reversed and remanded.

Henry H. Furth, of St. Louis, for appellant. Johnson, Rutledge, Marlatt & Lashly, of St. Louis, for respondent.

NORTONI, J. This is a suit by the vendor for damages accrued on account of a breach of contract of sale. At the conclusion of the evidence the court directed a verdict for defendant, and plaintiff thereupon suffered an involuntary nonsuit. It filed a motion in due time to set the nonsuit aside, but this the court overruled, and on exception duly saved the appeal is prosecuted here by plaintiff.

Plaintiff is a corporation organized and existing under the laws of the state of California and engaged in the business of drying and selling fruits. Tooker O'Brien & Co. is plaintiff's selling agent in San Francisco, and through the latter it is said plaintiff sold 800

50-pound boxes of raisins—that is, 600 boxes 2 crown L. M. raisins and 200 boxes of 3 crown L. M. raisins to defendant. The sale was negotiated by Rosen-Reichardt Brokerage Company of St. Louis, Mo., to defendant J. M. Anderson Grocer Company of and in the same city.

[1] It appears that plaintiff, a foreign corporation, is not qualified to do business in the state of Missouri—that is, it had not been licensed by the authorities here. It is argued, in view of this, that the court very properly directed a verdict for defendant because in such circumstances plaintiff was not entitled to sue under our laws. But it appears the transaction involved here falls within the category of interstate commerce rather than that of doing business in Missouri. Plaintiff maintained no business establishment here. It neither stored, nor paid for the storage of, goods nor carried any stock on hand here save an occasional car of dried fruits on consignment to its brokers for sale by the broker on plaintiff's account. It appears Rosen-Reichardt Brokerage Company received an offer from defendant on 800 boxes of raisins, and wired the proposal to Tooker O'Brien & Co. in San Francisco, whereupon the Tooker O'Brien Company confirmed the prices made, and the sale was thereupon consummated by the broker to defendant for the account of plaintiff. The raisins were thereafter shipped forward under a bill of lading made to plaintiff's order, notify the Rosen-Reichardt Brokerage Company; the brokerage company to receive a commission on the sale for its services, including the collection and remittance of the purchase price. It appears from this that the sale was not made in this state by plaintiff to defendant where it was not authorized to transact business, but rather it was made by the Rosen-Reichardt Brokerage Company in their capacity as brokers where they were fully authorized to transact business, and this on plaintiff's account for a commission. In such circumstances the transaction is regarded as one of interstate commerce effected through a broker who merely negotiates, sees to the delivery of the goods, and collects and remits the price. In a similar case, thought that of a factor, it is said the plaintiff corporation is not selling fruit in the state when the transaction assumes the form above set forth, but the factor is. Therefore the transaction is one of interstate commerce, and this is true even though the title of the goods remains in the seller for the while. See *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 20, 84 C. C. A. 167. See, also, *International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922. We perceive no distinction as to this subject-matter in a case such as this where the sale is made by a broker in Missouri, when it is remembered the title remains in the seller in

either case until the goods are delivered and a similar agency as to the mere right to sue attends either the factor or broker.

[2, 3] But it is argued the court properly directed a verdict for defendant, for that no sufficient note or memorandum of the sale as required by the statute of frauds appears. It is true the transaction falls within the purview of the statute, in that the price agreed upon exceeds \$30, and it is conceded none of the goods were actually received by the purchaser, and nothing in earnest was paid to bind the bargain. In such circumstances the statute (section 2784, R. S. 1909) requires that some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract, or their agent lawfully authorized. It appears, however, that, immediately upon the consummation of the agreement between the Rosen-Reichardt Brokerage Company and defendant, J. M. Anderson Grocer Company, the former—that is, the broker—made a memorandum of the sale in its books, and delivered a copy to defendant and also mailed a copy to the Tooker O'Brien Company in San Francisco, selling agent for plaintiff. This memorandum is in evidence, and relied upon as a sufficient writing concerning the transaction under the statute. The memorandum is as follows:

Sold by
Rosen-Reichardt Brokerage Co.,
813 Spruce Street,
St. Louis, Mo.

To J. M. Anderson Grocer Co.,

St. Louis, Mo.
For Account of Tooker O'Brien & Co.

Order No. _____.
Date 7/17/11

Folio

600	50 lb. boxes 2 cr. L. M. Raisins	5¼
200	50 lb. boxes 3 cr. L. M. Raisins	5½
	1911 crop.	

Charge

Shipment October or sooner.

F. O. B. Coast. Terms regular.

Accepted _____, Buyer.

Accepted _____, Seller.

It is argued on the part of defendant that this memorandum is insufficient because it is not signed by defendant or some agent by it thereto lawfully authorized but we are not so persuaded. It should be said in this connection, however, that the writing thereon, "F. O. B. Coast," "Terms regular," are trade terms which it is competent to define through parol evidence, and this appears to be conceded, for no point whatever is made touching that matter. Furthermore, it is to be said of this memorandum that it reveals a sale for account of Tooker O'Brien & Co., who, as before said, is the selling agent of plaintiff. In so far as the memorandum is concerned, Tooker O'Brien & Co. is treated as the seller and, of course, its rights under

the contract inure to the benefit of plaintiff for whom it was acting as a selling agent.

[4] On these several matters, however, no point is made and the real controversy presented here relates alone to the signing of the memorandum on the part of defendant; for it is said that neither defendant nor its agent signed it. The evidence tends to prove that the Rosen-Reichardt Company, Incorporated, is a broker engaged in selling fruits for commission. But it is argued on the part of defendant that the brokerage company is plaintiff's agent. So much may be conceded in a sense, but not in the view urged here. There is, perhaps, slight evidence in the record affording an inference that the brokerage company was plaintiff's agent, but if this be true, there is overwhelming evidence, too, tending to prove it was a mere broker, negotiating between the two parties. No one can doubt that a broker is the agent of both buyer and seller when it comes to executing the memorandum of a sale theretofore negotiated by him between them. In the first instance a broker may be regarded as the agent of one party only; that is, the party by whom he is originally employed. But when, acting as a broker, he strikes a bargain between the parties and the contract of sale is definitely settled, he becomes the agent of both parties for the purposes of executing the memorandum of the transaction. See Bouvier's Law Dictionary, "Brokers." In 20 Cyc. 256, 257, it is said:

"A broker is the agent of both parties to make a memorandum of the contract charging either, and his book entries or sales notes of sales duly consummated by him, if otherwise sufficient, will satisfy the statute."

A leading case, in discussing the office and authority of a broker in respect of the subject-matter here in judgment, says:

"Brokers and auctioneers are deemed to be the agents of both parties, and by virtue of their employment stand in such relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency. Such authority is implied from the necessity of the case, because without it they could not complete a contract of sale so as to make it legally binding on the parties."

See *Coddington v. Goddard*, 16 Gray (Mass.) 436, 444. *Browne on the Statute of Frauds* (5th Ed.) § 369, says:

"The same person may act as agent for both parties. This is shown by the familiar cases of entries by brokers and auctioneers, in addition to which others will be referred to presently. In regard to brokers, we have already had occasion to see that they bind both the buyer and the seller, between whom they complete a bargain, by their bought and sold notes or by their written book entry." *Id.* § 351.

To the same effect, see *Greeley-Burnham Grocer Co. v. Capen*, 23 Mo. App. 301; *Newberry v. Wall*, 84 N. Y. 576; *Butler v. Thomson*, 92 U. S. 412, 23 L. Ed. 684.

[5-7] The memorandum in evidence, which was not only delivered to plaintiff's selling agent, but to defendant as well, at the time recites the sale on the part of the broker for

the account of Tooker O'Brien & Co., plaintiff's selling agent, to defendant, of 600 50-pound boxes of raisins of the crop of 1911 at the prices therein indicated, on terms as to shipment, time, and payment in all respects sufficient; that is, in view of the oral evidence which may be given with respect to such trade terms as are therein set forth. Obviously the memorandum is, in every respect, sufficient unless it be that it is not signed by the party to be charged or by some person lawfully authorized on its part. In view of the authorities above cited, it is clear that the Rosen-Reichardt Brokerage Company possessed authority to sign defendant's name to this memorandum and bind it by so doing, or to sign its own name thereto and bind the defendant. No one can doubt that the signature to a memorandum which is a sufficient compliance with the statute of frauds may be made by an agent, though he write his own name instead of that of his principal, if it were his intention that the latter should be bound by it. See *Williams v. Bacon*, 2 Gray (Mass.) 387, 393; *Greeley-Burnham Grocer Co. v. Capen*, 23 Mo. App. 301, 304.

But it is said the memorandum is not even signed by the brokerage company. It is true no formal signature appears to be affixed thereto, but this is unimportant, in view of the fact that the name of the broker—that is, the Rosen-Reichardt Brokerage Company—is printed on the heading of the memorandum, and defendant's name is clearly written by the broker therein in typewriting as the purchaser. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged, as is said by Mr. Benjamin on Sales (6th Ed.) § 256. Indeed, the name of the party to be charged may be either in writing or in print, or by stamping the name upon the memorandum. Moreover, it may be in the body of the writing or at the beginning or at the end of it.

"But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract."

See Benjamin on Sales (6th Ed.) § 259. *Drury v. Young*, 58 Md. 549, 42 Am. Rep. 343; *Browne on Statute of Frauds* (5th Ed.) § 356. See, also, *Saunderson v. Jackson*, 2 Bos. and Puller, 237. In *Clason's Ex'rs v. Bailey*, 14 Johns. 486, Chancellor Kent says:

"It is a point settled that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. * * * Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear."

See, also, *Higdon v. Thomas*, 1 Har. & G. (Md.) 139, 152. It sufficiently appears that

defendant's name was written into the memorandum as the purchaser by the Rosen-Reichardt Brokerage Company who, according to the evidence, at that stage of the negotiations had, in virtue of its function as broker, become the agent of defendant, as well as plaintiff, and was authorized to do so; moreover, that defendant appropriated the name thus written by accepting and retaining the memorandum of the sale thus prepared and delivered to it. In the case of *Durrell v. Evans*, 1 Hurlstone & Colman's Rep. 172, a similar memorandum was considered, for there the name of the defendant, written by a factor at the head of the memorandum delivered to him, was regarded as a sufficient signature by his agent. In that case the memorandum related to the sale by the plaintiff's factor of certain hops, and on a cursory reading of the opinion it would seem that the court, through laying stress upon the evidence tending to prove the factor was the agent of defendant and authorized to sign his name thereto, cast an inference that such evidence was essential in every case. What was there said on the question of evidence showing authority in plaintiff's factor to represent defendant as well must be considered, however, in connection with the office of the factor, which is not in all respects identical with that of a broker. The broker, as before said, is in the first instance the agent of one party only—that is, the party who first employs him—but rises to the dignity of an agent for both on consummating the negotiations so as to enable him to represent both in executing the bought and sold notes. See *Bouvier's Law Dictionary*, "Brokers." But a factor is an agent of his principal only employed to sell goods for a factorage, or commission. See *Bouvier*, "Factor." With this distinction in mind, it is clear that the language of the court employed in *Durrell v. Evans*, supra, touching the matter of the evidence essential to show the authority of the factor to write the defendant's name in the heading of the memorandum as a purchaser of the hops, is to be treated as beside the instant case, for here the broker possessed the essential authority employed in virtue of his calling—that is, the authority is implied in law. We regard the memorandum as sufficient under the statute of frauds, in that the broker possessed authority to represent defendant as well as plaintiff.

The evidence is that plaintiff tendered the goods to defendant in due time, but after they reached Cupples Station, St. Louis, it refused to accept them. There is some argument put forward in the brief to the effect that this was insufficient, but obviously the tender so made will suffice. The argument concerning this does not merit discussion.

The judgment should be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

COOMBES v. KNOWLSON. (No. 1567.)

(Springfield Court of Appeals, Missouri, Feb. 15, 1916.)

1. COURTS — RULES OF DECISION — DECLARATION OF COMMON LAW — LOCAL DECISION.

Where a decision is to be based on the common law of a sister state, in a case in which the statute law of that state is not shown, the courts will follow the local precedents in declaring the rules applicable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 322, 323; Dec. Dig. —95.]

2. HUSBAND AND WIFE — ACTION BY WIFE IN OWN NAME — WHAT LAW GOVERNS.

Under Rev. St. 1909, § 8304, abrogating the rule that at common law a married woman could not maintain a suit at law in her own name, a married woman can maintain in this state a suit at law in her own name on a contract made in a foreign state, though, owing to the fact that the statute law of that state is not shown, the common law is to apply, since the forms of remedies, proceedings, etc., are regulated exclusively by the lex fori.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. —203½.]

3. TRIAL — STRIKING OUT TESTIMONY — OBJECTIONS.

A motion to exclude testimony received, on the ground that the witness was incompetent, and that no foundation had been laid, is properly overruled, where the only objection to the testimony was made at a time when the witness was testifying to transactions as to which he was unquestionably a competent witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 245, 252; Dec. Dig. —92.]

4. TRIAL — EXCLUSION OF EVIDENCE — EVIDENCE ADMISSIBLE IN PART.

A motion to exclude all the testimony of a husband relating to his acts as agent for his wife was properly denied, where the principal part of his testimony was competent; as defendant, if he desired a ruling upon the exact point, should have framed his motion to exclude so as to have specifically referred to the objectionable testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. —96.]

5. INTEREST — EVIDENCE.

In a married woman's action on a contract entered into between her husband and defendant for the manufacture of lumber for the defendant and afterwards assigned to her, testimony of her husband that some of the lumber had been ready for delivery a considerable time before the defendant accepted it was competent for the purpose of reducing the amount of interest to which defendant might be entitled if the jury found an agreement to pay interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 155, 156; Dec. Dig. —67.]

6. APPEAL AND ERROR — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

In such action the exclusion of defendant's testimony as to whether he had continued to receive estimates and pay for the lumber as the contract required could not have injured him, where it was not denied that he did not accept the lumber and pay therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4206; Dec. Dig. —1057.]

7. INTEREST — RIGHT TO RECOVER.

Interest is purely a statutory right.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1; Dec. Dig. —1.]

8. TRIAL — INSTRUCTIONS — INTEREST.

Where plaintiff's instruction did not tell the jury in direct and positive terms under what circumstances defendant would be entitled to interest, the refusal of defendant's proper instruction thereon was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. —214.]

9. INTEREST — RATE — STATUTE.

Under Rev. St. 1909, § 7179, interest in excess of 6 per cent. is not allowable when the agreement to pay is verbal.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 71-74; Dec. Dig. —34.]

10. INTEREST — VERBAL AGREEMENT — STATUTE — RATE.

Under Rev. St. 1909, § 7179, providing that creditors shall be allowed interest at 6 per cent. when no other rate is agreed upon, for all money payable on written contracts and for all other money due or to become due for the forbearance of payment whereof "an express promise to pay interest" has been made, one verbally agreeing to pay 7 per cent. promised to pay interest, and might be charged with the statutory rate of 6 per cent.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 76; Dec. Dig. —36.]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Marna F. Coombes against A. R. Knowlson. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with suggestions.

Arthur L. Oliver, of St. Louis, and Everett Reeves and A. Sloan Oliver, both of Caruthersville, for appellant. R. L. Ward and C. G. Shepard, both of Caruthersville, for respondent.

ROBERTSON, P. J. Plaintiff prevailed below, and defendant has appealed. The action is based on a contract entered into between plaintiff's husband and defendant in the state of Illinois, and provides for the manufacturing of certain lumber in Pemiscot county, this state, for the defendant. The contract was assigned for a valuable consideration by plaintiff's husband to her. The husband continued the business as her agent, and it was directly under his personal supervision. This action is to recover the amount claimed to be due plaintiff as assignee of said contract for lumber manufactured after the assignment.

[1] The first point urged here in behalf of the appellant is that the contract, having been executed in Illinois, is one governed by the laws of that state, and that, since there is no proof of the laws of Illinois concerning the right of a married woman to contract and prosecute suits in her own name, we must presume that the common law is yet in force there. Assuming said premises of defendant to be correct, we must, in following out the one concerning the common law, take the construction of the common law as made by the decisions of our own state as correct. *Wade v. Boone*, 184 Mo. App. 88, 98, 168 S. W. 360, and cases there cited.

[2] The argument brought forth by the ap-

pellant to defeat the plaintiff's action on this point is based more directly upon the idea that she cannot maintain the suit in her own name than that she cannot make a binding contract. In considering contracts at common law made by married women, it is necessary to keep in mind the distinction between executed and executory contracts. *Neef v. Redmon*, 76 Mo. 195, 197, and *Walker v. Owen*, 79 Mo. 563, 571. At common law, in contemplation of courts of equity, the wife may have a separate existence independent of her husband as to choses in possession. *Terry, Trustee, v. Wilson*, 83 Mo. 493, 498. Again, it is held in *Coughlin v. Ryan, Administrator*, 43 Mo. 99, 104, 97 Am. Dec. 375, that:

"If the husband should permit her to carry on business on her sole and separate account, without any such antenuptial agreement, all that she earns will be deemed to be her separate property and disposable by her as such, subject to the claims of third persons properly affected by it."

The facts in this case disclose a liability on behalf of defendant to the plaintiff, even at common law, and, although at common law she might not maintain a suit at law in her own name, that rule has been abrogated in this state by our statute (section 8304, R. S. 1909), and she can maintain a suit at law in her own name in this state irrespective of common-law rules.

"It is universally admitted and established that the forms of remedies and modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or * * * according to the *lex fori*." *Ruhe v. Buck*, 124 Mo. 178, 184, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439.

In that opinion the rule is extensively discussed and numerous instances given similar to the action in the case at bar where it was held that the action was governed by the laws of the state where prosecuted. Hence we have this situation: That at common law, where the wife contracted, and after there was a performance on her part, as in the case at bar, the other party could not escape liability because of the ordinary disability with which the common law burdened a married woman. The liability had been incurred, and then the only question was as to how it might be enforced. Our laws solve that problem and permit her to sue as a *feme sole*.

It is held in *Tremain v. Dyott*, 161 Mo. App. 217, 221, 142 S. W. 760, that matters connected with the performance of a contract are regulated by the laws of the state where performed. In *Smoot v. Judd*, 161 Mo. 673, 684, 61 S. W. 854, 84 Am. St. Rep. 738, it is said that:

"The law of the place where the contract is to be performed is the law of the contract."

That point was said to be not very material in that case. The opinion in that case was overruled upon another point in the same case. 184 Mo. 508, 518, 83 S. W. 481.

However, owing to our ruling as to the right of plaintiff to maintain her suit at law in this state in her own name, even if the contract is governed by the laws of Illinois, that question is not material in this case.

[3] Plaintiff's husband was a witness in her behalf, and testified not only to matters in which he acted as agent for his wife, but also as to other transactions between him and the defendant prior to the assignment of the contract to the plaintiff. It is now insisted on behalf of defendant that it was error to allow the testimony outside of the agency transactions to be admitted. Our attention is called to the pages of the record where it is stated that defendant's objection upon this point was overruled. What really occurred, as shown by this part of the record, is that plaintiff's husband, when he began his testimony, was asked if plaintiff was his wife and was asked about his signature to the contract. An objection was interposed on behalf of the defendant "because the proper foundation had not been laid." The court overruled the objection, and defendant excepted. The witness was then asked if he was plaintiff's agent in conducting this business from and after the assignment. He answered the question in the affirmative without objection. In behalf of the defendant an objection was made that it called for a conclusion. There was no ruling, or exception. The court then requested the witness "to state in what way the agency was arranged." The witness proceeded to testify about his management of the business for his wife, and shortly the objection was made in behalf of defendant to any testimony "on the part of the witness, because he is the husband of the plaintiff and the proper foundation had not been laid." The objection was overruled, and the defendant excepted. The witness then proceeded to the close of his testimony without any objection on the part of the defendant as to the incompetency of the witness, narrating mostly the transactions between him and the defendant prior to the assignment. At the close of the direct examination defendant's attorney stated:

"The defendant now moves the exclusion of all this witness' testimony because he is the husband of plaintiff and the proper foundation for his testimony had not been laid."

The court overruled the motion, and the defendant excepted. The court committed no error in making those various rulings, because, when the first objections were made, the witness was referring to transactions about which he was unquestionably a competent witness.

[4] The motion to exclude all of the testimony of the witness was properly denied because the principal part of it was concerning facts about which the plaintiff could properly testify, and it would have therefore been error to exclude all of the testimony. If the defendant desired a ruling upon the exact point for which he now contends, the motion

should have been so framed that it would have specifically referred to the objectionable testimony.

[5] The defendant complains that the plaintiff's husband was improperly allowed to testify about some of the lumber having been ready for delivery a considerable length of time before the defendant accepted it. The error into which the defendant has fallen in urging this point is in view of the fact that this testimony was offered for the purpose of reducing the amount of interest to which defendant would be entitled should the jury believe there was an agreement to pay interest.

[6] The defendant insists that similar testimony offered by him was rejected, but the question which the defendant claims he was not allowed to answer was one asked him as to whether he had continued to receive estimates and pay for lumber as the contract required. The exclusion of the answer to this question, even if it had been in the affirmative, could not have injured the defendant, because no one denied that he did not accept lumber and pay therefor, but the controversy was over a discrepancy on the measurements upon which plaintiff relied and those contended for by the defendant and upon the question of interest.

The most difficult question in this case is the one concerning the claim of the defendant for credits on plaintiff's account because, as defendant contends, he advanced to the plaintiff and to her husband, while carrying out the contract, considerable sums of money, for which defendant testified they agreed to pay interest. This agreement plaintiff and her husband denied.

[7] Interest being purely a creature of the statute, a party seeking to recover it must there find his authority.

Section 7179, R. S. 1909, provides:

"Creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

By section 7180 the contract rate of interest may go to 8 per cent. per annum, if in writing.

It is conceded that, if interest was agreed to be paid defendant for advances, it was not in writing. In one place the record shows defendant testified that the plaintiff's husband agreed to pay interest at the rate of 7 per cent. per annum. The account which defendant offered in evidence shows some charges of 7, and some of 6, per cent. interest. The real controversy in this case turns upon the question of whether the defendant is entitled to any credit for interest, and, if so, whether that issue was properly submitted to the jury, and if any error was commit-

ted in refusing instructions requested by defendant upon this point.

The defendant's answer admits the contract sued on, proceeds with a general denial of all other allegations, and specifically denies that he owes anything thereon. There was no objection by plaintiff to testimony, and the plaintiff by an instruction recognized the question of interest as one properly in the case, and we shall now so treat it without further discussion, and proceed to a consideration of the instructions given and refused upon this phase of the case.

At the request of plaintiff the court instructed the jury as follows, this being the only one given on this question:

"(2) The court instructs the jury that under the law a creditor cannot charge more than 6 per cent. interest for money loaned, except it be in writing specifying the amount of interest in excess of 6 per cent., and that on open accounts or money due, and where there is no agreement to charge any interest, then no interest can be charged until there is a demand for payment of said account or loan, and then only 6 per cent. can be collected. So, if you find and believe there was no agreement by Voorhees Coombes to pay interest on his account with defendant or for money advanced, and that no demand was made for same, then you will not allow to defendant any interest on such account or loan."

The defendant requested, and the court refused, the following instructions:

"(3) The court instructs you that, if you believe and find from the evidence that defendant, from time to time, subsequent to the execution of the contract sued on by plaintiff, advanced to one Voorhees Coombes, prior to his assigning his rights in this cause of action to plaintiff, Marna Coombes, certain money with which to operate and carry on his milling business in Pemisacot county, Mo., or for any other purpose, upon the request of said Voorhees Coombes, and upon his agreement to pay interest thereon, and that said amounts were advanced or loaned to said Voorhees Coombes over and above the amount of advances due him under his lumber contract with defendant, then defendant has the right to charge said Voorhees Coombes' account with such interest on said money until the same was repaid to defendant."

"(6) The court further instructs you that, if you believe and find that defendant, from time to time, subsequent to the execution of the contract sued on by plaintiff, advanced to one Voorhees Coombes, prior to his assigning his rights in this cause of action to plaintiff, Marna Coombes, certain money upon the request of said Voorhees Coombes, and upon his agreement to pay interest thereon, and that said amounts were advanced or loaned to said Voorhees Coombes upon his promise to repay the same, with interest, then defendant had the right to charge said Voorhees Coombes' account with interest thereon at the rate of 6 per cent. per annum."

[8] It will be noticed that plaintiff's instruction does not tell the jury in direct and positive terms under what circumstances the defendant should be entitled to have credit for interest, and, if the court refused a proper instruction on this point, requested by defendant, then error was committed. *Stephens v. City of Eldorado Springs*, 185 Mo. App. 464, 471, 171 S. W. 657.

[9] It will be observed that instruction numbered 3 requested by defendant is so

framed as to allow the jury to compute interest at the rate of 7 per cent. per annum if they found plaintiff, or her husband, verbally agreed to pay that amount, but the section of the statute which we have quoted does not allow the rate, when the agreement to pay it is verbal, to exceed 6 per cent.; so clearly the court did not err in refusing this instruction.

[10] Instruction numbered 6 requested by defendant is equivalent to telling the jury that, if they believe that plaintiff's husband verbally agreed to pay 7 per cent., yet he could be charged with 6, because this allowed the jury to base a verdict on any agreement to pay interest, and defendant testified that plaintiff's husband agreed to pay 7; hence, if the jury believed that testimony, then they would have charged plaintiff with 6 per cent., the amount authorized by the above-quoted section of the statute.

Before interest at 6 per cent. per annum can be recovered in a case of this kind the fact must be found that "an express promise to pay interest has been made." This section of the statute does not require that there must be an agreement to pay a fixed and certain amount of interest not exceeding 6 per cent., but that there must be "an express promise to pay interest." It has been held that, where there has been a promise to pay interest, but no amount agreed upon, then this section of our statute fixes the rate. *Hard v. Foster*, 98 Mo. 297, 311, 11 S. W. 760. Even where there is a written agreement to pay interest at a higher rate than 8 per cent. per annum, it is recognized that the creditor can collect the legal rate. *Long v. Abstract & Loan Co.*, 252 Mo. 158, 166, 158 S. W. 305 et seq. Said section 7179 fixes the rate at 6 per cent. where there is an express promise to pay interest, and, following the same reasoning as that upon which the said decisions of the Supreme Court are based, we must hold that, even if plaintiff's husband agreed to pay 7 per cent., yet he promised to pay interest, and this meets the requirements of that section, and it fixes the rate for which he can be charged at 6 per cent. per annum. Besides, sections 7179, 7180, and 7181 are all bound together by section 7182, and governed by the same rules, so that the holding of the Supreme Court in the *Long Case*, *supra*, is binding on us.

In the opinion in the case of *Balz v. Nelson*, 171 Mo. 682, 690, 72 S. W. 527, doubt is expressed as to the construction we now place on section 7179, but we think the *Long Case* removes that doubt and makes law which we must recognize. The case of *Filley v. McHenry*, 71 Mo. 417, 418, has come to our attention, but in that case the defendant had assumed an indebtedness which "bore 6 per cent. interest, and the agreement to pay the debt was an assumption of the

agreement of the original debtor in all its terms." The defendant there agreed with the plaintiff to pay interest at the rate of 8 per cent. per annum, but, as that contract was not in writing, it was held that the contract to pay 6 could be enforced.

Being of the opinion that defendant's refused instruction numbered 6 properly declared the law, and as there was no other one presenting this phase of defendant's most important defense, we must hold that it was such prejudicial error as requires us to reverse the judgment and remand the cause. Plaintiff criticizes this instruction because it is said it does not fix the time from which interest shall be computed, but no one could conclude that this authorized interest to be computed until money had actually been advanced and an agreement made to pay interest thereon. Defendant can readily remove all objections urged by plaintiff against this instruction in the event of another trial.

The judgment is reversed and the cause remanded, suggesting for the consideration of the trial court and the litigants, as did the Supreme Court in *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 677, 86 S. W. 150, the propriety of the appointment of a referee in this case.

FARRINGTON and STURGIS, JJ., concur.

CRAWFORD et al. v. NORTH AMERICAN UNION. (No. 1570.)

(Springfield Court of Appeals. Missouri. Jan. 8, 1916. On Motion for Rehearing, Feb. 15, 1916.)

1. INSURANCE §750—FRATERNAL INSURANCE—PAYMENT OF DUES.

A provision in the by-laws of a fraternal insurer collecting from month to month from its members only sufficient funds to pay its average loss and carry the insurance for such member for that month, for forfeiture in case of nonpayment on or before a fixed day, is valid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1895, 1896, 1903; Dec. Dig. § 750.]

2. INSURANCE §756—FRATERNAL INSURANCE—ASSESSMENTS—PAYMENT—WAIVER.

Where a fraternal insurer by its course of dealing led a member to believe that it would not insist on payment of assessments within the stipulated month, but would grant further time, it could not, without notice of intention to require strict compliance, enforce the provision for forfeiture in case of nonpayment.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.]

3. INSURANCE §755—FRATERNAL INSURANCE—PAYMENT OF ASSESSMENTS—WAIVER.

That a fraternal insurer accepted checks in payment of assessments mailed on the last day of the month in which they could be paid does not show a waiver of the provision requiring payment within the month under penalty of forfeiture, but merely of the right to demand payment in cash.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.]

4. INSURANCE ⇨755—FRATERNAL INSURANCE—ASSESSMENTS—PAYMENTS.

Where the by-laws allowed a member of a fraternal insurer a full month to pay assessments, the fact that it received payments from a member deposited in the post office of the place of her residence on the last day of the month does not show a waiver of the provisions requiring payment during the month under penalty of forfeiture; for, there being no collector at the member's residence, the insurer merely allowed her the privilege of paying on the last day of the month, making the mails its agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. ⇨755.]

5. INSURANCE ⇨755—FRATERNAL INSURANCE—ASSESSMENTS—WAIVER.

Where a certificate issued by a fraternal insurer provided for reinstatement after forfeiture for nonpayment of assessment, upon furnishing health certificate, reinstatement of a member on those conditions was not a waiver of the right to insist on forfeiture for nonpayment of future assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. ⇨755.]

6. INSURANCE ⇨755—FRATERNAL INSURANCE—BY-LAWS.

Where defendant took over the business of another fraternal insurer and notified members of the old association of its by-laws requiring payment of assessments within the month under penalty of forfeiture, and beneficiaries relied on the by-laws of defendant, a waiver of prompt payment made by the old company is unavailing in an action against the defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. ⇨755.]

7. INSURANCE ⇨755—FRATERNAL INSURANCE—PAYMENT OF ASSESSMENTS—WAIVER.

Where through misunderstanding, monthly assessments were not paid within time, and the insurer was so notified, a waiver of the by-law requiring payments to be made during the month under penalty of forfeiture is unavailing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. ⇨755.]

Robertson, P. J., dissenting.

On Motion for Rehearing.

8. APPEAL AND ERROR ⇨1175—DETERMINATION—JUDGMENT.

Where plaintiffs took an involuntary nonsuit upon the court giving a peremptory instruction for defendant, and defendant appealed from a motion granting plaintiffs a new trial, defendant, though successful on appeal, is not entitled to have final judgment rendered in its favor, but merely to have the order setting aside the nonsuit reversed; for plaintiffs, by taking nonsuit, might begin a new action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. ⇨1175.]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by David W. Crawford and others against the North American Union, a corporation. From an order setting aside a nonsuit and granting plaintiffs new trial, defendant appeals. Reversed and remanded, with directions.

Barbour & McDavid, of Springfield, for appellant. Hamlin & Hamlin, of Springfield, for respondents.

STURGIS, J. This suit is on a benefit certificate for \$2,000 in a fraternal life insurance society on the life of Mary J. Crawford. The certificate makes the application and by-laws a part of the contract, which provide for the payment of monthly dues of \$3.78, to become due on the 1st of each month, but allows payments to be made at any time during such month. The payments are to be made monthly without notice, and it is made the duty of each member to pay the secretary of the local council or send same to the secretary of the society at its home office in Monmouth, Ill., during each month the amount due for that month. It is stipulated that a failure to so make monthly payments ipso facto suspends the nonpaying member without any action of the defendant or any of its officers.

The insured died March 10, 1914, and it is conceded that the dues for the preceding month of February were not paid prior to the mailing of a check therefor by a son of deceased on March 9, 1914. On account of the insured not living where there was a local council and collector of the order, she had for several years paid her dues by mailing checks to defendant's general secretary. The envelope in which this last check was forwarded showed by the postmark of the mailing office, Springfield, Mo., the mailing date of March 11, 1914, at 11:30 a. m., but the witness testified that he placed it in the mail box about noon on March 9th. The insured took sick on the night of March 9th, and died about 1 o'clock on March 10th. We will therefore concede that the question of whether the check was mailed before or after the insured's death was a jury question.

The plaintiffs claim that the defendant, by a course of dealing with the insured with reference to the payment of her dues, had waived the strict compliance with the time of payment, and led the insured to believe that her dues would be accepted if paid as late as the 9th of the following month. This is the important question in the case. It should be said, however, that defendant received this check on the 12th or 13th of March, and, without any knowledge of the insured's sickness or death, at once returned the same as being paid too late, with notice that same would not be accepted without a certificate of the insured's good health as provided by the by-laws.

[1] Plaintiffs concede that, as defendant is a fraternal society having no or only a small reserve and collecting from month to month from its members only sufficient funds to pay its average losses and to carry the insurance of such member for that month only, the collection of monthly dues within the stipulated time is vital, and that a provision for forfeiture in case of nonpayment on or before a fixed day is valid and binding. All the authorities so hold, and we need only cite the

opinion of this court in *Burchard v. Western Commercial Travelers' Association*, 139 Mo. App. 606, 622, 123 S. W. 973, and the authorities there collected, and *Thompson v. Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765. We should note, however, that defendant granted all its members a whole month within which to pay each monthly dues.

[2] The defendant, on the other hand, concedes that, if the defendant, by its course of dealing with the insured, led her to believe that it would not insist on her paying same within the stipulated month, but would grant still further time, then it could not without notice to her of intention to require strict compliance forfeit for such delay in making payment. Such waiver may arise from repeatedly receiving overdue premiums without objection. There is abundance of authority for this also, but we cite only *McMahon v. Maccabees*, 151 Mo. 522, 537, 52 S. W. 384; *James v. Life Ass'n*, 148 Mo. 1, 12, 49 S. W. 978, and the authorities there cited.

The trial court held plaintiffs' evidence as to waiver insufficient, and directed a verdict for defendant; it having introduced no evidence. Later the court granted a motion for new trial, and defendant has appealed.

[3] We have carefully read the evidence, and are constrained to hold that the trial court was correct in its first ruling that there is no evidence in the case justifying a finding that defendant waived the sending of a check for the monthly dues at a date later than the end of the month for which the same was sent. It is true that several times defendant accepted payment by check mailed to it as late as the last day of the month, though such check was not in and of itself payment (*Carrol Bank v. Bank*, 58 Mo. App. 17, 26, and *Barton Bros. v. Hunter*, 59 Mo. App. 610, 618), and it is shown that such check could not, by the usual course of mail, have been received by defendant till after the end of such month. This, however, proves no more than that defendant, while entitled to demand payment in cash, had by its course of dealing waived such right by leading the insured to believe that it would accept a check in lieu of cash, provided, of course, the check was later paid in regular course, and in so doing the date of payment would be taken as the date of mailing the check. Such would be a waiver as to the manner of medium of payment, rather than the time.

[4] As to actually receiving the check after the stipulated time, though deposited in the mail within the time, the evidence shows that defendant's method of business contemplated that the monthly dues be paid to local collectors, and that the members have the entire month in which to make payment. Where a member, as in this case, had removed to a locality where there was no local collector, such member might well contend and defendant concede that the post office be the local

collector, and that such member be given the whole month within which to deposit the payment in the post office. Indeed, it has been held by courts of high authority, and we would so hold if necessary to a decision of the case, that:

"Where an insurance company authorized payment of premiums by mail, the payment is made when the letter containing the remittance is deposited in the post office." *Primeau v. National Life Ass'n*, 77 Hun, 418, 28 N. Y. Supp. 794, affirmed in 144 N. Y. 716, 39 N. E. 858.

In *McCluskey v. National Life Ass'n*, 77 Hun, 556, 28 N. Y. Supp. 931, the court held that, where payment could be made to a local agent within a stipulated time, then by directing or permitting such payment to be made by mail the post office authorities became the agents of the insurer to receive such payment, and that depositing the same in the mail within the stipulated time was sufficient, though not received by the insurer until some days later. We have therefore no hesitancy in holding that defendant, by its course of conduct in this respect, waived no more than that the insured would have a right, if such right was not given her by law, to pay the premium by depositing a check in the mail within the stipulated time. Here that was not done until nine days after such time had expired.

Plaintiffs are placed in the position of being compelled to admit that depositing the check in the post office is payment as of that date or else the February dues were not paid until the check was received on March 12th or 13th, and the insured was then dead. While defendant might, by a course of dealing in receiving past-due payments from a living insured person, waive prompt payment of such dues, it would be a long call on the doctrine of waiver to permit past-due premiums to be paid as a matter of right after the insured's death. *Schmidt v. Modern Woodmen*, 84 Wis. 101, 54 N. W. 264; *Conway v. Insurance Co.*, 140 N. Y. 79, 35 N. E. 420; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765. Plaintiffs do not claim a right to pay past-due premiums after the insured's death.

[5] In one or two instances the insured became delinquent, and was thereafter permitted to pay back dues and be reinstated on furnishing a health certificate. The by-laws gave the insured this right and such reinstatement on payment of back dues and furnishing a health certificate was not a waiver of any provision of the contract, but a compliance therewith. Such actions do not tend to show any waiver. *Smith v. Woodmen of the World*, 179 Mo. 119, 135, 77 S. W. 862; *Richards v. Insurance Co.*, 68 Mo. App. 585, 590; *French v. Hartford Life & Annuity Ins. Co.*, 169 Mass. 510, 48 N. E. 268; *Parker v. Knights Templar*, 70 Neb. 268, 97 N. W. 281. One payment of dues is shown to have been attempted to be made by sending a check on which payment was

refused for want of funds in the bank on which it was drawn, and that thereafter, and after the time for such payment had elapsed, the defendant requested that another check be sent. This was not done for some time, but, when this and later months' dues were paid, a health certificate was furnished, so that the insured's reinstatement on these conditions was a right vouchsafed to her by the contract, and not a waiver of any right by the defendant.

[6] We think it not very material and have not mentioned that the benefit certificate in suit was issued by a fraternal society other than defendant, and that defendant took over its business and continued to carry its risk under a contract to that effect made about a year prior to the default in question. Where we have used the word "defendant" we have included its predecessor. The evidence shows that the most serious ground for establishing a waiver arose from acts of the first company in accepting payment by checks mailed the last day of the month, etc. Defendant insists that it is not responsible for nor bound by any act of waiver by its predecessor; that by the terms of the agreement by which it took over this business the assured was bound, on accepting the transfer, to make payment of dues, though the same in amount as before, in accordance with defendant's rules and regulations, regardless of what might have been permitted by the old company. The defendant's by-laws strictly require payment to be made *during the month*. Notice to this effect was frequently sent to this insured. The by-laws of the old company required payment to be made *on or before the 1st day of the next month*. The plaintiffs, by insisting that the by-laws of *defendant* govern in order to show a waiver by accepting overdue premiums mailed on the last day of the month, makes the defendant independent of the old company in enforcing its by-laws, and, when the insured accepted insurance in the defendant company, to be governed by its by-laws, she must be held to an obedience to such by-laws until *defendant* indicated an intention to waive the same.

[7] It may also be well said that the insured, or her son, in omitting to make payment in February, did not rely on any supposed right to make payment later induced by past conduct of defendant or its predecessor. In transmitting the check on March 9th the son wrote:

"Please find check inclosed for \$3.78 to pay Mary J. Crawford's premium for March (meaning February). There was a misunderstanding. I thought my mother had paid this."

If the defendant had induced the insured to believe that dues for February could be paid in March as well as February, why mention a misunderstanding as to same being paid in proper time? Waiver in a case

of this kind contains the element of estoppel, and estoppel is based on inducing a party to act to his injury different than he would have done otherwise. The premium was not paid during February because of a misunderstanding, not because of a belief that same could be paid during March.

In any view of the case plaintiffs are not entitled to recover under the facts disclosed by their own evidence, and the case is reversed and remanded, with directions to set aside the order granting a new trial, and to enter judgment for defendant in accordance with the verdict.

FARRINGTON, J., concurs. ROBERTSON, P. J., dissents.

On Motion for Rehearing.

STURGIS, J. [8] Our attention is called by the motion for rehearing to the fact that no verdict was rendered in the trial court for the reason that, when the court gave for defendant the instruction in the nature of a demurrer to the evidence, and directing the jury to find for defendant, the plaintiffs at once, as was their right, took an involuntary nonsuit, and only a judgment of nonsuit was entered. The plaintiffs then moved to set aside the involuntary nonsuit and to grant them a new trial, which motion the court sustained. From this order the defendant appealed, as it had the right to do. *State ex rel. v. Railroad*, 149 Mo. 104, 106, 50 S. W. 278. The only point presented by such appeal is the correctness of the court's ruling in sustaining the demurrer to plaintiffs' evidence. This point we have resolved in defendant's favor, but such ruling does not entitle defendant to a final judgment in its favor. The plaintiffs had a right to take a nonsuit, as they did, at any time prior to a final submission and verdict for the very purpose of preventing a final judgment against them.

"The effect of the judgment * * * is not the same in both cases [to wit, on a nonsuit and on a verdict]; the cause of action being extinguished in the judgment on a verdict, but surviving the judgment on the nonsuit." *State ex rel. v. Railroad*, supra.

In the case of *Cohn v. Railroad*, 182 Mo. 577, 81 S. W. 846, relied on by plaintiffs for an affirmance of the judgment, the nonsuit was not based solely on the giving a demurrer to the evidence, but also on the ground that the court had refused to allow plaintiff to amend the petition, and, as the nonsuit was properly set aside on this latter ground, the court held that it would not consider the question of the demurrer to the evidence.

Here, however, the setting aside of the nonsuit involved only the correctness of the court's ruling in giving the demurrer, and, having held that the demurrer was properly given, we shall do here what was done in the case of *Coatney v. Railroad*, 151 Mo. 35, 51 S. W. 1036, reverse the order of the trial

court setting aside the nonsuit, and remand the case, with directions to overrule such motion.

It is so ordered.

FARRINGTON, J., concurs. ROBERTSON, P. J., having heretofore dissented, expresses no opinion.

KING v. KING et al. (No. 1515.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. MORTGAGES ⇐249 — RELEASE AFTER ASSIGNMENT.

Where a mortgagee held certain notes of his son secured by a deed of trust, and assigned them to his daughter in consideration of care, a subsequent deed of release by the mortgagee was ineffectual as to the assignee of the notes, and the assignee would be entitled to have the deed of trust foreclosed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 667-677; Dec. Dig. ⇐249.]

2. APPEAL AND ERROR ⇐1033 — HARMLESS ERROR—JUDGMENT FOR LESS THAN APPELLEE IS ENTITLED TO.

Where the facts clearly entitled one appellee to a decree declaring her to be the owner of certain notes, the appellant cannot complain of a decree giving her a lien on the notes, even though the remedy is not within her pleadings, either as an averment or as a necessary implication, and is a remedy that is not contained in her prayer, as the error is not prejudicial to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. ⇐1033.]

3. APPEAL AND ERROR ⇐592 — RULES OF COURT—ABSTRACT OF EVIDENCE.

Where the appellant did not comply with Rule 15 (169 S. W. xxi), which requires that appellants bring on appeal an abstract of the evidence in narrative form, the judgment of the court below will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618-2620, 8126; Dec. Dig. ⇐592.]

Appeal from Circuit Court, Dallas County; C. H. Skinker, Judge.

Suit by Jonathan King, Jr., against Jonathan King, Sr., and another. From a judgment for the defendants, plaintiff appeals. Affirmed.

John S. Haymes and O. H. Scott, both of Buffalo, for appellant. John W. Miller and W. C. Hawkins, both of Buffalo, for respondents.

FARRINGTON, J. This is a bill in equity brought by the plaintiff to restrain a sale by the sheriff of Dallas county acting as trustee under a deed of trust who had advertised the lands of plaintiff to sell under said deed of trust, and further asking that a deed of release made by defendant Jonathan King, Sr., be given effect, and that the court satisfy and release and remove said deed of trust as a cloud on plaintiff's title. The petition also avers that in December, 1908, plaintiff executed nine promissory notes for \$100 each

payable to the defendant Jonathan King, Sr., due one year each after the date of said notes, and that the deed of trust above mentioned was given to secure their payment; that in 1911 the plaintiff and defendant Jonathan King, Sr., entered into an agreement whereby said notes were to be satisfied and fully paid; and that on December 13, 1911, a written instrument was executed whereby Jonathan King, Sr., undertook to and did satisfy and release said deed of trust; but that the same has not been formally satisfied of record. The answer of Jonathan King, Sr., set up the making of said notes by the plaintiff, but denied that he entered into an agreement whereby they were satisfied, and averred that on December 13, 1911, the plaintiff by false and fraudulent representations induced him to sign a paper which defendant then thought was a receipt for interest due on the notes, and that at the time the defendant was under the influence of intoxicating liquor, induced to become so by the plaintiff in order to enable plaintiff to induce the defendant to sign what now purports to be the deed of release to the lands described in plaintiff's petition. He further avers that, at the time of the execution of the purported deed of release, Ada Taylor, his daughter and the sister of the plaintiff, was the owner of said notes, he (Jonathan King, Sr.) having delivered the possession of the same to her for a valuable consideration, to wit, her having taken care of him for the past several years and her promise to take care of him during the remainder of his lifetime. He prays the court, because of the fraud and deception practiced on him by the plaintiff, to cancel the deed of release purporting to have been executed, and asks that the temporary injunction issued be dissolved, and for all proper relief. The separate answer of Ada Taylor set up the making of the notes and deed of trust; denies any release was entered into by and between Jonathan King, Sr., and Jonathan King, Jr.; avers that at the time of the execution of the purported deed of release she was the owner of said notes and in possession of the same; and her prayer is that the court cancel the said deed of release and that the temporary injunction be dissolved.

The evidence introduced by the plaintiff tended to sustain the allegations of his petition. The evidence offered by the defendants tended to prove that the allegations in their answers are true, first, that the deed of release was procured by deception and fraud and by the plaintiff getting his father intoxicated and incapable of knowing what he was doing, his father being 77 or 78 years of age; and, second, that the father had given the notes to his daughter Ada Taylor, as the testimony of the father, the daughter, and the witnesses introduced by them shows that the

father had lived for some time at her home up to the time he handed her the notes, and that he gave them to her with the understanding that she would accept them as payment for her past services as well as that she would take care of him during the remainder of his lifetime. One of defendants' witnesses, a sister of Ada Taylor and the plaintiff, testified that the plaintiff offered her \$200 to steal some of the notes from Ada Taylor.

[1] Without going into detail concerning the evidence, it is sufficient to say that, in our judgment, the defendant Ada Taylor established her ownership of the notes prior to the time the alleged deed of release was made by her father. This being true, as we view it she would be entitled to a judgment declaring her the owner of the notes and vesting in her the right to have the deed of trust foreclosed according to its terms. The trial court, however, entered a decree finding that the notes were executed as alleged by the plaintiff and admitted by the defendants; that the deed of release made by Jonathan King, Sr., was not procured by fraud; and that the notes were given to plaintiff; but that at the time of the execution of the release the notes were subject to a lien in favor of Ada Taylor for support furnished and afterwards to be furnished to Jonathan King, Sr., but for such support Ada Taylor was to deduct all amounts used by her from whatever source derived provided the same were derived from her said father, there being evidence that the father was a pensioner and that he turned over his pension money to his daughter, some of which at least was used in his maintenance and support. The court further found that the deed of trust ought not be foreclosed during the lifetime of Jonathan King, Sr. It was decreed that plaintiff was the owner of the notes in controversy subject to the rights of Ada Taylor, and that Jonathan King, Sr., had no interest in the notes.

[2, 3] In equity cases the appellate court will weigh the evidence and render such decree as should be entered in favor of those complaining. The testimony will clearly sustain a decree in favor of the defendant Ada Taylor that she is the owner of the notes as consideration for a contract entered into between her and her father to care for him during the remainder of his lifetime. The decree, however, limits her right of recovery to a lien on the notes and gives her a remedy that is not within the pleadings either as an averment or as a necessary implication and a remedy that is not contained within her prayer. Her answer, the substance of which we have set forth, claims absolute ownership of the notes, and her evidence tends to prove that she is the owner of the notes, and not that she is entitled to a lien on them. However, respondent Ada Taylor is not com-

plaining of the decree rendered. Let it be admitted (but not conceded) that under *Roden v. Helm*, 192 Mo. loc. cit. 93, 94, 90 S. W. 798, and *Spindle v. Hyde*, 247 Mo. loc. cit. 48, 152 S. W. 19, cited by appellant, the relief given in the decree was beyond the pleadings in the case, yet that decree failed to give her the full relief she asked for and was entitled to under the evidence, and had she filed a cross-appeal we would not hesitate to enter a decree establishing her ownership of the notes secured by the deed of trust, but as she is in no way complaining of the decree entered, and as that decree merely gives her a lien on the notes rather than decreeing ownership in her of them, the appellant is in no position to complain of the error. For this reason the judgment will be affirmed; and for the additional reason that appellant has failed to comply with our Rule 15 (169 S. W. xxi), which requires that evidence be abstracted. Under this rule and our decisions, appellants in both law and equity cases must, as far as possible, bring the evidence here in the abstract in the narrative form, and no attempt whatever was made to do so in this case.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

————— OZARK FRUIT GROWERS' ASS'N v. ERB. (No. 1669.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

SUBSCRIPTIONS — 15 — VALIDITY — CONDITIONS PRECEDENT.

Where a contract between a fruit growers' association and various individuals relating to the shipment of fruit provided that it should be binding when there were 1,000 cars subscribed, and the subscription of the signers totaled 945 cars, and other parties, whose subscription totaled 200 cars, signed an identical contract with the association, but there was no evidence of community of interest between the signers of the two contracts, the first contract never became binding.

[Ed. Note.—For other cases, see *Subscriptions*, Cent. Dig. §§ 14-17; Dec. Dig. 15.]

Appeal from Circuit Court, Wright County; C. H. Skinker, Judge.

Action by the Ozark Fruit Growers' Association against Louis Erb. From a judgment for defendant, plaintiff appeals. Affirmed.

D. S. Mayhew, of Monett, and Jackson Jackson, of Hartville, for appellant. A. J. Pittman, of Memphis, Tenn., and N. J. Craig, of Mansfield, for respondent.

FARRINGTON, J. The plaintiff (appellant) brought this action against Louis Erb on an express contract, alleging that it had duly performed all the conditions incumbent

on it under the contract, and that defendant was indebted to it in the sum of \$195, being the total amount due on 13 carloads of peaches shipped by the defendant. It is alleged by plaintiff that under the terms of the contract it was entitled to receive from defendant \$15 per car. The defendant answered by a general denial and a special defense that the contract contained a provision that it would not be binding on the defendant unless 1,000 cars of peaches were subscribed by the parties of the second part to the contract (Erb and others); and, as it was on the construction of a provision of the contract relating to this special defense that the trial court rendered a judgment for the defendant, it will only be necessary for us to examine the correctness of that construction.

The contract sued on and introduced in evidence sets out the terms and requirements of the various parties, and contains this provision: "This contract shall be binding on both parties when there are 1,000 cars subscribed." It is signed by the plaintiff corporation, by its president and secretary, and 10 Missouri fruit growers. Among the 10 appears the name of Louis Erb, the defendant. There is nothing connected with this contract which would indicate the number of cars any signer would furnish, and plaintiff claims that on a separate memorandum, which was made at the time the various signers indicated the number of cars they would furnish. This memorandum is referred to in the abstract brought here, but nowhere is it set out for our examination, and on the witness stand the secretary of the plaintiff admitted that the number of cars subscribed, as he says, on this memorandum, totaled only 945, but he says that he put down 200 cars which some Arkansas parties had agreed to furnish, and which made the total number of the subscription, according to what he says the memorandum showed, to be 1,145 cars. He also testified that the Arkansas parties had not signed any contract at the time the defendant signed the one sued on, but that they afterwards signed a contract containing identically the same provisions, and this contract of the Arkansas parties is referred to in the abstract before us as "Exhibit D." The court refused to permit it to be introduced in evidence, and nowhere does there appear a copy of that exhibit, nor is its legal effect set forth. And there is no evidence in the record that would show a community of interest between the signers of the contract sued on and the signers of the contract said to have been executed by the Arkansas people for 200 cars. The facts show that the defendant shipped 14 cars. One of them he shipped through the plaintiff association, and for that one he paid the plaintiff. The others he shipped on his own account. The evidence presented to us fails to show that the contract ever became binding between the parties, and, in the ab-

sence of such showing, a suit based upon such a contract must necessarily fail.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

ABERNATHY v. LUSK et al. (No. 1562.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. CARRIERS — 208 — INJURIES TO PASSENGERS — LIABILITY — DEGREE OF CARE REQUIRED.

In a passenger's action for injuries there was evidence that numerous grips were in the aisle of a coach for a time sufficient for the trainmen to have discovered and removed them from the aisle, as they testified it was their duty to do; that the train was running about 20 or 25 miles an hour, and suddenly slowed down as plaintiff was walking along the aisle; that he was thrown forward in a run, and struck a grip, throwing him down; and that, when he was getting up, the train again started at its usual speed, again throwing him down. *Held*, that these facts, if true, showed a breach of the carrier's duty, in view of the high degree of care which a common carrier owes to a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. ¶ 298.]

2. CARRIERS — 315 — INJURIES TO PASSENGERS — BURDEN OF PROOF.

Where a passenger suing for personal injuries alleged specific acts of negligence, the burden was on him to make out his case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. ¶ 315.]

3. CARRIERS — 318 — INJURIES TO PASSENGERS — SUFFICIENCY OF EVIDENCE.

Where a passenger suing for injuries testified that the train was running about 20 or 25 miles an hour, and suddenly slowed down about one-half as he was walking along the aisle, throwing him forward against a grip obstructing the aisle, and that when he was getting up the train started up again at its usual speed, again throwing him down, the jury was justified in finding that the slowing down and starting up of the train were violent, extraordinary, and unusual, though plaintiff did not so characterize them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. ¶ 318.]

4. CARRIERS — 344 — INJURIES TO PASSENGERS — BURDEN OF PROOF.

In a passenger's action for injuries caused by stumbling over a grip obstructing the aisle when the train suddenly slowed down and started up again as he was arising, the burden of proving its affirmative plea of contributory negligence was on defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1399; Dec. Dig. ¶ 344.]

5. CARRIERS — 347 — PASSENGER'S ACTION FOR INJURIES — QUESTIONS FOR JURY.

A railroad passenger was not negligent, as a matter of law, in walking along the aisle of a moving train for a necessary purpose, where he was exercising ordinary precaution in making his way along the aisle, though the aisle was obstructed by grips, and though a sudden checking of the speed of the train threw him into a run and caused him to stumble over one of such

grips which was about four feet from him, when the change of speed occurred.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1380, 1388-1397, 1402; Dec. Dig. ¶347.]

6. TRIAL ¶250 — PERSONAL INJURIES — INSTRUCTIONS.

In an action for personal injuries where there was no allegation or proof of loss of time or service, it was error to charge that in estimating the damages the jury might consider plaintiff's condition in life.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

7. TRIAL ¶250 — INSTRUCTIONS — APPLICABILITY TO CASE.

In an action for personal injuries it was error to authorize the jury to consider plaintiff's loss of time, if any, in determining the amount of the verdict, where there was no averment in the petition of loss of time, and no evidence thereof, and the evidence showed affirmatively that plaintiff lost no time, but went to work immediately.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by J. R. Abernathy against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Bradley & McKay, of Kennett, for respondent.

FARRINGTON, J. This is a suit for damages for personal injuries alleged to have been sustained by plaintiff while a passenger in the rear coach of a passenger train operated by the appellants between Kennett and Vanduser, in this state, by stumbling over a grip which projected into the aisle of the car. Verdict and judgment for plaintiff for \$750, and defendants appealed. Plaintiff occupied a seat in the rear of the car, and at a point between Gideon and Parma he started to the toilet, which was in the forward end of the coach. Another passenger, a woman, had a grip on the floor projecting into the aisle 8, 10, or 12 inches. As plaintiff neared the grip the train suddenly reduced its speed, and plaintiff stumbled over this grip and fell forward, striking his left knee on the floor of the car. As he was getting up the speed of the train was suddenly increased, and plaintiff claims that he fell again, striking his left knee against the iron support of the seat, which is fastened to the floor of the car, cutting a gash on the outside of the knee and bruising the inside. It is alleged that the injury sustained is permanent, and, without detailing the evidence, we think there is sufficient evidence from which the jury was warranted in finding such to be true.

The petition charges specific acts of negligence, to wit:

" * * * Plaintiff further states that said receivers, by and through their agents, servants,

and employees operating said passenger train, had permitted several grips * * * to be put, placed, and left in such position on the floor of said train that they projected out into the aisle, thus and thereby obstructing and hindering the free passage of the passengers on said train to the water tank or closet in said train; * * * and plaintiff further states that his injuries as aforesaid were caused and occasioned on account of the negligence of the said defendants through their agents, servants, and employees operating said train in permitting said aisle to be obstructed with said grips, * * * and in suddenly checking or slowing down said train without warning to plaintiff at the time he fell as aforesaid over said grip or telescope in the aisle of said train and struck his left knee against the floor as aforesaid, and in suddenly jerking said train forward while plaintiff was getting up from the aisle of said train. Plaintiff further states that it was the duty of the defendants to keep the aisle of said train in a reasonably safe condition and reasonably free from obstructions, and to operate said train in such manner that passengers thereon might go from their seats to the water tank or closet and return without running the risk of injury; and plaintiff further states that the defendants, their agents, servants, and employees in the operation of said train, knew or by the use of ordinary care could have known that said aisle was obstructed as aforesaid, and that a sudden checking and slowing down or a sudden starting up of said train would likely injure passengers thereon."

The answer is: First, a general denial of the allegations of the petition, or any knowledge or information thereof sufficient to form a belief; and, second, a plea that, if plaintiff was injured as alleged, such injuries were caused by his own carelessness and negligence in failing to exercise ordinary care for his own safety while walking in the aisle of the car, and in failing to observe obstructions which might be in the aisle of said car, and that such acts of negligence on his part directly contributed to cause his injuries. The reply was a general denial. Appellants contend that the court erred in refusing to give a peremptory instruction at the close of all the evidence.

The evidence shows that the distance from Kennett to Vanduser is about 75 miles, that there are numerous stations between these two points, and that there were a great number of passengers on the train on this particular morning. Plaintiff's witness Crider, who was on the train, says there were a great many grips in the aisle, and he thinks the brakeman came through the car when he (the witness) saw these grips in the aisle. Plaintiff's witness Horner saw plaintiff fall, saying there was a sort of rocking or checking of the train at the time. He saw the grip projecting 8 or 10 inches in the aisle and said a lady had it. Plaintiff's witness Lotz saw him fall both times, and saw the grip in the aisle, saying it projected into the aisle 8 or 10 inches, and that "to have room to pass along there a person would have to be watchful." Plaintiff's witness Mrs. Lotz saw plaintiff fall, and saw the grip in the aisle, and says it belonged to a lady. Quoting:

"I couldn't tell exactly the distance it stuck out in the aisle. If any one didn't notice, they would have stumbled against it. If they had just been walking along the aisle, they might have run over it. If a fellow had been looking for grips, he might have seen it. * * * When Abernathy fell over the grip, that was not the first time I had noticed the grip; I think the lady had just used it. It had been sitting right there ever since I first noticed it. * * * The grip was sitting close to where I sat, and guess it extended out eight or ten inches. There was still room enough to pass if anybody noticed where they were going. It was daylight."

Plaintiff testified that there were a number of grips and other obstructions in the aisle, and that the large telescope grip he fell over occupied nearly all the aisle—10 or 12 inches. He says that when the sudden jolt of the train came he was about 4 feet from the grip, and was thrown forward in a run, and caught his toe on this large grip. He says there was a very sudden checking of the speed of the train, and then a sudden increase of the speed. He states that the aisle was about 24 inches wide. He saw the conductor and brakeman each go through there once or twice. Quoting:

"In going up that aisle I was using reasonable precaution. I wasn't of course, picking my path, but I was using sensible precaution in that aisle. I realized the condition before I started. Had it not been for the motion of the train, likely I wouldn't have touched the grip; I mean if it had not been for the jerking of the train. Whatever it was, it threw me off my feet. The grip is what caught my toe. I would have had a clear path if it hadn't been for the grips."

The conductor on the train, testifying for defendants, did not know anything about plaintiff being injured or about grips obstructing the aisle on this trip. He said that after every stop he would go through the train, and that it was one of his duties to keep the aisle free of obstructions. He testified that:

There were several ditches and bridges to cross between Gideon and Vanduser. "We slow up sometimes on these bridges. Sometimes we might get an order to slow to six or eight miles an hour, and of course we will come down to that."

The brakeman was equally ignorant of the facts. All he could say was that he had business in the car from time to time to look after the fires and call stations, and that it was a part of his duty to see that the aisles were kept free of obstructions.

Respondent in his brief makes this statement:

"It is true that there was no direct or positive evidence of negligence in the operation of the train, but there was positive evidence of the negligence of defendants in permitting the aisle to be obstructed by grips. Plaintiff insists that it is negligence for defendants to suddenly slow down or suddenly start up a train when an aisle is filled with obstructions as in this case. The plaintiff is not bottoming his case on the negligence alone in jerking the train, but on the negligence in permitting the aisle to be obstructed and slowing down the train, and then jerking it while the aisle was in that condition. It is the circumstances surrounding an act which determines its character with reference to negligence."

[1-3] Keeping in mind the high degree of care owed a passenger by a common carrier, we think the evidence amply demonstrates that there was a breach of the carrier's duty in this case. Giving the evidence the liberal construction in plaintiff's favor that it should have in passing on defendants' proffered demurrer thereto, it is established that there were numerous grips in the aisle of this coach, at least one of which had occupied about half the width of the aisle for some time before plaintiff fell—for a time sufficient for defendants' servants to have discovered its position and removed it from the aisle had they done what they themselves said was their duty to do. Appellants say that the fact that the personal baggage of another passenger was in the aisle *at the exact time of the accident*, and that plaintiff stumbled over it, does not, of itself raise a presumption of negligence on the part of the carrier, citing *Price v. Transit Co.*, 125 Mo. App. 67, 102 S. W. 626, and cases from other states. But the evidence shows more than that in our case. We do not think the plaintiff has to rely on a presumption of negligence in this case. He alleged specific acts of negligence, and the burden was on him to make out his case. Plaintiff testified that the train was running about 20 or 25 miles an hour, and that it slowed down about one-half, when he was thrown forward, and then, when he was getting up, the train started up again at its usual speed, throwing him down as hereinbefore detailed. He did not characterize the slowing down or the starting up as violent or extraordinary or unusual, but from what he did say the jury was justified in so finding. This was unusual, and whether it would have thrown a passenger down who was exercising due care for his own safety in walking in the aisle if free of obstructions is not material, because, under the facts, the aisle was obstructed with numerous grips, and the one plaintiff caught his toe on projected into the aisle 8, 10, or 12 inches, and had been there for some time before the injury. We think the evidence made a case for the jury.

[4, 5] Another point under the proffered demurrer: Defendants contend that plaintiff was guilty of contributory negligence as a matter of law. To this we cannot agree. The burden of proving this affirmative plea in the answer was on the defendants. The plaintiff had not been walking up and down the aisle for pleasure. He testified that it was necessary for him to go to the toilet in the forward end of the coach, and that he was exercising ordinary precaution in making his way down the aisle. To hold the plaintiff guilty of contributory negligence as a matter of law in this case would be a holding that, if there is a grip or grips occupying any part of the aisle, all passengers on the car must remain in their seats. Plaintiff did not casually walk along and blindly stumble over the projecting grip. He was thrown forward in a

run when the train suddenly checked its speed, and caught his toe on the grip. He was 4 feet from the grip when the change of speed occurred.

Appellants contend that the court erred in giving instruction No. 1 for plaintiff, for the reason that there was no testimony that defendants' servants knew the grip was in the aisle or that they permitted it to be placed there. From the testimony of Crider, Mrs. Lotz, the brakeman, and the conductor we think the evidence was subject to the construction that the servants of the defendants knew or by the exercise of the care required could have known that the grip was projecting in the aisle.

[8] The other instruction given for plaintiff is as follows:

"The court further instructs the jury that, if you find for the plaintiff, you will, in assessing his damages, take into consideration his age and *condition in life*, the injuries sustained by him, if any, the physical pain and mental anguish endured by him, if any, *his loss of time*, if any, such damages, if any, as you believe from the evidence he will sustain in the future as direct effect of such injuries, if you believe such injuries to be permanent, together with all the other facts, circumstances, and evidence in the cause, and assess his damages at such sum as from the evidence you may deem a fair compensation for the injuries received, not exceeding, however, the sum of \$5,000, the amount sued for in the petition." (Italics are ours.)

Appellants complain of this instruction: First, because it told the jury to take into consideration plaintiff's condition in life in estimating his damages. In *Gorham v. Railway Co.*, 113 Mo. 408, 410, 421, 422, 20 S. W. 1060, an instruction was approved which embodied this same element, but it does not appear that the instruction was attacked on that ground. A similar instruction was given in *Phelps v. City of Salisbury*, 161 Mo. 1, 10, 61 S. W. 582, the jury being told that in estimating the damages that plaintiff had sustained they would take into consideration "his age and condition in life," just as in our case. Appellant in that case contended the instruction was erroneous in this respect because of want of evidence upon which to base it. The court said:

"It is well settled that an instruction should not be given where there is no evidence upon which to base it (*Wilkerson v. Eilers*, 114 Mo. 245 [21 S. W. 514]), and the only question is whether or not plaintiff's personal presence before the jury at the trial authorized the instruction."

There was no evidence as to the plaintiff's age, and the court held that the instruction was not authorized by the personal appearance of the plaintiff before the jury. As to the words "condition in life" in the instruction, the court held that, since the plaintiff was a man and personally present before the jury, the instruction was not erroneous, although there was no specific evidence on the point, saying:

"But in this case the words 'condition in life' had reference alone to plaintiff's ability to work

or earn a livelihood, and is clearly distinguishable from a case in which a married woman is plaintiff; for in such case the husband alone can sue for the loss of the services of the wife, or for damages for her inability to work."

In *Ross v. Kansas City*, 48 Mo. App. loc. cit. 447, 448, approved in *Skiles v. Railroad*, 130 Mo. App. loc. cit. 169, 108 S. W. 1082, the court said:

"It is only in cases where the plaintiff seeks to recover damages for loss of time or service that the plaintiff's 'condition in life' can be considered by the jury."

There being no allegation or proof of loss of time or service, we must hold the instruction erroneous.

[7] Appellants further complain of this instruction because it authorized the jury to consider plaintiff's "loss of time, if any," in determining the amount of their verdict. There is no averment in the petition of loss of time, and there is no evidence of loss of time; indeed, the evidence shows affirmatively that plaintiff did not suffer any loss of time, but went right to work at the school he was going to Vanduser to take charge of. It is held in *Scholl v. Grayson*, 147 Mo. App. loc. cit. 664, 127 S. W. 415, that loss of time means loss of earnings, and that to recover for past loss of time and service there must be a special allegation. See, also, *Bartley v. Trorlicht*, 49 Mo. App. loc. cit. 218, 219. It is settled that loss of past earnings must be specially pleaded (see *Ingles v. Railroad*, 145 Mo. App. loc. cit. 247, 129 S. W. 493; *Slaughter v. Street Ry. Co.*, 116 Mo. 269, 23 S. W. 760; *Edwards v. Railway Co.*, 79 Mo. App. loc. cit. 259), and that an allegation of permanent injury is not equivalent to alleging loss of past time or earnings (*Coontz v. Railway Co.*, 115 Mo. loc. cit. 674, 22 S. W. 572; *Scholl v. Grayson*, supra).

Under the authorities above referred to, it is manifest that error was committed, and we cannot say it was nonprejudicial to the defendants.

The judgment is accordingly reversed, and the cause remanded.

ROBERTSON, P. J., and STURGIS, J., concur.

GREENFIELD v. ROBERTS COTTON OIL CO. (No. 1618.)

(Springfield Court of Appeals. Missouri. Feb. 15, 1916.)

1. APPEAL AND ERROR \S 581—ABSTRACT OF RECORD—SUFFICIENCY—STATUTE.

Under Rev. St. 1909, \S 2048, providing a short method of appeal, the abstract of record should show that a bill of exceptions was duly filed, and that it contained those matters which can be made part of the record in no other way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2575-2581, 2599, 2601; Dec. Dig. \S 581.]

2. APPEAL AND ERROR \S 537—BILL OF EXCEPTIONS—TIME FOR FILING—STATUTE.

Rev. St. 1909, \S 2029, as amended by Laws 1911, p. 139, provides that bills of exceptions

may be allowed by the trial court or the judge in vacation and filed at any time before the appellant shall be required by the rules of the appellate court to serve his abstract of the record. An appeal to the Springfield Court of Appeals, granted December 14, 1914, was returnable to the March, 1915, term of the court. *Held*, that the bill of exceptions filed September 13, 1915, no order of the court having been made extending the time to file the bill, was filed too late for consideration, where all cases returnable to the March, 1915, term were docketed for hearing no later than April 20, 1915, while the abstract of record should have been served, under the rules of the court, 30 days prior to that date.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 537.]

3. APPEAL AND ERROR §511—BILL OF EXCEPTIONS—LATE FILING—OBJECTION.

Under rule 32 of the Springfield Court of Appeals (169 S. W. xxiv), providing that it is sufficient if the abstract states that the bill of exceptions was duly filed without abstracting the record entries showing the extension of time to file and the filing of the bill, where no such statement was made in an abstract showing that the bill was signed and filed too late, but the respondent, in objecting, failed to state as a matter of fact that no order of the court was made extending the time for filing, as required by rule 15 (169 S. W. xxi), respondent's objection will be overruled, and appellant given the benefit of matters brought to the attention of the court by the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.]

4. MASTER AND SERVANT §276—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an action for injuries by a cotton gin employé when his hand, by the falling of a roll board, was knocked into the gin saws, evidence *held* sufficient to support verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.]

5. APPEAL AND ERROR §1001—REVIEW—VERDICT.

Where there is substantial evidence supporting the verdict, the Court of Appeals will not interfere therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.]

6. APPEAL AND ERROR §204—RESERVATION OF GROUND OF REVIEW—OBJECTIONS TO EVIDENCE.

Appellant cannot complain of the admission of evidence to which it failed to object below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by James A. Greenfield against the Roberts Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ely, Pankey & Ely, of Kennett, and E. L. Westbrooke, of Jonesboro, Ark., for appellant. R. A. Cox, of Malden, and Orville Zimmerman, of Kennett, for respondent.

STURGIS, J. At the threshold of this case we are met with the proposition that

there is nothing before us for review except portions of the record proper. The case is here by the short method of appeal provided for by section 2048, R. S. 1909. The abstract of the record sets forth the petition and answer, followed by the evidence in narrative form, closing with the statement that this was all the evidence in the case. Then comes the instructions of the court, both those given and refused, showing appropriate exceptions. Then follows the recital that, under the instructions of the court, the jury found a verdict for plaintiff. Then follows a motion for new trial, preceded by the recital that same was filed February 23, 1914, at the same term and within four days after verdict. This is the first intimation as to when the case was tried. It is then stated that the motion for new trial was overruled on December 14, 1914, and an exception saved. On this day a motion in arrest was filed and overruled, and an exception saved. Thereupon on the same day, December 14, 1914, the affidavit for appeal was filed and sustained. There is next a recital that the docket fee of \$10 was deposited, and an order made that the clerk make up a full transcript of the record, or in lieu thereof, a certified copy of the judgment and order granting appeal, and transmit same to this court. The abstract then closes with a recital signed by the judge of the Twenty-Second judicial district of Missouri that the defendant presented its bill of exceptions to the court, and prayed that same be allowed, signed, and sealed as such, and filed, and by order of the court be made part of the record in this case, which is accordingly done this 12th day of September, 1915. The file mark of the clerk of the circuit court of Dunklin county is attached thereto of date September 13, 1915.

[1] Liberal as are our rules of court in abolishing distinctions between the record proper and the bill of exceptions (Walls v. Tinsley, 187 Mo. App. 462, 173 S. W. 19), yet the abstract of the record filed here ought to show that a bill of exceptions was duly filed, and that such bill of exceptions contained those matters which can be made part of the record in no other way. There is nothing here as there was in the Tinsley Case indicating the beginning of any bill of exceptions, and showing that what followed was contained therein, or even showing when or at what term of court the case was tried, or that certain proceedings were had at a certain term of court. It is true that the last clause of the abstract recites that the defendant presented to the judge its bill of exceptions, and that he signed the same and ordered it filed on September 12, 1915, and that it was filed by the clerk on September 13, 1915, but as to what that bill of exceptions contained is left largely to conjecture.

[2] Another serious objection to our re-

viewing any matter of exception is that the case appears to have been tried and the appeal taken December 14, 1914. The bill of exceptions was filed September 13, 1915. It is not claimed, recited, or shown that any order of the court was made extending the time to file the bill of exceptions, or that such was filed within any duly extended time. It is yet the law of this state that, subject to the proviso added to section 2029, R. S. 1909, by Laws 1911, p. 139, bills of exceptions must be filed at the term or within such time thereafter as the court may, by order of record, allow, which time may be further extended as therein provided. The proviso to that section added by Laws 1911 is as follows:

"Provided, in all cases now and hereafter pending on appeal in the supreme court and in any of the courts of appeals, the bills of exceptions therein may be allowed by the trial court, or the judge thereof in vacation, and filed in such court, or with the clerk thereof in vacation, at any time before the appellant shall be required by the rules of such appellate courts respectively to serve his abstract of the record, and for the purpose of determining whether such bill of exceptions shall have been filed within such time such appellate court shall make reference to its docket. * * * Hereafter no case now or hereafter pending in any appellate court shall be affirmed for failure to file a bill of exceptions within the time allowed by the trial court, but such case may be affirmed for failure to file a bill of exceptions within the time in this section provided, if error do not appear in the record of the case."

It appears that the bill of exceptions here was not filed within the time allowed by such proviso. The appeal, having been granted December 14, 1914, was returnable to the March, 1915, term of this court. See our rule 16 (169 S. W. xxi). Referring to our docket for that term, as we are directed to do in determining whether the bill of exceptions was filed in proper time, we find that all cases returnable to such term were docketed for hearing not later than April 20, 1915, and that abstracts of record in all such cases should have been served under the rules of this court 30 days prior to such date. The bill of exceptions in this case was not filed till September 13, 1915, and therefore had not been filed at a time before the appellant was required by the rules of this court to serve his abstract of the record. Up to such date the appellant has a right to file his bill of exceptions and have the same considered, regardless of any order of the trial court extending the time; but not thereafter. The evident purpose of the statutory amendment above set out is to preserve to an appellant the right to have his appeal heard on the merits when it is found that at the time such case is reached for hearing in the appellate court in the usual and regular order of procedure the bill of exceptions was actually filed in time to accomplish that result, but it was not intended that such amendment should prolong the time for filing bills of exceptions indefinitely.

[3] Our rule 32 (169 S. W. xxiv) provides

that it is sufficient if the abstract states that the bill of exceptions was duly filed, without abstracting the record entries showing extensions of time to file and the filing of the bill of exceptions. But no such statement is made in the abstract. It merely shows that such bill was signed and filed on September 13, 1915. It is in no way indicated whether appellant is relying on an order of record extending the time or its right to file a bill of exceptions without any such order under Laws 1911, p. 139. If the latter, then it was filed out of time. *State v. Bailey*, 181 S. W. 605, decided at this term. On the other hand, the respondent, in making his objections here, does not state as a matter of fact that no order of court was made extending the time as required by our rule 15 (169 S. W. xxi) but contents himself with saying that the abstract does not so show. In this state of the record we will overrule respondent's objections and give appellant the benefit of all matters brought to our attention.

From the evidence it appears that plaintiff lost three fingers of his right hand while engaged in the operation of a ginning machine, which is used to separate the seed from lint cotton, by reason of his hand coming in contact with the saws which are a part of the machinery. In the operation of this machinery the cotton falls down from above between what is termed the breast roll and roll board, a space of about seven or eight inches. At the bottom of this is what is termed the spiked roller, which revolves toward the saws and carries the seed cotton against the saws which separate the lint from the seed. These saws are about eight inches below the roll board, and are protected by steel guards which project past the saws, and the saws are exposed only at a point below these steel guards. In operating cotton gins they become choked frequently, and the operator is provided with a stout stick about one inch square and twelve to fourteen inches long with which to distribute the cotton over the spiked roller, and the purpose of this stick is to keep the operator from having to distribute the cotton with his hands or bring same in contact with the saws.

[4] Plaintiff's version of the way in which he was injured is that, while he was trying to unchoke the ginning machine by means of the stick provided for that purpose, and while his hand was between the breast roll and roll board and above the saws and spiked roller which feeds the cotton to the saws, the roll board, weighing some 20 pounds, jumped out of the slot into which it was fitted and fell into the saws, striking plaintiff's hand with considerable force and shoving or knocking the hand with it into the saws. The evidence also tends to show that this roll board was in defective and dangerous condition, and had been in such condition for a sufficient length of time to charge defendant with notice of the same. In fact plaintiff testi-

fied that he had asked the foreman to have it fixed, and had then laid off for two or three days, but when he returned to his work on the day of his injury it had not been fixed. No other person saw this accident, and the manner of receiving his injury rests solely on plaintiff's evidence. Defendant's evidence tends to contradict and discredit plaintiff's version of how and why he was injured.

[5] The appellant's only complaint here is that a demurrer to the evidence should have been sustained, and, what amounts to the same thing, that there is no evidence supporting the instructions given. We do not agree that there is no substantial evidence supporting this verdict, and it is useless to cite authorities to the proposition that, where there is any substantial evidence supporting the verdict, this court will not interfere.

[6] The only other error suggested is that evidence was admitted showing that another workman was injured at a later time on this same machine, but the record here shows that such evidence was submitted without objection.

The result is that the plaintiff's judgment for \$1,000 is affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

COMPTON et al. v. MISSOURI PAC. RY. CO.
(No. 1624.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. RAILROADS \S 222—INJURY TO PROPERTY
—PLEADING—SPECIFIC CHARGE.

The charge in plaintiffs' petition that defendant railroad's employes negligently backed a car off the end of a switch and into plaintiffs' building, to their damage, was a sufficiently specific charge of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 720-724; Dec. Dig. \S 222.]

2. RAILROADS \S 222—INJURY TO PROPERTY—
RES IPSA LOQUITUR.

Where a railroad's servants, operating a train, backed a car off the end of a switch and into plaintiffs' building, this raised a presumption of negligence for plaintiffs under the res ipsa loquitur doctrine, the instrumentality that did the damage having been in defendant's sole control, the occurrence having been out of the ordinary course of events in handling railroad cars, and the plaintiffs not being in any position to explain what caused the unusual occurrence, while the facts negated contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 720-724; Dec. Dig. \S 222.]

Appeal from Circuit Court, Jasper County;
David E. Blair, Judge.

Action by Steve Compton and others, partners doing business as Dollie C. Mining Company, against the Missouri Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jas. F. Green, of St. Louis, and A. E. Spencer, of Joplin, for appellant. Shuck & Shuck, of Webb City, for respondents.

FARRINGTON, J. On July 7, 1915, the defendant railway company took its appeal from a judgment of the circuit court of Jasper county, wherein the plaintiffs recovered damages. The judgment is based on that part of the petition which follows:

"Plaintiffs, for cause of action, state that on or about the _____ day of _____, 1915, they were operating a mine near Neck City, Mo., and that in operating said mine they owned certain machinery, consisting of a concentrating plant, and in connection therewith an engine house, in which was located an engine, engine bed, coal house, coal bin, jack bins, and machinery and appliances used in connection with said engine and concentrating plant; that one of the defendant's railway switches or spurs extending from its main line of railway extended to within a short distance of plaintiffs' said mill and engine house, where the same terminated. Plaintiffs state * * * that on or about the _____ day of _____, 1915, defendant's agents, servants, and employes were engaged in operating upon said switch or spur a locomotive and a number of freight cars, and that said company, through its said agents, servants, and employes, negligently and carelessly ran said locomotive and freight cars off of the end of the said switch or spur with such force and violence that the same was run into and against the aforesaid engine house of the plaintiffs, thereby totally destroying said engine house, the engine and engine bed, coal house, coal bins, and jack bins, and the machinery, appliances and accessories used in connection with said engine. Plaintiffs state that said property was broken and damaged to such an extent that the same was of no value, and became and was worthless, to the plaintiffs' damage in the sum of \$600. Plaintiffs further state that said injury and damage to said property was caused by * * * the negligence of the said agents, servants, and employes in charge of and operating said train, as aforesaid."

Judgment was asked for the sum of \$600. The defendant's answer was a general denial. Plaintiffs' evidence showed that the car was run off the end of the switch track while being operated by the defendant's employes, and that it struck the engine house some 10 feet back of the point where the ends of the rails of the switch track were. Witness Fitzgerald testified that he was standing in front of the boiler, and noticed that the cars were—

"coming up around behind the cinder pile pretty speedy, faster than I ever saw them come in before."

He supposed they would stop at the coal bin, but they did not check. He did not see the end of the car that hit the engine room. He states that the engine operated by the defendant's employes was pushing up grade seven or eight cars in order to set a car of coal at the plaintiffs' bin. It was snowing hard at the time, but he saw one of the men on the cars give the stop signal. He did not know whether the engine wheels slipped, but said the engine was puffing and laboring. The evidence as to the damage is not controverted by the defendant; it being shown that the car, after being pushed off the end of the track, went into the boiler room of the plaintiffs' mining plant, practically destroying the engine house and the engine

and other machinery belonging to the plaintiffs. It is not claimed here that the allowance of damages was excessive. At the close of plaintiffs' case in chief the defendant offered, and the court overruled, a demurrer to the evidence. Defendant introduced evidence tending to show that its employes were pushing these cars up to plaintiffs' coal bin on this switch in order to leave some of the cars there; that it was snowing, and that the track was slippery; that, owing to the conditions, signals could be seen only a short distance, and that for this reason one brakeman was placed near the front of the train and the other near the middle; that because of the heavy snowfall the engineer could not see the signal given by the brakeman near the middle of the train; that the brakeman near the middle gave the stop signal in sufficient time, but that there was a slight delay because the other brakeman had to transmit the signal to the engineer, and that the drive-wheels of the engine caught on the rails, and the cars were propelled forward a short distance farther than was intended. The engineer testified on cross-examination that he knew the length of the switch track; that it was snowing, and the track was slick and in bad condition; that he stopped as soon as he could after getting the signal, and that the engine went about four or five feet before it stopped, and he said:

"If I had gotten the signal in time I wouldn't have had any trouble in stopping my train."

He further testified that if the man near the rear of the string of cars had given the signal to the other brakeman and he had in turn given it to him (the engineer) in time, he could have stopped the engine without backing into the plaintiffs' engine house. One reason that he gave for backing off the end of the switch was that he did not get the signal in time, and the other was that he could not see. The brakeman testified that the signals were given in time, but that the engine, for some reason, did not properly perform. At the close of all the evidence the defendant renewed its request for a peremptory instruction, which was again refused. The case was submitted to the jury on an instruction asked by plaintiffs, following the charge in the petition and two instructions asked by the defendant, the first being that, if the property was destroyed due to an accident or mischance not reasonable to foresee, the verdict must be for the defendant, and the other being that the employes of the defendant were only required to exercise ordinary care to do the work in a reasonably safe way, and that defendant was not liable merely because the plaintiffs' property was damaged, that before the jury could find for the plaintiffs they must find from the evidence that the defendant's employes negligently failed to exercise ordinary care in switching the cars in a reasonably safe manner, and that they must find that the damage to plaintiffs' property was the direct and

proximate result of such negligence. The petition contained a specific allegation of negligence, in that the defendant had failed to put a stop or bumper at the end of the switch track, but as there was no testimony offered on this, at the request of the defendant this charge of negligence was withdrawn from the consideration of the jury, and we therefore eliminated it in copying from the petition.

It is the appellant's contention here that the petition charged only general negligence, and that the case was submitted in plaintiffs' instruction only on general negligence, and states that if the evidence introduced by plaintiffs—which merely showed the manner in which the damage was done and the amount of the damage—makes a *prima facie* case of negligence, there was no error in the submission of the case on plaintiffs' instruction; but appellant contends that upon the evidence hereinbefore detailed there can arise no presumption of negligence on its part, and that therefore plaintiffs must recover on the *res ipsa loquitur* doctrine, or not at all, and that this case is not one that falls within the class of cases to which that doctrine is applicable.

[1] There are some acts which result in damage that are so simple and out of the ordinary course of events that to merely state the ultimate facts is about as specific an averment as can be framed into language, and yet this language may also be termed "general." The charge in the petition was that defendant's employes negligently backed a railroad car off the end of a switch—where it did not belong—and into plaintiffs' engine house, to their damage. It was the backing of the car off the end of the switch that caused the damage, and an allegation that the car was so handled, negligently, strikes us as a specific charge. The instruction, as before stated, required a finding of negligence on the charge contained in the petition, and this fortifies the plaintiffs against the attack that they had not made a *prima facie* case on the specific charge in the petition.

[2] On the other hand, we are cited to the case of *Price v. Street Ry. Co.*, 220 Mo. 435, 119 S. W. 932, 132 Am. St. Rep. 588, where the Supreme Court held that a charge in a petition very similar to the charge here, under the facts of that case, was a general and not a specific charge of negligence. And, admitting that the plaintiffs' petition does charge general negligence, and that the instruction was based on a finding of general negligence, and that, in order for plaintiffs to recover, their evidence concerning the occurrence and the damage must be such as to raise a presumption of negligence (the *res ipsa loquitur* doctrine), we are still of the opinion that the judgment should be affirmed, because the identical elements which have called forth the application of the *res ipsa loquitur* doctrine in other cases of negligence are present here; that is, the instrumentality that

did the damage was under the sole control and operation of the defendant's employes, the occurrence—that is, the backing of the railroad car off the end of a switch track and over against and into plaintiffs' property—is certainly out of the ordinary course of events in handling railroad cars, and the plaintiffs merely know that the car was backed off the end of the switch track, and are in no position to explain (from the fact that the car was under the sole control of defendant's employes) what caused this unusual occurrence, and the facts negative any idea of contributory negligence. When these elements combine in a case, whether it be a railroad train setting fire to an adjoining landowner's property, where it is shown that sparks from the engine caused the fire (*Kenney v. Railroad*, 80 Mo. loc. cit. 578; *Wise v. Railroad*, 85 Mo. 178—both of which cases were decided prior to the enactment of section 3151, R. S. 1909, which was first passed in 1887); or whether the action be between master and servant (*Klebe v. Parker Distilling Co.*, 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149); or whether the action be between carrier and passenger (*Price v. Street Ry. Co.*, 220 Mo. 435, 119 S. W. 932, 132 Am. St. Rep. 588, and numerous other cases in this state); or in cases where one is walking along a street and is struck by a falling object; or in cases where a person is struck by objects swinging out from the side of cars in motion (*Chesapeake & O. Ry. Co. v. Davis*, 119 Ky. 641, 60 S. W. 14); or in cases where cross-ties fall from moving railroad cars and strike one not on the right of way (*Howser v. Cumberland & Penn. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332); or in cases where the door of a railroad car falls on one lawfully trying to open it (*Tateman v. Railway Co.*, 96 Mo. App. 448, 70 S. W. 514)—from the foregoing examples it is seen that the application of the *res ipsa loquitur* doctrine is not limited to any particular class of cases. As said in *Klebe v. Parker Distilling Co.*, 207 Mo. loc. cit. 490, 491, 105 S. W. 1057, 13 L. R. A. (N. S.) 140, the holding that it applied or did not apply to certain particular cases is not to be intended as establishing a universal rule without limitations or exceptions. It is said in *Blanton v. Dold*, 109 Mo. loc. cit. 74, 18 S. W. 1149:

"But some catastrophes are of a nature such as carry, in a mere statement of their occurrence, an implication of some neglect. In such event 'the thing itself speaks,' as some judges have expressed it; often in Latin, though the idea is none the less forcible or clear in our mother tongue. *Byrne v. Boadle* (1863) 2 H. & C. (Exch.) 725; *Briggs v. Oliver* (1866) 4 H. & C. (Exch.) 407."

The case of *Byrne v. Boadle* (cited in the quotation) was where a traveler was permitted to recover on showing that he was struck by a solid substance, which was a bale of goods; that at the time this bale of goods

was being lowered from the window of a warehouse, and proof of the ownership of the warehouse. The case of *Lane v. Illinois Cent. R. Co.*, 43 La. Ann. 833, 9 South. 560, is very similar to our case on the facts. Some cars were backed into the property of the plaintiff, destroying a barroom and the appurtenances and injuring plaintiff's wife. The court in disposing of that case, after stating the facts, remarked:

"It is useless to state how the accident occurred. The defendant explains the circumstances under which it happened, but does not attempt to justify it, or even to charge any contributory negligence on the part of the party really injured."

In our case the defendant undertook to explain how this car was run off the track and into the plaintiffs' property, but the explanation was not sufficient to satisfy the jury, and is not sufficient to cause us to question the correctness of their determination.

We are cited in appellant's brief to the case of *McAnany v. Shipley*, 189 Mo. App. 396, 176 S. W. 1079, the application of which to this case we fail to see.

If the appellant is correct in that the charge in the petition is a general charge, then plaintiffs' evidence did no more than sustain a general charge. It is held in *Price v. Street Ry. Co.*, supra, that a plaintiff does not lose the right of resting on the presumption if the evidence introduced (meaning by the plaintiff) does not clearly show what did cause the accident. The only evidence in our case indicating what caused the cars to be backed too far was put in by the defendant, and the testimony of defendant's witnesses, even had they been introduced by the plaintiffs, would have fallen within the rule in the *Price Case*, as, under their evidence, it is doubtful whether it was a failure to give the signal in time, or the fact that snow was falling, that caused the car to be pushed farther than was intended by the engineer.

Under any view of the evidence and the law governing this case, the judgment is for the right party, and should be affirmed. It is accordingly so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

WALL v. ST. LOUIS & S. F. R. CO.
(No. 1598.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. CARRIERS §—76—RIGHT TO SUE.

Where plaintiff undertook to perform the duty of giving his deceased mother a decent burial, and assumed responsibility for all funeral expenses and the cost of transportation of the corpse, he was the proper party to sue a carrier for violating his right to control the body for the purpose of a decent burial by so mishandling the box in his presence as to bend

down the thumbscrew and burst open the sides of the box.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. ¶¶ 76.]

2. CARRIERS ¶135 — DAMAGES—EXCESSIVE-NESS.

Plaintiff shipped his mother's corpse by railroad, and when the box and casket containing it were being unloaded at its destination the baggageman pushed one end upon a truck about 18 inches below the door of the car, threw the other end out, and threw a heavy trunk on top of it. Plaintiff protested, telling him the box contained his mother's body, and the baggageman replied with profane and vulgar language, and continued to throw other trunks on the box until the thumbscrews were bent down and the sides of the box broken open, making it necessary to repair the box before the funeral. The jury returned a verdict for \$5 actual damages and \$500 punitive damages. *Held*, that the punitive damages were not excessive, or so out of proportion to the actual damages as to indicate passion and prejudice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 599-602, 603½-604½; Dec. Dig. ¶¶ 135.]

Farrington, J., dissenting.

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by W. R. Wall against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellant. C. G. Shepard, of Caruthersville, H. E. Doerner, of Steele, and Everett Reeves, of Caruthersville, for respondent.

ROBERTSON, P. J. This case has been to the St. Louis Court of Appeals, and the opinion of that court is reported in 184 Mo. App. 127, 168 S. W. 257. After the case returned to the circuit court, the defendant filed an amended answer, alleging, among other things:

"That the plaintiff is not the only child of the deceased, but she left other children, who are not made parties to this suit; that their names are unknown to defendant, and for that reason cannot be stated; and defendant avers that there is a defect of parties plaintiff in this suit."

The plaintiff during the latter part of his mother's life was supporting her. She and some of the other children were living with him. Upon the death of the mother the plaintiff assumed the responsibility for all funeral expenses and the cost of the transportation charges of the corpse, as alleged in his petition. Plaintiff and several witnesses in his behalf testified that when the box and casket containing his mother's body were being unloaded at Brooks Junction the baggageman pushed one end of the box onto a truck beside and about 18 inches below the door and then threw the other end out. He then threw a heavy drummer's trunk on top of the box. At that time the plaintiff was standing outside of the baggage car and

requested the baggageman to not do that, and stated to him that the box contained his mother's body. The baggageman replied, "To hell with it," and delivered himself of a few profane and vulgar epithets directed to the failure to some one to furnish him assistance. He continued to throw trunks on the box until he had three on it and bent the thumbscrews down and bursted the sides of the box. Before the funeral the plaintiff had the box repaired. The baggageman denied the plaintiff's testimony and stated that the station agent and the train porter were present when he was unloading the baggage, but neither of these parties were called as a witness. The defendant put the undertaker who took charge of the body at Bloomfield on the witness stand, and he testified that the thumbscrews on top of the box were bent down and the sides of the box split.

The jury returned a verdict for \$5 actual and \$500 punitive damages. The defendant has appealed, and only two points are urged in the brief—a defect of parties plaintiff and that the excess of the punitive damages over the actual indicates passion and prejudice on the part of the jury.

[1] The right to recover in this case, as discussed by the St. Louis Court of Appeals when the case was there, is not a property right in the commercial sense, but a right, as defendant concedes, of the near of kin to possess and control the body for the purpose of a decent burial. Defendant also states this in its brief:

"That there may be a recovery of punitive damages, for a wilful, malicious, or wanton violation of this right, we concede to be no longer an open question in this state."

The plaintiff being the person who had undertaken to perform the duty of giving his deceased mother a decent burial, and being the only person who was affected financially by actual damages to the box furnished exclusively by him, and being also the only person who observed or was directly affected by the outrages committed by the baggageman, he was the proper and only party entitled to sue. The theory contended for in behalf of defendant, if applied, would lead to absurd results. According to that contention, babes and far-away relatives, who never know of the disgraceful occurrences, would be necessary parties; those who suffered no pecuniary loss would have to be made parties, and as to them no punitive damages could be assessed. If there were others who would come within the rule that permits a recovery in the case at bar, the testimony failed to disclose them. In defendant's brief is cited *Koeber v. Patek*, 68 L. R. A. 956. In that case it was held that the allegation that plaintiff was the son of deceased, and that he was the only person having any interest was sufficient to negative

existence of any other person having equal or greater right or duty to supply proper burial to his mother's remains. In that case it is further stated that, if others existed whose rights suffered, defendant could set up such facts and then the necessity of their joinder be then considered. In the case at bar the testimony discloses that plaintiff assumed and was exercising full and exclusive control of the burial of his mother, and until the defendant disclosed that there were others whose rights were involved we must assume that all necessary parties are in court. We hold that in this case there is no showing of a defect of parties plaintiff, and this point is ruled against defendant.

[2] The contention that the punitive damages are excessive is based on the assertion that they bear no just proportion to the actual damages found, and hence this indicates passion and prejudice. In the case of *Adams v. St. Louis & San Francisco R. Co.*, 149 Mo. App. 278, 284, 130 S. W. 48, the jury assessed no actual damages in the verdict and \$100 punitive, and this court affirmed the judgment. In the opinion in *McNamara v. St. Louis Transit Co.*, 182 Mo. 676, 686, 81 S. W. 880, 66 L. R. A. 486, many instances are given of a great difference in the actual and punitive damages allowed, and in which the judgments were affirmed on appeal. The utter and wicked disregard with which the employé of defendant in this case at bar treated the remains of plaintiff's deceased mother, when plaintiff was undertaking to perform his sad duty thereto, were such that we are convinced that the punishment administered by the jury is extremely moderate.

The judgment is just and is affirmed.

STURGIS, J., concurs. FARRINGTON, J., concurs, except that he is of the opinion the judgment should be reversed, and the cause remanded, unless plaintiff reduces his recovery to \$100.

FARRINGTON, J. (dissenting). I concur in the foregoing opinion in so far as it affirms the judgment for actual damages, but cannot agree to the amount allowed as punitive damages. The only justification for allowing such damages is that the act done by this servant of the defendant in charge of the express car was done in a reckless, wanton, and in law malicious manner. His motive, causing him to act as he did, is clearly shown by the plaintiff's testimony, in which he said the servant was cursing because his employer didn't furnish enough help for him in handling the baggage. It is not a case where the defendant is maliciously, wantonly, and recklessly injuring the other party, vindictively, because infuriated at him, or for the purpose of humiliation. There is no showing that the defendant acquiesced in the servant's act, or rat-

fied it, or had any knowledge whatever that he was of such a disposition; and while all this does not excuse the master, it should be borne in mind in fixing the extent of the punishment to be visited on the master. As a matter of fact, the evidence is that the servant who did the wrong was in the employ of the United States Express Company, which ran its cars in the train operated by the defendant, and so the railroad company became his master.

Turning to our statutes, to see how much a jury would be permitted to punish the actual party who did the wrong in this case, we find that the maximum fine is fixed at \$200, it being a misdemeanor, and probably not over \$100, if section 4619, R. S. 1909, applies. Other statutes—such as section 4792, R. S. 1909, directed against opening a grave and stealing the body—fix the fine at not to exceed \$500. We call attention to these statutes, because the Legislature has fixed a maximum limit for the fines for offenses involving far more turpitude than is displayed in the case before us. The verdict, analyzed, fines the railroad company for a wrong of a servant, who is indirectly in its employ, the sum of \$500 for doing an actual damage of \$5. I say it is excessive, and that it should be reduced to \$100 punitive damages.

CUNNINGHAM v. VON MAYES et al. (No. 1688.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

FIXTURES—§15—EXECUTION SALE—POST OFFICE OUTFIT.

Articles necessary to fix up a store building as a post office, placed therein and leased along with it, though separately mentioned, when it was leased as a post office, some of them not attached, and the others only by nails, screws, or brackets, to keep them in place, all of which will necessarily be removed when the post office use ceases, are not fixtures, so as to pass by execution sale of the realty; permanency of annexation being lacking.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. §15.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Injunction suit by Clinton H. Cunningham against Von Mayes, receiver of the Citizens' Bank of Hayti, and another. From an adverse judgment, plaintiff appeals. Affirmed.

C. G. Shepard and Everett Reeves, both of Caruthersville, for appellant. B. L. Guffy and Von Mayes, both of Hayti, for respondents.

STURGIS, J. This is a suit to enjoin the sheriff and judgment creditor from selling under execution the post office furniture and fixtures in the building at Caruthersville, Mo., leased to the United States for a post office, and being used as such. The plaintiff is the owner of the real estate, including the building having title thereto by virtue of a

sheriff's deed under execution. One Roberts was the former owner of both the building and the furniture and fixtures in question, and, as such, leased the same to the United States for post office purposes for the period of ten years. Subsequent to this lease two judgments were obtained against Roberts. Execution was issued on one judgment, levy made on this real estate, and the same sold, and a sheriff's deed executed to defendant as purchaser conveying the same to him by appropriate description of the land. Subsequently execution was issued on the other judgment and levy made by the sheriff on the post office furniture and fixtures as the personal property of Roberts. The plaintiff claims that such property is not personalty, but a part of his real estate passing to him by his purchase and sheriff's deed. The trial court, after hearing the evidence, found for defendant, and refused to grant a permanent injunction.

The rights of the United States as tenant of this property are in no wise involved, as the purchaser of any or all of it, whether realty or personalty, must take the same subject to such lease. This suit is in reality between two creditors or purchasers under the respective executions, and it is held in *Donnewald v. Turner Real Estate Co.*, 44 Mo. App. 350, and *State, to Use, v. Marshall & Co.*, 4 Mo. App. 29, that in such cases many of the distinctions arising between landlord and tenant, vendor and vendee, etc., determining the question whether as between such parties fixtures are to be regarded as personalty or part of the realty, are of no value. It is said in the second case that the question of intention, which is so often the paramount one, is of little importance and in the first one it is said that the issues must be determined with more particular reference to the character of the annexation and the uses and purposes of the property annexed. This, we think, means little more than that the intention of the owner is to be determined by the physical and other pertinent facts, rather than by any express intention as evidenced by contract or understanding between the parties differently interested in the property or by any secret intention established by oral evidence. *Progress Press Brick Co. v. Brick & Quarry Co.*, 151 Mo. 501, 516, 52 S. W. 401.

The material physical and pertinent facts in this case are: That the building had not been erected for the special purpose of a post office, but for general business purposes and was an ordinary storeroom. The fixtures were not built in or with the building nor contemplated as a part of the same. *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299. When it was leased for the post office the owner was required to and did place this furniture and fixtures therein and lease the same along with the building, though separately mentioned in the lease. It is agreed that

these fixtures are such as are usual and common in post offices in towns such as Caruthersville. They are manufactured and sold for that purpose, and are, for the most part, suitable for no other purpose. When the government ceases to use a building for a post office, such fixtures are necessarily removed, if the building is to be further used at all, and in this respect such fixtures differ from ordinary trade fixtures which may be used by successive owners or tenants in the same or any similar business. It is common knowledge that such fixtures are moved from one building to another on the change of the post office site. The particular fixtures in question consisted of post office cabinets with boxes therein, money order and stamp cabinets, general delivery cabinets, tables for receiving and dispensing mail both city and rural route, lockers, desks, an iron safe, etc. The cabinets of boxes, the money order and stamp cabinets, and general delivery cabinets were so placed as to form a partition separating the lobby from the part of the room used by the post office employees. These were set on the floor or on bases prepared for same, and fastened thereto by screws or nails and were also fastened to the ceiling by braces. No, or only slight, damage would be done to the building by their removal. The iron safe, the lockers, tables, and some of the cabinets were not fastened to the building at all. We know of no rule by which these articles of furniture last mentioned, not in any way attached to the realty, can be held to be fixtures and pass with the realty. While necessary to the use to which the building is now put, so is household furniture in every dwelling house, and iron safes in offices and business houses.

In 19 Cyc. 1037, the test as to fixtures being part of the realty is stated thus:

"(1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

And in this same work and volume (page 1047) this language is used:

"If the annexation is not intended to be permanent, the chattel will not be deemed a fixture. As it is sometimes expressed, 'it must be for the benefit of the inheritance.'"

To the same effect is *Donnewald v. Turner Real Estate Co.*, supra, citing *Wood Landlord and Tenant*. In *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299, the court held that lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses, in that case a church, by means of candles, oil, or other fluids or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty, though affixed thereto and necessary to its use as

such. It is also there held that a church organ was such a fixture where the facts showed that in building the church an alcove or recess had been constructed so as to receive the organ, and it was a part of the church as designed. The criterion for determining what are fixtures is there stated to be the united application of the tests above quoted from 19 Cyc. 1037. This case is cited and followed by the Court of Appeals of Illinois in *Chapman v. Union Mutual Life Ins. Co.*, 4 Ill. App. 29, where it is held that ordinary movable settees of a church, as well as gas chandeliers, lamps, brackets, etc., are not such fixtures as pass with the realty under a sheriff's sale thereof, the court saying:

"But the fact that furniture is indispensable to the proper uses of the building does not make the furniture so far a permanent accessory thereto as to impress upon it the character of a fixture."

In *Tyler v. White*, 68 Mo. App. 607, 610, it is made a test of fixtures:

"That a permanent accession to the freehold was intended to be made by the annexation of the article."

The court may well have found here that the only purpose in fastening these fixtures to the realty was for security and to keep same in place. This fact tends to rebut the idea of same becoming a part of the realty. 19 Cyc. 1041.

The present case differs from *Crane v. Construction Co.*, 121 Mo. App. 209, 98 S. W. 795, and *St. Louis Radiator Co. v. Carroll*, 72 Mo. App. 315, and *Sosmon v. Conlon*, 57 Mo. App. 25, cited by respondent, as the property there in question was placed in the building in accordance with the purpose and design for which the building was constructed or to be permanently used.

These views lead to an affirmance of the judgment.

ROBERTSON, P. J., and FARRINGTON, J., concur.

CARTER v. WABASH R. CO. (No. 14838.)
(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. RAILROADS §348—CROSSING ACCIDENTS—PROOF—PRIMA FACIE CASE.

In an action for injuries at a railroad crossing the existence of some evidence that the warning signals were not given as required by Rev. St. 1909, § 3140, establishes a prima facie case, unless it conclusively appears that the injury was the result of the negligence of the party injured, or that it was not due to the failure to give the signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1188-1150; Dec. Dig. §348.]

2. RAILROADS §334—CROSSING ACCIDENTS—DUTY TO STOP AND LISTEN—SUDDEN EXCITEMENT FROM FAILURE TO SOUND WARNING.

Where a team in approaching a railroad crossing becomes unmanageable upon the sudden appearance of an approaching train, and defendant's failure to give the warning signals in ap-

proaching the crossing as required by Rev. St. 1909, § 3140, contributes to the collision that follows, the driver of the team, in the excitement of the sudden danger thrust upon him through the failure of defendant to give the signals, is not to be held to the same accountability for failing to look and listen as is a prudent person who is afforded time to deliberate and act after so doing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1027; Dec. Dig. §334.]

3. RAILROADS §337—CROSSING ACCIDENTS—FAILURE TO SOUND WARNING—EXCITEMENT OF HORSES.

Where the proximate cause of a crossing accident is defendant's failure to sound warning as required by Rev. St. 1909, § 3140, the right to recover cannot be defeated because plaintiff's team contributed to the accident by becoming excited and unmanageable at the sudden fast approach of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. §337.]

4. RAILROADS §337—CROSSING ACCIDENTS—PROXIMATE CAUSE—EVIDENCE.

Where plaintiff's team in approaching a crossing became excited and unmanageable at the sudden fast approach of a train, and a collision ensued, defendant's failure to sound warning as required by Rev. St. 1909, § 3140, was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. §337.]

5. APPEAL AND ERROR §1066 — HARMLESS ERROR—INSTRUCTIONS.

In an action under the wrongful death statute allowing a recovery of from \$2,000 to \$10,000, an instruction, general in character, authorizing a recovery for the value of probable support when there is no evidence of decedent's earnings, is not reversible error, if nothing appears to authorize at least a recovery of nominal damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. §1066.]

6. APPEAL AND ERROR §216—INSTRUCTIONS—NECESSITY FOR REQUESTS.

Failure of defendant to request an instruction limiting recovery to nominal damages is a waiver of its right to complain on appeal of the general character of the instruction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §216; Trial, Cent. Dig. § 628.]

7. APPEAL AND ERROR §301 — HARMLESS ERROR—INSTRUCTIONS.

Where a motion for a new trial contains no assignment that the verdict was excessive, an instruction authorizing a recovery for loss of probable support when there is no evidence of decedent's earnings will not be regarded as reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. §301.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"To be officially published."

Action by Gilhe Carter against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

David H. Robertson, of Mexico, Mo., and J. L. Minnis, of St. Louis, for appellant. Barclay, Fauntleroy & Cullen, of St. Louis, and Fry & Rodgers and E. S. Gantt, all of Mexico, Mo., for respondent.

. NORTONI, J. This is a suit for damages accrued to plaintiff under the wrongful death statute on account of the negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

The grounds of negligence relied upon relate to the failure of defendant to sound the bell or whistle attached to its locomotive engine on approaching a public road crossing at which plaintiff's husband was killed. It appears plaintiff's husband and his neighbor Byars were en route home from Benton City, riding in an ordinary lumber wagon drawn by a team consisting of one horse and a mule. The hour was about noon, and they were driving south in the highway approaching the crossing on defendant's track when it appears decedent's team became frightened and ran upon the track immediately in front of defendant's locomotive and train. Plaintiff's husband was engaged in driving the team. The railroad track runs slightly southeast and northwest through Benton City, a small town, while the highway—that is, Sims street—on which plaintiff's husband was driving, runs north and south. Sims street is at the eastern border of Benton City, and is a much-used public highway on which defendant maintained a railroad crossing. Front street, in Benton City, parallels the railroad track on the north side and immediately south of it; that is, between it and the railroad tracks are a number of residences, outhouses, trees, etc., so as to more or less obstruct the view to the westward of one driving south on Sims street until Short street is reached, where the view is more or less open, but obstructed further west to some extent. Decedent, driving the team, came south on Sims street, across Short street, and south of the latter street where upon defendant's right of way several obstructions to the western view appear. Besides the defendant's main line, it maintained two side tracks north of it. Near or about 425 feet west of the Sims street crossing and 44 feet to the north of the track on the right of way defendant maintained its stock pens. Further west were certain corn cribs and other small buildings. About 14 feet north of the main track was what is called the passing track, and 18 feet 8 inches north of the passing track, that is, between 31 and 32 feet north of the main track, was defendant's house track. Both of these side tracks separated from the main line some distance west of the Sims street crossing. On the stock track were standing a string of stock cars immediately south of the stock pen, and also a furniture car with its west end opposite the east end of the stock pens, but the furniture car was situate on the curve of the track, and was about 40 feet in length. The east end of the furniture car, it is said, stood about 23 feet north of defendant's main track, and other cars were west of it. All of these tended

to obstruct the view to the westward of one driving toward the railroad crossing on Sims street. Defendant's train which occasioned the death of plaintiff's husband, it is said, was running from 50 to 60 miles an hour in an endeavor to make up lost time, for it was 40 minutes late. It is in evidence, too, that defendant's west-bound passenger train was due at Benton City about that time, and as plaintiff's husband approached the tracks he was seen to be looking toward the eastward. The evidence tends to prove that from a point 40 feet north of the crossing he might have seen the approaching passenger train from the west, say, for 700 or 800 feet. The evidence is that the wind was blowing from the east, and defendant's train came from the west at a high rate of speed, from 50 to 60 miles per hour, and on the part of plaintiff a number of witnesses say neither bell nor whistle was sounded; that is, the usual statutory crossing signals were not given. Defendant's fireman says—that is, in his evidence most favorable to plaintiff—that he observed plaintiff's husband driving toward the track when he was about 50 feet north of the crossing, and his face at that instant was to the southeast, but he immediately looked to the westward, and at the same time the mule he was driving became frightened and started forward, and plaintiff's husband was trying to hold it. It is to be inferred from the evidence that the team became unmanageable and ran immediately in front of the train. Indeed, the mule escaped entirely, that is to say, he crossed the track without serious hurt, while plaintiff's husband and his companion, Byars, were killed as a result of the collision as was also the horse. It is quite obvious from the evidence that the mule became frightened on the coming into view of the fast approaching train as it emerged from beyond the furniture car on the sidetrack, and ran forward in an endeavor to cross ahead of it. Indeed, it appears that Byars laid hold of the lines as well, and jointly endeavored with plaintiff's husband to control the team. The witness says concerning this:

"Yes; as soon as he saw the mule was scared he looked and got up, and the other man looked and commenced pulling on the line. Well, it looked to me as if the man ahold of the lines wasn't going to hold the mules, and that's what the other man thought, and went up to help him, and they was both holding the lines."

Moreover, this witness, the fireman, said that both men appeared to be excited at the time.

[1] It is argued that the court should have directed a verdict for defendant, but we are not so persuaded. Although there is evidence on the part of defendant tending to prove the necessary signals on approaching the crossing were given, it is conceded in the argument that the evidence is abundant on the part of plaintiff tending to prove the

contrary; that is to say, that defendant was negligent, in that it failed to sound the signals required by the statute. The statute (section 3140, R. S. 1909) requires either that the bell attached to a locomotive engine approaching a public road crossing shall be kept ringing for a distance of at least 80 rods from such crossing, or that the steam whistle attached to the locomotive shall be frequently sounded for the same distance. Under this statute it is said, if it appears in the evidence that the signals were not given, and that a collision occurred at the crossing, then the presumption is afforded perforce of the statute to the effect that such facts bear the relation of cause and effect so as to cast the burden on defendant to show the failure to give the statutory signals did not cause the injury. In other words, the statute supplies the causal connection, and in every instance, on such facts appearing, plaintiff makes a prima facie case for the jury, unless it conclusively appears in the evidence that the injury was occasioned through the negligence of the party suffering hurt, or at least solely from some cause other than the failure to give the signals. See *McGee v. Wabash R. Co.*, 214 Mo. 530, 114 S. W. 33; *Green v. Mo. Pac. R. Co.*, 192 Mo. 131, 90 S. W. 805.

[2-4] But it is argued on the part of defendant that railroad tracks are in and of themselves a signal of danger to all persons sui juris, and therefore the law casts the duty upon one about to go upon them to look and listen for the approach of trains. Moreover, if he omits to do so, and is injured as a result thereof, he is to be denied a recovery on the grounds of contributory negligence. On these premises it is argued that, as it appeared plaintiff's husband, who was driving the team, could have seen the train when he was from 40 to 50 feet north of the main track, no recovery may be allowed, for that he omitted to look and listen at that time. But the evidence is that at that moment he was looking to the southeast; it may be for the approach of a passenger train then about due from the east. He turned immediately to look to the west as his attention was called by his companion, Byars, and the mule, it appears, at that instant started forward toward the track, when both the decedent and Byars put forward their best efforts to control him. The argument advanced would be persuasive, indeed, were it not that the evidence tending to prove the mule became unmanageable when plaintiff's husband was from 40 to 50 feet from the track, and ran forward to the point of collision, notwithstanding the effort of both decedent and Byars to control him. The evidence of the fireman suggests that the mule became frightened on the sudden appearance of defendant's train about the time it emerged into view from behind the fur-

niture car standing shortly west of the crossing. In this view it may be said that the failure of defendant to sound the necessary signals for the crossing contributed with the fright of the mule to the collision which resulted. In such circumstances, where the evidence reveals a sudden danger thrust upon one through the fault of another so as to occasion a condition of excitement for the while, it is certain that the person thus excited and injured is not to be held to the same degree of accountability in respect of prudent conduct as is one who is afforded time to deliberate and act after so doing. See *Garrett v. Wabash R. Co.*, 159 Mo. App. 63, 139 S. W. 252. The evidence is that plaintiff's husband, his companion, Byars, as well as the team, were excited, and, no doubt, both men did the best they could in the circumstances in the particular case. Notwithstanding the joint efforts of decedent and Byars, the mule plunged forward upon the track, and the evidence is the horse, impelled by the mule, did likewise, and the horse perished in the collision, as did the two men, while the mule escaped beyond the track with slight injury. Although it be true that defendant's negligence in omitting to sound the signals must be traced as a proximate cause of the injury, the right of recovery is not to be denied because, forsooth, the unfortunate conduct of the mule contributed as well. See *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446. If the conduct of the mule appeared to be the sole and only cause of the collision, another and distinct principle would attend the situation. But here it is to be inferred that the mule, theretofore quietly wending its way toward the track unaware of the approach of the train, was suddenly frightened through its appearance at 50 to 60 miles per hour, as it emerged from behind the furniture car but shortly away, and in this condition of excitement plunged forward to cross the tracks. Obviously the failure of defendant to continually ring the bell or frequently sound the whistle for a distance of 80 rods west of the crossing may be regarded as the proximate cause of the collision, for that the mule was unaware of the presence of the train until it suddenly came into view with a seeming threat of disaster. The evidence of the fireman is that the mule was in no wise excited until it saw the approach of the train, whereupon it was suddenly seized with fright, and, this being true, liability is entailed against defendant for its failure to sound the statutory signals, in that, had they been sounded, no doubt, plaintiff's husband might have had the situation sufficiently in hand to have saved himself before the element arising on account of the uncontrollable fright and conduct of the mule intervened. See *Mitchell v. St. Louis, etc., R. Co.*, 122 Mo. App. 50, 97 S. W. 552. The case is clearly one for the jury,

and, though we have considered the matter extensively because of the earnest arguments put forward in the briefs, we do not regard the question as a debatable one.

[5-7] Plaintiff's instruction on the measure of damages is general in character, and submitted, among other things, her right to recover for pecuniary loss; that is, the value of the support of her husband. There is no evidence tending to prove the amount plaintiff's husband earned. It appears he was a farmer, aged 39 years, robust and in good health, and that his family consisted of his wife and at least two children. He had been engaged on the day of his death in delivering hogs from the farm to the market in town, so it sufficiently appears that he did work incident to his avocation. The verdict is for \$7,500. The suit proceeds under the penal statute—that is, section 5425, R. S. 1909—which, according to the decision of the Supreme Court in *Boyd v. Mo. Pac. R. Co.*, 249 Mo. 110, 155 S. W. 13, Ann. Cas. 1914D, 37, authorizes a recovery of \$2,000 as penalty, and above that amount compensatory damages not exceeding in all \$10,000. It is argued that, according to this view of the statute, all of the recovery above \$2,000—that is, the amount here, \$5,500—is compensatory, and therefore the court erred in submitting the matter of the value of the probable support to be rendered by decedent to his wife without evidence of his earning capacity. But obviously this element of damages was properly incorporated in the instruction. Enough appears at least to authorize a recovery of nominal damages in respect of this matter. Such being true, the instruction is not to be regarded as reversible error. If defendant desired the right of recovery on this ground to be limited to nominal damages, it should have asked an instruction accordingly. In failing to do so it waived its right to complain here of the general character of the instruction referred to when it appears there was some evidence—at least enough to authorize a recovery of nominal damages as for loss of earnings. See *Browning v. Wabash*, 124 Mo. 55, 27 S. W. 644; *Mabrey v. Gravel Road Co.*, 92 Mo. App. 596, 69 S. W. 394; *Nelson v. United Rys. Co.*, 176 Mo. App. 423, 158 S. W. 446; *State ex rel. v. Reynolds*, 257 Mo. 19, 165 S. W. 729; *King v. St. Louis*, 250 Mo. 501, 157 S. W. 498. Moreover, there appears to be no assignment in the motion for a new trial to the effect that the verdict is in any wise excessive. This being true, the matter complained of should not be regarded in any event as reversible error. See *Shinn v. United Rys. Co.*, 248 Mo. 173, 154 S. W. 103.

The judgment should be affirmed.
It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

JONES v. LOUISVILLE & N. R. CO. et al.
(No. 1498.)

(Springfield Court of Appeals. Missouri.
Feb. 15, 1916.)

1. CARRIERS — CARRIAGE OF LIVE STOCK — ACTIONS — JOINT LIABILITY.

Where horses were transported over two different lines of railroad, proof that, when received, they were injured, and that one of them died from such injury, will not support a joint judgment against both railroad companies; for, as the liability of one did not commence until the liability of the other had ceased, they were not joint tort-feasors, but the negligence, if any, was separate.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. —228.]

2. CARRIERS — CARRIAGE OF LIVE STOCK — CONNECTING CARRIERS — LIABILITY OF.

Where an initial carrier issued a through bill of lading for an interstate shipment of horses which was to be made also over other lines, it is liable for the negligence of connecting carriers, and proof that the horses were injured during transit, without proof as to the line on which it occurred, will support judgment against it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 950, 951; Dec. Dig. —219.]

3. CARRIERS — CARRIAGE OF LIVE STOCK — LIMITATION OF LIABILITY.

A bill of lading for an interstate shipment, providing that, in consideration of a reduced rate, a shipper of live stock should not recover more than \$100 for each horse or mule killed, is valid.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. —218.]

4. CARRIERS — CARRIAGE OF LIVE STOCK — ACTIONS — LIABILITY.

Where an interstate bill of lading fixed the recovery for death of horses at \$100 in consideration of a reduced rate, the fact that the owner receipted for the injured animal on representations by the local agent of the carrier that it was liable will not warrant recovery of expenses in attempting to cure the horse.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. —218.]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by H. G. Jones against the Louisville & Nashville Railroad Company and James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad. From a judgment for plaintiff, defendants appeal. Reversed as to the defendant receivers, and reversed and remanded, with directions, as to the Louisville & Nashville Railroad Company.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. C. P. Hawkins & Son, of Kennett, for respondent.

STURGIS, J. As this case reaches this court, it is one for damages for injuries to a horse shipped by way of St. Louis from Lexington, Ky., to Kennett, Mo. The two defendant railroads are connecting carriers, St. Louis being their common terminal, and

together forming a continuous line between the points mentioned. Plaintiff purchased the horse in question and three others at Lexington Ky., and the vendor there entered into a contract of shipment on plaintiff's behalf. The defendant Louisville & Nashville Railroad Company is the initial carrier to which the horses were delivered for shipment. It issued a through bill of lading at a fixed freight rate, giving Kennett, Mo., as the point of destination.

The petition alleges the delivery to and acceptance by the initial carrier of this and the other horses for shipment in good condition, and that such defendant undertook to safely and speedily transport said horses to destination, and there deliver same to plaintiff; that said horses were not safely and speedily transported and delivered to plaintiff at Kennett, Mo., but were negligently and carelessly transported and so handled by the defendants, their agents, servants, and employes, that said horses were cut, bruised, wounded, and maimed, resulting in the death of the horse now in question of the value of \$250. Plaintiff further alleges that he was required and forced to doctor and care for said horse for 40 days, which was reasonably worth \$1.50 per day, and that he incurred a doctor bill for said horse amounting to \$5. These are the items on which plaintiff recovered judgment against both defendants, being \$100 for the horse, \$60 for care and attention and \$5 veterinary bill.

The evidence shows that, when the horses arrived at Kennett, Mo., all of them were loose in an ordinary box car and no partitions or stalls built therein so as to confine each to its proper place; that the horses showed evidence of rough handling, and the one now in controversy, which died thereafter, was bruised and maimed and scarcely able to walk; that, notwithstanding plaintiff gave it the best of care and attention, it never recovered, and died from such injury. Nothing is shown as to when and how this animal was injured, other than its condition and the condition of the car on arrival at destination.

[1] It is well settled, we think, that plaintiff cannot, under the facts here shown, recover against both carriers as joint tortfeasors. No concurring act of negligence of both carriers is shown. While the condition of the animals when the car was opened at Kennett and the manner in which they were found in this case furnished a basis for inferring negligence of one or the other or both carriers in transporting these animals, there is nothing to show any joint concurrent negligence of the two successive carriers. The horses were not in the joint control of these defendants at any time. No act of negligence by one carrier could have been participated in by the other. When the carriage by one ceased, then, and not till then, did that of the other begin. What was said by

the court in *Walker v. Railroad*, 162 Mo. App. 374, 378, 142 S. W. 729, is applicable here:

"But such proof does not show concurrent negligent acts or omissions, if indeed it shows any negligence. It shows merely that the goods received different injuries at different times while in different custodies. If any inference of negligence is permissible, it is of several and disconnected acts of negligence not contributing to produce a common injury and not combining to produce several injuries, but each of itself producing a separate injury. Each is, or would be, a separate and distinct wrong perpetrated by the defendants severally, and would not as negligence justify a judgment against both for either injury or against either for both injuries. The joint verdict and judgment cannot stand on the ground that they are based on concurrent acts of negligence."

See, also, *Otrich v. Railroad*, 154 Mo. App. 420, 430, 134 S. W. 665. This last case also held that, where two carriers are sued for joint negligence, in order to recover against either the proof must show such joint negligence; that there is a total failure of proof when only separate acts of negligence are shown. That case, however, was overruled on this point in *Hutchinson v. Safety Gate Co.*, 247 Mo. 71, 108, 152 S. W. 52, and it is there held that, where two carriers are sued for joint concurring negligence, the plaintiff may recover against either the one or the other as the evidence may justify. See, also, *Boehm v. Electric Co.*, 179 Mo. App. 663, 676, 162 S. W. 723.

It is also held in *Walker v. Railroad*, supra, local page 379, of 162 Mo. App., 142 S. W. 729, that the connecting or terminal carrier can be held responsible only for its own negligence, and cannot be held for the negligence of the initial carrier. The evidence in this case shows that whatever negligence there was in placing these horses loose in an ordinary box car with no stalls or partitions is the negligence of the initial carrier, since the horses were received at Kennett in the Louisville & Nashville car in which they were loaded at Lexington, Ky.

[2] We will have to rule, therefore, that plaintiff is not entitled, on the facts here, to a joint judgment against the two carriers. Nor do we think there is any basis for a separate judgment against the connecting carrier. Such, however, is not the case with the initial carrier. Its liability is that of an interstate carrier engaged in interstate commerce, and its liability is to be determined by the federal act relating to interstate carriers. *Thomas Bros. v. Railroad*, 188 Mo. App. 22, 32, 173 S. W. 96; *Manufacturing Co. v. Railroad*, 174 Mo. App. 184, 156 S. W. 830. The federal act referred to is generally designated as the Carmack Amendment, and provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common

carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroads, or transportation company from the liability hereby imposed."

In *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, the court said, in construing the same, that the dominating feature of this act makes the initial carriers liable for any loss, damage, or injury to such property caused by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.

In the present case a contract for through shipment was made with the Louisville & Nashville Railroad Company at Lexington, Ky., for the transportation of these horses to Kennett, Mo., and the bill of lading issued designated Kennett, Mo., as the point of destination. The initial carrier therefore is liable, not only for its own negligence, but that of the connecting carrier as well. To make a case against it, the plaintiff need show no more than that the property was negligently injured during the course or transportation. This same question was considered by this court in *Keithley v. Lusk*, 190 Mo. App. 458, 465, 177 S. W. 756, and we there held the initial carrier liable on an interstate shipment. That this is true also under the state laws, see *Meyers v. Railroad*, 120 Mo. App. 288, 96 S. W. 737 and cases cited.

[3] We see no reason, therefore, why the plaintiff should not have judgment against the Louisville & Nashville Railroad Company. As to the measure of damages the bill of lading constituting the contract of shipment recites that:

"In the present instance the shipper elects to avail himself of the said reduced rate, and has delivered on the cars of the carrier the following described live stock."

By another clause it is provided that:

"Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement in which the amount claimed shall not exceed * * * for a horse or mule \$100."

That such a limitation is a valid one is now the settled law. *Wyatt v. Railroad*, 173 Mo. App. 210, 212, 158 S. W. 720. The trial court properly limited the recovery for the loss of the horse to \$100, but allowed an additional amount of \$65 for care and attention and doctor bills in trying to cure such horse. This latter charge is sought to be justified on the ground that the local agent of the connecting carrier, the Frisco Company, authorized plaintiff to incur this expense.

[4] However, waiving the question of the authority of this local agent to make such contract binding on his company, the evi-

dence falls to show that he did do so. Plaintiff's evidence on that point is as follows:

"I discovered the condition of these horses when we got to the car and went to unload them. I did not receipt for them until Jim Frazier [the local agent] told me that would cover all damages. He said that was all right, and I told him I would sign up a receipt, and he said it was a bad night, and to take them home and do the best I could with them. * * * Mr. Frazier was the man that was there that night. He is the man that said I would have to file an account with them. He said they were liable for them, and then I said I would sign up for them."

Considering that plaintiff was the owner of the injured horse, and the same was being turned over to him, we think this evidence falls short of showing a contract that the railroad would pay plaintiff for caring for his own horse. Nor do we think that plaintiff will claim that this local agent of the Frisco line had authority to make such a contract for the Louisville & Nashville Railroad, the only one we hold to be liable in this case.

It results that the judgment against the receivers of the St. Louis & San Francisco Railroad Company is reversed; that the judgment against the Louisville & Nashville Railroad Company is also reversed, and the cause remanded, with directions to the trial court to enter judgment against the last-named defendant for the sum of \$100.

ROBERTSON, P. J., and FARRINGTON, J., concur.

BOWSER v. CITY OF ST. LOUIS et al. (No. 14875.)

(St. Louis Court of Appeals. Missouri.
Feb. 8, 1916.)

APPEAL AND ERROR \Leftrightarrow 803—DISMISSAL—EFFECT—INJUNCTION.

In a suit to enjoin a city from refusing to continue to furnish water to plaintiff who resided outside the corporate limits, a temporary injunction was granted to remain in force until the city by resolution or ordinance should discontinue the use of such water or regulate it, and that the cause should be held open for applications for such orders as might thereafter become necessary. The city subsequently provided by ordinance for relief of plaintiff, and the injunction was dismissed, and costs assessed against plaintiff. Plaintiff appealed to the Supreme Court, and his appeal was dismissed without remand. *Held*, that any right to reopen the case and reinstate the injunction was lost; the decision of the Supreme Court being a conclusive adjudication against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. \Leftrightarrow 803.]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

"Not to be officially published."

Action by W. H. Bowser against the City of St. Louis and others. A temporary injunction was dissolved, and plaintiff appealed from such order; the appeal being dismissed by the Supreme Court. Thereafter he petitioned the circuit court to reinstate the

injunction, and from a judgment overruling the petition, he appeals. Affirmed.

See, also, 177 S. W. 610.

George S. Grover, of St. Louis, for appellant. Lambert E. Walther, of St. Louis, for respondents.

NORTONI, J. Plaintiff appeals from the action of the court declining to reinstate a restraining order and to retax certain costs. It would seem that there is nothing before us for review in that the Supreme Court finally disposed of the case in which plaintiff's motion is said to have been filed.

Plaintiff resides immediately outside of the limits of St. Louis and, together with several of his neighbors, enjoyed the use of city water by some arrangement with the authorities. In the summer of 1906 the city notified plaintiff and others that the practice of furnishing them water would be discontinued, and he instituted his suit in equity for injunctive relief against the city, Mayor Rolla Wells and Mr. Adkins, the water commissioner, and the collector of water rates. On a trial of the issue in December, 1906, the court discharged the city of St. Louis and Mayor Wells as parties defendant, but awarded a temporary injunction against Benjamin Adkins, the water commissioner of the city, and F. Scharwitz, assessor and collector of water rates. By the decree which was entered December 10, 1906, the court ordered:

"That this injunction remain in force until the city of St. Louis, by resolution or ordinance, shall direct the discontinuance of such supply of water to plaintiffs or shall regulate the use thereof by ordinance under the provisions of the act of 1899, or until the further order of the court."

Moreover, the decree recites too:

"It is further ordered and adjudged by the court that this cause be held open for such applications and orders as may hereafter become necessary and proper in the premises."

The term of court at which the decree above mentioned was entered lapsed on December 31, 1906, and thereafter plaintiff, together with others interested in similar cases, procured the passage of an ordinance by the city of St. Louis assuring to them the supply of water sought to be made secure in the injunction suit. Subsequently at the following term of court in July, 1907, it was made to appear to the court that the city had provided by ordinance for the relief of plaintiff, and the court thereupon entered an order vacating the temporary injunction theretofore issued, and also taxing the costs accrued in the case since the date of the decree December 10, 1906, against plaintiff. It is said in the briefs that the court dismissed plaintiff's bill at this time, but the record before us reveals nothing as to this. It does appear, however, in the abstract that:

"On July 12, 1907, the temporary injunction in this cause was dissolved by Judge Reynolds, to which ruling, order, and decree of the court,

plaintiffs duly excepted and saved their exceptions."

Also:

"On the same day all costs accruing since December 10, 1906, were taxed against the plaintiffs, to which ruling, order, and decree of the court plaintiffs duly excepted and saved their exceptions."

It appears that plaintiffs filed a motion for rehearing touching this matter in the circuit court in due time, and the same was overruled, to which ruling an exception was saved. Thereupon an appeal was prosecuted to this court from the orders above set forth. The case was transferred to the Supreme Court because it appeared that though the city of St. Louis had been discharged by the decree, it nevertheless appeared on plaintiffs' appeal to be a necessary party to the suit. The case coming on for hearing in the Supreme Court, the appeal was dismissed there in the view that, as the city of St. Louis had provided by ordinance for the relief of plaintiff, the cause of action abated through the voluntary act of the city in passing the ordinance. Moreover, in disposing of the case the Supreme Court said:

"By requesting the passage of said ordinance, and accepting the benefits thereof, the appellants have resolved the questions presented by the petition in the case into moot questions purely, which this court will not pass upon."

The Supreme Court merely dismissed plaintiff's appeal without remanding the cause. See *Bowser v. City of St. Louis et al.*, 234 Mo. 656, 138 S. W. 344; *Hicks v. City of St. Louis*, 234 Mo. 647, 653, 138 S. W. 342. It does not appear that plaintiff filed any motion for rehearing or otherwise after this order of dismissal in the Supreme Court, but on the contrary he submitted to the judgment there rendered. After the mandate of the Supreme Court was filed in the circuit court, plaintiff appeared and filed the motion involved here requesting the circuit court to reinstate the injunction theretofore issued and, it is said, to reinstate the decree of December 10, 1906, and also for retaxation of the costs. This motion the court overruled, and exceptions were duly saved to this ruling. It is from the ruling last mentioned that plaintiff prosecutes the present appeal. Obviously the question presented in the appeal here is *res adjudicata*, for such is of the subject-matter involved in the plaintiff's appeal to the Supreme Court which was dismissed as above stated. The circuit court had vacated the temporary injunction because it appeared that the city of St. Louis, through passing an ordinance, afforded the relief to plaintiff prayed for in his bill, and indeed the decree by which the temporary injunction was given in the first instance stipulated on its face that such injunction shall—

"remain in force until the city of St. Louis by resolution or ordinance shall direct the discontinuance of such supply of water to the plaintiffs or shall regulate the use thereof by ordi-

nance under the provisions of the act of 1899, or until the further order of the court."

The city had, by ordinance, covered the subject-matter involved in the suit. Because of this the circuit court vacated the temporary injunction in accordance with the power reserved to do so in the decree of December 10th. It was from this order of the court and, it is said, the dismissal of plaintiff's bill as well at the subsequent term—that is, July 12, 1907—plaintiff prosecuted his appeal to the Supreme Court. However, the abstract does not show that plaintiff's bill was dismissed. It appears only that the court vacated the temporary injunction and taxed the costs accruing after December 10th against plaintiff. But be this as it may, if plaintiff's bill were dismissed, as is argued, that subject-matter was involved in the appeal to the Supreme Court, for the order, it is said, not only vacated the temporary injunction, but dismissed the bill as well. The Supreme Court examined the record before it and dismissed the appeal without remanding the cause, because the subject-matter was no longer in controversy, the city having granted by ordinance a full measure of relief. This manifestly concludes that matter. It is certain that when an appeal is allowed in due form and manner by the trial court, as appears here, the appellate court not only becomes invested with jurisdiction of the cause, but the jurisdiction of the trial court is likewise divested. See *Kehler v. Walls*, 118 Mo. App. 384, 94 S. W. 760. Moreover, when an appeal is thus had and the case is reversed or dismissed outright, without remanding it to the trial court, the jurisdiction of the trial court no longer obtains in respect of that case. See *Donnell v. Wright*, 199 Mo. 304, 97 S. W. 928. Such was the course pursued here, for plaintiff's appeal was considered by the Supreme Court and dismissed outright, without remanding it for further consideration. See *Bowser v. City of St. Louis et al.*, 234 Mo. 656, 138 S. W. 344; *Hicks v. City of St. Louis*, 234 Mo. 647, 138 S. W. 342. Plaintiff made no move to reopen this conclusive disposition of his case by the Supreme Court, but submitted to the order dismissing his appeal, and then about two weeks thereafter filed the motion presented here, praying the circuit court to reinstate the decree of December 10, 1906—that is, the temporary injunction theretofore vacated—and to retax the costs. The court overruled this motion, no doubt in the view that the Supreme Court had determined the whole matter, and it was without power to reinstate the decree, which the Supreme Court had declined to reinstate. It is from this judgment plaintiff prosecutes the appeal here and argues that the restraining order theretofore vacated should be reinstated, and upon its reinstatement all of the costs taxed against defendant. Although it may be true a motion to retax the costs is open for con-

sideration after judgment usually, it is clear the matter is concluded by the judgment of the Supreme Court above adverted to, for the taxation of costs sought is urged in the view solely that such costs are recoverable on the part of plaintiff as the prevailing party on reinstatement of the decree awarding an injunction theretofore vacated. The proposition on which the right to costs is asserted—that is, the reinstatement of the decree—is manifestly *res adjudicata*, and this court is without power in the premises precisely as was the trial court. Nothing is said about retaxing costs on any other ground, and the sole argument is that plaintiff is entitled to a reinstatement of the injunction, and thus the costs incident thereto. This is concluded by the judgment of the Supreme Court.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

BOWERS v. BELL. (No. 14132.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

EVIDENCE §§397, 417, 441—PAROL EVIDENCE TO VARY WRITING.

Defendant agreed with plaintiff, a real estate broker, that plaintiff should have as commission whatever he might realize on a sale of defendant's land above \$2,400. Plaintiff expected to sell the land to M. for \$3,200, and at his request defendant executed to plaintiff an option to purchase the land at \$3,200; the option being taken by plaintiff for the purpose of turning it over to M., defendant to receive only \$2,400, while the remaining \$800, to be represented by a note secured by a deed of trust, to go to plaintiff for his services. A conveyance was made to M., and defendant received the note and deed of trust for \$800, but refused to deliver the note to plaintiff, and subsequently by producing it caused the deed of trust to be released. *Held*, that evidence as to the agreement between plaintiff and defendant was admissible under the exception to the parol evidence rule to the effect that extrinsic evidence may be admitted to prove a prior or contemporaneous collateral parol agreement distinct from that contained in the writing, or under the exception applicable where a part only of the real agreement is reduced to writing, and, moreover, the option did not bind plaintiff, and was not such a contract as merged all the prior or contemporaneous oral negotiations and bargainings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1845, 1874-1899, 2030-2047; Dec. Dig. §§ 397, 417, 441.]

Appeal from Circuit Court, Ralls County; Wm. T. Ragland, Judge.

Action by Charles E. Bowers against Leo T. Bell. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

B. F. Glahn, of Palmyra, and H. Clay Heather and Chas. T. Hays, both of Hannibal, for appellant. Eby & Hulse, of New London, for respondent.

ALLEN, J. This is an action by a real estate broker to recover compensation for his services in effecting a sale of certain land belonging to the defendant. The amended petition upon which the case went to trial is in two counts. The first count declares upon an express agreement between plaintiff and defendant, whereby plaintiff was to receive any excess over and above \$2,400 for which he might sell defendant's land, averring that plaintiff sold the land for \$3,200 and thereby became entitled to the sum of \$800. The second count of the petition seeks to recover the reasonable value of plaintiff's services in selling the land, alleged to be \$800. The answer, aside from certain admissions which need not be noticed, is a general denial. The cause was tried before the court and a jury, and at the close of plaintiff's evidence the defendant moved that plaintiff be required to elect upon which of the two counts of his petition he would stand. This motion was sustained, and the plaintiff, in compliance therewith, elected to stand upon the first count. Defendant then offered an instruction in the nature of a demurrer to the evidence, which instruction the court gave. Thereupon the plaintiff took an involuntary nonsuit with leave to move to set the same aside. Thereafter the court overruled plaintiff's motion to set aside the nonsuit, and plaintiff appealed.

It appears that in 1911 one Clayton Mark, of Chicago, Ill., through an agent named Perkins, was engaged in acquiring a large acreage of bottom or low lands in Marion county, Mo., with a view of organizing a drainage district under the laws of this state. The defendant owned 160 acres of land of this character in said county, which lay within the limits of the contemplated drainage district. Plaintiff, having sold certain other lands to Mark, began correspondence with the defendant regarding the sale of defendant's lands. Plaintiff's evidence goes to show that defendant agreed that plaintiff could have, as commission, whatever he might realize over and above \$15 per acre, or a total of \$2,400. On October 29, 1911, in reply to a communication from plaintiff, defendant wrote plaintiff a letter in which, among other things, he said:

"Now you can investigate this farm, and you will find that I offered you a bargain in the proposition I made you, \$15 per acre—\$2,400; mortgage \$1,400—\$1,000."

Again on December 4, 1911, in answer to a letter written by plaintiff to him, defendant wrote plaintiff, saying:

"I will give you an option for 80 days on the proposition I made you, \$2,400 mortgage \$1,400."

Plaintiff testified that on December 12, 1911, he and defendant met at Palmyra, Mo., by appointment. Plaintiff's testimony, in substance, is that at his request defendant then and there consented to execute a writing giving to plaintiff or his assigns an option to purchase the land at the stated price

of \$20 per acre, a total of \$3,200; that it was understood, however, that this option was taken by plaintiff merely for the purpose of turning the same over to Mark or his representative; and that defendant would receive but \$15 per acre for his land as originally agreed—that is to say, that defendant would receive \$1,200 in cash, and the purchaser would assume the mortgage upon the land (which then appears to have been \$1,200, instead of \$1,400), the remaining \$800 of the purchase price to be represented by a note secured by deed of trust and to go to plaintiff in compensation for his services if such sale were consummated. Pursuant to this agreement, according to plaintiff's evidence, the following instrument was thereupon prepared by plaintiff and signed by the parties, viz.:

"Real Estate Option.

"I, L. T. Bell, of Monroe City, for and in consideration of one dollar, do hereby grant to C. E. Bowers, of Quincy, Ill., his heirs and assigns, the privilege of purchasing on or before the 12th day of January, A. D. 1912, the following described real estate, to wit: * * *

"In case of purchase and the above-named price paid, I agree to furnish abstract showing good title and to convey said real estate by warranty deed to Edmund T. Perkins, or any person he may direct, reciting in deed such consideration as said Edmund T. Perkins shall name.

"Purchase price to be twelve hundred cash when deed is executed and eight hundred in twelve months, purchaser to assume mortgage for \$1,200.

"Witness my hand and seal this 12 day of Dec. 1911.

L. T. Bell. [Seal.]
"C. W. Bowers. [Seal.]"

Plaintiff's evidence shows that the sale was not consummated until in March, defendant agreeing to the extension of time for closing the sale. On February 27, 1913, prior to the consummation of the sale, defendant wrote plaintiff in response to a letter from the latter regarding a certain proposal of the purchaser relating to discounting the purchase price, saying: "I would not want to have you discount the deed of trust you are to let me have." In reply to this, defendant wrote declining the proposition of discount, and, among other things, saying: "Now that sounds strange to me, your interest to be protected. * * * I have made out one deed and one deed of trust"—and afterwards was ordered to make out deed to another party and did so and also another deed of trust for you.

It appears that defendant had, in fact, executed a deed to Perkins, Mark's agent, but that later, upon request, he executed a deed directly to Mark. A new deed of trust to secure plaintiff's \$800 was also executed in lieu of the one originally prepared. The latter does not appear in the record, but that finally executed ran from Clayton Mark and wife to one Longmire as trustee for Leo T. Bell, the defendant, to secure a note for \$800 due one year after date.

Plaintiff's evidence shows that the sale was thus finally consummated; that defendant received \$1,200 in cash, and also the note and

deed of trust last above mentioned, the purchaser, Mark, assuming the payment of the aforesaid mortgage on the property. The deed of trust securing the note of \$800 was at once recorded. Plaintiff testified that some time in March he met defendant in Monroe City, Mo.; that defendant then had with him this deed of trust, which had been returned to him from the recorder's office; and that he gave it to plaintiff, saying that he did not have the note with him, but would mail the same to plaintiff as soon as he returned home. Plaintiff further testified that thereafter he repeatedly wrote defendant regarding the note, but received no response to his letters; that later he went to defendant's home and requested defendant to deliver the note to him; but that defendant refused to do so, saying that he had changed his mind. It seems that thereafter the defendant, by producing the mortgage note, caused this deed of trust to be released.

It appears that the trial court forced plaintiff to a nonsuit upon the theory that the option agreement hereinabove set out constituted the written contract between the parties covering the subject-matter of the litigation, and that the extrinsic evidence adduced by plaintiff could not be permitted to vary or contradict the terms thereof. The court had permitted the various letters offered and plaintiff's parol testimony to be admitted, but at the close of plaintiff's case the court evidently rejected all of this as being incompetent because of the existence of the written option agreement aforesaid. This view we believe to be unsound, under the facts and circumstances disclosed by this record.

No one will dispute, and it is conceded by appellant, that the general rule, well established, is that where parties have put their contract in writing, then in the absence of fraud, accident, or mistake, the law presumes that the writing embodies the agreement between them, and extrinsic evidence is not admissible to vary or contradict the terms thereof. The reason for this ancient principle of law, as a general rule of evidence, is so obvious and has been so often stated, as to render it wholly unnecessary for us to do more than refer to the rule itself. But there is perhaps no rule of law more flexible or subject to a greater number of exceptions. In practice it must be applied with much care and caution, otherwise grave injustice may result. Indeed, it has been said that its application depends largely upon the particular facts of each case; and that the courts, in their efforts to prevent the rigid application of the rule from working extreme hardship and injustice, have sought from time to time to engraft so many exceptions upon it as to render the great body of case law upon the subject almost in hopeless conflict. While there is in fact much apparent conflict in the authorities, for the most part the facts of the cases wherein the courts

have refused to apply the rule will be found to fall within certain well-recognized exceptions thereto, many of them as thoroughly established as the rule itself and quite as necessary to the demands of justice.

Among these numerous exceptions is one, firmly established, to the effect that even where a written contract exists between the parties touching the same general subject-matter, extrinsic evidence may nevertheless be admissible in proof of a prior or contemporaneous collateral parol agreement between them, separate and distinct from that contained in the writing itself, and not inherently in conflict with the latter. See *Jones on Evidence* (2d Ed.) § 439, p. 552; 17 Cyc. 713 et seq.; *Owsley v. Jackson*, 163 Mo. App. loc. cit. 18, 144 S. W. 154; *Boggs v. Laundry Co.*, 171 Mo. loc. cit. 290, 70 S. W. 818; *Greening v. Steele*, 122 Mo. loc. cit. 294, 26 S. W. 971; *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398; *Avil Printing Co. v. Publishing Co.*, 127 Mo. App. 141, 89 S. W. 900; *Huckabee v. Shepherd*, 75 Ala. 342.

The parol agreement upon which this action is predicated, and for a breach of which a recovery is sought, is one entirely separate and distinct from the so-called option agreement, *supra*, which came into evidence in plaintiff's case. And when the evidence embraced within this record is fully and properly considered, it does not appear that the contract sought to be enforced, established by plaintiff's parol testimony and the letters admitted in evidence is, in any way contradictory or repugnant to the written option of December 12, 1911. On the contrary, it is quite clear, under the evidence adduced, that the two are entirely consistent, and that the signing of the written option, and the consummation of the sale in accordance with the terms thereof, were but steps in the execution or carrying out of the parol agreement between the parties. The option paper on its face shows that the land was to be conveyed to a third party, the stated consideration to be such as Perkins should name. Defendant was to receive \$1,200 in cash, and a note and deed of trust were to be executed to him for \$800. That the note and deed of trust were to be made to him is in no way inconsistent with the alleged agreement by virtue of which he was obligated to deliver the same to plaintiff. And under the circumstances no inconsistency arises from the fact that the sale price, to a third party, was stated in the option paper to be \$3,200.

And it seems quite clear that but a part of the real understanding and agreement between the parties was reduced to writing, thus bringing the case also within another well-known exception to the general rule referred to above. See cases cited, *supra*. According to plaintiff's evidence, the complete understanding and agreement between plaintiff and defendant embraced the execution by defendant of the written option, the conveyance of the land to Perkins, or at his

direction, at the stated price of \$3,200, and the taking back by defendant of the note for \$800 and the deed of trust securing it; but that all of this was but a part and parcel of the entire contract made, and ancillary or incidental to the chief objects and purposes of the latter.

In *Huckabee v. Shepherd*, supra, the defendant agreed with the plaintiff, a real estate broker, to allow him a stipulated portion of the sale price of certain lands if he would aid defendant in consummating a sale thereof. After beginning negotiations with third parties, but before consummating a sale, plaintiff purchased the property "for himself and associates," under a written contract executed by both of the parties. However, the evidence went to show that it was orally agreed that the fact that plaintiff was "taking an interest in the purchase would not affect his right to the stipulated part of defendant's compensation." It was held that the agreement of the parties as to plaintiff's compensation was distinct from the contract of sale itself. The court said:

"The case, then, is one where the particular contract sued on was not reduced to writing, and where the one actually put in writing was not intended to contain all matters of agreement between the parties. Oral evidence is admissible in such cases to show this state of facts, without infringing the rule excluding parol evidence of contemporaneous stipulations, which contradict or vary the legal effect of written instruments. * * * This principle is a qualification of the general rule last stated, and is admitted to be of difficult, and often of delicate, application in practice. But it is well founded in reason, as well as established by authority, and is often invoked by the courts 'to enable one party to escape from the fraud or injustice of the other.'"

For the purposes of the discussion, supra, the written option has been treated as a valid subsisting written contract between the parties, though not as one containing all of the agreement between them. But in fact we do not regard it as the contract between plaintiff and defendant covering the real subject-matter of the litigation. And it is quite apparent that the instrument is not a contract binding upon plaintiff. It does not purport to be of such character. It was intended to give plaintiff or his assigns an option to purchase, binding defendant to sell on the terms named. It did not undertake to and did not bind plaintiff to do anything whatsoever, and plaintiff's signature to it could have had no legal effect. Added to this, though it may be inconsequential here, the evidence suggests that no actual money consideration was paid defendant for its execution, in which case, standing alone, it was not originally binding even

upon the defendant. In any event, its office was merely to obligate defendant to sell to Mark at a price which would net to plaintiff a commission of \$800, and to fix the terms of the sale. Manifestly, it in no sense can be said to constitute a contract between these parties into which became merged all of their prior or contemporaneous oral negotiations and bargainings, for it does not purport to be such an instrument. Evidently it was executed pursuant to some prior existing contract between plaintiff and defendant. Plaintiff's evidence tends with much force to show that this contract was in terms as alleged in the petition, and that defendant flagrantly breached it. In this connection, see *Heagy v. Cox*, 191 Mo. App. 377, 177 S. W. 684.

The argument that, though defendant did originally agree to sell his land for \$2,400, he may have changed his mind by December 12, 1911, when the option agreement was executed, and that the latter instrument presumably embraces all of the terms and conditions of the contract between the parties, is sufficiently disposed of by what we have said above. But we may add that defendant's written declarations and conduct subsequent to December 12, 1911, appearing from plaintiff's evidence, go to show that defendant well knew that plaintiff was to receive \$800, or the note and deed of trust therefor, as compensation for selling the land. Defendant, in his letter of February 27, 1912, refers to plaintiff's "interest" in the proceeds of the sale, and to a deed of trust executed for plaintiff. And plaintiff's testimony is that after the sale was consummated defendant gave him the deed of trust promising to send the note, but that defendant later refused to turn over the note to him, saying that he had changed his mind. And the demurrer, of course, admits the truth of plaintiff's testimony.

It expressly appears that plaintiff was to receive no commission or other compensation from the purchaser of this property, but was to receive his compensation, if any, from the defendant; and there is no question in the case of a dual agency on plaintiff's part.

It is quite clear that plaintiff's evidence was such as to make out a prima facie case in his favor, and that it was error to sustain the demurrer to the evidence.

The judgment should therefore be reversed, and the cause remanded, with directions to set aside the nonsuit and grant plaintiff a new trial. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

SWIFT v. JOHNSON. (No. 14203.)
(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

WORK AND LABOR ⇐30—ACTIONS—INSTRUCTIONS.

In an action for services in baling hay, the refusal of an instruction authorizing recovery in quantum meruit, if, while plaintiff was baling hay, defendant requested plaintiff not to bale all of the hay agreed to be baled, was not error, where the reasonable value of services, was shown by all the evidence to be the same as the contract price.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. ⇐30.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by H. C. Swift against Wallace Johnson. From a judgment for defendant, plaintiff appeals. Affirmed.

A. C. Whitson, of Mexico, Mo., for appellant. Clarence A. Barnes, of Mexico Mo., for respondent.

ALLEN, J. This is an action begun before a justice of the peace to recover a balance of \$13 claimed to be due and owing to plaintiff from defendant for services rendered by plaintiff in baling certain hay for defendant and furnishing wire therefor. The suit was instituted in November, 1910, and the trial before the justice of the peace resulted in a judgment for defendant. Plaintiff appealed to the circuit court, where, upon a trial de novo before the court and a jury, there was a verdict and judgment for defendant and plaintiff prosecuted his appeal to this court. Upon that appeal we reversed the judgment for error on the part of the trial court in refusing an instruction offered by plaintiff (see *Swift v. Johnson*, 175 Mo. App. 660, 158 S. W. 96), and remanded the cause. Thereafter, upon another trial in the circuit court, before the court and a jury, there was again a verdict and judgment in favor of defendant, and the plaintiff has again appealed the case here.

It appears that plaintiff sought to obtain from defendant the use of the latter's hay baler for the purpose of baling certain hay, and it was agreed that plaintiff might use the baler for baling 19 or 20 tons of hay, provided he would bale some hay for the defendant as compensation therefor. There is a direct conflict in the testimony, however, in the record before us, as to the quantity of hay agreed to be baled by plaintiff for the use of the baling machine. It appears that defendant had two ricks of hay, and told plaintiff that he could have the use of the baler if he would bale the hay in these two ricks; but plaintiff's estimate as to the quantity of hay in these ricks exceeded considerably that of defendant, and plaintiff was unwilling to bale all of the hay therein as compensation for the use of the baler for his own purposes. Thereupon an oral agreement was

made in the premises; but the testimony is directly conflicting as to the terms thereof. Plaintiff asserts that the agreement was that he would bale 5 tons of defendant's hay in compensation for the use of the baler, and that defendant agreed to pay \$2 per ton, and to furnish the wire, for the baling of any of defendant's hay over and above 5 tons; while defendant's testimony, definitely stated at this trial, is that plaintiff agreed to bale 10 tons of hay for defendant for the use of the baler, defendant to pay only for the excess, if any, above 10 tons. Defendant's version of the transaction is corroborated by a witness who was near by, and who declares he heard the conversation, though he was advanced in years and his hearing somewhat impaired.

Plaintiff made use of defendant's baler for his own purposes, and in compensation therefor baled the hay in one of defendant's ricks, and a part of the hay in the other rick. It appears that plaintiff ceased baling defendant's hay at the latter's request; but plaintiff asserts that he had then baled 13½ tons for defendant. On the contrary, defendant's evidence goes to show that plaintiff had baled only 6 or 7 tons for defendant. After a controversy had arisen between plaintiff and defendant regarding the matter, defendant, through an attorney, paid plaintiff \$5.20. The account sued upon is for \$27 for baling 18 tons of hay, less \$10 for use of the baler and the \$5.20 paid by defendant, leaving a balance of \$13.

The assignments of error before us need not be set out in detail. One point made by learned counsel for appellant is that defendant could not avail himself of "matters in set-off, counterclaim, or recoupment," without pleading the same in defense. But it is quite clear that there is nothing of this sort in the case, for the testimony adduced by defendant simply went to establish his defense to the account sued upon.

Complaint is made of the refusal of an instruction, requested by plaintiff, authorizing a recovery in quantum meruit if the jury found that, while plaintiff was baling defendant's hay, defendant "requested and directed the plaintiff to not bale all of said hay agreed between the parties to be baled." And appellant says:

"When plaintiff is prevented from completing his contract by the defendant, he is not restricted to his pro rata share of contract price, but may recover the reasonable value of his services."

But there was no error in refusing this instruction. The instructions given fully covered the issues in the case. And here the reasonable value of the service was shown, by all the evidence thereon, to be precisely the same as the alleged contract price, to wit, \$2 per ton.

There is considerable said in appellant's brief to the effect that there was no meeting

of the minds of the parties and hence no express contract. What was said touching this phase of the matter on the former appeal is not pertinent to the case presented by this record. Upon the second trial the court gave the instruction which was refused at the first trial, and which we held should have been given.

A jury has again found the disputed issues of fact in defendant's favor. A careful scrutiny of the record discloses nothing of which appellant may rightfully complain. It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

LUTHER v. GRANGER EXCH. BANK. (No. 14075.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916. Rehearing Denied Feb. 24, 1916.)

INTERPLEADER \S 33—ORDER—PAYMENTS UNDER.

An order in interpleader by a bank against the administrator de bonis non of a decedent and the administrator of decedent's wife, who died pending settlement as administratrix of decedent's estate, which orders the bank to pay a specified sum held by it and owned by decedent's estate to the administrator of the wife to hold for payment to the proper person, does not justify the bank in paying stock dividends due to the estate thereafter to any person other than the administrator de bonis non, and a payment of the same to the administrator of the wife does not relieve the bank from liability to the administrator de bonis non.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. \S 68-71, 74; Dec. Dig. \S 83.]

Appeal from Circuit Court, Scotland County; Charles D. Stewart, Judge.

"Not to be officially published."

Action by John E. Luther, administrator of the estate of Sylvanus Flick, deceased, against the Granger Exchange Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Jayne, of Memphis, for appellant. John E. Luther and H. V. Smoot, both of Memphis, and Smoot & Cooley, of Kirksville, for respondent.

NORTONI, J. This is a suit by the administrator de bonis non of the estate of Sylvanus Flick to recover \$395 dividends on bank stock, the property of the estate. Plaintiff recovered, and defendant prosecutes the appeal. It is conceded the bank stock was owned by Sylvanus Flick, and that the dividends sued for were earned and set apart by defendant bank. The case was tried on the following agreed statement of facts:

"Agreed Statement of Facts.

"It is agreed in this case that Sylvanus Flick departed this life in Scotland county, Mo., intestate, and that his widow and wife, Sarah D. Flick, was duly appointed administratrix of his estate, and filed an inventory of the assets

of said estate, including the bank stock in controversy.

"It is further agreed that before the estate of said Sylvanus Flick was finally administered upon the said Sarah D. Flick departed this life, and that H. P. Flick, her son, was duly and legally appointed administrator of her estate.

"It is further agreed that J. Adam Schenk, public administrator, of Scotland county, Mo., was appointed administrator de bonis non of Sylvanus Flick's estate.

"It is further agreed that H. P. Flick, as the son of Sylvanus Flick, deceased, claimed to be entitled to be appointed administrator de bonis non of his father's estate, Sylvanus Flick, and that he had instituted proceedings in this court to compel the probate court of Scotland county, Mo., to appoint him as such administrator de bonis non of the Sylvanus Flick estate, and while this suit was pending the defendant in this case, holding money and property belonging to the estate of said Sylvanus Flick, deceased, filed a suit in this court requiring the said H. P. Flick, who was claiming the assets of said estate, and Adam Schenk, who was claiming assets of said estate, to interplead for the same, and that both filed their interplea, and this court found that H. P. Flick was entitled to the \$4,200 of the estate of Sylvanus Flick, deceased, as administrator of the estate of Sarah D. Flick, in order that he might hold the same and make a settlement with the proper person, who might be the legal representative of said Sylvanus Flick, deceased, and that this judgment is now on record in this court and unappealed from, and in accordance with said judgment this defendant turned over to said H. P. Flick forty-two hundred and some dollars in money, and that was done before he turned over this money claimed to have accrued in this suit.

"It is further admitted that said defendant has paid H. P. Flick, as administrator of the estate of Sarah D. Flick, deceased, the sum of \$395, being the dividends on the bank stock mentioned in this suit, and on February 10, 1911.

"It is further admitted that the estate of Sarah D. Flick, deceased, is now in process of administration, that the estate is still open and is still pending in the probate court, and that said H. P. Flick has been ordered to make his final settlement of said estate.

"It is further agreed that J. A. Schenk resigned as administrator de bonis non of the estate of Sylvanus Flick, deceased, and that the plaintiff, J. E. Luther, was duly appointed by the probate court of Scotland county, Mo., as administrator de bonis non of said estate, and that he duly qualified as such administrator by giving bond, and is now acting as such."

The case was tried before the court without a jury, and no instructions were asked or given on either side. It is argued the judgment should be reversed because defendant paid the dividends on the bank stock to H. P. Flick, administrator of the estate of his mother, Sarah D. Flick, shortly after it had been required to pay \$4,200 to H. P. Flick as administrator of his mother's estate under an order of the circuit court of Scotland county, but obviously the proposition advanced avails nothing. It is conceded that on the death of Sarah D. Flick H. P. Flick was appointed administrator of her estate. It is conceded that J. A. Schenk was appointed administrator de bonis non of the estate of Sylvanus Flick, of which Sarah D. Flick, prior to her death, had been administratrix. Defendant bank at that time held \$4,200 in money belonging to the estate of Sylvanus

Flick. About this time a controversy arose between H. P. Flick, administrator of his mother's estate, and J. A. Schenk, administrator de bonis non of the estate of Sylvanus Flick, as to who was entitled to administer the Sylvanus Flick estate. While litigation concerning this was pending in court, defendant bank filed a bill of interpleader invoking relief, and was ordered to pay the \$4,200 then in its hands to H. P. Flick "in order that he might hold the same and make a settlement with the proper person, who might be the legal representative of Sylvanus Flick, deceased." It is said this order of the court was not appealed from and became conclusive. This matter is not before us for review, but obviously H. P. Flick, as administrator of his mother's estate, was in no wise entitled to the possession of this \$4,200 belonging to the estate of Sylvanus Flick, and it would seem the court should have ordered defendant bank to pay that sum to Schenk, administrator de bonis non of Sylvanus Flick's estate, but this it did not do. But, be this as it may, the question concerning it is not for review here. The fact that the bank had been ordered by the court on its bill of interpleader to pay the \$4,200 held by it and owned by the Sylvanus Flick estate to H. P. Flick, administrator of Sarah D. Flick's estate, to hold for payment to the proper person, is of no avail as justification for defendant bank paying the dividends thereafter to any person other than the administrator de bonis non of the estate of Sylvanus Flick, who, as such, was entitled to have and receive the dividends which the bank says it paid to H. P. Flick. Subsequently J. A. Schenk resigned as the administrator de bonis non and plaintiff, J. E. Luther, was appointed by the court in his stead. The dividends earned on the bank stock owned by the estate of Sylvanus Flick and set apart to it are the property of the estate, and plaintiff, as the administrator de bonis non, is entitled to recover them, as the court found and declared.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE v. SAAK. (No. 14103.)
(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. INDICTMENT AND INFORMATION \Leftrightarrow 111 —
PRACTICING MEDICINE WITHOUT LICENSE—
NEGATING EXCEPTIONS.

Rev. St. 1909, § 8315, declares that any person practicing medicine or surgery without a license from the state board of health, or after revocation of such license, shall be deemed guilty of a misdemeanor, provided that physicians registered on or prior to March 12, 1901, shall be regarded for every purpose as licentiates and registered physicians, an information charging accused with practicing medicine without a license did not negative the exception. Held that, as the exception was not contained in that por-

tion of the statute defining the offense, it was not necessary to negative it in the information, but to be available as a defense it must be insisted on by accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. \Leftrightarrow 111.]

2. INDICTMENT AND INFORMATION \Leftrightarrow 202 —
DUPLICITY—CURE BY JUDGMENT.

If an information in the language of Rev. St. 1909, § 8315, charging a physician with practicing without a license, was subject to attack for duplicity, a judgment of conviction cured the defect.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. \Leftrightarrow 202.]

Reynolds, P. J., dissenting.

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

"Not to be officially published."

Henry Saak was convicted of practicing medicine without a license, and he appeals. Affirmed, and cause certified to the Supreme Court, on dissent.

T. W. Hukriede, of Warrenton, E. Rosenberger & Son, of Montgomery City, and Morris & Hartwell, of La Crosse, Wis., for appellant. Emil Roehrig, of Warrenton, for the State.

ALLEN, J. This is a prosecution for the alleged violation of section 8315, Revised Statutes 1909. The information charges that:

"On or about March 1, 1912, and until September 14, 1912, the defendant 'did then and there, and without then and there having a license so to do from the state board of health of the state of Missouri, unlawfully, wrongfully, and willfully practice medicine and surgery, and did then and there treat the sick and others afflicted with bodily and mental ailments and infirmities, and did then and there attempt unlawfully, wrongfully, and willfully to treat the sick and others afflicted with bodily and mental ailments and infirmities, and did, then and there, unlawfully, wrongfully and willfully represent and advertise himself by means of printed matter, the exact nature of which is to this informant and prosecuting attorney unknown, so as to indicate that he was authorized to practice medicine and surgery, and that he was authorized to treat the sick and others afflicted with bodily and mental ailments and infirmities, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Missouri.'"

Defendant was convicted and his punishment assessed at a fine of \$50, and he appeals.

There is no bill of exceptions here, and consequently nothing but the record proper is before us. The only question demanding attention is that raised as to the sufficiency of the information to sustain the conviction.

[1] It is urged that the information is fatally defective in failing to charge that defendant was not a registered physician on or prior to March 12, 1901.

Section 8315, supra, upon which the prosecution is based, is as follows:

"Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense. Any person filing, or attempting to file as his own a license of another, or a forged affidavit of identification, shall be guilty of a felony, and, upon conviction thereof, shall be subject to such fine and imprisonment as are made and provided by statutes of this state for the crime of forgery in the second degree. Said fines to be turned into the state treasury when collected: Provided, that physicians registered on or prior to March 12, 1901, shall be regarded for every purpose herein as licentiates and registered physicians under the provisions of this article."

In *State v. Humfeld*, 182 Mo. App. 639, 166 S. W. 331, we recently passed upon this identical question. Upon the authority of *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179, and *State v. O'Brien*, 74 Mo. 549, we held that it was not essential that the information negative the so-called exception contained in the proviso to this section, overruling *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035; *State v. Brand*, 158 Mo. App. 27, 131 S. W. 923; *State v. Hellscher*, 156 Mo. App. 63, 135 S. W. 959. We see no reason to depart from that ruling. It is true that *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, is referred to in *State v. Carson*, 231 Mo. 1, 132 S. W. 587; but there the Supreme Court was not passing upon the sufficiency of an indictment or information, and did not rule the point here involved. While the proviso to section 8315 was not directly involved in the later case of *State v. Smith*, supra, the opinion therein appears to clearly support our ruling in the *Humfeld* Case, approving the decision in *State v. O'Brien*, supra, which case is here closely in point.

In passing it may be said that in *State v. Huxell*, 191 Mo. App. 304, 178 S. W. 866, the Kansas City Court of Appeals expressly refrained from passing any opinion upon the question now before us.

The rule unquestionably is that where an exception is contained in the section of the statute defining the offense, though it be in a proviso thereto, and such exception constitutes part of the description of the offense sought to be charged, the indictment or information must negative such exception. But an exception is not required to be so negated unless it is so far a necessary ingredient of the offense denounced as to be

essential to its definition or description. See *State v. Smith*, supra, and authorities cited. And where a proviso merely exempts a class, therein mentioned, from the operation of the statute, it is unnecessary to negative the exemption of the proviso, but such exemption, to be available, must be insisted upon by way of defense. See *State v. O'Brien*, supra.

The section under consideration makes it an offense to practice, or attempt to practice, medicine, etc., without a license from the state board of health. The proviso thereto provides that physicians registered on or before March 12, 1901, shall be regarded as "licentiates and registered physicians." As the section now stands, the offense appears to be fully defined in the body thereof. The exemption contained in the proviso exempts a class from the operation thereof. And it does this by merely declaring that registration prior to March 12, 1901, shall operate as a license.

Under the established rule applicable in such cases, we do not deem it essential that an information based upon this section charge that the defendant was not a registered physician on or prior to March 12, 1901. If such be true, defendant may show this in defense; and, if shown, it negatives the charge of practicing, etc., without a license, for such registration is declared to be tantamount to a license.

[2] If the information, which follows the language of section 8315, upon which it is based, is open to attack for duplicity—which we do not say—in the state of the record before us we think that it was cured by the verdict, and that such defect, if any, is one not now available to appellant. See *State v. Nieuhaus*, 217 Mo. 345, 117 S. W. 73; *State v. Flynn*, 258 Mo. 211, 167 S. W. 516.

The verdict is a general verdict of guilty, assessing the minimum punishment for one offense under this section. We see no valid objection to the form of the verdict or that of the judgment entered thereon.

In this view, the judgment should be affirmed, and it is so ordered.

NORTONI, J., concurs.

REYNOLDS, P. J., dissents in a separate opinion, and as he deems the decision herein to be contrary to the decision of the Supreme Court in *State v. Carson*, 231 Mo. 1, 132 S. W. 587, he asks that the cause be certified to the Supreme Court for determination by that tribunal, which is, accordingly, done.

REYNOLDS, P. J. (dissenting). This prosecution is bottomed on section 8315, Revised Statutes 1909. That section has been before our court and the Kansas City Court of Appeals and before the Supreme Court. Our court in *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, again in *State v. Brand*, 158

Mo. App. 27, 131 S. W. 923, and *State v. Hellscher*, 156 Mo. App. 63, 135 S. W. 959, held that an information under this section which failed to aver that the defendant had not been registered as a physician or surgeon on or prior to March 12th, 1901, was fatally defective. So I understand to be the view of the Kansas City Court of Appeals in *State v. Huxoll*, not yet officially reported but see 178 S. W. 866, although that court does not expressly so decide. In *State v. Carson*, 231 Mo. 1, 132 S. W. 587, section 8315, as section 5 of the Act approved March 12th, 1901 (Laws 1901, p. 207), was before the Supreme Court, and at page 13 of that report, our opinion in *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, supra (inadvertently cited in the opinion, however, as in 149 Mo. App.), was quoted and cited as correctly stating the law on the point here involved. The case of *State v. Morgan*, 96 Mo. App. 343, 70 S. W. 267, was there also cited approvingly by the Supreme Court. In *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179, it was urged that section 9 of the Act of March 12th, 1901, which is now section 8319, Revised Statutes 1909, and which exempted persons rendering gratuitous service to and treatment of the afflicted, and commissioned surgeons of the United States army, navy, public health and marine hospital service from the operation of the act, was so much a part of section 8315 as to render it necessary for the pleader to negative it in the information. Our Supreme Court held that this exception relating to gratuitous treatment not being a part of the description of the offense denounced by section 8315, nor in that section, but in another section exempting certain classes from the operation of the law, need not be set out in the information but was an affirmative defense. Our court, in *State v. Humfeld*, 182 Mo. App. 639, 166 S. W. 331, overruled *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, supra, and *State v. Brand*, 153 Mo. App. 27, 131 S. W. 923, supra, and "*State v. Hoelscher*, 163 Mo. App. 352, 143 S. W. 850." (The citation of this last case as *State v. Hoelscher*, 163 Mo. App. 352, 143 S. W. 850, is an inadvertent confusion of cases. The decision intended to be overruled in that is *State v. Hellscher*, 156 Mo. App. 63, 135 S. W. 959.) Later the Kansas City Court of Appeals, in *State v. Huxoll*, supra, challenging the correctness of our holding in overruling these cases, and on the authority of *State v. Carson*, supra, seems to hold to the law as there announced by the Supreme Court, and as we had announced it in the *Hellscher* Case, 150 Mo. App. 63, 135 S. W. 959, supra, as well as in the *Brand* Case, supra. It did hold that the decision of the Supreme Court in *State v. Smith*, supra, was not applicable to this section 8315.

I have concluded, on careful reconsideration of the authorities, that we were in error in our decision in *State v. Humfeld*, supra, in overruling the cases there referred to and

in our construction and application of the decision of the Supreme Court in *State v. Smith*, supra. Without going into an elaboration of the argument by which I reached this conclusion, I refer for my views on it to what was said in *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, supra. On careful consideration of the decision in that case, I do not find anything in it contrary to what is held in *State v. O'Brien*, 74 Mo. 549, and think that it finds full support, not only in *State v. Carson*, supra, but also in *State v. Bockstruck*, 136 Mo. 335, loc. cit. 351, 38 S. W. 317. To summarize what we held in the *Hellscher* Case, the Act of March 12th, 1901, was limited to those who not before then registered or authorized to practice, should thereafter practice or hold themselves out to do so, and that removing the exemption from one part of the act to another and calling it a proviso in section 8315, did not have the effect of excluding it from a description of the offense. When that is so, that is, when it is of the essence of the offense, "and constitutes a part of the description of the offense sought to be charged, the indictment must negative the exception, otherwise no offense is charged." *State v. O'Brien*, supra. So all the authorities hold, and *State v. Smith*, supra, so far from changing this, recognizes it as a settled rule. The offense condemned by section 8315, as I read it, is practicing or holding out to practice as a physician, not having a license from the State Board of Health, and not having been registered "on or prior to March 12th, 1901;" that practicing after March 12th, 1901, not having been registered on or before that date, is as much of the gist of the offense and as material to its description as is not to be licensed after that date by the State Board of Health. Aid is given to this view by considering section 8311, which is the initial section of chapter 78, relating to the practice of medicine and surgery. That section makes it unlawful for any person "not now a registered physician within the meaning of the law" to practice "except as herein provided," and section 8315 expressly provides, by proviso, it is true, that the act shall not apply to those registered "on or prior to March 12th, 1901." "Not now registered within the meaning of the law," is as applicable to one not registered on and prior to March 12th, 1901, as to one not thereafter licensed by the State Board. It seems clear to me that no one registered on or prior to March 12th, 1901, is within the prohibitions of this law, and to proceed against one for practicing without being registered or licensed, it must be affirmatively charged not only that he was not licensed by the Board after March 12th, 1901, but that he was not a registered physician or surgeon on or prior to March 12th, 1901. Nothing said or in decision in *State v. Smith*, supra, challenges this. In that case Judge Ferris has said (233 Mo. loc. cit. 251, 135 S. W. 465, 33 L. R. A. [N. S.] 179) that section

1 of the Act of March 12th, 1901, "appears without change as section 8311 of the revision of 1909, and section 5, with some amendments not material to the case at bar, appears as section 8315 of said revision." So it is clear that the proviso in section 8315 was not construed in *State v. Smith*, supra, or if considered, was not deemed to have changed the old law. The error of our decision in *State v. Humfeld*, supra, was in applying that decision to the proviso in that section 8315, which was the question before us in our previous decisions and which was before the Supreme Court in *State v. Carson*, supra. The sum and substance of section 8315 is that one who practices medicine or surgery, or advertises that he will do so, and who had not been registered prior to March 12th, 1901, or licensed since then so to do by the State Board, is liable to prosecution and punishment. It is no more an offense under this, to practice without a license from the State Board issued after March 12th, 1901, than it is to practice, not having been lawfully registered on or prior to March 12th, 1901; each is within the law. True, the registration on or before March 12th, 1901, is set out by proviso in section 8315, while in the Act of March 12th, 1901, it is in the body of the act, and as we held in *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035, supra, it is as much within the provisions and prohibitions of the law as if in the body of the law. So said our Supreme Court in *State v. Carson*, supra. That in *State v. Smith*, supra, that court held that the exemption in section 8319 was not of the definition of the offense, falls far short from so holding as to the proviso in section 8315. In brief, the proviso in section 8315 was not in any manner presented to, considered or construed by the court in *State v. Smith*, supra.

The information here involved, in failing to charge that the defendant was "not registered on or prior to March 12th, 1901," in my view of the decisions and of the law is fatally defective.

Turning to this information and to the verdict on it, I think that the verdict is fatally defective. The information charges several distinct offenses in one count. It will be observed that section 8315, after setting out several offenses, provides for punishment by fine or imprisonment, or both, "for each and every offense." That is, it is an offense "to practice medicine or surgery; it is an offense to attempt to treat the sick or others suffering from bodily infirmities; it is an offense to represent or advertise oneself so as to indicate that the one so doing practices medicine or surgery, or that he is authorized so to do." To do any one of these things, without a license from the state board, not having on or prior to March 12th, 1901, been registered, or after having had a license, it is revoked, is a distinct offense, entailing punishment on conviction, in a minimum fine of \$50, etc. To so mingle in one

count of an information, these several charges, is duplicity. It is true that our Supreme Court, in *State v. Davis*, 237 Mo. 237, loc. cit. 239, 140 S. W. 902, and following, as well as in many other cases, has held that duplicity must be attacked before verdict by proper motion. In the *Davis* Case it appears that while the information was not questioned before verdict, and it is said that if that had been done it might have been quashed, it is held that inasmuch as it appeared by the verdict exactly upon which of the several offenses the defendant was convicted, the point against the information as bad for duplicity was not available.

In *State v. Washington*, 242 Mo. 401, 146 S. W. 1164, the information was held good after verdict and not subject to be attacked for duplicity. That decision is placed upon the distinct ground that the verdict was specific as to one of the charges in the information, it being said (242 Mo. loc. cit. 409, 146 S. W. 1164, and treating of the instructions which had been given):

"It is well established law that the verdict must be definite and certain as to the crime of which the accused is found guilty. If the instruction had submitted the case upon the theory of guilt as to both gambling devices (no motion to quash or elect having been filed), or as to one of such devices, specifically designating it, the conviction could have been sustained. But in the form in which the instruction was given it cannot be determined from the record whether the defendant was convicted of setting up and keeping both tables described or of only one, and if the latter, then which one."

In each of these cases, *State v. Davis* and *State v. Washington*, supra, the holding is clear that if the information is bad for duplicity and has not been attacked for that reason prior to verdict, it is too late to make that attack after verdict, provided the verdict is single and distinctly shows upon which one of the specific offenses alleged the defendant has been convicted; then the verdict will stand; otherwise it will not. The latter is the case here. The statute enacts that on conviction, there shall be a fine of not less than \$50 for each offense. Here there is a verdict of guilty, on an information charging several offenses, and a fine of \$50. No one can say of which of these three or more alleged violations of this section of the statute this defendant was convicted and to which violation the fine applies. Evidently the jury convicted and punished for but one offense. To say to which of those charged it is to be applied, is impossible to determine. For this reason also, I think that the judgment in this case must be reversed. I distinctly place this on the verdict, believing that it is not responsive to the information and not supported by it, and I am not placing it on ground of duplicity in the information. What I do claim is, that this verdict is not responsive to the charges in the information.

The information is further attacked in that it fails to name the persons treated. This is

unnecessary. *State v. Doerring*, 194 Mo. 398, loc. cit. 414, 92 S. W. 489.

For the reasons stated, I think the judgment of the circuit court should be reversed and the cause remanded. As I deem the opinion of the court is contrary to the decision of the Supreme Court in *State v. Carson*, *supra*, and think that is the last and so the controlling decision on the sufficiency of the information, I ask that the cause be certified to the Supreme Court.

HOELSCHER v. MISSOURI, K. & T. RY. CO. (No. 13993.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

**1. WATERS AND WATER COURSES — 171—
OVERFLOWING OF STREAM — OBSTRUCTION—
LIABILITY.**

Though waters overflowing the bank of a stream are to be considered as surface waters, yet if such overflow is caused by one who negligently obstructs the natural course of the stream, he is liable for any loss that ensues.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. —171.]

**2. WATERS AND WATER COURSES — 179—
OBSTRUCTION OF STREAM — DAMAGES — PROXIMATE CAUSE—QUESTION FOR JURY.**

In an action for the overflowing of land during a rainfall by the damming of a creek due to the faulty construction of the pilings of a railroad bridge, where it appeared that dikes along the creek below the bridge were washed away, held, that under the evidence the question of proximate cause was for the jury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. —179.]

3. APPEAL AND ERROR — 1170 — HARMLESS ERROR—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In such case when, under the evidence, a loss may be attributed to the act of God or defendant's negligence, an instruction on the effect of an act of God that assumes defendant's liability and its effort to escape is not reversible error in view of Rev. St. 1909, § 2082, providing that no judgment shall be reversed, except for material error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. —1170.]

4. TRIAL — 260 — REQUESTS FOR INSTRUCTIONS.

The refusal of an instruction, the substance of which is sufficiently included in other instructions, is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. —260.]

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

"Not to be officially published."

Action by Louis Hoelscher against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

NORTONI, J. This is a suit for damages accrued to plaintiff through defendant's negligence in impeding the natural flow of wa-

ter in a stream so as to overflow his crops. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant's railroad tracks run, generally speaking, in an eastwardly and westwardly direction skirting the bluffs on the Missouri river bottoms, and at the point in question it maintained a bridge across Koch's creek, which it appears was negligently constructed in that the pilings under the bridge were not set according to the thread of the stream. The particular bridge complained of was parcel of defendant's side track and immediately north of its main line. This bridge, it appears, was negligently constructed through setting the piling in rows obliquely across the stream, rather than according to its course, and thus tended to obstruct the passage of debris during the freshets. At the time in question, Koch's creek was swollen because of heavy rains and, as a consequence, debris lodged against the bridge because, forsooth, the pilings thereunder impeded the floating debris so as to accumulate the water on the north side of defendant's tracks. The waters thus having been accumulated broke through Koch's dike north of the tracks, and finally washed several hundred feet of the railroad embankment away to the west of the creek, and thence flowed onto Koch's land, cut through the dikes constructed by plaintiff Hoelscher between him and Koch and into Hoelscher's fields. We copy from plaintiff's brief a sufficient statement of the facts appearing in evidence to afford a fair view of the case:

"Koch's creek is a running stream of water with a well-defined channel and banks on either side. It commences out in the hills, is fed by springs, and slowly finds its way from the hills down into the bottom lands of Warren county, and after meandering for several miles it empties itself into the Missouri river.

"The defendant's tracks and right of way in the southern part of Warren county, and near defendant's Treloar station, run in an eastwardly and westwardly direction, while the general direction of Koch creek is from north to south, and Koch creek flows under defendant's tracks at a point west of defendant's Treloar station.

"At the point where Koch creek crosses under defendant's railroad tracks William Koch owns the lands on the north side of defendant's right of way; he also owns the lands on the south of defendant's right of way, and on both sides of Koch creek. Koch's lands on the south of defendant's right of way, and on the west side of Koch creek are joined on the west by plaintiff's lands, and on the south by lands owned by one Fritz Poertner. Plaintiff and Poertner had each constructed a dike between their lands and Koch, in order to prevent water from coming from Koch's lands onto theirs. From the south of defendant's right of way, and going in a southern direction, dikes had been constructed by Koch on either side of Koch creek in order to keep the waters of Koch creek as it came from the north within its banks. And from the north side of defendant's right of way up to the bluffs on Koch's land, a dike had been constructed by Koch on the west side of Koch creek so that the water in coming down from the hills would flow down Koch branch, instead of going westwardly along the right of

way of the defendant company, and then flowing over the adjacent lands.

"The evidence in the case shows that the various dikes mentioned in the evidence had been constructed and maintained by the various land-owners for some time prior to the time that the right of way had been graded for railroad purposes, which is now used by this defendant company, and that there has been no change in the location of any of the streams or the dikes since the defendant's roadbed was graded, excepting that the dikes in some places have been made higher so that a larger volume of water could be more easily carried. When the defendant's railway was built the dikes along Koch creek where the railway crosses the creek were leveled down and scraped across. The dikes along the creek from the south side of defendant's right of way were as high as the railroad embankments.

"At the point in controversy there are two bridges commonly called pile bridges. These bridges were constructed by driving a row of piling on either side of Koch creek, and by driving rows of piling in the bed of the stream. On these pilings sills and cross-pieces were laid, spiked together, and ties were placed thereon, and on the ties the rails were placed.

"The pilings as driven were driven in a row, but did not follow the thread of the stream. They were set at right angles with the railroad tracks. The rows of piling were not set in a line, but were set 'catwampus.'

"When the original bridge was constructed, being the bridge for the main line, and the pilings were thus placed in the stream, naturally the carrying capacity of the stream at that point was diminished somewhat. The main line bridge was not constructed by the appellant. In 1909 or 1910, the defendant company put in a side track to the north of the main track, and constructed a second piling bridge, mentioned as the passing track bridge. The pilings of this bridge were not set on a line with the pilings in the old bridge, nor were they set on a line with the thread of the stream, and naturally, when the second set of pilings were placed in the stream, its carrying capacity was again materially diminished.

"Some distance down below the railroad bridges Koch had constructed a farm bridge from bank to bank of the Koch creek. This farm bridge had no pilings, and, as the evidence showed, in no way interfered with the free passage of the water, or anything in Koch branch.

"To the east of Koch branch some considerable distance was another branch called Steucken's branch. It was a smaller branch, did not carry the volume of water that Koch creek carried; its general direction was the same as Koch branch, coming from the hills, flowing in a southerly direction under the right of way of the defendant company, and led on down in the bottom, and to the east of the Koch branch joining Koch branch, and these two branches emptying into the river. There was also a pile bridge over Steucken's branch where defendant's railroad crosses the same.

"Many years ago, to the south of what is now the defendant's right of way, and to the west of Koch branch there was a lake called Slapper's Lake. A part of plaintiff's lands were originally in Slapper's Lake. A small stream came down from the hills emptying itself into Slapper's Lake and finding its way out of Slapper's Lake drained the same, meandered down through the bottoms, joined Koch branch and Steucken's branch, and emptied itself into the river. This was known as Smith's branch, but before the defendant company's railroad was built Slapper's Lake was drained, and the land was reclaimed, and Smith's branch was ditched straight into the river at a point about a mile west of Koch creek.

"In July, 1910, there was a heavy rainfall. It commenced during the night and continued

up until noon. It was not a continuous rainfall; the showers would last for a while, then cease, and then commence again. On account of the narrow space in Koch branch at the mouth of the new piling bridge, when the waters and debris of Koch creek reached the mouth of defendant's passing track bridge where the pilings had been driven in and along the stream, there was not sufficient space for the waters and debris to pass through. As a result the waters commenced damming up. Defendant's section men went to the mouth of the bridge with poles in order to keep the mouth of the bridge clear, but, despite their efforts, they were unable to do so. The water and debris there formed a solid dam, and the waters were backed up north up to Koch's corncrib, a distance of about 300 feet. The right of way embankment of the defendant company held the waters for a while, but suddenly the embankment gave way; some of the defendant's tracks were washed out, and the waters broke over defendant's railroad embankment. They rushed over into Koch's field on the west side of Koch branch, covered that field, and with a mighty rush and sweep went westward and southward, breaking the dams between Koch's land and plaintiff on the west, and Poertner's dam on the south. The waters also broke some of the dikes on the west side of Koch's branch, and likewise broke some of the dams on the east side of Koch branch. This water which rushed over and broke plaintiff's dam remained on his field for some time and rotted and spoiled about 30 acres of growing corn.

"A county bridge, which was located north of defendant's right of way, was washed out and brought down Koch branch, but it lodged at a point some 30 or 40 feet north of the bridge in controversy, and did not in any way obstruct the bridge.

"Some 30 feet north of the mouth of the bridge in controversy Koch had constructed a 3-wire fence adjacent to defendant's right of way to keep his stock in. The debris broke these wires, loosened them at the end, but the wires did not become entangled with the piling. Some of the defendant's witnesses, however, testified that in clearing up the debris from around the mouth of the bridge they found some of the wire there lodged.

"None of the driftwood lodged under, or was caught by Koch's wagon bridge. That was always open. In fact, the debris never got any farther than the mouth of defendant's passing track bridge. There it lodged, and when the railroad embankment broke, the debris was carried over into Koch's field.

"This was the third time that the county bridge had been washed out by rains, and there was abundance of evidence to show that in 1905, and in other years, there had been rainfalls just as heavy. The civil engineers placed on the stand by the plaintiff testified that the carrying capacity of the stream was considerably diminished by both and either of the bridges as constructed with the piling driven in the stream, and in this they were corroborated by defendant's engineers.

"The evidence clearly shows that although when the first bridge was constructed the capacity of the stream was somewhat diminished; yet when the second bridge was constructed in 1909 or 1910, the construction of this bridge, by driving the piling in the stream, acted as an extra obstruction, and diminished the carrying capacity of the stream to such an extent that when this rainfall occurred in July, 1910, the carrying capacity of Koch branch at the mouth of the defendant's passing track piling bridge was so small that it was impossible for the water and debris to flow thereunder, and thereby the damming up of the waters with the consequent damage to plaintiff's growing corn crop was caused."

J. W. Jamison, of St. Louis, and J. W. Delventhal and Emil Roehrig, both of Warrenton, for appellant. T. W. Hukriede, of Warrenton, and E. Rosenberger & Son, of Montgomery City, for respondent.

NORTONI, J. (after stating the facts as above). [1, 2] The evidence is that defendant's bridge on which rested its side track was negligently constructed in the particulars complained of, and the court submitted the issue with respect to the construction and maintenance of this bridge alone to the jury. It seems to be conceded on the part of defendant that the bridge was negligently constructed, and that because the pilings thereunder were set as above indicated it impeded the floating debris so as to dam up the stream and turn the water to the westward over Koch's dikes in such quantity as to wash away the railroad embankment and overflow Koch's land south of the tracks. But there is evidence, too, that the dikes constructed by Koch along the side of the creek south of the railroad track were likewise washed away. Because of this it is argued the court should have directed a verdict for defendant in the view that, according to the physical facts, though the bridge was negligently constructed, such negligence was not the efficient and proximate cause of plaintiff's loss; that is, the overflow of his crops. But on an examination of the evidence, this is by no means clear, and the question with respect of it appears to be one for the jury. Koch's land lies both north and south of the railroad tracks. He had constructed a dike along the banks of Koch's creek both north and south of the railroad tracks. Plaintiff Hoelscher's land was lower than that of Koch, and lies immediately to the west of it. Plaintiff and his neighbor, Poertner, had constructed dikes to prevent the overflow of water from Koch's land upon that owned respectively by them. It is true that the dikes constructed by Koch along the side of the creek south of the railroad were washed away, and it is argued from this that plaintiff would have suffered the same injury, though defendant's bridge so negligently constructed had not impeded the flow of water. But the evidence is by no means conclusive touching this matter. It appears that defendant's bridge accumulated the floating debris, and thus impeded the flow of the water in the creek so as to cause the breaking of the dike north of the railroad track, and thus occasion, too, such extraordinary pressure of the water against the railroad embankment as to wash it away and deluge Koch's fields. In this manner the free flow of water which it may be otherwise would have passed on according to the course of the creek within the dikes was turned upon Koch's land and thus operated to soak and to destroy the resistance of the dikes constructed of mere dirt on the side of the bank. Had the water not been turned

over the railroad embankment within Koch's field, it may be the dikes would have offered sufficient resistance to withhold it in the current of the stream, and thus on to the Missouri river without injury to plaintiff's dike and his crops. When it is remembered that the damming up of the water at the bridge was the cause of its coming into Koch's field in a flood which appears to have been extraordinary in character, because of the accumulation of the water in a body, there is an abundance in the evidence tending to authorize a finding on the part of the jury that the proximate cause of the breaking of the dikes between Koch's land and that of plaintiff Hoelscher may be attributed to the bridge. Although it be true, generally speaking, that waters overflowing the banks of a stream are to be regarded as surface waters, no one can doubt that where the overflow is occasioned by the negligent act of one who obstructs the natural water of a stream, liability for the loss which ensues is entailed on the person whose negligence occasioned it. See *Edwards v. Missouri, K. & T. R. Co.*, 97 Mo. App. 103, 71 S. W. 368. On the evidence before us, the question of defendant's liability appears to be one for the jury.

At the instance of plaintiff, the court gave the following instruction:

"The court instructs the jury that in order for the defendant to escape liability, in this cause, under the exemption that the injury done was an act of God, as explained in other instructions, you must find that the act of God was the sole and only cause of the injury, and that it must be unmixed with the negligence of the defendant; and if the jury find that defendant's negligence commingled with the act of God in the loss as an active and cooperative element, and the loss is proximate thereto—that is, a reasonable consequence of defendant's negligence—it is regarded in law as the act of defendant, rather than the act of God."

[3] It is argued that this instruction is obnoxious in that it assumes defendant was liable, and sought to escape. The general purport of the instruction appears to be well enough. See *South Side Realty Co. v. St. Louis & San Francisco R. Co.*, 154 Mo. App. 364, 134 S. W. 1034. But it is unhappily worded in that it, no doubt, proceeds in part, at least, according to the view that it devolved upon defendant to "escape liability." But the question as to whether the loss should be attributed to the act of God solely or to the negligence of defendant in part at least was in the case, and, this being true, we are not prepared to say the instruction was so misleading as to authorize a reversal of the judgment because of it. The statute (section 2682, R. S. 1909) commands that no judgment shall be reversed, except for error materially affecting the merits of the controversy against the interests of the appellant. Therefore the matter should be passed as not reversible error at least, unless we believe the error was material. See *Shinn v. United Rys. Co.*, 248 Mo. 173, 154

S. W. 103. We do not believe that the instruction, even worded as it is, is so misleading as to be harmful to defendant.

[4] It is argued the court should have given defendant's instruction No. 8, but it seems its refusal was well enough in view of other instructions given which sufficiently submitted the theories of defense presented. Defendant's instructions No. 3 and No. 4, when read together, sufficiently presented the subject-matter hypothesized in its No. 8 refused.

There are other arguments put forward in the brief, all of which have been examined with care, but it is unnecessary to extend the opinion concerning them. The questions thus presented have all been heretofore settled through the prior course of decision, as will appear by reference to the cases cited in plaintiff's brief.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE v. McNAIL. (No. 13932.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. ASSAULT AND BATTERY \Leftrightarrow 68—DEFENSE OF CHILD—RIGHT OF PARENT.

Defendant's son, a boy of about 16 years of age, was engaged in a fight with another lad. His assailant's brother procured rocks and attempted to hold defendant's son so that the original assailant might strike him. *Held*, that defendant had the same right to act in defense of his son as the son did in his own defense.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 98; Dec. Dig. \Leftrightarrow 68.]

2. ASSAULT AND BATTERY \Leftrightarrow 96 — CRIMINAL PROSECUTION—INSTRUCTIONS.

In such case where defendant contended that he used no more force than was necessary to protect his son from grievous injury, the court should, notwithstanding defendant interfered and knocked down his son's assailants, charge on that theory.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 142-150; Dec. Dig. \Leftrightarrow 96.]

Appeal from Circuit Court, Reynolds County; E. M. Dearing, Judge.

"Not to be officially published."

Joe McNail was convicted of assault and battery, and he appeals. Reversed and remanded.

R. I. January, of Centerville, A. T. Brewster, of Poplar Bluff, and O. L. Munger, of Piedmont, for appellant. C. R. Wadlow, of Centerville, and J. B. Kleith and J. H. Raney, of Patterson, for the State.

NORTONI, J. Defendant appeals from a judgment convicting him on a charge of assault and battery.

Defendant, a school director, together with another member of the school board and the district clerk, were engaged in transacting

some business at the schoolhouse, and a fight took place between young Fox, a boy about 16 years of age, and a son of defendant. On the part of the state several witnesses testified that, while defendant's son, aged also about 16 years, was thus engaged in a fight with young Fox, he (defendant) interfered, and assaulted the prosecuting witness, Harlie Fox, a brother to the young man with whom his son was engaged in the altercation. The state's witnesses say defendant knocked Harlie Fox down, and, according to their evidence, it would seem under circumstances which did not appear to be justifiable in the least. But the evidence for defendant is to the effect that, though he assaulted the prosecuting witness, he did so merely for the purpose of protecting his son from an impending dangerous battery. It is said the two boys about 16 years of age each—that is defendant's son, Henry McNail, and Dallas Fox—were engaged in the fight, and the prosecuting witness, Harlie Fox, a boy of about 15 years of age, handed his brother, Dallas, a couple of rocks, and said: "Hit him, Dallas, hit him!" It was in conjunction with this conduct on the part of the prosecuting witness, according to the evidence introduced on behalf of defendant, that defendant pushed Harlie Fox backward and leveled a blow at him. Also there is evidence, too, on the part of defendant that the prosecuting witness attempted to catch and hold defendant's son while Dallas Fox inflicted punishment upon him with the two stones, which, it is said, the prosecuting witness handed to his brother with instructions to "hit him." From what has been said, it is apparent that there is substantial evidence in the record tending to prove defendant interfered and assaulted the prosecuting witness for the purpose of protecting the onslaught then being made upon his son, and that he used no more force than was reasonably necessary under the circumstances attending the situation.

[1, 2] Defendant requested the court to instruct the jury on this feature of the case to the effect substantially that, if such fight were in progress between the two boys, and defendant honestly believed his son was imperiled and in danger of great bodily harm through the conduct of the prosecuting witness participating therein, he was justified in acting on such appearance to prevent serious injury to his son, Henry McNail, and in striking the prosecuting witness the several blows mentioned in the evidence, provided he employed no more force than appeared at the time, in view of all the circumstances, to be reasonably necessary for that purpose. The instructions requested presenting this view of the law were all refused over the exception of defendant, and in this the court erred. It appears that no instructions whatever were given by the court touching this feature

of the case, and such was the real matter of defense put forward. It is manifest that defendant's father had the same right to act in defense of his son in the circumstances of the case that the son engaged in the affray had to act in defense of himself. The court erred in declining to instruct the jury touching this feature of the case. See Kelley's Criminal Practice (3d Ed.) § 523; State v. Harrod, 102 Mo. 590, 15 S. W. 373; State v. Reed, 137 Mo. 125, 138, 38 S. W. 574; State v. Totman, 80 Mo. App. 125.

The judgment should be reversed, and the cause remanded.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

JEFFRIES v. CHICAGO & A. R. CO.
(No. 14102.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. RAILROADS §413—FENCING TRACKS—STATUTORY LIABILITY.

Rev. St. 1909, § 3145, requiring every railroad to maintain fences on the sides of the road with gates at farm crossings, and imposing a liability in double the amount of damages for injury to animals caused by the failure to construct or maintain fences, imposes on a railroad company the obligation to construct and maintain fences, including gates, at a private crossing, and authorizes a recovery for double damages for injuries to animals on the track, entering on the track through an open gate because of the company's negligence constituting the proximate cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1459-1472; Dec. Dig. §413.]

2. RAILROADS §413—FENCING TRACKS—STATUTORY LIABILITY.

Where a gate in a railroad right of way fence was installed for the benefit of an adjoining owner, and the gate communicated with a public highway, the railroad company must exercise ordinary care to keep the gate closed, so as to prevent cattle passing the highway from entering on the track, but the fact that the gate communicated with the public highway raised a duty in respect of the public at large.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1459-1472; Dec. Dig. §413.]

3. RAILROADS §443—FENCING TRACKS—INSTALLING GATES—NEGLIGENCE—EVIDENCE.

Evidence held to justify a finding that a railroad company, installing a gate in its right of way fence for the benefit of an adjoining owner, but communicating with a public highway, failed to exercise ordinary care to keep the gate closed, and it was liable for the loss of animals entering on the track through the open gate.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. §443.]

4. RAILROADS §446—INJURIES TO ANIMALS ON TRACK—EVIDENCE.

Where, in an action against a railroad company for injury to animals on the track, there was evidence that the cattle came through an open gate in the railroad right of way fence and passed down the right of way to the cattle guard, that the cattle were struck inside the right of way and carried by the locomotive over into the public road crossing, and that the section men and others traced the marks of the cattle through the open gate into the right of

way along down the track to the cattle guard, the mere fact that the engineer and fireman testified that the cattle were actually on the crossing when the collision occurred did not justify a direction of a verdict for the railroad company, for the weight of the testimony was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. §446.]

5. APPEAL AND ERROR §1170—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Rev. St. 1909, § 2082, declaring that no judgment shall be reversed unless the court on appeal believes that the error complained of materially affected the merits against the party complaining, must be applied according to its spirit, and though an instruction is unhappily phrased, it will not be regarded as reversible error, unless the court on appeal believes that it was actually misleading to the prejudice of the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4063, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. §1170.]

6. RAILROADS §425—INJURY TO CATTLE ON TRACK—LIABILITY.

Where cattle came on a right of way through an open gate in a railroad right of way fence and passed over a defective cattle guard and on a public crossing, the railroad company, guilty of negligence in not having the gate closed, was liable for injury inflicted on the cattle by a train running on them while at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1527-1533; Dec. Dig. §425.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by David M. Jeffries against the Chicago & Alton Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. E. S. Gantt, of Mexico, Mo., John S. Gatson, of Vandalla, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through the negligence of defendant in respect to a gate in its right of way fence. Plaintiff recovered, and defendant prosecutes the appeal.

It appears defendant's east-bound train killed 12 steers owned by plaintiff and injured 8 others through colliding with them on its tracks. The ground of recovery asserted and relied upon relates to defendant's failure to keep a gate in its right of way fence closed. Defendant's railroad runs, it is said, on a general course of east and west at the point in question, and a public highway runs parallel with it and immediately adjacent to and along the north side of the right of way. Parties other than defendant own and operate a coal mine immediately south of the railroad track and abutting its right of way, from which a private road leads across the railroad track to the northward and into the public highway which, as before said, runs east and west along the north side of the right of way. Defendant maintains a gate in its north right of way fence at the point

where this private road from the coal mine intercepts the highway. About one-half of a quarter of a mile, or, say 600 or 700 feet east of this private roadway crossing the tracks, a public highway running north and south crosses the railroad, and at this defendant maintains cattle guards on either side.

The evidence tends to prove plaintiff's cattle came from the westward along the highway immediately north and parallel to the railroad track, and entered the defendant's right of way through the open gate at the private road crossing near the coal mine some time in the evening on January 8th. The evidence is abundant that defendant's gate in the right of way fence adjacent to the public highway stood open at the time, and had so remained for some days before; also that the hoof marks, or tracks, of the cattle revealed they had passed from the public highway through the open gate across to the south side of defendant's tracks on the right of way, and thence east to the neighborhood of the cattle guard on the west side of the public road running north and south before mentioned. Between 7 and 8 o'clock in the evening they were run upon and some killed and others injured by defendant's east-bound train. It appears defendant had, some years before, installed the gate in its north right of way fence, at the point where the private road passed from the public highway to the coal mine, for the accommodation of those operating the mine. The evidence tends to prove that this gate remained open much of the time, so as to enable wagons and teams engaged in hauling coal to pass into and out from the mine, and also for the use of pedestrians employed about it. But there is evidence, too, that the section men were instructed by defendant to keep it closed at least after working hours at the mine. The gate was frequently closed at about 4 or 5 o'clock in the afternoons, and thus remained until the following day. But it appears it had been open on this occasion some three days before; that is to say, it had not been closed for that length of time. Indeed, after the collision with plaintiff's cattle, the section men, on endeavoring to close the gate, found it frozen in the earth, so that it was necessary for some two or three of them to colobar in dislodging it. There is no question in the case with respect to the sufficiency of the gate or its fastenings, but the evidence proceeds in the view that defendant had omitted to exercise ordinary care with respect to keeping the gate thus opening into the public highway closed.

[1] The statute (section 3145, R. S. 1909), which is counted upon, affixes the obligation on defendant to construct and maintain proper fences, including gates, at the place in question, and authorizes a recovery for double damages for injuries entailed on persons therein contemplated as a result of its breach. It comprehends, too, cases of this character where the open gate may be traced through

defendant's negligence as the proximate cause of the injury.

[2] But it is argued the court should have directed a verdict for defendant because it appears the gate was left open by those operating the mine, and in this connection it is said defendant is not required to maintain a watchman at the gate at all times. The proposition is no doubt true in part, but not entirely so when considered with reference to the facts involved here. It has been declared, where a farm gate, erected for the sole benefit of an adjoining proprietor owning and occupying lands on either side of the right of way, was left open by a stranger without the consent of the railroad and nothing more than this appeared, that no liability was thus entailed upon the company for the loss of cattle passing through upon the tracks. See *Binicker v. Hannibal & St. Joseph R. Co.*, 83 Mo. 660, and cases of similar import. But obviously the principle is without influence here, for besides the gate in the instant case remaining open for several days, it appears, too, that instead of being merely installed for the benefit of an adjoining owner, it communicated with the public highway, and this fact alone raised a duty in respect of the public at large, of which plaintiff is one. The distinction in such cases has been heretofore recognized and pointed out, as will appear by reference to *Francis v. Quincy, O. & K. R. Co.*, 118 Mo. App. 435, 93 S. W. 876. No one can doubt that in such circumstances the law devolved the duty upon defendant to exercise ordinary care to keep the gate which it had installed in the right of way fence adjacent to the public highway closed so as to prevent cattle passing the highway from entering upon the tracks.

[3] It is true defendant had installed a proper gate, with proper fastenings, for the accommodation of those operating the coal mine on the south side of the track, but it appears to have neglected the matter with respect to keeping it closed. There is evidence in the record tending to prove that those operating the coal mine were looked to concerning this. The evidence is that the gate remained open almost constantly during the daytime but was usually closed about 4 or 5 o'clock in the afternoon, when the coal mine shut down. It was open all during the day before plaintiff's cattle came upon the track, and indeed it appears to have been open for as many as two or three days theretofore all the time. The man who usually closed it said he was engaged in pumping at the mine, and did not close the gate. It was seen to have been open at 5 o'clock that evening, and all the evidence goes to show it was open immediately after the cattle were killed, for the section men found it then open and frozen to the ground. It is certain that if defendant either knew the gate thus connecting with the public highway was open, or if it had been open for a sufficient length of time for it to have discovered the fact

through exercising ordinary care to that end, and to have closed it before the cattle passed through, liability for the loss proximately resulting therefrom is cast on defendant for that it omitted to exercise ordinary care toward keeping the gate closed. See *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202, 205, 77 S. W. 115; *Atchison, T. & S. F. R. Co. v. Kavanaugh*, 163 Mo. 54, 63 S. W. 374. The court very properly declined to instruct a verdict for defendant.

[4] Defendant's locomotive engineer and fireman who were the only witnesses to the actual collision say that the cattle were upon the crossing of the north and south public highway about one-half quarter east of the coal mine when the collision occurred, and in view of this it is argued no recovery may be allowed, for it is said defendant is not liable when the collision occurs upon a public highway, in the absence of evidence of the negligent operation of the train. But obviously the question concerning this on the evidence was one for the jury. The evidence on the part of plaintiff, and, indeed, almost conceded in the case, tends to show the cattle came upon the highway through the open gate above referred to and passed down the right of way to the cattle guard. There is evidence, too, tending to show the cattle were struck inside of the right of way to the west of the cattle guard, and carried by the locomotive over into the public road crossing. These facts and circumstances constitute ample evidence for the consideration of the jury contra to that of the engineer and fireman. The record is replete with evidence tending to show that defendant's section men and others traced the marks of the cattle through the open gate into the right of way along down the railroad track and immediately adjacent to the west side of the cattle guard where, according to plaintiff's theory, the collision actually occurred. The mere fact that the engineer and fireman say the cattle were actually upon the road crossing when the collision occurred avails nothing on the argument that the court should have directed a verdict for defendant, because the matter of the credibility of the witnesses and the weight and value to be given to the testimony are for the jury. See *Gannon v. Laclede Gas-light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

[5] An argument is directed against plaintiff's first instruction, and if the evidence revealed a real controversy in the case as to how long the gate stood open, we would consider it seriously; but, in view of the facts, it would seem the instruction is sufficient. The evidence is that the gate had remained open for three days and nights before the injury, and it abundantly appears the cattle passed through it into the right of way.

The instruction complained of is unhappily worded, but it hypothesizes all of the essential facts, and requires the jury to find that defendant omitted to exercise ordinary care toward keeping the gate closed. Moreover, when the entire instruction is considered, it is clear that it authorized a verdict for plaintiff only in event the defendant knew the gate was open, or by the exercise of ordinary care it might have known such to be the fact in time to have closed it. When it is remembered the gate was open for three days and nights before the collision and that defendant's section men testify it was frozen to the ground immediately thereafter, it would be straining a point to condemn the instruction as misleading on the argument advanced against it. In view of the statute (section 2062, R. S. 1909) commanding that no judgment shall be reversed unless we believe the error complained of materially affects the merits against the appellant, we are unable to treat with the argument as valid. This statute should be applied according to the spirit reflected in its make-up, and therefore, though an instruction be unhappily phrased, it should not be regarded as reversible error unless we believe it was actually misleading to the prejudice of appellant. See *Shinn v. United Rys. Co.*, 248 Mo. 173, 154 S. W. 103.

[6] Defendant requested, and the court refused, several instructions in the view that if the cattle were run upon while on the north and south public road crossing, no recovery should be had, notwithstanding they came upon it over the cattle guard after entering the right of way through the open gate. It is argued the court should have given these instructions, but we are not so persuaded. If the cattle actually came upon the right of way through the open gate, as the evidence so abundantly discloses, and passed over defendant's cattle guard, which appears to have been somewhat defective, and were run upon in the public road crossing, liability nevertheless obtains against defendant, for that the question with respect of this is to be determined by reference to the condition of the fence at the point of entry. This court has heretofore said, in a similar situation:

"The law has been declared most clearly to be that if cattle get within the inclosure of a railway company's track by neglect to perform its statutory duty in regard to maintaining proper fences or cattle guards at the place where the cattle enter, it is no defense to show that, at some distant point where the damage occurred, no fence or other statutory protection for cattle was required by the statute to be maintained (citing cases)."

See *Sappington v. Chicago & Alton Ry. Co.*, 95 Mo. App. 387, 393, 394, 69 S. W. 32, 34.

We see nothing further in the case which merits discussion, and the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

WRIGHT et al. v. NIOKEY et al. (No. 1525.)
(Springfield Court of Appeals. Missouri. Feb.
15, 1916. Rehearing Denied. March
11, 1916.)

1. PLEADING \S 248—AMENDED PETITIONS—
NEW CAUSE OF ACTION.

Where the original petition alleged that defendant cut down and destroyed and carried away 20,000 railroad ties, the property of plaintiff, and converted the same to his own use, and that the value of the property was \$1,000, an amended petition, charging that defendant cut down and carried away timber standing on premises of plaintiff and manufactured same into 20,000 railroad ties, of the value of \$1,000, did not change the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 686, 687, 688-706, 708 $\frac{1}{2}$, 709; Dec. Dig. \S 248.]

2. TRESPASS \S 20—TRESPASS TO REAL ESTATE—POSSESSION OF PLAINTIFF.

The possession of unfenced and unoccupied land is constructively in the owner, who has such possession as will support an action for cutting and removing timber thereon.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. \S 32-47; Dec. Dig. \S 20.]

Appeal from Circuit Court, Butler County;
J. P. Foard, Judge.

Action by P. M. Wright and others against Leander F. Nickey and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

E. R. Lentz, of Poplar Bluff, for appellants.
J. W. Chilton, of Winona, for respondents.

ROBERTSON, P. J. Plaintiffs prevailed below and defendants have appealed. The plaintiffs' petition alleges that they were, during 1909, owners of a tract of land in Butler county, and it continues as follows:

"For cause of action plaintiffs state that during the year 1909, the defendants wrongfully and unlawfully entered upon the above-described premises, the same being then and there the property of plaintiffs, as aforesaid, and then and there cut down and destroyed and carried away 20,000 railroad ties, the property of the plaintiffs, and converted the same to their own use. Plaintiffs aver the value of said ties at the time so taken and converted by defendants to their own use was the sum of \$1,000, for which amount and for costs plaintiffs pray judgment."

During the progress of the trial an amendment of plaintiffs' petition was allowed so that the foregoing quoted part was made to read as follows:

"For cause of action plaintiffs state that during the year 1909 the defendants wrongfully and unlawfully entered upon the above-described premises, the same being then and there the property of plaintiffs, as aforesaid, and then and there cut down and destroyed and carried away timber then and there standing and growing on said premises, and manufactured same into 20,000 railroad ties, and converted the same to their own use. Plaintiffs aver the value of said timber at the time so taken and converted by defendants to their own use was the sum of \$1,000, for which amount and for costs plaintiffs pray judgment."

[1] The defendants filed a motion to strike the amended petition for the alleged rea-

son that it changed the cause of action. The motion was overruled, defendants excepted, and the trial proceeded.

The defendants are wrong in their contention that there is a change in the cause of action. The original petition alleges:

That the defendants "cut down and destroyed and carried away 20,000 railroad ties, the property of the plaintiffs, and converted the same to their own use."

The amended petition charges:

That they "cut down and destroyed and carried away timber then and there standing and growing on said premises, and manufactured same into 20,000 railroad ties."

The conclusion forced upon us by the allegation in the original petition is that defendants wrongfully cut the timber from plaintiffs' land out of which the ties were made. The plaintiffs do not claim either petition to be a work of art, but the meaning of each is clear. The amended petition alleges the same facts as the original. The measure of damages is alleged in the original petition to be the value of the ties; in the amended petition it is alleged to be the value of the timber before made into ties. We think a mere statement of the facts under this point sufficiently and clearly justifies the holding that there was no change in the cause of action. This insistence is ruled against defendant.

[2] The only other point necessary to notice, relied upon by defendants, is a contract which defendants had with Leander F. Nickey for cutting this timber. It has been adjudged that he had no title to the land. Chilton v. Nickey, 261 Mo. 232, 169 S. W. 978. The defendants contend that plaintiffs should not prevail here because they were not in possession of the land at the time of the alleged trespass, but that Nickey had possession under color of title when he gave the contract to defendants. One opinion cited to support this contention condemns it. Brown v. Hartzell, 87 Mo. 564, 568. In Chilton v. Nickey, supra, the Supreme Court held, on facts stronger for defendants than are developed here, that Nickey did not have the actual possession of the land. The land, as the testimony developed here, was unfenced and unoccupied. In the Brown Case, supra, it is said:

"The possession is constructive when the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff. In that case the title draws to it the possession."

There is no merit in the contention that plaintiffs had no such possession of the land as would support their action. They were the owners of it and those under whom defendants claim did not have the possession thereof.

The judgment is affirmed.

FARRINGTON and STURGIS, JJ., concur.

STEGALL v. AMERICAN PIGMENT & CHEMICAL CO. (No. 14810.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916. Rehearing Denied Feb. 24, 1916.)

APPEAL AND ERROR ⇐1195—QUESTIONS CONCLUDED.

Questions determined on writ of error to review a judgment are finally adjudicated between the parties, and cannot be raised again by the defeated party moving to quash an execution issued on the judgment affirmed by the court on a writ of error on the grounds presented on the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇐1195.]

Error to St. Louis Circuit Court; Eugene McQuillin, Judge.

"Not to be officially published."

Action by Harry W. Stegall against the American Pigment & Chemical Company. There was a judgment for plaintiff, which was affirmed on appeal, and there was a judgment denying a motion of defendant to quash the execution issued on the judgment, and it brings error. Affirmed.

See, also, 263 Mo. 719, 173 S. W. 674; 150 Mo. App. 251, 130 S. W. 144.

James T. Roberts, of St. Louis, for plaintiff in error. Jamison & Thomas, of St. Louis, for defendant in error.

ALLEN, J. This case is before us on a writ of error whereby it is sought to review the action of the circuit court of the city of St. Louis in overruling a motion to quash an execution. In 1908 plaintiff (defendant in error) instituted suit against defendant corporation (plaintiff in error) before a justice of the peace upon an account for services rendered defendant. Defendant appeared specially before the justice of the peace and moved to quash the return of service made by a special constable. This motion was overruled, and, defendant declining to appear further, judgment was rendered against it for the amount of plaintiff's claim. Thereafter, and in due time, the defendant prosecuted its appeal to the circuit court of the city of St. Louis, where it again entered a special appearance and moved to quash the aforesaid return. The circuit court permitted the special constable to amend his return, and, after hearing testimony upon defendant's motion to quash, overruled the same. Thereupon, defendant not appearing further, judgment was again rendered in plaintiff's favor for the amount of his demand. Thereupon defendant brought the case to this court by writ of error, and this court fully reviewed and passed upon the rulings of the circuit court involved in the proceeding and complained of, and affirmed the judgment of the circuit court. See *Stegall v. Pigment & Chemical Co.*, 150 Mo. App. 251, 130 S. W. 144, for a full statement of the proceedings in the case and the con-

clusions reached by this court on the questions involved.

It appears that subsequent to the decision of this court, supra, defendant applied to our Supreme Court for a writ of prohibition seeking to prohibit the enforcement of the judgment theretofore rendered against it and affirmed by this court. The Supreme Court issued its preliminary rule in prohibition, but thereafter, in banc, rendered judgment quashing the same and denying the peremptory writ. See *State ex rel. v. Shields*, 237 Mo. 329, 141 S. W. 585. Thereafter defendant filed in the circuit court a motion to quash the execution which had been issued upon said judgment. Among other things this motion set up that defendant's constitutional rights were being violated in certain particulars. The motion was overruled, and thereupon defendant sued out a writ of error from the Supreme Court to review this action of the circuit court. When the case presented by this writ of error was reached by the Supreme Court, that court held that no constitutional question was involved so as to give it jurisdiction in the premises and transferred the matter here. See *Stegall v. Pigment & Chemical Co.*, 263 Mo. 719, 173 S. W. 674.

We are now asked to review the action of the circuit court in overruling defendant's motion to quash an execution issued upon the judgment heretofore affirmed by this court. This motion (the substance of which is set out in *Stegall v. Pigment & Chemical Co.*, 263 Mo. 719, 173 S. W. 674), in so far as it raises anything which could be the basis of such a motion, and aside from the constitutional questions attempted to be raised, is predicated upon the identical matters passed upon and determined by this court in *Stegall v. Pigment & Chemical Co.*, 150 Mo. App. 251, 130 S. W. 144. These questions were there finally adjudicated and are no longer open for review. Defendant has litigated these issues, and they have been determined against it. They cannot be reopened and relitigated upon a motion to quash an execution. See *Fielder v. Bambrick Bros. Const. Co.*, 178 S. W. 763. As to this the Supreme Court in *State ex rel. v. Shields*, 237 Mo. loc. cit. 327, 141 S. W. 585, said:

"There is a further reason for quashing the writ in this case. It appears that the whole matter has been fully and finally adjudicated by the St. Louis Court of Appeals. That court had full jurisdiction to determine the questions involved. That court could determine the sufficiency of the return of the special constable, as well as the sufficiency of the proof made of the facts to show jurisdiction in the justice's court. It did in an elaborate opinion rendered hold that the return was sufficient to confer jurisdiction, and in addition found from the evidence that defendant, although a foreign corporation, was as a fact doing business in this state at the time of the service, and that the service upon its president, resident in this state, was a good service under the facts disclosed. Wheth-

er this judgment of the St. Louis Court of Appeals is right or wrong we need not determine. It is sufficient for us to say that such court had the right to adjudicate the questions, and it has so done. The whole of relator's complaint here is *res adjudicata*. *Coleman v. Dalton*, 71 Mo. App. loc. cit. 24; *State ex rel. v. Mills*, 231 Mo. 499 [133 S. W. 22]."

It follows that the judgment—i. e., the order overruling the motion to quash the execution, to which this writ of error is directed—should be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

COLLINS v. SMITH. (No. 14208.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

1. APPEAL AND ERROR ⇐732—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error that the court erred in overruling defendant's motions for new trial and in arrest present nothing for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. ⇐732.]

2. TRIAL ⇐253—INSTRUCTIONS—EXCLUDING DEFENSES.

In an action for wages claimed by plaintiff for services rendered as a domestic servant, the defense was that the plaintiff was merely to have a home and support in return for her services. The evidence showed rendition of services and that plaintiff received clothes from defendant. The jury were charged that lodging in defendant's house and eating food therein, while plaintiff was working there, were incidental to domestic service, but that furnishing of clothing by defendant was not incidental to such service. *Held* that, while furnishing clothes is not incidental to domestic service, yet the instruction was erroneous in precluding the jury from considering the only defense, which was that plaintiff was to receive nothing for her services but board and support.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. ⇐253.]

3. APPEAL AND ERROR ⇐1066—REVIEW—HARMLESS ERROR.

In such case, the instruction must be considered prejudicial, the instructions not presenting a harmonious whole and the presumption of prejudice prevailing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇐1066.]

4. APPEAL AND ERROR ⇐1170—HARMLESS ERROR—DISREGARDING.

The giving of such instruction must be regarded as one affecting the merits of the action, and so cannot be disregarded under Rev. St. 1909, § 2082.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. ⇐1170.]

Appeal from Hannibal Court of Common Pleas; Wm. T. Ragland, Judge.

"Not to be officially published."

Action by Nellie Collins against Elma Smith. From a judgment for plaintiff defendant appeals. Reversed and remanded.

Hays, Heather & Henwood, of Hannibal, for appellant. Chas. E. Rendlen, of Hannibal, for respondent.

ALLEN, J. This is an action for wages alleged to be due plaintiff for services rendered the defendant as a domestic servant. The defendant is a married woman, and, during the period with which we are here concerned, operated a boarding house in Hannibal, Mo. On or about December 1, 1908, plaintiff, a young woman, began living with defendant and doing work of a domestic character in and about defendant's boarding house, and so continued until some time in May, 1913. There is a direct and sharp conflict in the testimony as to the terms of the oral agreement made between plaintiff and defendant when the former came to live with the latter. Plaintiff's version thereof is that the defendant agreed to pay her \$3 per week, together with her board and lodging. On the other hand, the defense is that plaintiff was to have merely a home and support in return for her services. The petition avers that plaintiff did general housework, and assisted in cooking, in defendant's boarding house from December 1, 1908, to May 23, 1913, 231 weeks; that such services were reasonably worth \$3 per week, with board, lodging, and washing; and that defendant had paid to plaintiff on account thereof \$50, and clothing of the value of \$31.25, a total of \$81.25. Judgment is prayed for the balance alleged to be due, to wit, \$611.75. The answer is a general denial. The trial before the court and a jury resulted in a verdict and judgment in plaintiff's favor for \$300, and the defendant prosecutes the appeal.

[1] There is but one assignment of error before us for consideration, and this relates to the giving of an instruction for plaintiff. Two other assignments of error are made in appellant's brief, one that the court erred in overruling defendant's motion for a new trial, and the other that the court erred in overruling defendant's motion in arrest. These, of course, present nothing for review.

An instruction for plaintiff, in substance, authorized a verdict for her if the jury found that she worked for defendant at the latter's instance and request, unless the jury found that there was an agreement between plaintiff and defendant that the services were not to be paid for, or that defendant would compensate plaintiff therefor only by furnishing her a home and support. This instruction is not complained of.

On behalf of defendant, the court instructed the jury that if they found that the services were rendered by plaintiff and accepted by defendant under an agreement or understanding between them that, as compensation therefor, defendant would provide plaintiff with a home and support her, then plaintiff could not recover.

[2] These instructions appear to be well enough and to fairly submit to the jury the only contested issue in the case. But aside from plaintiff's instruction referred to above,

the court, at plaintiff's request, gave the following instruction:

"The jury are instructed that lodging in defendant's house and eating food therein while plaintiff was working there were and are incidental to domestic service which plaintiff was rendering in defendant's home, and are such as are incidental to that character of work, the pay for which plaintiff sues herein; but that clothing furnished by defendant are not incidental to such service."

This is the instruction of which appellant complains. It is unnecessary to state in full the grounds upon which it is here assailed. We think that the instruction should not have been given, for reasons to be presently noted and which are embraced within the objections urged thereto by appellant.

In support of the instruction, respondent relies upon what was said by this court in an opinion by Goode, J., in *Fitzpatrick v. Dooley*, 112 Mo. App. loc. cit. 176, 86 S. W. 719. There the court was dealing with a case involving a claim for services alleged to have been rendered by the plaintiff as a servant in the family of defendant. The judgment was reversed, for reasons which need not be here stated, and the cause remanded. At the close of the opinion the court said:

"One suggestion ought to be made. The respondent admits appellant furnished her with clothes and food after she reached her majority. Board is an ordinary incident of domestic service when a servant is paid wages, but clothes are not. If respondent is to recover wages for what she did when of full age, the value of the clothing she was supplied with by the appellant ought to be taken out in assessing her damages."

While the language quoted was quite appropriate in the connection in which it was used, it does not follow that it would be proper to incorporate it, or the precise idea conveyed, into an instruction to a jury in a case wherein the issues are such as they are here. In the first place, it will be observed that Judge Goode says that board is an ordinary incident of domestic service when a servant is paid wages. The crucial question of fact here involved was whether plaintiff was to be paid wages, or was to work for her support. And this instruction tells the jury broadly, and without qualification, that board and lodging furnished plaintiff were merely incidental to plaintiff's employment, though the defense was that plaintiff's agreed compensation was to be her support in defendant's home. In effect, the instruction tells the jury that board and lodging did not constitute compensation or part compensation for plaintiff's services, and refers to the fact that plaintiff is suing for her "pay" therefor. Where services of this character are rendered for wages to be paid, board and lodging are presumptively incidental thereto where the employé is in fact maintained in the home of the employer. But this is merely a disputable presumption of fact. It is not, in any event, a presumption authoritatively raised by the law, binding upon the court and the jury alike. It is the province of the jury, in a

proper case, to determine whether or not they will raise such a presumption. See *Ham v. Barret*, 28 Mo. 388; *Bluedorn v. Railroad*, 121 Mo. 258, 25 S. W. 948; *Linderman v. Carmin*, 255 Mo. 62, 164 S. W. 614; *Haycraft v. Grigsby*, 88 Mo. App. 354, and further authorities cited.

In the last-mentioned case (88 Mo. App. loc. cit. 362) it is said by Goode, J.:

"The doctrine of those cases is that a disputable presumption should not be mentioned in instructions to the jury when there is evidence tending to disprove it, and the rule is equally appropriate in controversies like this. The jury may be misled by such references."

But in the case before us there is no room for the raising of such a presumption unless wages were to be paid plaintiff. And whether or not there was an agreement to pay wages, as such, is the crux of the whole case. Learned counsel for respondent in his brief says that "to tell the jury what is incident to respondent's services, if she was to receive wages, did not put out of the case this defense" (i. e., the defense that plaintiff agreed to work for a home and support). But the instruction in question does not tell the jury this, but is a positive declaration that board and lodging are incidental to the work which plaintiff was performing. It would have been useless to tell the jury that if it was agreed that plaintiff would be paid wages, as plaintiff contends, then her board and lodging were incidental to the service, for the controversy related alone to plaintiff's right to receive wages.

The effect of the instruction was to tell the jury that plaintiff's board and lodging were not to be considered on the question of the compensation alleged to be due her. And this excluded from consideration, pro tanto at least, the only defense interposed. This, we think, was clearly error, and error going to the very vitals of the case.

[3, 4] The remaining question is whether the giving of this instruction constitutes prejudicial error necessitating a reversal of the judgment. Learned counsel for respondent contends that the error, if any, is cured by defendant's instructions, and that the instructions when considered as a whole fairly submit the issue in the case. But the doctrine invoked, which has been applied in numerous cases in this state, is here, we think, without application. The instructions, when considered together, we think, do not present a harmonious whole and constitute a proper charge to the jury covering the issue to be submitted. The instruction under review proceeds upon a theory radically wrong, in that it positively excludes proper matters of defense, and is essentially in conflict with proper instructions given for defendant. Under such circumstances, it is impossible to tell what the jury selected as a guide. Such an error is presumptively prejudicial, and we cannot here say that it did not directly contribute to produce a result prejudicial to ap-

pellant, to wit, the adverse verdict. We are therefore unable to say that it was harmless. See *Morton v. Heidorn*, 135 Mo. loc. cit. 617, 37 S. W. 504; *Mansur-Tebbetts Imp. Co. v. Ritchie*, 143 Mo. loc. cit. 618, 45 S. W. 634; *Ross v. Met. St. Ry. Co.*, 132 Mo. App. 472, 112 S. W. 9; *Mining Co. v. Fidelity & Casualty Co.*, 161 Mo. App. loc. cit. 208, 142 S. W. 438.

Nor, in this view, does section 2082, Rev. Stat. 1909, avail respondent anything; for the error must be regarded as one "affecting the merits of the action."

It follows that the judgment must be reversed, and the cause remanded, and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

JOHNSON v. J. I. CASE THRESHING MACH. CO. (No. 14024.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916.)

MASTER AND SERVANT §321—INDEPENDENT CONTRACTOR—DEFECTIVE APPLIANCES.

Where defendant engaged an engineer to take a threshing outfit consisting of an engine and separator over the highway during a dry season of the year, and the spark arrester on the engine had a very large hole in it through which sparks and burning embers freely passed and were scattered broadcast in such a manner that it had been known to set fire to the separator when 160 feet away, and a fire which originated from sparks which escaped from the engine destroyed certain ricks of hay belonging to the plaintiff, it was immaterial whether or not the engineer was in fact an independent contractor or the agent of the defendant, as the condition of the engine was such as to render its operation along the highway a great danger to the property of others, responsibility for which the defendant could not avoid by turning the engine over to an independent contractor; the rule being that where work is attended with danger to others, and mischievous consequences will result from the performance thereof, unless special precautionary measures are adopted, the duty rests upon the employer to see that such measures are duly employed, which duty he cannot shift to another and escape liability by having the latter perform the work as an independent contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1262; Dec. Dig. § 321.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by W. D. Johnson against the J. I. Case Threshing Machine Company. From a verdict for plaintiff, defendant appeals. Affirmed.

E. S. Gantt, of Mexico, Mo., for appellant. David H. Robertson, of Mexico, Mo., for respondent.

ALLEN, J. This is an action to recover the value of certain hay belonging to plaintiff alleged to have been destroyed by fire originating from a spark or sparks negligently allowed to escape from a traction engine of defendant which was being propelled

along a highway adjacent to plaintiff's farm in Audrain county, Mo. There was a verdict and judgment in plaintiff's favor for \$290, and the defendant prosecutes the appeal.

It appears that a certain traction engine and "separator" had been sold by the defendant to one Mitchell, but the latter defaulted in payments to be made by him to defendant therefor, and defendant, through an agent, took possession of the property which was then upon a farm about 3½ miles from the town of Molino, Mo., and caused the same to be brought to the latter place and sold under a chattel mortgage held by defendant thereon. At this sale defendant became the purchaser thereof, and thereupon caused the engine and separator to be moved to Mexico, Mo. The engine, propelled by its own power and drawing the separator, was moved along a public road adjoining plaintiff's farm upon a day, according to the evidence, when the weather was quite dry and when a very strong wind was blowing in the direction of plaintiff's meadow, which was covered with dry grass. A fire started in this meadow near the road shortly after the engine had passed, and the evidence tends to show that it originated from a spark or sparks thrown therefrom. The engineer in charge of the engine testified that fire was discovered in plaintiff's meadow by a man accompanying him, and that they stopped and, as they thought, extinguished the same. It appears, however, that the fire was not completely extinguished, and that it later burned across the meadow and reached and destroyed plaintiff's ricks of hay on the farther side thereof.

It is admitted, for the purposes of this appeal, that the fire was set out by a spark or sparks from the engine, and it is also conceded that the verdict is not excessive. The negligence charged in the petition is as follows:

"First, said engine was negligently constructed and defective as aforesaid, in that it did not have a spark arrester sufficient to prevent the escape of sparks; second, that it was negligence in the defendant to cause said engine to be moved through the country under the conditions aforesaid; third, it was negligence in the defendant to furnish the persons in charge of said engine with an implement from the construction of which necessarily fire was used in moving said engine and thresher along the public road; and, fourth, said engine was negligently handled, managed, and controlled by those in charge thereof and in the employment of the said defendant in moving said engine and thresher."

The answer is a general denial, coupled with a plea to the effect that defendant contracted with a competent engineer, one Williams, to take this property to Mexico and there load it upon cars for shipment; that in moving said "threshing outfit" Williams "was acting as an independent contractor without instructions or directions as to de-

tails of said work"; and that if plaintiff suffered any damages in the premises "it was from the acts of negligence of said Eugene Williams in the performance of his contract for the moving of said machinery, and not otherwise."

There are no assignments of error, as such, in appellant's brief. One point made by appellant is that the evidence conclusively showed that Williams, the engineer in charge of the engine, was an independent contractor, and that the court erred in refusing to direct a verdict for defendant on this ground. It is true that the testimony of Williams, called as a witness for plaintiff, tended to show an agreement between him and defendant's representative whereby he was to move the threshing outfit to Mexico and load it upon cars there, furnishing the necessary help, a team to draw the water tank, the fuel, oil, etc.; but we are not prepared to say that the evidence taken as a whole was conclusive as to the relation existing between Williams and defendant. In any event it is unnecessary to dwell upon the matter, in the view which we take of the case.

The evidence showed that the spark arrester upon this engine had a very large hole in it, through which sparks and burning embers freely passed and were emitted and scattered broadcast. It had been in this condition for many months, and was furnished to Williams in this condition to be driven across the country. The evidence shows that it was customary for sparks or burning embers to be thrown out by the engine both when operated to run a separator for threshing purposes and when driven along by its own power. More of these were emitted, it is said, when wood was used as fuel than when coal was burned, but in any event when the engine was "laboring" it appears that sparks and "fire" were cast out through the smokestack by the force of the "exhaust" in great quantity. The distance to which such burning particles would fly depended of course, to a considerable extent, upon wind and weather conditions. The former owner testified that the engine had thus set fire to the separator when the latter was 160 feet from it. At the precise time here in question coal, it is said, was being used as fuel, though pieces of wood had been picked up along the road from time to time and used to supplement the coal. And it seems that the fire originated near a hill, and, evidently, while the engine was laboring to ascend the same. The instrumentality therefore with which the alleged independent contractor was required to work was defective, and its condition such as to render its operation along a highway, where, as here, there was much inflammable matter near at hand, one attended with grave danger to the property of others, unless special precautionary measures were taken in the premises. In our opinion the facts of the case fall within the

rule that where the work is "attended with danger to others," and mischievous consequences will result from the performance thereof, unless special precautionary measures are adopted, a duty rests upon the employer, or proprietor, to see that such precautionary measures are duly employed, which duty he cannot shift to another and escape liability for its nonperformance by having the latter perform the work as an "independent contractor." And this rule we believe to be sound upon principle and supported by the great weight of authority.

It is frequently said that this exception to the rule of nonliability for the acts of an independent contractor obtains where the work let to the contractor is "necessarily," "inherently," or "intrinsically" dangerous. But what is meant appears to be well stated in 26 Cyc. p. 1559, as follows:

"Another exception to the general rule, closely related to the one just considered, is that where the work is dangerous of itself, or as often termed is 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do the work. Stated in another way, where injuries to third persons must be expected to arise, unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief. The injury need not be a necessary result of the work; but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken."

In *O'Hara v. Gaslight Co.*, 244 Mo. loc. cit. 409, 148 S. W. 884, it is said:

"The rule announced by 2 Thompson on Negligence, page 899, and approved by this court in *Loth v. Columbia Theater Co.*, 197 Mo. loc. cit. 354 [94 S. W. 847] is: 'The general rule is, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work.' Italics ours.

And see *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Salmon v. Kansas City*, 241 Mo. 14, 145 S. W. 16, 39 L. R. A. (N. S.) 328; *Carson v. Blodgett Const. Co.*, 189 Mo. App. 120, 174 S. W. 447; *Thomas v. Lumber Co.*, 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; *St. Louis, etc., Ry. Co. v. Madden*, 77 Kan. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788; *Railway Co. v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604; *Moll on Independent Contractors*, § 72 et seq.

In *Covington, etc., Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, a leading case, it is said:

"The weight of reason and authority is to the effect that, where a party is under a duty to the public, or a third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another (citing numerous authorities).

The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, C. J., in Bower v. Peate, supra, 1 Q. B. Div. 321.* It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

This is followed and applied in *Thomas v. Lumber Co., supra*, a well-considered case, in passing upon the question of the liability of a railroad company at common law, for damages caused by fire sent out by sparks emitted from a defectively equipped engine which was being operated at the time by an "independent contractor."

As may well be expected, the decisions are by no means uniform in applying this doctrine. Whether work of a given character is to be regarded as "necessarily," "inherently," or "intrinsically" dangerous, or its performance "attended with danger to others," within the meaning of such terms when used in this connection is often a matter as to which different opinions may be entertained. It has been repeatedly held that blasting in a public street or highway is work attended with such danger to others as to preclude one from shifting to an "independent contractor" the duty to guard against injuries to third persons. See *Carson v. Blodgett Const. Co., supra*, and authorities cited. It has been frequently held that the same measure of duty is imposed upon one who contracts for the setting out of fires on his own land, where the circumstances are such that the property of others is thereby endangered, though the cases are conflicting on the question of an employer's liability for the acts of an independent contractor in the use of fire in performing his contract. *St. Louis, etc., Ry. Co. v. Madden, supra*; *Moll on Independent Contractors, § 74*; *1 Thompson on Negligence, 656.* As to this Judge Thompson says:

"Upon the plainest considerations, this principle ought to be applied to the case where an independent contractor, acting within the terms of his contract, sets out a fire on the premises of the proprietor, where he is doing work under the contract, and the fire spreads to the land of an adjoining proprietor, doing damage there; for certainly it must be conceded that a fire, unless guarded, is likely to lead to mischief." *1 Thompson on Negligence, 656.*

In *Loth v. Columbia Theater Co., supra*, the defendant contracted for the alteration of a sign suspended above the street, necessitating the raising and lowering thereof, and the plaintiff, a pedestrian upon the street, was injured by the falling of the sign during the progress of the work. As to the liability of the defendant the court said:

"But the injury in the case at bar resulted directly from the acts called for and made necessary by the contract; that is, the changing

and replacing of the sign, and not from acts which were merely collateral to the contract, and if by the negligence and carelessness of the men handling the sign it fell upon and injured plaintiff, the company is liable as if it had directly performed such acts. *16 Am. & Eng. Ency. (2d. Ed.) 196."*

The facts of the case before us, we think, bring it within the scope of this doctrine. The undertaking to propel along a public highway this engine, which would inevitably throw out quantities of sparks and burning coals or embers to be caught by the wind and carried upon property near the highway, was a work attended with much danger to such property, particularly during a dry period of the autumn season. And there appears to be no dispute or conflict in the evidence relative to the danger attendant upon the work. One ought not to be allowed to turn over to a so-called independent contractor such an instrumentality to be driven along the public highway, scattering fire broadcast upon the property of others, with no steps or measures whatsoever taken to lessen the danger, and evade responsibility for the injurious consequences naturally resulting therefrom. A duty rested upon the defendant, we think, to at least see that such precautions were taken as, in reason, would be expected to prevent the happening of such a casualty as occasioned plaintiff's loss, which duty defendant could not shift or evade. If there be room for a difference of opinion as to a proprietor's liability for acts of an independent contractor who, in the performance of his contract, sets out fires on the premises of the proprietor, when the property of others is thereby endangered, we think that such is not the case where, as here, the owner must know that the performance of the work contracted to be done will in all human probability, if not inevitably, cause fire to be directly cast upon the premises of another. Live sparks would inevitably be hurled out from this engine in propelling it along a highway, and in the ordinary course of things great numbers thereof would fly beyond the limits of the highway and upon the property of others. Upon the occasion in question the danger was enhanced by reason of the fact that it was during a dry period and a strong wind was blowing. It is said that Williams was not confined to a precise time for moving the "outfit," but that this was left somewhat to his discretion. But, for one thing, it appears that dry and solid roads were necessary for the work, and clearly it was not contemplated that it would be done, if possible, when conditions were least favorable for setting out fire. And under the circumstances we consider defendant liable for the act of Williams in driving the engine when a strong wind was blowing, and the country thereabout very dry, as well as for his failure to take other precautions in the premises.

We are of the opinion, therefore, that the evidence was ample to warrant the verdict and judgment against defendant corporation irrespective of whether Williams is to be regarded as its servant or an independent contractor. The principle involved is that in such cases a primary duty rests upon the proprietor, which is personal to him, to see that suitable precautionary measures are taken to prevent injury and loss to others, which he cannot in any manner evade. If he contract with an independent contractor to perform the work, without more, he is liable for the failure of such contractor to take appropriate precautions in the premises, for it is his personal duty to see that such precautions are taken. In the instant case, though it be conceded that Williams was not defendant's servant, but was acting in the capacity of an independent contractor, nevertheless defendant is liable for his neglect to take steps to guard against injuries of the character here in question. It must be conceded that defendant made no attempt to discharge the said primary duty resting upon it; and the jury, upon abundant evidence, have found that Williams, on his part, neglected and failed to discharge such duty. For this neglect and failure the defendant must be held liable.

Complaint lodged against an instruction for plaintiff on the question of the burden of proof on the issue as to whether Williams was an independent contractor or defendant's servant becomes inconsequential because of our views expressed above, and the matter need not be discussed.

We think that the judgment ought to be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

DUBRAY et al. v. CHICAGO & A. RY. CO.
(No. 14096.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1916. Rehearing Denied Feb. 24, 1916.)

1. RAILROADS \S 443—KILLING ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE.

In an action against a railroad company for the killing of animals struck by a train, evidence held to show prima facie the negligence of the company in the performance of the statutory duty to maintain fences and cattle guards.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1608-1620; Dec. Dig. \S 443.]

2. RAILROADS \S 411—KILLING OF ANIMALS—REMEDIES.

The remedies prescribed by Rev. St. 1909, \S 8145, 8146, 5428, against railroad companies killing animals on the track, are, so far as they relate to compensatory damages, not exclusive, but cumulative only.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1409-1450; Dec. Dig. \S 411.]

3. RAILROADS \S 411 — FENCING TRACKS — CARE REQUIRED.

A railroad company, inclosing its right of way within the limits of an incorporated mu-

nicipality, though not required to do so by statute, must exercise due care with respect to maintaining the inclosure; and where defects in the inclosure were either known to the company, or had existed for such time as to impute to it knowledge thereof, a finding of negligence was authorized.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1409-1450; Dec. Dig. \S 411.]

4. RAILROADS \S 443—KILLING ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE.

In an action against a railroad company for killing animals struck by a train, evidence held not to justify a finding of negligence of the engineer in failing to take steps to avoid the accident after knowledge of the presence of the animals on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1608-1620; Dec. Dig. \S 443.]

5. EVIDENCE \S 207 — ADMISSIONS — STATEMENT BY ATTORNEY.

It is not error to exclude, when offered by defendant, the opening statement of plaintiff's counsel on a former trial of the case; the statement purporting to show what plaintiff's counsel then expected to prove.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 707-712; Dec. Dig. \S 207.]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by S. P. Dubray and another against the Chicago & Alton Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Scarritt, Scarritt, Jones & Miller, of Kansas City, and A. O. Whitson, of Mexico, Mo., for appellant. E. S. Gantt, of Mexico, Mo., and Kennen & Kennen, of Laddonia, for respondents.

ALLEN, J. This is an action to recover damages for the killing of certain mules, and injury to other mules, belonging to plaintiffs, alleged to have been caused by defendant's negligence. There was a verdict and judgment for plaintiffs below, and the defendant prosecutes the appeal.

On or about January 25, 1912, plaintiffs, having 23 mules on a farm a few miles from the town of Laddonia, Mo., undertook to drive them to Laddonia and deliver them there to certain persons who had agreed to purchase them. The mules were not led or controlled by halters or fastenings of any sort, but in a herd were driven along and guarded by men on horseback. In this manner they were conducted along a public road, known as the Martinsburg and Laddonia road, which enters Laddonia from the north and becomes a street (Pine street) of the town. Laddonia is an incorporated municipality, and defendant's railroad, it is said, extends about "northeast and southwest" through it, though it is generally referred to in the testimony as running east and west. Pine street extends north and south, intersecting the railroad about 200 feet west of defendant's station, which is on the north side of the railroad tracks. Main street is

immediately south of the tracks and parallel therewith. The greater portion of the town lies east of Pine street, but the corporate limits extend perhaps a quarter of a mile west thereof, including much property which is vacant though platted. Within the corporate limits, and a short distance west of Pine street, the defendant had constructed a cattle guard, and from this point on to the west defendant's right of way was inclosed by fences; that is to say the "side" fences began at this point, and a "wing" fence extended from this cattle guard to each of these side fences. Plaintiffs' evidence is that, at the time with which we are here concerned, there were gaps in defendant's fences—the side and wing fences mentioned—and an opening between the cattle guard and one wing fence, and that the cattle guard itself was somewhat out of repair, and that these conditions had existed for a considerable period of time.

Plaintiffs' mules were driven south on the Martinsburg and Laddonia road, or Pine street within the corporate limits, until within about two blocks of the railroad tracks, when they were halted, and one of the plaintiffs, S. P. Dubray, rode forward to look out for trains. A freight train of the defendant company had stopped and was standing at the east end of the "passing track," perhaps half a mile east of the station, headed west. After perceiving that no other train was in sight, Dubray returned to the mules and they were driven south on Pine street, and across the railroad at the Pine street crossing, and were turned east into Main street. They were to be delivered at certain stock pens situated farther east on Main street, and were being driven toward this place, when some of them took fright at the freight train mentioned above, which in the meantime had proceeded on its way and was approaching and about to pass the station. As the engine of this train drew near, the mules "turned back"—i. e., turned about and went west on Main street. Those in charge of them were unable to restrain them, and as a result they became separated or "scattered," and went off in various directions. Some of them crossed the railroad at the Pine street crossing—i. e., about 200 feet west of the station—and these, or some of them, together with others, it seems, that did not cross the railroad tracks, went west along defendant's right of way, and entered the inclosed right of way, above mentioned, which began at the cattle guard referred to. It appears that the engine drawing the freight train was then passing or about to pass the station. It was then approximately 6:30 p. m. on January 25th, and was "cloudy," and it is admitted that it was dark.

This freight train did not stop at the station. It had been stopped at the east end of the passing track, it is said, for the reason that it was expected to "take siding" in order

to allow an east-bound passenger train to pass. It appears, however, that the station agent received an order directing that the freight train proceed on to a station farther west and there meet the passenger train, and that the agent, by means of a lantern, signaled the train crew to proceed, and "passed up" the order to the conductor, who was on the engine, as the train passed the station platform. Defendant's witnesses said that the speed of the train, when the engine passed the station, was about 6 to 8 miles per hour, though there was testimony for plaintiffs that its speed was 3 or 4 miles per hour. It was increasing in speed all the time, and the engineer testified that he had on a "full head of steam" as it passed the station. The train overtook plaintiffs' mules that entered the inclosed right of way, and struck some of them. Two were killed outright, two others were so badly injured that they had to be killed, and still others were in some manner and to some extent injured. It did not appear that any one saw the train strike any of the mules. The engineer testified that he did not see any mules; that about half a mile west of Laddonia he found that his engine was slipping, whereupon he stopped to investigate, and found a mule's head beneath the "pilot," and that it was in this way that he learned that a mule had been struck and killed. The bodies of the two dead mules, or portions thereof, and the badly injured mules, were found the following morning along defendant's right of way at distances ranging from about a quarter of a mile to perhaps a mile from the station.

The petition charges negligence on the part of defendant in failing to maintain its fences and cattle guard aforesaid, intended to inclose the portion of its right of way in question, in reasonably good condition, so that the same would be reasonably sufficient to prevent animals of this character from entering upon said inclosed right of way, and that defendant's agents and servants in charge of its freight train aforesaid knew "that said mules were upon said right of way and track ahead of said engine, and that they were in a position of peril, and likely to be struck, frightened, run, and injured by said engine and train of cars," or by the exercise of ordinary care on their part could have discovered the same, "in time to have stopped said engine and train of cars before frightening, overtaking, and striking any of said mules, or in time to have given warning of the approach of said engine by sounding the whistle and ringing the bell on said engine," but that defendant's said agents and servants did "negligently frighten and run said mules, and run said engine and train of cars upon said mules," without warning of any sort.

Upon the theory that plaintiffs had improperly joined two causes of action in one count, defendant filed a motion praying that plaintiffs be required to elect upon which of

said causes of action they would proceed to trial. This motion was overruled. This action of the court, however, is not before us for review. The answer, so far as it need be noticed, is a general denial, coupled with a plea of contributory negligence on the part of plaintiffs in failing to have the mules haltered or tied together, and in failing to have sufficient men to care for them, while driving them through the public streets.

[1] A careful examination of all of the evidence contained in the record before us has convinced us that plaintiffs made out a prima facie case. The action is not one for double damages under section 3145, Revised Statutes 1909; nor can we say that it necessarily invokes any of the statutory remedies. See sections 3145, 3146 and 5428, Rev. Stat. 1909. It is suggested in respondent's brief that actual negligence on defendant's part need not be shown, as though the remedy afforded by section 5428, *supra*, were invoked. However, respondent asserts that in any event liability, prima facie, was shown as for negligence of defendant in the performance of the statutory duty to erect and maintain fences and cattle guards. This appears to be the theory upon which the petition proceeds, in so far as it counts upon the failure of defendant to use ordinary care to maintain its side and wing fences and its cattle guards in reasonably good condition and sufficient for the purposes for which they were intended. And we regard the evidence as sufficient to support an action based on this ground.

[2] It is well settled that the statutory remedies, so far as they relate to compensatory damages, are not exclusive, but cumulative. *Hill v. Railroad*, 49 Mo. App. 520; *Id.*, 121 Mo. 477, 26 S. W. 576; *Oyler v. Railroad*, 113 Mo. App. 375, 88 S. W. 162; *McCaskey v. Railroad*, 174 Mo. App. 724, 161 S. W. 277.

[3] It may be conceded, we think, that defendant was not required by statute to fence so much of its right of way as lay within the corporate limits of Laddonia, without affecting plaintiffs' right to recover. As to the exemptions from the statutory requirements in general, see *Acord v. Railroad*, 113 Mo. App. 84, 87 S. W. 537, where the question is elaborately discussed by Norton, J. But defendant did inclose by fences its right of way in the western part of the town, beginning at the point where the cattle guard was maintained. Granting that it was not required by statute to do so, but might have performed its statutory duty by beginning such inclosure at the western line of the corporate limits, it does not follow that defendant is relieved from all duty to exercise care with respect to maintaining its fences and cattle guard. There was a short street or lane immediately north of defendant's right of way, and parallel with it, which extended west from Pine street. And

the evidence tends to show that this lane and the right of way, west of Pine street, were so far hemmed in as to form a sort of cul de sac into which plaintiffs' mules fled, and that in going west they could readily enter the inclosed portion of the right of way because of defendant's neglect to properly maintain its fences and cattle guards.

The facts in evidence justified a finding that plaintiffs' mules thus came within this inclosure. And having entered the same, with defendant's train following them, they were in a trap as it were, with a fence on either side of the track and cattle guards at crossings. If in the performance of the statutory duty imposed upon it, defendant saw fit to extend the inclosed portion of its right of way within the corporate limits, it became its duty, under the circumstances, to exercise due care with respect to maintaining such inclosure. Plaintiffs' evidence tended to show that the conditions complained of and relied upon in this connection were either known to defendant or had existed for such length of time as to impute to defendant knowledge thereof, and was sufficient, we think, to warrant a finding that defendant's negligence in this respect proximately resulted in loss and damage to plaintiffs.

It is not urged that plaintiffs were guilty of contributory negligence as a matter of law in failing to have the mules haltered or tied together, and the question need not be discussed. And for the reasons indicated above we are of the opinion that the trial court committed no error in overruling the demurrer to the evidence.

[4] But the case was submitted to the jury upon the theory, also, that defendant's engineer knew that the mules were upon the track and right of way, and in a position of peril, in time to avoid injuring them by the exercise of ordinary care to that end. In submitting this as a predicate of liability, the court, at the request of plaintiffs, gave the following instruction:

"The court instructs the jury that although you may believe from the evidence that the defendant used ordinary care to maintain the side fences, wing fences, and cattle guard, mentioned in the testimony at the time and before plaintiffs' mules, if any, passed over and through said fences and cattle guard, and although you may believe from the evidence that the side fences, wing fences, and cattle guard mentioned in the testimony were in good order and condition as the said mules, if any, passed over and through said fences and cattle guard, yet, if you further believe from the evidence that the engineer in charge of the engine and train of cars mentioned in the testimony knew that said mules, or any of them, were upon the railroad track and right of way of the defendant in front of and ahead of said engine and train of cars, and that said mules were in a position of peril and likely to be struck, frightened, run, and injured by said engine and train of cars in time to have stopped said engine before frightening, running, and striking said mules, or any of them, and therefore could have averted injury to said mules, or some of them, by stopping said engine and train of cars within time and space in which

it was reasonably possible to stop the train with safety to the train and those on the train, and neglected to do so, then plaintiffs are entitled to recover for the injury to their mules which could have been prevented by stopping the train."

It was error, we think, to give this instruction, for the reason that the evidence did not support it. We are unable to find any substantial evidence in the record to sustain a recovery on the theory thus pursued. It will be observed that the instruction proceeds solely upon the theory that the engineer in charge of the engine and train *knew* that the mules, or some of them, were on defendant's right of way and track in front of the engine, and "in a position of peril and likely to be struck, frightened, run, and injured" by the engine and train, in time to avoid injuring them. Touching this matter the only positive testimony in the record is that of the engineer himself, who testified that he did not see any of the mules, and knew nothing of the matter until he felt his engine slipping when about a mile west of Laddonla. A witness for plaintiff, who was upon the station platform, testified that he "hollered" to the engineer as the engine passed the platform, shouting to him that the track ahead was "full of mules." But he says that the engineer gave no indication that he heard, and the engineer says that he did not hear any one call to him. This witness says that while upon the station platform he saw some of the mules pass over the railroad tracks at the Pine street crossing, which was about 200 feet distant, though he did not see them enter the inclosed right of way.

Respondent urges that the fact that this witness was able to see these mules pass over the Pine street crossing shows that the engineer must have seen them likewise. It would not follow that the engineer actually saw

these mules pass over the crossing; nor are we prepared to say that he could be convicted of negligence in not seeing them. It was dark; and the engine was equipped with an oil headlight, which, it is said, cast light only about 25 feet ahead of the engine. But the mules that went over the Pine street crossing, going north, when the engine was approximately at the station, were not in a position of peril when they crossed the tracks, and did not become in a perilous situation until after they had fled west and entered the inclosed right of way. And it is clear that there is no evidence tending, directly or inferentially, to show that the engineer knew that any of plaintiffs' mules were in this inclosed right of way, and "in a position of peril and likely to be struck, frightened, run, and injured by said engine and train of cars," in time to take steps to avoid injuring them. Manifestly it was reversible error to give this instruction which, without evidence to support it, authorized a recovery for the said alleged negligence of the engineer alone, though the defendant were not found to have been otherwise negligent.

[5] Questions raised as to other instructions given for plaintiff may be readily eliminated on another trial, and need not be discussed. Nor do we regard it necessary to refer to other assignments of error further than to say that we think that the court did not err in excluding, when offered by defendant, the opening statement of plaintiffs' counsel on a former trial of the cause, which purported to show what plaintiffs' counsel then expected to prove.

The judgment is reversed, and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

CREWS v. GULF GROCERY CO. et al.
(No. 2437.)

(Supreme Court of Texas. Feb. 23, 1916.)

1. CORPORATIONS §410—OFFICERS—AUTHORITY.

Where one of the principal purposes of the president and general manager of a wholesale grocery company in purchasing a retail stock of groceries at wholesale prices was the collection of a debt due from the seller, the purchase was within his authority, though he may also have intended to use the stock in opening a retail business by the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1629-1632; Dec. Dig. §410.]

2. ESTOPPEL §110—EQUITABLE ESTOPPEL—PLEADING.

In an action by the seller of a stock of groceries for damages for breach of the contract, estoppel of plaintiff to claim damages by his conduct in mortgaging the stock and accepting proceeds of sale thereof by a receiver as exempt is not available as a defense, when it has not been pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. §110.]

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by L. A. Crews against the Gulf Grocery Company and others. From a judgment of the Court of Civil Appeals, reported in 146 S. W. 654, reversing a judgment for plaintiff, he brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the district court affirmed.

Dougherty & Gordon and John M. Conley, all of Beaumont, and Ramsey, Black & Ramsey, of Austin, for plaintiff in error. Joe Williams, of Port Arthur, and Greer & Nall and T. H. Bowers, all of Beaumont, for defendants in error.

YANTIS, J. The plaintiff in error, L. A. Crews, was engaged in the retail grocery business in the town of Port Arthur, Tex., at the time the alleged cause of action sued upon arose. The Gulf Grocery Company, defendant in error, was a corporation, and was engaged in the wholesale grocery business in said town. Crews, as plaintiff in the district court, filed suit against the Gulf Grocery Company for damages for the alleged breach of a contract of purchase by the Gulf Grocery Company of Crews' stock of groceries and store fixtures. The trial was by jury, and the case was submitted to the jury on a general charge. The judgment was in favor of the plaintiff, Crews. The Gulf Grocery Company appealed to the honorable Court of Civil Appeals for the First District. In that court the judgment was reversed and rendered in favor of the Gulf Grocery Company; said court holding that the special charge requested by the Gulf Grocery Company was a peremptory charge and that, where no facts had been given, the reason for the reversal was that the undisputed

evidence showed that W. N. Holmes, the president and general manager of the Gulf Grocery Company, was without authority to make the contract of purchase, with the purpose in view for it to engage in the retail grocery business. A writ of error was granted by this court on the petition of Crews.

For a statement of the issues we extract from the opinion of the honorable Court of Appeals the following:

"Plaintiff in his amended and supplemental petitions, upon which the case was tried, alleged in substance that the defendant, on or about January 29, 1910, acting by and through W. N. Holmes, its president and general manager and duly authorized agent, entered into a verbal contract with appellee by the terms of which the defendant corporation contracted and agreed to purchase from plaintiff a stock of groceries in the town of Port Arthur, Tex., owned by the plaintiff, together with the store fixtures owned and used by plaintiff in the grocery business he was then conducting in said town, and to reimburse plaintiff for moneys expended by him in launching the said business by advertising the same at Port Arthur, Tex., contracting and agreeing with this plaintiff by parol to pay him the sum of dollar for dollar in cash for said stock of groceries and fixtures and agreeing to take charge of said stock of groceries and fixtures on the 1st day of February, 1910, and to take possession thereof and reimburse the plaintiff in full for all expenses incurred by him in launching said business by way of advertising the same in the city of Port Arthur, Tex., and paying him therefor in cash according to the inventoried cost price to plaintiff on the 1st day of February, 1910, and in consideration of the premises plaintiff agreed and contracted with the defendant, by parol, to sell and deliver said groceries and fixtures incident to said business, agreeing to deliver possession thereof to the defendant corporation on the 1st day of February, 1910, and according to the terms of the parol agreement with the defendant as aforesaid, and to receive on said date the contract price therefor in cash as above mentioned. The inventory value of said stock of groceries is alleged to be the sum of \$3,690.49; the cost price of the fixtures, \$3,753.25; and the amount expended by plaintiff in advertising his business prior to the execution of said contract of sale, the sum of \$500—the aggregate of said amount being the sum of \$7,943.74.

"Plaintiff further alleged that in compliance with his part of the agreement he tendered said stock of groceries and fixtures to defendant on the 1st day of February, 1910, but the defendant refused to accept them. Plaintiff further alleged that on the 1st day of February, when he tendered said stock of groceries and fixtures to the defendant, it requested plaintiff to hold the property and continue the operation of the business as the property of the defendant until March 10, 1910. Plaintiff further alleged that on the 14th day of May, 1910, he filed his first amended original petition, alleging insolvency on the part of the defendant Gulf Grocery Company, and praying for the appointment of a receiver for said company, and, in lieu of a notice to show cause why a receiver should not be appointed, defendant, in order to indemnify plaintiff for any judgment that he might recover against it, agreed to and did execute a bond payable to plaintiff, contingent upon the recovery of a judgment against the defendant, in which the sureties on said bond agreed to make themselves parties defendant to the said suit, and agreed that any judgment rendered against the defendant might also be rendered against them in said suit; said sureties being

the defendants W. N. Holmes and R. H. Woodworth.

"The defendant filed its amended answer, on which it went to trial on January 16, 1911, and in addition to exceptions, answered by general denial, and specially denied that it made the contract to purchase from plaintiff, or that it agreed to take over plaintiff's business; that it was contemplating going into the retail grocery business and the same was discussed at its stockholders' meeting, and by resolution of its stockholders the directors of the company were authorized to enter into negotiations or to make such arrangements as to them might seem proper, and to determine whether or not the defendant should or should not enter into the retail grocery business in Port Arthur; that defendant's directors declined to go into the retail grocery business, or to purchase plaintiff's stock of goods; that if defendant's agent, W. N. Holmes, did make the agreement with plaintiff, as alleged by him, then he was without authority to bind defendant, if ever he had agreed so to do, as such authority is lodged in defendant's board of directors by its by-laws, and is not delegated to its president, which fact was well known to plaintiff, and he was advised at all times that W. N. Holmes did not have such authority. Defendant further alleged that plaintiff was indebted to it in the sum of \$1,889.86, with 6 per cent. interest thereon from January 1, 1910, for goods, wares, and merchandise sold; that a receiver had been appointed for plaintiff's stock of goods, and under order of the court had sold same and paid the proceeds to plaintiff's creditors, and defendant had received from said receiver a 20 per cent. dividend out of said proceeds, amounting to \$377.96.

"On January 16, 1911, plaintiff filed his second supplemental petition, and alleged that W. N. Holmes was, at the time of the making of the contract sued on by plaintiff, president and general manager for the Gulf Grocery Company, and as such had express authority under the by-laws of the Gulf Grocery Company in force at that time to make and enter into the contract sued on by plaintiff. Plaintiff also alleged that the said W. N. Holmes had authority to make said contract, because the same was within the charter powers of said Gulf Grocery Company. Plaintiff further alleged that, at the time said contract was entered into between plaintiff and defendant, plaintiff was indebted to the defendant Gulf Grocery Company in a large sum of money, to wit, about \$2,000; that it was contemplated by the parties to said contract, as one of the inducements thereto, and one of the moving considerations on the part of the defendant, that the debt of the Gulf Grocery Company should be deducted from the purchase price of the properties; and that the contract was in fact made by the defendant company, induced by the consideration that by making said contract it would in fact protect and collect its debt due it by plaintiff on open account for goods, wares, and merchandise; and by reason of these facts the said Holmes, as president and general manager of said corporation, had authority to make the contract sued on by the plaintiff as a matter of law. Plaintiff also alleged that the defendant company was bound by said contract for the additional reason that said association is a trading corporation under the law and is bound by the rules of law governing trading corporations, and the defendant company, being a trading corporation and acting by and through its president and general manager, was liable for the contract made by him as a matter of law.

"On the 16th day of January, 1911, defendant filed its first supplemental answer, and, besides exceptions to plaintiff's second supplemental petition, urged a general denial."

The plaintiff in error, Crews, further alleged that when the alleged contract of sale was made, January 29, 1910, he had a solvent, prosperous business, which was daily increasing, and that the defendant in error, the Gulf Grocery Company, on said date in fact took possession of his said business under said contract, by causing the preparation and mailing of a certain letter to each of his creditors, in which the said Gulf Grocery Company, in substance, advised each of his creditors to send in a statement of their accounts against L. A. Crews, and that it was *very important* that they should do so; that immediately thereafter his creditors sent in statements of their accounts, which he was unable to pay at that time, but that it was understood in said contract of sale that the said Gulf Grocery Company would pay said accounts and deduct them from the price of said stock of goods and groceries; that before said letter was written by the Gulf Grocery Company to his creditors they were not pressing him for the payment of his debts, but after said letter had been received by them they immediately began to press him vigorously for the payment of their claims; that this condition of affairs caused his financial ruin; that on the said 1st day of February, 1910, when he tendered the said stock of groceries and fixtures to the Gulf Grocery Company, it requested him to hold the property and continue the operation of the business, and to hold the property as the property of the said Gulf Grocery Company until the 10th day of March, 1910, or until the return of John W. Gates, a director in the defendant company; that on said last date the Gulf Grocery Company applied for and secured the appointment of a receiver for his said business.

The contention is made by the Gulf Grocery Company that the undisputed evidence showed that when Holmes, as general manager of the Gulf Grocery Company, proposed to Crews to purchase his stock of groceries and fixtures, he (Holmes) had the purpose in view for the Gulf Grocery Company to enter the retail grocery business, and to use said stock of groceries therein; that, though it had been proposed by the stockholders of the Gulf Grocery Company to its directors for it to enter the retail grocery business, it had not been decided by the board of directors so to do. It was on this theory that the defendant in error requested a peremptory charge at the trial in its favor. It was this contention which was sustained by the Honorable Court of Civil Appeals, when it reversed and rendered this cause in favor of the defendant in error.

[1] If to enter the retail grocery business were the only purpose entertained by Holmes when he made the proposition to purchase Crews' stock of groceries, a serious question, and one not free from difficulty, would

be presented. But the evidence shows that one of the controlling purposes of Holmes was to collect from Crews, on behalf of the Gulf Grocery Company, a large debt, in the neighborhood of \$2,000, which the evidence indicates might and probably would have been lost unless collected in this way. There is no dispute about this. It was stated by Holmes, at the time the proposition to purchase was made, that in paying Crews the Gulf Grocery Company would expect to deduct the amount which Crews owed it from the consideration agreed upon. At the trial Holmes himself testified that to collect this debt was one of his main reasons for proposing to purchase the stock of groceries, fixtures, etc. He testified on this point as follows:

"At the time of this transaction Mr. Crews owed the Gulf Grocery Company about \$1,900. Of course, when discussing this deal, that was one of our objects—in particular, to take out the \$1,900 owed us. We figured, among other things, that we would collect the debt to the Gulf Grocery Company; that was the only way we could get any money out of it."

Crews testified on that point as follows:

"Well, they were heavy creditors of mine. I owed them more money than I did any one else, which I thought then was one of the main reasons for wanting to buy me out."

He further testified:

"The main consideration or point made was that the Gulf Grocery Company should get their money, and get it first."

We think this evidence presents a very different question from the one contended for by the Gulf Grocery Company, which was to the effect that Holmes was acting beyond the scope of his powers as president and general manager of the Gulf Grocery Company to enter the retail grocery business. This was stated by Holmes, it is true, at the time of the proposed purchase, to be one of his purposes. If this proposition contended for by the defendant in error were admitted to be sound, still there would be present the other question; that is, whether Holmes was acting beyond the scope of his powers as president and general manager of the business of the Gulf Grocery Company to purchase Crews' stock of groceries, fixtures, etc., in order to collect a large debt which the Gulf Grocery Company would otherwise probably lose. We think this question is the controlling one. A part of the safe management of the business of the Gulf Grocery Company was the collection of its debts. The duty to collect its debts was clearly within the scope of Holmes' powers as president and general manager. Without this authority, to continue the business of the Gulf Grocery Company as a going concern would be impossible. If this authority were denied to him, the Gulf Grocery Company would soon be forced into liquidation; for if Holmes, its president and general manager, were authorized to sell goods, and prohibited from collecting the debts created by such sales, bankruptcy would be inevitable.

That he had the power to collect debts due the Gulf Grocery Company is not even debatable. He could not be a general manager without having this authority. It is necessarily implied as one of the duties of the president and general manager. Of course, as general manager he could have in his employ men to do the collecting for the Gulf Grocery Company; but they must necessarily act under his direction and control, and probably be subject to discharge by him if they failed to obey his instructions, and to comply with his demands about making collections. Though he had others employed to do the collecting, he would still have the general control and supervision of the collections. So to admit that he was general manager concedes that he had the power to collect the debts due to the Gulf Grocery Company.

Now, having this authority, it follows, we think, that he would be acting within the scope of his powers as general manager when, in order to collect a debt for it, he should purchase property from one of its debtors and deduct the debt due to it from the agreed consideration. Thompson on Corporations (2d Ed.) §§ 1465, 1491, 1575, 1576; Panhandle National Bank v. Emery, 78 Tex. 498, 15 S. W. 23; Farmers' National Bank v. Templeton (Civ. App.) 40 S. W. 412; Booker-Jones Oil Company v. National Refining Company, 132 S. W. 816; Thompson v. Mills, 45 Tex. Civ. App. 642, 101 S. W. 561; Hamm v. Drew, 83 Tex. 77, 18 S. W. 434. This is especially true when the property purchased, as in this instance, is of a kind and character which could be used in the main line of business of the Gulf Grocery Company. It was engaged in the wholesale grocery business, and the stock of goods which its manager was agreeing to purchase could be placed with its stock of groceries and disposed of by it in its regular line of wholesale business; and as Holmes was buying the stock of groceries at wholesale prices, it would suffer no loss by purchasing the groceries and reselling them for its wholesale business, and it would at the same time save the large debt due it by Crews, which Holmes testified was one of the main purposes he had in view. It was not necessary for the Gulf Grocery Company to enter the retail business in order to dispose of the goods which it was purchasing from Crews. This we think states a case where it is evident that Holmes, as president and general manager, was acting within the scope of his powers in making the contract to purchase Crews' stock of groceries. The fact that one of his purposes was to enter the retail grocery business, if not itself within the scope of his powers so to do, would not nullify his contract, when one of the main purposes for making it was within the scope of his powers. Having authority to purchase the stock of groceries in order thereby to collect a large debt, the mere fact that another rea-

son which prompted him to make the purchase might be beyond his powers as a general agent would not render illegal the contract. If, for any reason growing out of the facts, Holmes had authority to make the contract and bind the Gulf Grocery Company, this would be sufficient to defeat the defendant in error's contention that Holmes acted without authority in making the contract. We therefore are of the opinion that the honorable Court of Civil Appeals erred in holding that the peremptory charge requested by the defendant in error should have been given.

[2] Several special charges were requested by the defendant in error, presenting in different forms that the plaintiff in error, Crews, was estopped to demand recovery for breach of the contract by his own conduct in relation to the stock of groceries and fixtures after the contract was repudiated by the Gulf Grocery Company. These charges were based upon evidence that Crews mortgaged the fixtures or groceries in favor of one of his creditors, and that after the receiver sold the property he received and accepted from the court several hundred dollars as the proceeds of the sale of the fixtures as being exempt from forced sale. There was no plea of estoppel made by the defendant in error, and no pleading by it which alleged any of said facts from which an estoppel could be deduced. The defense, therefore, should not have been submitted, and the special charges referred to were properly refused. A remittitur was filed below, covering the amount of money which was paid Crews by the receivership suit. But, had this not been done, the rule would be the same as applied to the refusal of said special charges.

We have examined all of the assignments presented by the defendant in error, and hold them to be without merit.

For the error indicated in the holding of the Court of Civil Appeals, its judgment is reversed, and the judgment of the district court is in all things affirmed.

ATKISON v. STATE. (No. 3922.)

(Court of Criminal Appeals of Texas. Jan. 26, 1916. On Motion for Rehearing, Feb. 16, 1916.)

1. WITNESSES \S 244—EXAMINATION—LEADING QUESTIONS.

It is not error to allow the state to lead an unwilling witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 848; Dec. Dig. \S 244.]

2. HOMICIDE \S 191—EVIDENCE—ADMISSIBILITY.

Where accused was not present and the occurrence was not communicated to him before he killed deceased, a witness cannot give his impression that deceased intended to kill accused when he armed himself shortly before the final affray; it appearing that deceased before

he was killed permitted himself to be disarmed by his friends.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 414; Dec. Dig. \S 191.]

3. HOMICIDE \S 340—APPEAL—DETERMINATION.

Where accused was only convicted of manslaughter, the propriety of a charge on murder, which issue was raised by the evidence, need not be determined.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. \S 340.]

4. HOMICIDE \S 112 — SELF-DEFENSE — RIGHT TO.

Where accused by his unlawful and wrongful acts sought out deceased for the purpose of provoking a difficulty for the unlawful purpose of committing an assault and battery upon deceased, and he used language with the intent of producing an occasion to bring on a difficulty, provoking deceased into attacking him with a knife, self-defense is not available, and the killing will be manslaughter, though, if deceased without provocation attacked accused, accused might stand his ground, and, if necessary, kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. \S 112.]

5. HOMICIDE \S 340—APPEAL—HARMLESS ERROR.

Where accused was convicted only of manslaughter, the refusal of charges directing that under given circumstances accused could not be convicted of murder as well as charges submitting more than one theory of manslaughter was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. \S 340.]

6. CRIMINAL LAW \S 829—TRIAL—INSTRUCTIONS.

Where the court gave an adequate instruction on self-defense the refusal of requested charges on that issue is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. \S 829.]

On Motion for Rehearing.

7. HOMICIDE \S 300—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, evidence held to raise the issue as to whether accused provoked the difficulty so that a charge on self-defense properly submitted the question whether accused provoked the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

Appeal from District Court, McCulloch County; Jno. W. Goodwin, Judge.

Geary Atkison was convicted of manslaughter, and he appeals. Affirmed.

Woodward & Baker, of Coleman, and Joe Adkins, of Brady, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of manslaughter, and his punishment assessed at five years in the penitentiary.

The state's evidence was amply sufficient to show that just about or before night appellant, with some companions, was in a drug store in the town of Stacy preparing to take a drink of "coke." Deceased, Eli Brown, who was on a visit to his sister,

who ran a hotel and restaurant, went from the restaurant into the back of the drug store to get a bucket of water. In doing so he passed appellant, who hailed him, and he responded. Upon getting the bucket of water, deceased was returning to the restaurant therewith, and, when passing, or just after passing, appellant about the door, appellant used most vile, indecent, and insulting language towards Brown. Brown resented it then but friends interfered, and no encounter was then had. Brown, smarting under the insult, immediately went across the street to his sister's, got a double-barrel shotgun, went across to the Stacy store, where he procured shells, and loaded the gun. The Stacy store was a block or less distant from the drug store. Brown's sister, brother-in-law, and other friends, hearing of the difficulty, and anticipating that he might kill appellant with the shotgun, induced him to give it up or took it away from him. His brother-in-law unbreeched the gun, took out the cartridges, and placed the gun under the counter in the store. Brown did not thereafter have the gun in his hands at all or attempt to get it. He remained in the store. Appellant, with the knowledge that Brown was in the store and had taken the gun therein, went from the drug store to the Stacy store. In going he drew his pocketknife before reaching the Stacy store, and kept it open in his hand until he reached the store. This knife was shown to have had a blade a quarter of an inch wide and $3\frac{1}{8}$ inches long, the entire knife 6 inches long. It had a guard where the blade fitted into the handle, so that it was, or had the appearance of, a dirk or dagger.

The testimony of some witnesses was to the effect that, when appellant reached the Stacy store at this time, he renewed the insults to Brown. His friends again interfered, and two of them took him away to avoid a further difficulty or to prevent a killing. They carried him some distance from the Stacy store, tried in various ways to get him not to return to the store, but he persisted to such an extent that they turned him loose and desisted from any further efforts to keep him away from the Stacy store, where Brown remained. Upon his return to the store the second time he again had his said knife open ready for use. The testimony of some witnesses clearly shows that appellant again renewed his insults to Brown, some of the witnesses making him the aggressor in then also assaulting Brown. They thereupon clinched. Appellant cut deceased's cheek open with his knife, cut him in the back of the left shoulder, stabbed him between the first and second ribs into the region of the heart, the doctor thinking it severed the aorta, from which wounds Brown expired in a very short time, without speaking. Some of the witnesses made Brown the aggressor at the immediate time they clinched and began fighting. It was

also a disputed question whether Brown had a knife in his hand and assaulted appellant therewith, some of the witnesses testifying he did have and assaulted appellant therewith; others to the effect that he did not have. Appellant claimed that deceased in this fight slightly cut him in places. The state's theory and claim was that these wounds were self-inflicted.

We have not attempted to give in detail the testimony, nor all of the disputed issues. We have merely given an outline so that the case may be understood in a general way.

[1] The appellant has some bills to some claimed leading questions propounded by the state's attorneys to the witness W. C. Graham. The court qualified them by showing that the witness was decidedly adverse to the state, and for that reason he permitted said leading questions. These bills, as qualified, show no error. *Carter v. State*, 59 Tex. Cr. R. 75, 127 S. W. 215. A great many other cases in point could be cited, but it is unnecessary.

[2] As explained and qualified by the court, no error was committed by the judge in refusing to permit defendant to ask the witness Frank Smith and have him answer the impression that was made upon his mind by the deceased at the time he saw deceased with said gun, which was at the time he was going with it from his sister's to the Stacy store, the court's qualification showing that appellant was not present, what occurred between Smith and deceased was not communicated to him, and that his impression of what he thought Brown's then intention was was inadmissible, the witness being permitted to testify all that was said and done between them at the time. Neither does another bill, wherein he sought to have the witness Jess Stacy testify that he Stacy believed that the deceased intended to go and shoot the defendant when he came into the store with the gun, as qualified by the court, show any error.

[3] The court gave a most admirable and apt charge submitting every issue properly which was raised by the testimony and necessary to be submitted to the jury. The charge seems to have been prepared with a great deal of care and with a clear conception of the issues in the case. The court correctly and fully charged on murder. The evidence clearly and forcibly presented this issue. But, as the jury found the appellant guilty of manslaughter only, there is no necessity of giving or discussing the charge on that issue. The court then correctly and fully charged the jury on self-defense in a most favorable and complete way in appellant's behalf and in every way which was raised by the evidence. Appellant's testimony, with other testimony, raised the issue of self-defense. The court then charged on every phase of provoking the difficulty by appellant, and in each instance properly

charged the converse of each issue on this subject raised by the testimony. Unquestionably provoking the difficulty by appellant in every way submitted by the charge was raised by the testimony.

[4] The charge submitted the question of manslaughter under our manslaughter statute on that phase of the testimony and the well-established law by the many decisions of this court as follows:

"You are further instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant by his own willful and wrongful acts, if any, went to where the deceased Eli Brown was killed, for the unlawful and willful purpose of provoking a difficulty with him, with the unlawful and willful purpose and intention to commit an assault and battery upon Eli Brown, and you further believe from the evidence beyond a reasonable doubt that the defendant did some act or used language or did both, with the unlawful and willful intention of producing an occasion to bring on a difficulty and to commit an assault and battery upon deceased, Eli Brown, and that such acts or language or both of the defendant, if any, such there were, were reasonably calculated under the circumstances at the time to provoke a difficulty with the deceased, and that such acts or language or both, if any such there was, of defendant caused the deceased to attack the defendant with a knife, and that the defendant cut or stabbed Eli Brown with a knife, and thereby killed him in order to save his own life, then if you so find, you are instructed that the defendant's plea of self-defense will not avail him, and the homicide would be manslaughter, and, if you so find from the evidence beyond a reasonable doubt, you will find the defendant guilty of manslaughter, and assess the penalty as prescribed in this charge."

In the next paragraph the court submitted the converse of the proposition, and told them, if that state of fact was true, appellant's right of self-defense was not forfeited, and he could stand his ground and defend himself by the use of such means as the facts and circumstances indicated to him to be necessary to protect himself from danger, or what reasonably appeared to him at the time to be danger. The charge of the court on this subject has many times been expressly approved by this court. *Woodward v. State*, 54 Tex. Cr. R. 88, 111 S. W. 941; *Prescott v. State*, 54 Tex. Cr. R. 485, 113 S. W. 530; *Matthews v. State*, 42 Tex. Cr. R. 31, 58 S. W. 86; *Tardy v. State*, 47 Tex. Cr. R. 444, 83 S. W. 1128; *Gray v. State*, 61 Tex. Cr. R. 454, 135 S. W. 1179; and a large number of other cases collated by Mr. Branch in section 464 of his Criminal Law.

[5] Appellant objected to the court's charge, because it did not also submit a charge on manslaughter on the theory that deceased's attack of him with a knife produced that degree of passion sufficient to render him incapable of cool reflection. But he asked no special charge submitting manslaughter under any such a theory. By his charge No. 1, which quoted, in substance, articles 1128, 1129, subds. 1 and 3, and article 1130, he told the jury that, if they believed from the evidence that just prior to and at the time of the killing of Brown he had been informed that

Brown had gone after his gun for the purpose of killing him, and that at such time such acts and statements were of a nature to produce in his mind such passion, anger, rage, resentment, or terror as to render his mind incapable of cool reflection, and, while his mind was in such condition they believed he was not acting in his self-defense, he stabbed or cut Brown, and thereby killed him, he would not be guilty of any higher offense than manslaughter, and, "if you so believe, or have a reasonable doubt thereof, it will be your duty to acquit defendant of the grade of murder." This special charge, as seen, is not a charge submitting the question of manslaughter on the theory appellant claims it should have been, but was a specific charge telling the jury, under the circumstances stated, they must not convict him of murder. In our opinion, as he was acquitted of murder and only convicted of manslaughter, the refusal of the court to give this charge does not present reversible error, and, further, as he was convicted of manslaughter only, the fact that the charge of the court submitted that question under one theory alone also does not present reversible error. If the jury had found the appellant guilty of murder, then a different question would be presented. It might be that, if the jury had convicted him of murder, it would have been reversible error to have refused his said special charge No. 1. As he was acquitted of murder, and this charge was on that subject, murder passes out of the case, and so does said charge so far as presenting any error is concerned.

[6] As the court submitted appellant's claimed self-defense in a full and complete charge properly as presented by the testimony, the court did not err in refusing appellant's said charges Nos. 3, 4, and 5 on that subject. Neither did the court err in refusing his special charge No. 9 about his right to arm himself with a pistol, etc., as the evidence did not properly raise the necessity of any such charge.

After a careful consideration of the record in this case, the forcible brief filed by appellant's able attorneys, and the oral argument of this case, we think no reversible error is shown, and that the judgment should be affirmed, which is accordingly ordered.

DAVIDSON, J., absent.

On Motion for Rehearing.

PRENDERGAST, P. J. Appellant urges some of the same propositions which he urged when the cause was submitted and decided. We will discuss the one we think is necessary.

His first contention is that this court erred in holding that the lower court was justified in charging on provoking the difficulty, asserting:

"We earnestly submit to the court that there is not one line of testimony in this record from

the caption of the statement of facts to the certificate of the court approving same that authorized the court to charge the jury on the law of provoking the difficulty."

Surely appellant's attorneys have forgotten the record, or they could make no such assertion.

[7] The statement of facts contains some 85 typewritten pages, and shows that some 27 witnesses testified. In the original opinion we gave a correct general statement amply established by the evidence, but did not quote the testimony of the respective witnesses. Of course, we cannot now undertake to quote all of the witnesses nor all of the testimony. We will give some of it on this issue of provoking the difficulty. In addition to what we give, there is testimony by other of the witnesses substantially to the same effect. The record teems with testimony raising the issue, and in fact showing that appellant provoked the difficulty. And the jury were clearly authorized therefrom to believe, as they did, that appellant provoked the difficulty for no other purpose than that of either killing deceased or doing him serious bodily injury.

There was but one difficulty between the parties. Several minutes elapsed between the beginning of it to the time that appellant killed the deceased. There is no particle of testimony in this record which shows, or tends to show, that appellant had the slightest cause from deceased to grossly insult him as he did and continue his gross insults and abuse of him from the time he first began it until after he had stabbed him to the heart and killed him.

All of the witnesses—and there were several of them, including appellant himself—who saw and heard the beginning of the difficulty at Bowen's drug store clearly and without doubt establish this state of fact there: The deceased, Eli Brown, walked into said drug store from his sister's restaurant across the street to get a bucket of water at a hydrant at the back end of the drug store. In going, he passed appellant and some of his friends. He neither said nor did anything whatever to appellant. Appellant hailed him: "Hello, Brown." Brown responded: "Hello." After getting his bucket of water, he passed back the same way that he had entered, and, when he got to the door, appellant said to him, so he himself swore: "Don't you want to shoot some craps, Eli?" Eli Brown, deceased, responded: "No; I don't do that." Appellant then said: "Suck your a—— then." Deceased responded: "Don't you get too smart." Appellant then said to him: "That's what I said, you son of a bitch." What we have just given is from the sworn testimony of appellant himself in his direct examination. Mr. W. C. Graham, who was present in the drug store at this time, swore that appellant then, in addition, said: "Go to hell, and go on there with your slop"—as Brown started off with his bucket

of water. Graham further swore that appellant further said to Brown something like, "Kiss my a——." Hubb Jones, one of appellant's witnesses, who was present and saw and heard what occurred in the drug store, swore that appellant also said to Brown there: "Brown, if you don't like that, suck my a——, you son of a bitch." Other witnesses who were present testified substantially to the same thing. It is unnecessary to quote them. All of them also show that then Brown at this time set his bucket of water down and started to resent appellant's most insulting, indecent, and provoking language to him. Tom Menge, who was then present, swore: "Brown was turning facing him [appellant] with a bucket of water, and Geary [appellant] drew his knife and says: 'G—— d——n you; don't come on me. G—— d——n you; I'll kill you.' At the time the defendant drew his knife Brown was standing in the door or inside the door somewhere about the door. Brown was turned facing him, when he [appellant] called him [Brown] a son of a b——h." Appellant himself in cross-examination swore that he himself then got out his knife. He said: "I went down there after mine. And I got it out and opened it, and I said: 'That was just what I said, you son of a b——h.'" All the other witnesses, and appellant himself, further swore that his friends then got in between them, and they all, in effect, swore that no one at the time held Brown, but that two or three of them at the time held appellant and kept him from then assaulting and killing Brown with his knife. The evidence, as stated in the original opinion, without any dispute, showed the character of this knife then drawn by appellant, and with which he soon afterwards killed Brown. It was a most deadly weapon, in effect, it was a dirk or dagger, with a guard between the handle and the blade, the blade being 3½ inches long.

All the testimony without dispute shows that deceased went directly from the drug store to his sister's, Mrs. Jarrett's, a short distance only, at once procured a double-barrel shotgun, went immediately therewith to the Stacy store, procured shells, and loaded the gun. His sister, Mrs. Jarrett, and her husband and other friends, having heard of the difficulty at the drug store, immediately went to deceased in the Stacy store and induced him to surrender the gun, which he did, and the shells were then taken out by Mr. Jarrett, his brother-in-law, and the gun placed under the counter. Deceased at no time thereafter had the gun in his hands or attempted to procure it, but remained in the Stacy store. His sister and others were attempting to get him to go back to her residence, or hotel. Before he could do so, appellant went from the drug store to Stacy's store.

Aaron Bowen, who was present at the drug store and saw and heard what then occurred,

swore that, after Brown left the drug store, appellant remained there just a little bit. He further swore: "I saw him when he left the drug store. He stated to me where he was going. He said Brown was over there with a gun, and he was going over there. He went out at the front door." This witness further swore that he heard appellant down there at the store cursing, and that he then went down there. Mrs. Burrows, the postmistress, swore that in order to reach Stacy's from the drug store appellant had to pass the post office, the post office and Stacy's joining; that, when appellant thus approached Stacy's store, "he was just saying, 'The G——d——n son of a b——h,'" to Brown; that Mr. Bowen tried to get him to go away. "I told him he would have to get away from the front of the office to swear; that I would make it cost him something if he didn't." The witness Arch Johnson swore that at this time "the defendant came up with a knife in his hand and was walking towards the crowd where Brown was," and he (the witness) caught with both his hands appellant's arm in which he had the knife, "and held him until Aaron Bowen walked up, and then we both turned and led him in behind some stores there," and that appellant, when they first started away with him said: "You think I want to go, don't you? I am not afraid of him or all the shotguns he can get." On cross-examination Johnson further testified that at this time Brown was right near the door of Stacy's store, "and the defendant was right on the gallery with his open knife, and I took hold of him; he had his knife in his right hand;" that Brown said nothing to him at the time; that he and Aaron Bowen both took hold of him at that time. "I pulled him. He pulled back once." Mr. Graham further swore that, when appellant came to the store the first time, he came from out of the crowd somewhere, "and he came rushing up to the store and says: 'Let me get to him.'" Mr. B. K. Bowen swore that, when these parties took hold of him to take him away when he first went to the Stacy store, "he seemed to be pulling back"; "I heard him say that with an oath, 'The G——d——n peaked-faced son of a b——h said he was going to shoot me, and he must shoot me';" that he kept repeating this; that the parties who had hold of him were insisting that he come on and not have any trouble, and he would reply: "He said he was going to shoot me, and he must shoot me." The testimony of these two witnesses and several others also is to the effect that Johnson and Aaron Bowen then took him away from the Stacy store and did all they could to persuade him not to return to the Stacy store, where Brown was. Appellant himself swore that they took him 34 steps from Stacy's store and tried to keep him from going back there. Aaron Bowen swore: "He said he wanted to go back over there; that Brown wanted to run him out of town, and then I told him to

go ahead. He said he wanted to go back over there; that Brown was over there with a gun; that Brown wanted to run him out of town, and I told him to go ahead." That appellant then went back to the Stacy store, and he (the witness) went back to the drug store. Mell Pearce testified: "Just before the fight occurred I heard the defendant make a statement that he was laying for Brown; that he was after Brown." Again he heard him say he was laying for Brown, or was after Brown. "Brown's the man I am after."

All the witnesses, and appellant himself, said that it was upon his return to the Stacy store that the fight occurred in which appellant stabbed and killed the deceased. Mr. Graham swore that, when appellant came back the second time to Stacy's store, "and defendant came and cornered Brown and called him a G——d——n son of a b——h, and that was what I said awhile ago, and he came back cussin'. He just came up through the crowd there and called him a son of a b——h. He called Mr. Brown a son of a b——h. I think that was the second time he came back and called him a son of a b——h. He came up there twice cursing." Mrs. Burrows testified that, when appellant returned to the Stacy store the second time, "Mr. Atkison [appellant] ran into the store, and as he went in he said just the same thing, the same oath, that he had been saying. He just ran past Mrs. Jarrett and grabbed Mr. Brown by the collar." What he had been saying, as shown by a previous quotation of her testimony, was calling Brown a G——d——n son of a b——h. Mr. W. B. Arthur swore that, when appellant returned this second time, deceased said to him, "'You have abused me without any cause,' and he says, 'I think you ought to take it back,' and Atkison refused to take it back. He says, 'I won't take anything back, you peaked-faced son of a b——h;' and, when he said that, Brown jumped and struck at him; and, when he did that, I pushed Brown back with that arm and shoved Atkison back with that one, and they came around me, and Brown came around the other way, and they went to knocking." Mr. B. K. Bowen swore: "The deceased said, 'You called me a son of a b——h, didn't you?' Geary said, 'No.' Brown said, 'You called me a son of a bitch,' the second time. And then he [appellant] said, 'Yes; you are a G——d——n peaked-faced son of a b——h;' and then they clinched there." Jess Stacy swore that, when deceased took hold of appellant, "he said, 'You called me a son of a b——h,' and he [appellant] said, 'Yes; I did, you G——d——n son of a b——h or bastard.' I heard him say that. He didn't say a word about willing to take it back or anything or willing to apologize, but did say he was a son of a b——h bastard." Appellant himself on cross-examination swore: "The first I knew Brown had me in the collar, and

he said, 'You called me a son of a b—h,' and grabbed me in the collar, and I stated, 'Yes; that he was a G—d—n son of a b—h.' O. B. Jarrett swore that, when appellant started in the house just before the fight, "I heard him say, 'The d—n son of a b—h.'"

All the testimony then shows that deceased and appellant went to fighting. They clinched. Appellant was cutting and stabbing deceased with that most dangerous knife, or dagger, and plunged it into deceased's heart, or the aorta thereof, and that, when deceased then got away from him, he ran, and the appellant ran after him. Deceased fell in the dark, and almost immediately thereafter expired. In running after him the appellant stumbled; and, as deceased was in the dark and he could not see him, he immediately returned to the Stacy store, got up on the gallery, and even then Mrs. Jarrett swore he said: "Go, you son of a b—h." Tom Menge swore that, when appellant got back up on the gallery of the Stacy store immediately after he had stabbed and run deceased, "I heard the defendant say that he was going to kill every G—d—n Jarrett in that town that night." Mr. B. K. Bowen swore that appellant then said: "The Jarretts are G—d—n m—r f—g s—s of b—hes, every one of them." Mrs. Fannie Johnson, who was 350 or 400 yards away, said she heard him then talking and cursing loud, and "I heard him call the Jarretts' name and say they were G—d—n s—s of b—hes, and everybody that was kin to them, and everybody that was friends of them."

There can be no shadow of doubt but that provoking the difficulty by appellant was in the case from start to finish, and it was the duty of the court to charge on provoking the difficulty. The state has just as much right to have every issue raised by the evidence in its favor charged upon as the accused has. As stated in the original opinion, the court correctly charged on this question, and also in appellant's favor charged the converse.

We have carefully reconsidered the other grounds of appellant's motion for a rehearing. There is no necessity of restating or discussing them, as they were all properly decided in the original opinion. Nothing new is urged as to these grounds in the motion for a rehearing. The motion is overruled.

TOWNSER v. STATE. (No. 3939.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

1. FORGERY — 29 — INDICTMENT — ALLEGATIONS — CREATING PECUNIARY OBLIGATION.

An indictment for forgery of an order to deliver goods and charge them to the purported maker, need not allege that the order, if genu-

ine, could have created any pecuniary obligation.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. 29.]

2. FORGERY — 29 — INDICTMENT — ORDER FOR GOODS.

The indictment for forgery of an order to a salesman in a store to deliver goods need not allege that he himself had goods for sale, or was empowered to furnish them.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. 29.]

3. FORGERY — 12 — ORDER FOR GOODS — NECESSITY OF ACCEPTANCE.

To constitute forgery of an order to deliver goods, the party to whom it is directed need not accept or comply with it, or be able to do so.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28-47; Dec. Dig. 12.]

4. FORGERY — 29 — INDICTMENT — ORDER FOR GOODS.

The indictment for forgery of an order on a company for goods need not allege whether it was a firm or a corporation; its name not being alleged to have been forged.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. 29.]

5. INFANTS — 16 — JUVENILE OFFENDERS — PROSECUTION — GIRLS.

Nothing in the juvenile and delinquent child acts authorizes or requires the dismissal of an indictment against a girl, and the trial of her as a delinquent child or juvenile, such acts applying only to boys.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. 16.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Hattie Townser was convicted, and appeals. Affirmed.

J. W. Baker, of Nacogdoches, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of forgery, and assessed the lowest punishment.

The indictment, after the preliminary necessary allegations, alleged that appellant on or about April 29, 1915, in said county—

"did then and there, without lawful authority, and with intent to injure and defraud, willfully and fraudulently make a certain false instrument in writing, purporting to be the act of another, to wit, purporting to be the act of Eliza Matthews, which said false instrument is to the tenor as follows: 'Mr. Fout let this girl have 4 yards of Pink Sateen and 2½ yard of Pink Valing her name is Veola Rhodes. Charge it to Eliza Matthews.' On the back of said instrument were the following words: 'Tim Rhodes Da' In the above instrument the words 'Mr. Fout' were intended to mean, and did mean, W. C. Fouts, who is a salesman at the store of Tucker-Hayter & Company, Nacogdoches, Texas. In the above set forth instrument the name 'Eliza Matthews' was intended for, and did mean, Eliza Matthews."

This indictment is in strict accordance with the form therefor laid down by Judge White in his Ann. C. C. P. § 882, and also with Judge Willson's form in his Criminal Forms (4th Ed.) No. 410, p. 215, and is clearly sufficient.

[1] Appellant attacks by a motion in arrest

of judgment said indictment on several grounds; one, because it did not allege that said instrument would have created, diminished, discharged, or defeated any pecuniary obligation or in any way affected any property belonging to the purported maker, Eliza Matthews, if same had been true. In this character of instrument, such allegation is unnecessary and has been held to be so by many decisions of this court. *Davis v. State*, 70 Tex. Cr. R. 253, 156 S. W. 1171, and authorities therein cited; *Horton v. State*, 32 Tex. 80; *Labbaite v. State*, 6 Tex. App. 257; *Morris v. State*, 17 Tex. App. 660; *Dooley v. State*, 21 Tex. App. 549, 2 S. W. 884; articles 454 and 807, C. C. P.

[2, 3] The instrument clearly, on its face, was neither vague nor uncertain, and especially when taken in connection with the explanatory averments, and showed clearly that the order to furnish the goods called for was to Mr. W. C. Fouts, a salesman at the store of Tucker-Hayter & Co., which was all that was necessary in that regard; nor was it necessary for the indictment to allege that said Fouts himself had goods for sale or that he was empowered to furnish said goods from the stock of Tucker-Hayter & Co. *Keeler v. State*, 15 Tex. App. 111; *Spicer v. State*, 52 Tex. Cr. R. 177, 105 S. W. 813; *Hendricks v. State*, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *Rubio v. State*, 50 Tex. Cr. R. 177, 95 S. W. 120. In order to constitute forgery of an instrument such as in this instance, it is not necessary that the party to whom the order is directed shall accept it or comply with it or be able to do so. To constitute forgery it is not necessary that it be successful to the extent of having procured the goods thereby ordered. *Reese-man v. State*, 59 Tex. Cr. R. 434, 128 S. W. 1126; *Rubio v. State*, supra.

[4] Neither was it necessary for the indictment to allege whether Tucker-Hayter & Co. was a firm, partnership, or corporation. It was not their names which were alleged to be forged. *Lamb-Campbell v. State*, 72 Tex. Cr. R. 628, 162 S. W. 879; *Lucas v. State*, 39 Tex. Cr. R. 48, 44 S. W. 825; *Webb v. State*, 39 Tex. Cr. R. 534, 47 S. W. 356; *Usher v. State*, 47 Tex. Cr. R. 93, 81 S. W. 309; *Reese-man v. State*, supra. As stated above, the said indictment with the explanatory averments made is clearly sufficient under the statute and the authorities.

[5] Before the trial began, appellant's grandmother made for her, and she filed, an affidavit alleging that she was a female under 18 years of age, to wit, that she was a female 14 years of age, and she sought to have the court dismiss the case against her and sought to be tried as a juvenile only. The court, on the motion of the state, struck

out said affidavit and refused to consider it on two grounds: One, that this was not a proceeding in a juvenile court against a delinquent child, but a regular proceeding under an indictment for a felony; and the other, because the law makes no provision for such indictment being dismissed in the case of a female; that that law only applied to male defendants.

We have had under careful consideration the said juvenile and delinquent child acts of the Legislature in the recent cases of *McCallen v. State*, 174 S. W. 611, and *Bartee v. State*, 174 S. W. 1061, and we therein fully discussed the said laws and the effect thereof. We there held that, even in a prosecution of a male under 17 years of age for a felony, the said laws did not make it compulsory for the district judge to dismiss such felony charge and have the party proceeded against under the juvenile act, but that the court had the power and authority in such case of felony to proceed to the trial regularly as if the party was an adult male; and that in misdemeanor cases the court had the same power and authority, but that, in such misdemeanor case, it was necessary to at first enter an order to the effect that the party should be prosecuted as an ordinary criminal, and not a juvenile. We think it wholly unnecessary to discuss these questions again. We have no doubt that we reached the correct conclusion in those cases.

We know of no law authorizing or requiring that a female under 18 years of age and above 13 years of age cannot be prosecuted for any felony, or that the district judge is either authorized or required to dismiss a felony indictment against a female and have her tried as a delinquent child or as a juvenile can be when a male under 17 years of age. We know of no law which has provided a place of imprisonment other than the penitentiary for females who are prosecuted under the age of 18 years like the Gatesville institution has been provided for males under 17 years of age. The necessity for such a law has never arisen so far as we know. At least, there is no such law.

The evidence was clearly sufficient to authorize the verdict. The testimony of the appellant herself would have been sufficient for this. Appellant's special peremptory charge to acquit was properly refused by the trial judge; and so was his charge No. 2, even if the record should show that either was presented in such a way and in such a time as to require this court to consider them.

The judgment is affirmed.

DAVIDSON, J., not present at consultation.

MARSHALL v. STATE. (No. 3759.)

(Court of Criminal Appeals of Texas. Nov. 10, 1915. On Motion for Rehearing, Jan. 12, 1916. On Motion for Further Rehearing, Feb. 16, 1916.)

CRIMINAL LAW. ⚡1171—APPEAL—HARMLESS ERROR.

In a prosecution for homicide where it appeared that accused in attempting to arrest deceased on a misdemeanor charge shot him, although he did not even know deceased, a dying declaration made by deceased was excluded on objection by accused. In argument the prosecuting attorney referred to the dying declaration and stated that the reason it was not in evidence was because it had been objected to. *Held* that, though the prosecuting attorney referred feelingly to the evidentiary value of the dying declaration, yet as the jury were present and knew that it was excluded on accused's objection the reference thereto in the argument was harmless, if erroneous, particularly in view of the fact that only 15 years' imprisonment was passed as punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. ⚡1171.]

Harper, J., dissenting.

Appeal from District Court, Milam County; J. C. Scott, Judge.

E. V. Marshall was convicted of murder, and he appeals. *Affirmed*.

J. W. Garner, of Rockdale, and Henderson, Kidd & Gillis, of Cameron, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 15 years' confinement in the penitentiary.

It is made to appear by the record that the deceased, Marvin Williams, and his wife had parted, and his wife had returned to her mother's home; that deceased was living with Earl Cook. On Friday before the homicide on Monday, deceased went to the home of his mother-in-law, and there conducted himself improperly, firing off a pistol and doing other unbecoming acts. The matter was reported to the justice of the peace, and a complaint sworn out, charging deceased with carrying a pistol. The justice issued a warrant and delivered it to the constable of the precinct, Mr. J. D. Hamilton. On Monday, when Hamilton decided to go after deceased and arrest him on the warrant, he went to the place of business of appellant and requested him to go with him. Appellant got in the buggy with Hamilton and they started, appellant being unarmed. They stopped at a drug store, and there the city marshal, John Bonds, gave appellant a pistol. When the constable and appellant arrived at Earl Cook's they ascertained the deceased was at the home of Mr. Will Cook. They went to Will Cook's, and the constable arrested deceased. After the arrest, the evidence conflicts as to what occurred, but all agree that deceased fled, and the con-

stable and appellant pursued him. Several shots were fired, as the officers say, to frighten deceased. None of them struck deceased except one, and as to the conditions under which this shot was fired the evidence is in conflict. The state relied on the statements of deceased, admitted as dying declarations, and according to this statement appellant and deceased outran the constable; that when appellant was near to and close to deceased he stopped to reload his pistol, and said to deceased, "If you don't stop, I will kill you," and he (deceased) replied, "That is the only way you will get me," when appellant shot him.

The defendant's contention is that the first shots were fired to frighten deceased and cause him to stop; that appellant overtook him, when deceased turned and began to fight appellant; that appellant struck at him with the pistol, when it fired, and the fatal wound was inflicted. The evidence shows deceased was a strong, able-bodied man, weighing about 185 pounds, while appellant would weigh not exceeding 150 pounds.

Will Cook was permitted to testify that after deceased was carried to his home Dr. Kilpatrick was called, appellant having gone with Earl Cook after him, and the doctor told deceased, "If he had any business to attend to or wanted to see any one, he had better attend to it or see them." Shortly after the doctor departed deceased said to witness, "Uncle Will, the doctor is just like I have been; I knew I was going to die and I want to tell you how it was done;" and then the witness was permitted to detail, over the objection of appellant, what deceased said about how the fatal shooting occurred. This occurred in the afternoon, and George Middleton was permitted to testify what deceased said to him about 7 o'clock on the evening he was shot, over appellant's objection. Middleton said he remarked to deceased, "Well, you will be sitting up in two or three days," and deceased said, "No, I am bleeding inside; I will never sit up;" and then Middleton was permitted to testify as to what deceased said about the difficulty. The testimony of both these witnesses was objected to on the ground that no sufficient predicate had been laid to admit the statements as dying declarations. We have carefully reviewed the authorities cited by appellant, and we cannot say the court erred in admitting this testimony, although it would have been better for the state to have affirmatively shown that deceased was sane and in his right mind. This it seems to us, from reading the record, appears, as there is no evidence that the doctor administered to him any medicine that would and could affect his mind, nor was the wound such a one as would affect him mentally. On another trial though, if the same objection is made to the testimony, it would be better for the

state to show by positive and affirmative testimony that deceased was conscious of approaching death and had no hope of recovery; that the declarations were voluntarily made; that same were not made in answer to interrogatories calculated to elicit a particular statement; and that deceased was in his right mind and sane at the time he made the declarations to these two witnesses. This becomes important in this case inasmuch as deceased was carried from Rockdale to Cameron the next day and there made a written statement to the sheriff, which was excluded by the court on the testimony of Dr. Best, whose testimony was such that it led the court to think that deceased at that time had not given up all hope of recovery, but instead seemed to have a hope of recovery if given proper treatment.

We have said this much in view of another trial, and this brings us to the question which we think requires a reversal of the case. Appellant's counsel, in presenting the case to the jury, argued that but little weight should be given to the alleged dying declarations of deceased as testified to by Cook and Middleton; that when he made such statements he was angry, as men would be under such circumstances, and he (counsel) did not think from the testimony that deceased had given up all hope of recovery, and the statement was not made under the conditions and circumstances which showed that deceased was conscious of approaching death, and with the seriousness which should attend such statements. We think these comments were legitimate and proper, and one counsel was authorized to make in the light of the fact that statements made by the deceased the day after the above statements were made were excluded by the court on the ground that deceased had not at that time given up all hope of recovery. Such comments went to the weight the jury would give to such statements, and was not a criticism of the court in admitting the statement in evidence, which he did admit. The theory of the defense was based on the testimony of Hamilton and appellant, and presented a wholly different state of facts, and it was proper and legitimate for counsel to argue that this evidence was entitled to greater weight and was more reasonable and consistent with all the evidence. And in reply to this it was proper for the state's counsel to insist that the statement was made under a sense of impending death, and therefore great weight should be given to it by the jury, and more than should be given to the testimony of Hamilton and appellant, who would naturally be interested in the verdict to be returned. But state's counsel did not stop there. In the bill of exceptions presented by counsel for appellant to the court, it is alleged that the following language was used by counsel for the state in his closing address:

"The state endeavored to furnish you, gentlemen of the jury, with the dying declaration of the deceased, and if his dying statement made in yonder jail to Ben Nabours, the deputy sheriff, at a time when deceased was in a dying condition and his life blood was flowing in chambers where it was not accustomed to flow, after Dr. Best, his physician, had told him that he was standing in the portals of death and was soon to face his Maker and render an account in the courts of heaven of the acts of his life—a solemn statement made in writing by the hands of the deputy sheriff, who had him in custody and at a time when the animosities and prejudices of life had all vanished from his mind and his eyes were lifted upwards to that scene where truth alone is spoken, it is because you [referring to and pointing to defendant's attorney] would not let it come. We offered to prove this solemn dying declaration of this man made under these circumstances, and it would be before you now, but for the objections of the defendant's attorneys."

The statement made by deceased to Mr. Nabours had been excluded by the court, on the ground that it was not shown to be a dying declaration. The court refused to approve the above bill, and appellant undertook to prove it up as a bystander's bill, and it is sworn to by Messrs. J. W. Garner, W. G. Gillis, and T. S. Henderson. All these gentlemen were attorneys for appellant on the trial of the case, and we hardly think they are "bystanders" within the meaning of the statute. Of course, we appreciate that when bills are refused after court has adjourned, it is difficult to prove them up by others than the attorneys at so late a time, but if the stenographer's act has brought about a new condition of affairs, rendering a change in the law governing these matters necessary, this should be presented to the Legislature. The courts cannot amend the statute. However, when the court refused the above bill, the court prepared one of his own, and filed it, and in it is shown:

"After the testimony had been closed, the jury charged, and the case was being argued to the jury, defendant's counsel in course of his argument attacked the sufficiency and weight of the testimony of the witnesses Cook and Middleton as to the deceased's alleged dying declaration, and argued to the jury that these witnesses were more or less interested, that Cook was a kinsman and was prejudiced against the defendant, and that the testimony of these two witnesses was fragmentary in character, and it necessarily did not show that the deceased had made the statements under a consciousness of impending death, and with the seriousness which should attend such statement; that they were made in the course of conversation with his relatives and friends, and under circumstances which show that his mind was inflamed by passion against defendant, and that he was giving vent to his feelings rather than making a deliberate statement of the particulars, and that the state had not offered the testimony of the witness Dr. Kilpatrick to show that deceased was in such condition as to make his statement a dying declaration, and that under these circumstances the jury could not give to the declarations as testified to by these witnesses that high degree of credit to which dying declarations are entitled.

"Thereafter the district attorney, in his closing argument to the jury, called attention to the objection of defendant's attorney to the dying declaration of deceased as testified to by Cook

and Middleton, and in a burst of passion and eloquence said: "They tell you that these are not dying declarations, but at no time did the deceased alter or in any manner change the declarations and statements made by him to Cook and Middleton immediately after the shooting. He did not make any contrary statements to J. D. Hamilton, who brought him from Rockdale to Cameron on the train. He did not make any contrary statements to Ben Nabours at the jail. For if he had done so, it could have been proven by Ben Nabours at a time when deceased was practically dying and when the death gurgles were in his throat, and about an hour prior to his death; and if the deceased made any such contrary statement different from what he made to Cook and Middleton, then the reason it is not here is because you [pointing to defendant's attorney] have objected to it."

"While the district attorney was making this statement, counsel for the defendant was endeavoring to have him stopped, calling upon him to stop, and appealing to the judge, who for the moment was not upon the bench, but was standing near by, with his hand on the bench, and before he could resume the bench the above statement had been made in full to the jury. The judge having not understood the language, counsel for the defendant stated to him what the district attorney had said, and stated that he had objected to the remarks, and sought to stop them, because the statements therein made were not in evidence, and had been excluded from the consideration of the jury, and were highly prejudicial to the defendant, and calculated to inflame the minds of the jury against him, and asked the court to admonish and instruct the jury not to consider the statements, and to reprimand the district attorney for his gross violation of his privilege and require him to withdraw his said remarks, so that the jury might understand that the statements were improper, and that they could not consider them for any purpose, and that the district attorney was subject to reprimand for having made them. The judge merely remarked, 'I sustain your objection; I don't wish any statements made outside of the records,' but failed to further take notice of defendant's request, or to further instruct and admonish the jury concerning said language, or to reprimand the district attorney, or to require him to withdraw his remarks."

"The defendant excepted to the remarks of the district attorney and to the refusal of the court to instruct the jury as requested by defendant, as hereinabove shown."

This bill, prepared by the court, must, under the circumstances, be taken as correctly presenting the matter, and in it is shown that the district attorney said:

"He [deceased] did not make any contrary statement to Ben Nabours at the jail. For if he had done so, it could have been proven by Ben Nabours at a time when deceased was practically dying and when the death gurgles were in his throat, and about an hour prior to his death; and if the deceased made any such contrary statement different from what he made to Cook and Middleton, then the reason it is not here is because you [pointing to defendant's attorney] have objected to it."

This was improper argument, and should not have been made. If counsel for defendant thought the testimony of Ben Nabours inadmissible, it was his duty to object to it, and it seems the court took the same view of it as did counsel for appellant, and it was improper for counsel for the state to say that "deceased made no contrary statement to Ben Nabours." What he said to Nabours was not in evidence, and it could not be got-

ten before the jury in this indirect way. This argument would give added strength to the testimony of Cook and Middleton, which had been attacked for various reasons, and coming at the close of the argument would be calculated to influence the jury. A jury at times cannot understand why certain testimony is excluded, and they resent at times the fact it is excluded, and if counsel is permitted to argue that, if they could have heard it, what it would have shown, they are likely to accept the statement of the prosecution as to what it would have shown, and give to such statement undue weight.

In this case the evidence discloses appellant had never met deceased, and knew no such man existed until summoned by Hamilton to go with him to make the arrest. The reason for the homicide, whatever it was, arose from incidents attendant upon the attempted arrest. His testimony, the testimony of Hamilton, and the testimony of Will Cook (outside of the dying declaration) would tend strongly to show that appellant, if guilty of any offense, was guilty of no higher grade of offense than manslaughter. And yet, with this closing speech of counsel ringing in their ears, the jury returns a verdict finding appellant guilty of murder, assessing a very heavy penalty. We cannot say this improper argument did not contribute to such a verdict being rendered.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J. (dissenting). The reversal of this case on the ground stated in the opinion, in my judgment, violates all of the principles heretofore established by this court on the subject, and is contrary to practically all cases heretofore decided on that point. *Mooney v. State*, 176 S. W. 56, and cases therein cited; *Martoni v. State*, 167 S. W. 350, and cases therein cited.

Both the bill and the statement of facts with absolute certainty show (I quote from the bill, which is the same as the statement of facts):

"* * * The state proved by the witness Ben Nabours as follows:

"I was the deputy sheriff in charge of the jail when the deceased, Marvin Williams, was brought over from Rockdale. When he was brought to the jail, I sent for Dr. E. E. Best, the county physician. When he came, he examined deceased and said to him, 'You are a mighty sick man, and the chances are you will never be any better.' I then asked him if there was any word he wanted to send anybody.' He said he wanted to let his uncle know about it. He then told me that he wanted me to write down his statement about how he was shot. I told him I would and I wrote it down in a little pocket memorandum book and he signed it. I have the book here [producing a small memorandum book from his pocket].

"Here the defendant's attorney objected to the testimony of the witness and to the introduction of any statement because no sufficient predicate had been laid for its introduction as a dying declaration; and the court remarked, 'Is Dr. Best in the courtroom?' The District

Attorney said, 'Yes, sir.' The court then said, 'I would like to hear him before I rule.' Thereupon Dr. E. E. Best testified: 'I was called to see the young man Marvin Williams at the county jail. I found him greatly prostrated and in a dying condition. He was not able to talk much. I asked him how it occurred and told him his condition—that he was a very sick man. He said, 'I know it. I may not get better.' I said, 'You may not get well, and if you do not get well or get better, what do you wish me to do?' He replied, 'Notify my uncle in Rockdale.' He remarked from time to time, 'You have got to do something for me.' I told him, 'We may take you to a sanitarium.' He said, 'Take me anywhere.' His attitude seemed to be that he wanted something done for himself immediately. He was in intense pain and wanted relief. He said, 'I know I am bad hurt, but I want you to do something for me.' At another time he said, 'If you don't take me to the sanitarium, I am going to die' or 'I won't get over this.' The impression made on me by his remarks was that he was in distress and wanted me to do something to give him relief. He expressed no belief that he was going to get better or that he was going to die. But his remarks impressed me that he was in distress and wanted something done and felt that something must be done right away and probably felt that he wanted me to relieve him from physical suffering because he was in distress.

"Here the jury was retired by direction of the court, and the witness Dr. Best was further examined in the absence of the jury, and, after the court had further examined him, the court sustained defendant's objection to the testimony of the witnesses Nabours and Best, and excluded the same from the jury and excluded the statement referred to in the testimony of the witness Ben Nabours as a dying declaration."

When Dr. Best testified on the point, appellant again, in the presence and hearing of the jury, objected, because the predicate was not sufficient to offer the said written statement as a dying declaration. It was at that point and after the testimony of both of these witnesses and the objections had been made in the presence and hearing of the jury that the court retired the jury. He then heard Dr. Best further testify on the point, but neither the bill nor the statement of facts gives what further testimony Dr. Best gave before the court out of the hearing of the jury. The court after hearing this further testimony by Dr. Best, then sustained appellant's objections and excluded said testimony.

There can be no doubt but that the prosecuting attorney could properly argue as he did, with possibly the sole exception of this statement: "Then the reason it is not here is because you [pointing to defendant's attorneys] have objected to it"—simply that and nothing more. Appellant's attorneys at the time objected to that argument of the prosecuting attorney, and the court promptly sustained their objection. They did not, on the trial, attach enough importance to the matter to even ask a written charge from the court to the jury to disregard said argument. As stated, it all occurred in the presence and the hearing of the jury, and they had absolute knowledge at the time said prosecuting attorney made said argument that appellant's attorneys had objected to

said proposed testimony, and that it was excluded by the court on their objection.

Under the circumstances, I think it not only improbable, but practically impossible, for the prosecuting attorney's argument to have in the slightest degree influenced the jury either to find the appellant guilty of murder or to enhance his punishment therefor. I think it utterly unreasonable that the jury, because of said argument, under the circumstances, ignored their oaths to decide the case on the evidence, and to have decided it, or been in any way influenced in deciding it, because of said argument. To my mind, it is utterly unreasonable to think or imagine that the jury, disinterested and wholly unbiased, should ignore all of the evidence in the case, all of the argument of the able attorneys on both sides on the merits of the case, violate their oaths and decide the case, or be influenced in any way in deciding it, because of said one slight short statement of which they each had absolute knowledge, without reference to what the attorney said.

The court submitted both manslaughter and aggravated assault. The jury, under their oaths, after hearing all the evidence, charge of the court and argument of counsel, refused to find him guilty of either manslaughter or aggravated assault, but instead found him guilty of murder, as the evidence amply warranted, if it did not require, them to so find. The deceased was shot in the back and killed by the appellant, while he was running and 40 or 50 yards away from him. To my mind, the fact, if it be a fact, that appellant had had no previous acquaintance with the deceased instead of being in his favor is against him. He had no reason or cause whatever to shoot the deceased in the back, while he was running from him, and kill him. The penalty, in my opinion, is not a heavy penalty, considering all the facts of this case. Human life in this state seems to be the only cheap thing in it. Here the appellant, without cause or justification, shoots down the deceased, a young man just past 22 years of age, who in all human expectancies would have lived at least his three score years and ten, if not longer, and he and his family and the state is deprived of his life of perhaps 50 years by the appellant; and he should consider himself fortunate, indeed, if he escapes with punishment of confinement, not deprivation of his life, for even 15 years. I think 15 years, or not less than 5 nor more than 15, as his sentence is under the law now, is not a heavy penalty, but a very moderate one.

In my opinion, this judgment should not be reversed, but it should be affirmed.

On Motion for Rehearing.

PRENDERGAST, P. J. We have again reviewed this case and have reached the conclusion that the dissenting opinion heretofore filed correctly decides the question on

which the original opinion reversed the case. In view of both opinions, we think it unnecessary to further discuss the question. The dissenting opinion will now be made the opinion of the court.

It is therefore ordered that the rehearing herein be granted, the judgment reversing and remanding the case set aside, and the order now entered will be that the case be in all things affirmed.

HARPER, J. I wish to enter this my dissent to the judgment granting the motion for rehearing and affirming the judgment. I think the case should be reversed, and adhere to the original opinion.

On Motion for Further Rehearing.

PRENDERGAST, P. J. In his dissenting opinion Judge HARPER has collated a large number of cases wherein the argument of prosecuting attorneys have been condemned by this court, and some cases reversed because thereof. In a great number of them reversals were not had alone because of such condemned arguments, but they were reversed on other grounds, and what was said of the arguments was more in view of another trial and as a caution to prosecuting attorneys than otherwise.

He has also copied some portions of the opinions of the judges in some of them, and ingeniously contends they apply to the question in this case. But we think what is quoted as said by the judges, when taken in connection with the facts and argument they were discussing in those cases, are inapplicable to this case. It would be a useless waste of time to point out the various distinctions and inapplicability of these cases.

It is unfortunately true the judges in writing opinions have not always had and kept in mind the proper rules applicable in the discussion and condemnation as reversible, of arguments of prosecuting attorneys. Because of this, some arguments have been condemned as reversible in connection with other reversible errors (and sometimes perhaps without any other reversible error), which should not, and otherwise would not, have been.

On the other hand, an equally large number of cases as Judge HARPER has collated, could be collated, wherein this court has held arguments of prosecuting attorneys objected to, were not cause for reversal, and some of them, apparently at least, much more hurtful to the accused than the argument in this cause could have been. But we see no necessity at this time of collating them.

The rules on this subject are clearly and distinctly laid down in such cases as *Bass v. State*, 16 Tex. App. 69; *Pierson v. State*, 18 Tex. App. 524; *House v. State*, 19 Tex. App. 227; *Tweedle v. State*, 29 Tex. App. 586, 16 S. W. 544; *Young v. State*, 19 Tex. App. 542; *Kennedy v. State*, 19 Tex. App. 634; *Hatchell v. State*, 47 Tex. Cr. R. 385, 84 S. W. 234;

Felder v. State, 59 Tex. Cr. R. 145, 127 S. W. 1055; and an innumerable number of other cases following these, and to the same effect, and down to this very date.

We correctly stated how all this matter occurred before the jury in the opinion of Judge PRENDERGAST when first written by him as a dissenting opinion. It is unnecessary to again state it, or further discuss the question.

The motion for rehearing is overruled.

HARPER, J. (dissenting). On the original hearing this case was reversed and remanded, Presiding Judge PRENDERGAST dissenting. On state's motion for rehearing, the original opinion was overruled and the case affirmed, this writer entering his dissent. Appellant has now filed a motion for rehearing, and I wish to state more fully why I cannot agree to an affirmance of the case, and my reasons for thinking such error was committed as should result in a reversal of the case.

In the original opinion, I held that the court committed no error in admitting the testimony of Cook and Middleton as to what they claimed were the dying declarations of deceased. While my Brethren express no opinion on this question, I suppose they agree with me, as they affirm the case. However, appellant earnestly insists we were in error in so holding, and says there is no testimony showing that deceased was sane at the time he made such declarations, and contends that the testimony would rather suggest that deceased was unbalanced and deranged mentally. In this view I cannot concur. It is true the record discloses deceased, a few days before the homicide, had behaved very unseemly, had cursed and abused his wife, and threatened at one time to kill and burn his wife, but his wife attributed this to meanness and drinking. While the question was not asked the witness, "Was deceased sane at the time you were talking with him?" yet they detail a conversation and acts and conduct of deceased, from which no reference could be drawn but that he was sane and rational at the time he made the declarations testified to. As said by Mr. Branch, in his work on Criminal Law in section 485:

"It is enough, if it satisfactorily appear in any mode that they were made under proper sanction, whether it be directly proved by express language of the declarant or be inferred from his conduct and other circumstances in the case, all of which are resorted to in order to ascertain the state of declarant's mind"—citing *Morgan v. State*, 54 Tex. Cr. R. 549, 113 S. W. 934, and a number of other cases.

While, as contended by appellant, it is true the state did not call the attending physician, Dr. Kilpatrick, but relied on the testimony of a kinsman of deceased, Will Cook, and a neighbor, George Middleton, not only to prove the dying declarations, but also the facts that would render the statement admissible, and while we held, and are still of the opinion, that the testimony of these

two men was sufficient to render the declarations admissible, yet such facts, in our opinion, but emphasize the error in permitting the district attorney to strengthen and lend additional weight to the testimony of these two men by stating in his closing argument what the deputy sheriff would have testified to had not appellant interposed an objection to his testimony. As stated, in other words, the objection of appellant to the testimony of Cook and Middleton as to the alleged dying declaration went to the weight to be given this testimony, and did not render it inadmissible. Appellant's counsel in their argument to the jury took this view and were contending that but little weight should be given to this testimony by the jury, or, as stated by the court in the bill prepared by him:

"Defendant's counsel in course of his argument attacked the sufficiency and weight of the testimony of the witnesses Cook and Middleton as to the deceased's alleged dying declaration, and argued to the jury that these witnesses were more or less interested, that Cook was a kinsman and was prejudiced against the defendant, and that the testimony of these two witnesses was fragmentary in character, and it necessarily did not show that the deceased had made the statements under a consciousness of impending death, and with the seriousness which should attend such statement; that they were made in the course of conversation with his relatives and friends and under circumstances which show that his mind was inflamed by passion against defendant, and that he was giving vent to his feelings rather than making a deliberate statement of the particulars, and that the state had not offered the testimony of the witness Dr. Kilpatrick to show that deceased was in such condition as to make his statement a dying declaration, and that under these circumstances the jury could not give to the declarations as testified to by these witnesses that high degree of credit to which dying declarations are entitled."

When appellant's counsel had made this argument, the force of it not only apparently impressed the jury, but impressed counsel for the state, and state's counsel became fearful that the jury would give but little weight to this testimony admitted under the predicate they had laid and circumstances in the case, and to strengthen this testimony and cause the jury to give it added weight, they go outside the record and state what they could have proven by a deputy sheriff as to what deceased said on another and different occasion, if appellant had not objected. Or, to put it in the language of the trial court:

"Thereafter the district attorney, in his closing argument to the jury, called attention to the objection of defendant's attorney to the dying declaration of deceased as testified to by Cook and Middleton: and in a burst of passion and eloquence, said: 'They tell you that these are not dying declarations, but at no time did the deceased alter or in any manner change the declarations and statements made by him to Cook and Middleton immediately after the shooting. He did not make any contrary statements to J. D. Hamilton, who brought him from Rockdale to Cameron on the train. *He did not make any contrary statements to Ben Nabours at the jail. For, if he had done so, it could have been proven by Ben Nabours at a time when deceased was practically dying and when the death*

gurgles were in his throat, and about an hour prior to his death; and if the deceased made any such contrary statements different from what he made to Cook and Middleton, then the reason it is not here is because you [pointing to defendant's attorney] have objected to it.'" (Italics ours.)

In what more emphatic language could the district attorney have told the jurors that, if counsel for appellant had not objected to Ben Nabours testifying, he would have proven by him the same testimony as he had proven by Cook and Middleton? State's counsel had called Ben Nabours to the witness stand and tried to make this proof. The court had sustained appellant's objection and would not permit Nabours to testify, for the reason that Dr. Best, who was attending deceased at that time, made it apparent that deceased did not then appreciate that he was in a dying condition and had no hope of recovery. This was 24 hours after the statement Cook and Middleton claim had been made to them. State's counsel must have appreciated the fact that the jury under such circumstances would give but little weight to the dying declarations testified to by Cook and Middleton, and without that statement there would be no evidence to justify a conviction for murder, but the testimony and all the testimony outside of that declaration would only justify a conviction for manslaughter, if in fact the jury would not find appellant justified under his plea of self-defense.

The writer has searched the authorities, and in his opinion has found no case that would justify a holding that such improper conduct, statement, and argument of the district attorney would not present reversible error, where the person on trial is found guilty of the higher grade of offense and more than the minimum punishment assessed.

As said by Judge Hurt, in *Parks v. State*, 35 Tex. Cr. R. 382, 33 S. W. 874:

"It is always within the province of counsel, for either the state or the defendant, to fully cover all the field authorized by the testimony elicited on the trial, and to draw therefrom all legitimate deductions, and to explain the same with argument and illustration; and we would not be understood as in any wise placing a limit to legitimate and proper argument to be indulged in by counsel, either for the state or the defendant. There are barriers, however, that cannot be passed; and when it is made to appear to us that remarks have been used outside the evidence in the case, especially of a denunciatory character, such as are calculated to inflame the minds of the jury against the defendant, and more especially when it is shown that these remarks were used in the closing argument, with no opportunity to reply on the part of the defendant, so abused, it is the duty of this court to interfere."

See, also, *Thompson v. State*, 33 Tex. Cr. R. 475, 26 S. W. 987; *Conn v. State*, 11 Tex. App. 400.

In *Robbins v. State*, 47 Tex. Cr. R. 318, 83 S. W. 693, 122 Am. St. Rep. 694, Judge Henderson said:

"Bearing in mind that there was no evidence whatever of this, and that none could have been

introduced (as in this case), it simply demonstrated how the district attorney * * * attempted to evade the law. * * * It occurs to us that such conduct, even though the court instructed the jury to disregard such argument, would be cause for reversal. So much of this character of argument was calculated to thoroughly poison the minds of the jurors against appellant as a man of the most base and vicious character, and not only tend to his conviction, but also to increase his punishment. Under the circumstances it was impossible for the court to withdraw the dagger and heal the wound inflicted at the same time. *Rutherford v. State*, 67 S. W. 100."

In *Greene v. State*, 17 Tex. App. 407, Judge Willson said:

"It was improper for counsel for the prosecution in the concluding argument to state that if the defendant's stepdaughter had been examined as a witness * * * she would have testified to certain facts. Such statement was not warranted by the evidence; was not legitimate argument; and was not justified by anything said by counsel for defendant in addressing the jury."

See, also, *Laubach v. State*, 12 Tex. App. 591.

In *Nalley v. State*, 28 Tex. App. 392, 13 S. W. 672, Judge White said:

"Even if the prosecuting officer could have proved what he stated, such testimony would have been clearly inadmissible against defendant, unless he had been directly connected with the matter. *Favors v. State*, 20 Tex. App. 158; *Marshall v. State*, 5 Tex. App. 273. There being no proof that these overtures to the witness were made by the authority or with the knowledge of the accused, such statement by the district attorney was illegal and unjust, and was highly calculated to prejudice the accused. *Barbee v. State*, 23 Tex. App. 199 [4 S. W. 584]. Anything Sam Nalley, the brother, might have done in the matter, in the absence and without the knowledge of defendant, was most clearly inadmissible against and could not be binding upon him (*Maines v. State*, 23 Tex. App. 568 [5 S. W. 123]), and afforded no reasonable presumption or inference pertinent to the issue in the case for which defendant was on trial, and the court should have so instructed the jury (*Taylor v. State*, 27 Tex. App. 464 [11 S. W. 462]). 'No improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree. No testimony should be offered on the part of the prosecution that is not relevant and legal. No remarks should be made by counsel for the state which are not fully warranted by the evidence.' *Gazley v. State*, 17 Tex. App. 267. That the course of the district attorney in this matter was calculated to prejudice the rights of defendant is, we think, manifest. How far he has been prejudiced, in the absence of any attempt upon the part of the court to obviate and avert the prejudice, it is impossible to tell. The law demands a fair, impartial, and legal trial. For this apparent wrong done the defendant in the trial below, the judgment is reversed and cause remanded."

In *Exon v. State*, 33 Tex. Cr. R. 469, 26 S. W. 1090, Judge Simkins sharply criticizes district attorneys for stating what could have been proven by a witness had the court not excluded the testimony. He says:

"Now * * * the evidence was excluded by the court, but the district attorney informed the jury that the entire grand jury would swear to the fact that Mrs. Exon stated she saw her husband and daughter in a compromising position. * * * There can be no question as to the importance of this testimony. * * * The state-

ment of Mrs. Exon before the grand jury would therefore be naturally taken by the jury, * * * to be strong corroboration of her daughter's testimony;" and the case was reversed.

In *Clark v. State*, 23 Tex. App. 263, 5 S. W. 116, Judge Willson said:

"Counsel for the state, in the closing argument, alluded to certain testimony offered by the state, and which had been rejected by the court, and stated that he could have proven certain facts by said testimony had not the defendant interposed objections. This was not legitimate argument, was injurious error, and should have been promptly and emphatically condemned by the court, and its injurious tendency, so far as possible, removed from the minds of the jury."

And in commenting on improper testimony being injected into the case in the district attorney's closing argument, Judge Willson said in *Tillery v. State*, 24 Tex. App. 274, 5 S. W. 848, 5 Am. St. Rep. 882:

"These matters were wholly foreign to the case on trial, without any support * * * in the evidence, and were calculated to operate upon the minds of the jury prejudicially to the defendant. These improper remarks, if there was no other error apparent in this record, would justify, if not demand, a reversal of the judgment."

Judge White so announces in *Fuller v. State*, 30 Tex. App. 565, 17 S. W. 1108; Judge Simkins in *Weatherford v. State*, 31 Tex. Cr. R. 536, 21 S. W. 251, 37 Am. St. Rep. 828; Judge Henderson in *Beardon v. State*, 46 Tex. Cr. R. 148, 79 S. W. 37; and when Judge Ramsey succeeded that learned justice, he, in the case of *Davis v. State*, 54 Tex. Cr. R. 249, 114 S. W. 373, reviewed the authorities in this state and laid down the rule when improper argument will be cause for reversal. After discussing the authorities he says:

"And it has been held that, where the remarks of the prosecuting attorney in argument were excepted to, but no charge in regard to them was asked, no error is presented. This language has been so frequently used by this court that it is not singular that the learned trial judge seemed to attach much importance to the fact that no charge was asked by counsel for appellant instructing the jury to disregard the improper argument objected to. We think, however, the true rule in respect to this matter may be thus stated, that unless the remarks of counsel for the state are obviously of a character to impair the rights of the defendant or prejudice his case before the jury, such remarks, though improper, will not be considered for reversal, unless a charge was asked and refused and exception reserved (*Lancaster v. State*, 36 Tex. Cr. R. 16 [35 S. W. 165]), and that it follows as a necessary corollary from this doctrine that where the improper argument is of such a grave character as to render it obviously injurious and hurtful, and the matter is properly preserved by bill of exceptions, that the fact that no special charge was asked instructing the jury to disregard same will not of itself deprive the appellant in a proper case of reversal of a judgment of conviction."

And he applies it to a case wherein were discussed statements of extraneous facts, as in this case.

In *Taylor v. State*, 50 Tex. Cr. R. 562, 100 S. W. 394, Judge Brooks said:

"It is true no special charges were asked, but, nevertheless, in the light of this record this ar-

gument is so highly prejudicial as to exclude every other reasonable hypothesis then that it was prejudicial to the rights of appellant. It follows, therefore, that the court erred in not granting a new trial to appellant, on account of the argument and statements of the county attorney."

Powell v. State, 70 S. W. 219, is another case wherein Judge Brooks reversed the case solely because of improper remarks, and they were deemed so hurtful in that case that the case was reversed, even though the court instructed the jury not to consider the remarks.

Mr. Branch, in his work on Criminal Law (section 62), lays down the rule:

"Error for state's counsel to get before the jury in argument a fact which he would not be entitled to prove and the effect of which is damaging to defendant"—citing *Jenkins v. State*, 49 Tex. Cr. R. 461, 93 S. W. 726, 122 Am. St. Rep. 812; *Rodriguez v. State*, 58 Tex. Cr. R. 275, 125 S. W. 404; *McKinley v. State*, 52 Tex. Cr. R. 184, 106 S. W. 842; *Askew v. State*, 54 Tex. Cr. R. 416, 113 S. W. 287; *Baughman v. State*, 49 Tex. Cr. R. 34, 90 S. W. 166; *Coleman v. State*, 49 Tex. Cr. R. 86, 90 S. W. 499; *Cline v. State*, 71 S. W. 23; *Turner v. State*, 59 Tex. Cr. R. 329, 45 S. W. 1020; *Battles v. State*, 53 Tex. Cr. R. 207, 109 S. W. 195; *Rice v. State*, 37 Tex. Cr. R. 43, 38 S. W. 803; *Pollard v. State*, 33 Tex. Cr. R. 203, 26 S. W. 70.

Many other cases could be cited written by the learned judges who have preceded the writer on the bench, and, since he has been honored with this position, he has endeavored to follow the rules of law as established by them in this, as in other instances.

In the recent case of *Bullington v. State*, 180 S. W. 679, the writer had occasion to express his views in a case wherein counsel for the state in argument had injected into the case evidence that was not in the record, and we held it presented reversible error, even though no special charge was presented in regard thereto. In that case we said:

"The rule is that if the remarks are of such character that instructions not to consider same would not remove from the minds of the jury the prejudicial and harmful effect of the argument, it will present error, even though no written charge was requested."

And such rule apparently received the approval of all members of the court, and such is the rule, I think, the court has been following since he has been a member of the court. See *Harwell v. State*, 61 Tex. Cr. R. 233, 134 S. W. 701; *Clements v. State*, 61 Tex. Cr. R. 161, 134 S. W. 728; *Coffman v. State*, 62 Tex. Cr. R. 95, 136 S. W. 779; *Paris v. State*, 62 Tex. Cr. R. 355, 137 S. W. 698; *Burrell v. State*, 62 Tex. Cr. R. 635, 138 S. W. 707; *Johnson v. State*, 63 Tex. Cr. R. 50, 138 S. W. 1021; *Davis v. State*, 64 Tex. Cr. R. 13, 141 S. W. 264; *Grimes v. State*, 64 Tex. Cr. R. 64, 141 S. W. 261; *McMillan v. State*, 65 Tex. Cr. R. 319, 143 S. W. 1174; *Rushing v. State*, 62 Tex. Cr. R. 309, 137 S. W. 373; *Williams v. State*, 148 S. W. 306; *Beaver v. State*, 63 Tex. Cr. R. 581, 142 S. W. 12; *Thompson v. State*, 150 S. W. 182; *Liner v. State*, 70 Tex. Cr. R. 75, 156 S. W. 212; *Brailford v. State*, 71 Tex. Cr. R. 113, 158 S.

W. 542; *Daniels v. State*, 71 Tex. Cr. R. 662, 160 S. W. 708; *Harwell v. State*, 71 Tex. Cr. R. 473, 160 S. W. 379; *Dunn v. State*, 72 Tex. Cr. R. 170, 161 S. W. 468; *Bradley v. State*, 72 Tex. Cr. R. 287, 162 S. W. 516; *Cooper v. State*, 72 Tex. Cr. R. 645, 163 S. W. 425; *Stanfield v. State*, 73 Tex. Cr. R. 290, 165 S. W. 218; *Hemphill v. State*, 72 Tex. Cr. R. 638, 165 S. W. 465, 51 L. R. A. (N. S.) 914; *Eads v. State*, 170 S. W. 147; *Marshall v. State*, 175 S. W. 154. Many other cases could be cited rendered since I have had the honor of being a member of the court, but in the opinion in the case of *Johnson v. State*, 148 S. W. 330, Judge Davidson, in a case similar to this, so aptly expresses the law, I quote from it:

"Another bill recites that the county attorney, in his argument, made the following statement to the jury: 'He shot an unarmed man; shot him in the back, because he went there to collect a bill. "He ordered me out, and before I got out he shot me."' To these remarks objections were urged by the defendant. The testimony with regard to this in the dying declaration was excluded by the court. Indirectly, if not directly, through the witness Smith, the matter was placed before the jury in regard to his being the bill collector, and seeking to collect from the defendant. This statement or argument, if deemed an argument, by the prosecuting officer was unwarranted and on a crucial point in the case which had been excluded by the court in part at least, and directly so, so far as the dying declaration was concerned, and it was used illegitimately by the county attorney as an argument; and it was upon a most crucial point in the case, and was therefore not permissible. If the prosecuting officers will continue to violate the rules of argument and make statements of fact before a jury which are not permissible, or which have been excluded by the court, then they force upon this court the duty of reversing cases. They understand, or ought to understand, that when they transgress the rules far enough in the line of unwarranted argument to use matters before a jury to press a conviction, when such things are unwarranted by law and have been excluded by the court, they assume the responsibility of forcing this court to reverse judgments. The accused in Texas is entitled to a fair trial on legitimate testimony."

In this case, as in that case, the district attorney had tried to get the testimony admitted. The court had excluded it; yet in his closing argument he states, in effect, what the witness would have testified. It was on the crucial point in the case, and without this testimony of the district attorney the jury, in my opinion, would have found appellant guilty of no higher grade of offense than manslaughter, if guilty of any offense; yet with this testimony of the district attorney (not argument) before them, the jury finds the appellant guilty of murder, and assesses a penalty almost equivalent to life imprisonment. Had the court admitted this testimony in evidence over the objection of appellant, with no proper predicate laid, this court would not hesitate to reverse the case. When the district attorney tried to lay the proper predicate, he could not do so, and the court would not permit the witness to testify; yet in his closing argument the district

attorney gets the testimony before the jury by himself telling the jury what the witness would have sworn. If the law can be evaded in this way, it would be better that they make no objection to testimony, for then they would know what they had to meet, and they could discuss it in their argument. When it comes as this testimony did on the crucial issue in the closing address of the district attorney, an accused is helpless and at the mercy of the court.

I am of the opinion that the case should be reversed, and counsel made aware that additional facts and extraneous matters cannot be gotten before the jury by their unsworn statements made in the closing argument.

MCPHERSON v. STATE. (No. 3918.)

(Court of Criminal Appeals of Texas, Jan. 19, 1916. On Motion for Rehearing, Feb. 16, 1916.)

1. BURGLARY \S 36 — PROSECUTION — EVIDENCE.

In a prosecution for burglary of a saloon, where defendant, its former employe, was shown to have opened the saloon in the morning and closed it at night while working there, evidence that he had been in possession of a key, though he no longer worked there, was admissible.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 90; Dec. Dig. \S 36.]

2. CRIMINAL LAW \S 372—EVIDENCE—OTHER OFFENSES.

In a prosecution for burglary of a saloon, evidence that a drug store in the same building was burglarized on the same night, the two transactions being so interwoven as to be but one in effect, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 833, 834; Dec. Dig. \S 372.]

3. BURGLARY \S 41—CONVICTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary, evidence held sufficient to support conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 94-103, 109; Dec. Dig. \S 41.]

4. CRIMINAL LAW \S 368 — EVIDENCE — RES GESTÆ.

In a prosecution for burglary, testimony of defendant as to what another, also charged with the crime, with whom defendant denied acting in concert, had told defendant while the other was in the very commission of the act, as to how such other had gained entrance, was competent, though such other was not competent as a witness, since declarations made by a person who is incompetent to testify as a witness are admissible if part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 806, 812, 814, 815, 821; Dec. Dig. \S 368.]

5. CRIMINAL LAW \S 359—EVIDENCE.

In a prosecution for burglary of a saloon, the judgment showing that two persons, other than defendant, also charged with the crime, had pleaded guilty to burglarizing the saloon on the particular occasion, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 789, 790; Dec. Dig. \S 359.]

6. CRIMINAL LAW \S 359—EVIDENCE—COMMISSION OF CRIME BY ANOTHER.

In a prosecution for burglary of a saloon, any testimony tending to show that parties other than defendant broke and entered the saloon was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 789, 790; Dec. Dig. \S 359.]

7. BURGLARY \S 16—PRINCIPALS AND ACCESSORIES—"PRINCIPAL."

One who stood out in front of a saloon, keeping watch, while others broke and entered it, was guilty of burglary as a "principal."

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 3; Dec. Dig. \S 16.]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

8. BURGLARY \S 16—PRINCIPALS AND ACCESSORIES—PRINCIPAL.

The mere presence of defendant where and when a saloon was being broken and entered did not constitute him a principal in the crime of burglary, unless he aided by his acts, or encouraged by his gestures, those engaged in the offense.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 3; Dec. Dig. \S 16.]

9. CRIMINAL LAW \S 792—TRIAL—INSTRUCTIONS—PRINCIPALS AND ACCESSORIES.

In a prosecution for burglary of a saloon, where defendant testified that he was called into the place to have a drink by parties engaged in committing the crime, and that he left as soon as he understood the true condition of affairs, defendant had the right to have presented to the jury the law, applicable to his defense, that he was not guilty as a principal, unless he aided in the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1818-1820; Dec. Dig. \S 792.]

10. CRIMINAL LAW \S 841—TRIAL—INSTRUCTIONS TO JURY—OBJECTION.

Objection to the charge must be made before it is read to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2022; Dec. Dig. \S 841.]

11. CRIMINAL LAW \S 656—TRIAL—REMARK OF COURT.

In a prosecution for burglary of a saloon, where a detective testified that the morning after the burglary they searched defendant's house and found none of the stolen property, the court's remark that all the testimony of the witness could have been eliminated by objection by the state, because immaterial, was improper, as calculated to cause the jury to give but little weight to the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1524-1533; Dec. Dig. \S 656.]

12. CRIMINAL LAW \S 349 — EVIDENCE — FRUITLESS SEARCH.

In a prosecution for burglary of a saloon, a detective's testimony that he searched defendant's house and found none of the missing property, defendant claiming that others, who had previously pleaded guilty to the burglary, and in whose possession stolen property had been found, were alone guilty, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 778-785; Dec. Dig. \S 349.]

13. CRIMINAL LAW \S 349—EVIDENCE.

In a prosecution for burglary of a saloon, where defendant had admittedly been at the scene of the crime when it was committed, but, as he claimed, with an innocent purpose, testimony that from the appearance of his clothing

shortly after he had none of the stolen property on his person, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 778-785; Dec. Dig. §349.]

14. BURGLARY §16—PRINCIPAL—NECESSITY FOR CONCERT.

Defendant, present when a saloon was burglarized, entering from the front at the criminals' invitation, while they entered from the rear, was not guilty as a principal, unless acting in concert with them.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 3; Dec. Dig. §16.]

On Motion for Rehearing.

15. CRIMINAL LAW §1119 — APPEAL AND ERROR—PRESENTATION OF GROUNDS OF REVIEW.

In a prosecution for burglary, a bill of exception showing that when the state started to cross-examine a witness the court remarked, "all this cross-examination could have been eliminated upon objection by the state, because the testimony is immaterial," and showing defendant's exception to the remark, was sufficient to present for review the error that the court's remark would naturally cause the jury to give little weight to the testimony, which was material and important under other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. §1119.]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

John McPherson was convicted of burglary, and he appeals. Reversed, and cause remanded.

Charles Murphy, of Houston, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

[1, 2] The state proved that appellant had been bartender for W. H. Connors, who owned a saloon in Houston. That the saloon was sold to A. Rainey, when appellant lost his position; the saloon was burglarized that night. All the evidence about the keys was admissible, as the evidence showed that appellant opened the saloon in the morning and closed it at night while working there, and therefore the state's contention was that he was in possession of a key to the burglarized house, notwithstanding he no longer worked there, and these bills present no error. Neither does the bill that complains that the court permitted evidence to be introduced that the drug store of Ralph Hurlock was burglarized the same night. The saloon which appellant was charged with burglarizing and the drug store were in the same building, and, in placing appellant, his son and Hainey at this point on the night of the burglary, Hurlock fixed the time that he saw them at the time his store was burglarized, it being the same night the saloon was burglarized. The transactions were so interwoven as to be part and parcel of the same transaction.

However, as we view the record, there are

several errors pointed out in the bills. The bills themselves are very vague, indefinite, and incomplete, but we think that bill No. 6 is sufficiently full and complete to present the matter complained of, and as it presents error, we will review all the questions wherein we think the court erred, regardless of whether or not the bills are full enough in and of themselves to manifest the error, so that they will not occur on another trial.

[3] As stated, the state placed appellant, his son, and Hainey at the drug store at the time the drug store closed. Then by Mr. and Mrs. Fetters it proved that appellant, his son, and Hainey walked down in front of the saloon, and in a few moments turned and went into the saloon. The state also proved the saloon was burglarized. This evidence would support a conviction.

[4] Appellant took the stand and admitted he was at the drug store, and said he walked down in front of the saloon, and was waiting for a car to go home. While standing there he was called by Frank Barefield, *who was inside of the saloon*, and asked if he did not want a drink; that he, his son, and Hainey turned and went in the saloon through an open door, and when he got in there he could see what was taking place; he then refused to drink, and he and his son at once left; that as he left Ford was passing along with his arms full of bottles of whisky, and asked him if he wanted a portion of it, and he told him no. It is seen his defense was that Barefield and Ford burglarized the saloon, and while he went into the saloon, his acts were not such as to constitute him a party to the crime, either as principal, accomplice, or accessory. While testifying, as shown by one bill, he desired to testify to what Barefield told him on that occasion how he said he (Barefield) got into the house. The court excluded this testimony on the ground that Barefield would not be a competent witness, as he was also charged with the offense. There is no doubt that Barefield would not be a competent witness, but what appellant wished to testify to was *res gestæ* of the crime. Barefield made the remarks while engaged in the very act, and it has always been held that declarations made by a person who is incompetent to testify as a witness are admissible if *res gestæ* of the transaction. *Neely v. State*, 56 S. W. 626; *Croomes v. State*, 40 Tex. Cr. R. 675, 51 S. W. 924, 53 S. W. 882; *Kenney v. State*, 79 S. W. 817, 65 L. R. A. 316; *Hunter v. State*, 54 Tex. Cr. R. 226, 114 S. W. 124, 130 Am. St. Rep. 887; *Thomas v. State*, 47 Tex. Cr. R. 534, 84 S. W. 823, 122 Am. St. Rep. 712. Appellant was testifying (and that was his defense) that Barefield and Ford alone committed the burglary, and anything that was said or done tending either to prove or disprove that fact would be admissible if *res gestæ* of the transaction. It is the event speaking, not the person testifying. Mr. and Mrs. Fetters did not

see Ford or Barefield—they only saw appellant, his son, and Hainey enter the saloon.

[5] Appellant desired to introduce the judgment showing that Barefield and Ford had pleaded guilty to burglarizing this saloon on this occasion. This judgment should have been admitted.

[8-10] It is evident from the state's testimony that all five men did not enter from the front door, and did not go in together. Any testimony which would tend to show that Ford and Barefield alone were the parties who broke and entered the saloon should have been admitted, as this was a part of appellant's defense. Beginning with *Du Bose v. State*, 10 Tex. App. 251, we have an unbroken line of decisions holding that when the issue is whether or not the person on trial committed a crime, he has the right to show that some other person committed it, and any evidence tending to show that fact is admissible. *Kunde v. State*, 22 Tex. App. 97, 3 S. W. 825. In that case it was held that threats and acts of a codefendant proximately connected with the transaction, tending to show that he committed the crime, are admissible. Of course, the question would then arise as to whether appellant on the occasion so conducted himself as to be a principal in the transaction. If he was standing out in front, keeping watch, while Barefield and Ford broke and entered the saloon, he would be a principal. The court submitted properly the law as to who are principals, but he nowhere in the charge instructed the jury that the mere presence of appellant at the time and place of the commission of the crime would not constitute him a principal, unless he aided by acts, or encouraged by gestures, those engaged in the offense. Under appellant's testimony he had the right to have presented the law applicable to the state of case upon which he relied for a defense. This was not complained of before the charge was read to the jury, but inasmuch as the case will be reversed on other grounds, we call attention to it so that the law may be properly applied on another trial.

[11, 12] Appellant testified that when he saw Barefield and Ford in the saloon, and understood what they were doing, he at once left. He testified to meeting several people on his way home, and he desired to prove by these people that he had nothing in his hands, and his clothing gave no evidence that he had anything in his pockets or concealed beneath his clothing. He further desired to prove by city detectives Lyons and Martin that the morning after the burglary they searched the house of appellant and found none of the stolen property in his house nor in his possession. Detective Lyons did testify that he searched appellant's premises and found none of the stolen property. When the state went to cross-examine this witness the court remarked:

"All this cross-examination of the testimony of this witness could have been eliminated up-

on objection by the state, because the testimony is immaterial."

Exception was reserved to the remark that the court considered immaterial the testimony of Detective Lyons that he had searched the premises of appellant and found none of the stolen property. This remark was calculated to cause the jury to give but little, if any, weight to Lyon's testimony. Appellant also offered Detective Martin as a witness, and desired to prove by him that he searched appellant's premises and found none of the missing property. The court sustained objection to this testimony, and excluded it. We think this testimony clearly admissible, and the remark of the court was improper. If those officers had found in their search a portion of the missing property, this court has held recent possession of stolen property, unexplained, will sustain a conviction. *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839; *Brown v. State*, 56 Tex. Cr. R. 87, 119 S. W. 312; *Strickland v. State*, 78 S. W. 689. Then why should not evidence that appellant's premises were searched by the officers and none of the stolen property found be admissible as a circumstance in his favor, as much so as the circumstance that goods were found be admissible for the state? One is a circumstance tending to show guilt, while the other is a circumstance tending to support his plea of innocence, and especially in this case does this testimony become very material, for appellant admits going in the saloon, as he says, being asked by Barefield and Ford, who have pleaded guilty to burglarizing this saloon on this occasion. The goods were found, or a portion of them, apparently from this record, in the possession of Ford and Barefield, but there is no evidence that any of the goods were found in appellant's possession, or in the possession of his son or Hainey, the three men the Fetters saw together, and saw enter the saloon. Certainly the testimony would have a strong tendency to show that appellant's testimony as to why he entered the saloon and immediately left when he saw what was occurring was probably true, and if true he was entitled to an acquittal.

[13] On another trial the court will admit the testimony of the res gestæ statements of Barefield; he will admit the testimony that from the appearances of appellant's clothing he had none of the stolen property in his pockets or concealed about his person, while on his way home from the saloon, that is, so far as the witness could judge from appearances; he will admit the testimony that appellant's premises were searched by Officers Lyons and Martin, and they found none of the stolen property in his possession, nor on his premises; he will admit the pleas of guilty of Barefield and Ford that they committed this burglary, and then he will properly apply the law as to who are principals, presenting appellant's

theory as made by the testimony, as well as the law as applicable to the case as made by the state's evidence.

[14] If Barefield and Ford had already broken and entered the saloon before appellant, his son, and Hainey went into it, they would not be guilty as principals with Barefield and Ford, unless they were acting with them. If there was no acting together, and Barefield and Ford entered from the rear or some other door before appellant, his son, and Hainey entered at the front door, appellant could not be held responsible for the acts of Ford and Barefield. He would not be a coprincipal with them or either of them, even though he entered the saloon at the invitation of Barefield, who was a former owner of the saloon, after the entry had been made. The testimony of Mr. and Mrs. Fetters for the state would have a tendency to show that appellant, his son, and Hainey were not acting with Barefield and Ford, even if appellant, his son, and Hainey broke, within the contemplation of law, the front door. Mr. and Mrs. Fetters did not see Barefield nor Ford. They only saw the other three, and appellant's explanation, if true, would show that he was not at least acting with Ford and Barefield. Of course, the circumstances raise the issue that he may have been acting with them, and the law should be properly submitted presenting the various phases as made by the testimony.

We do not deem it necessary to discuss the other questions raised.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

[15] The state has filed a motion for rehearing, insisting that bill of exception No. 6 is insufficient in that the answer of the witness is not stated and copies bill No. 7 in the motion. This was not the bill we held sufficient, but it was bill No. 6 which complained of the comment of the court on the weight to be given the testimony of the witness Lyons. Lyons had testified that he went to the home of appellant to see if he could find any of the articles stolen out of the burglarized house; that he searched the house and did not find anything they were looking for. After the witness had so testified, bill No. 6 shows that when the state started to cross-examine this witness, the court remarked:

"All this cross-examination could have been eliminated upon objection by the state, because the testimony is immaterial."

Defendant: "We reserve an exception to the remark of the court."

The defendant then desired to prove similar testimony to that of Lyons by Detective Martin—to prove by Martin that defendant had none of the stolen goods at his house. The court refused to permit him to prove these facts by Martin, and sustained an ob-

jection to his testimony. Defendant then proceeds in the bill to state that he objected to the remarks of the court as being upon the weight to be given the testimony; and, as the remarks of the court were calculated to and would cause the jury to give no weight to the testimony of Detective Lyons that he searched appellant's house and found none of the stolen goods in appellant's possession, we held this bill presented error, and are still of that opinion, and the question is sufficiently presented in the bill to authorize us to review the action of the court.

The motion for rehearing is overruled.

WHETSTONE v. STATE. (No. 3928.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916. On Motion for Rehearing, Feb. 23, 1916.)

1. CRIMINAL LAW §1099—APPEAL—STATEMENT OF FACTS—LATE FILING.

The statement of facts with reference to the denial of new trial for newly discovered evidence, having been filed after adjournment, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.]

2. CRIMINAL LAW §511—ACCOMPLICE TESTIMONY—CORROBORATION.

Corroboration of accomplice being required only to tend to connect defendant with commission of the crime, and not to connect him therewith, it is enough that, on reward being offered for papers taken in a burglary, defendant, who was with the accomplices on the night of the crime, brought in some of them, and afterwards others of them, on further reward being offered, and stated that he found them buried on or near land in his possession, and, on being asked as to the sack in which they had been, brought in one, and, on it proving not to be the one, brought in another, stating, as was the fact, "This is the sack."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

Appeal from District Court, Cass County; H. F. O'Neal, Judge.

Willie Whetstone, Jr., was convicted, and appeals. Affirmed.

Figures & Stewart, of Atlanta, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of burglary; his punishment being assessed at two years' confinement in the penitentiary.

The state's case is made by the evidence of two accomplices. The evidence is to the effect: That the three went into the burglarized house at night and committed the theft of some property, notes, and mill checks, and some other matters. That in order to do this they had to break a safe. The safe would not lock, but it could be bolted, and was bolted on this particular night. Defendant was familiar with the situation of the safe, having worked in the store a short time prior

to the burglary. It is unnecessary to go into a detailed statement. Briefly, the evidence shows that the defendant, with Nat Benjamin and John Williams, entered the store and took the things. Some of them were buried near a field belonging to Mr. Snipes, where they were subsequently found. Appellant brought some of the property back to the owner of the house and delivered them to him, stating during the conversation: That he had found them out in the woods near where he was working. That subsequently he found some more of the property and returned it. Mr. Morris paid him something for this. There are quite a lot of circumstances that tend to corroborate the testimony of the accomplices and connect appellant with the transaction. The contention of appellant is that the evidence is not sufficient. We are of opinion that it is. The accomplices or associates in the burglary make a plain case, and the circumstances and incidents connected with the whole matter, we think, sufficient to show that appellant was connected with it.

[1] The remaining proposition for reversal is based upon newly discovered evidence. There was a statement of facts, with reference to this phase of the case, filed after adjournment of the court; the court having adjourned early in October, and the statement of facts with reference to the motion for new trial was not filed until early in January, subsequent to the adjournment of court. Under the decisions of this state this statement of facts cannot be considered. There are quite a number of opinions so holding, and the reasons are fully given in those various opinions. It is unnecessary to go into any further discussion of that question.

The judgment will be affirmed.

DAVIDSON, J., not present at consultation.

On Motion for Rehearing.

DAVIDSON, J. This case is before us on motion for rehearing. Preliminary to the motion, it is contended by appellant's counsel that the opinion states, and the writer is responsible for the statement, that the court was in error in stating that appellant had worked for the alleged owner of the burglarized house. Critically speaking, perhaps, that statement went a little broad. I might collate facts and circumstances which I think would justify the statement; but, giving the benefit to the defendant, the writer will state, so that the appellant may not be injured by any such statement, that that statement, perhaps, was a little strongly put.

[2] The main contention, and the only serious contention in the case, is whether or not the state's witnesses were sufficiently corroborated. They were accomplices; admittedly so. Counsel states the proposition a

little strong in contending there must be evidence independent of the accomplices which connects appellant with the burglary. That is stating the law a little stronger than the statute, which requires that the corroboration will only tend to connect the defendant with the commission of the offense, where accomplice testimony is used by the state. We have reviewed this testimony again, and are still of opinion that it is sufficient to tend to connect the defendant with the commission of the offense. The accomplices make a case. The evidence shows that the two accomplices and defendant were together on the night of the burglary prior to it, and also that they were at a party or social function and left that party. The accomplices testified they were at the party together, and that they discussed the matter of burglarizing the house and entering the store of the alleged owner, and that appellant was active in the conspiracy, and went with them, and the three broke into the house, committed the burglary, got quite a lot of papers, not much money, and went away. Some of the evidence suggests that appellant hid the stolen papers. Later there was a reward offered by the owner for the recovery of these papers. Appellant brought in some of them. There were others missing, and a heavier reward was offered for their recovery. The last-mentioned papers seem to have been notes of some importance and valuable. Those first brought in by appellant seem to have been time checks, or mill checks, or something of that kind, amounting to a sum less than \$20; but the others were larger in amount and value. Later appellant brought all these in. He said he was working on Mr. Snipes' place, and that he had occasion to attend to a call of nature, and went across the fence in the edge of the woods, and unearthed the first batch of papers, and carried them in and delivered them, and later he went back and unearthed the others and took those in. During the conversation between himself and the owner of the house there was something said about a sack in which these papers were placed. Appellant brought in a sack, but it proved not to be the one. At the time he brought it he asked the owner if this was the sack. The owner told him, "No," and he went off and returned with another sack, and said, "This is the sack." It was the sack stolen from the house. There were other facts and circumstances detailed, including the fact that the land on which the property was found was in appellant's possession. At least, it was found on land adjoining that controlled by appellant, if not directly on that in his possession. These facts were along this same line developing fully these occurrences and statements, but we deem it unnecessary to go into details, but are of opinion that this was sufficient to tend to connect the defendant with the burglary.

The motion for rehearing is overruled.

MARTIN v. STATE. (No. 3950.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

CRIMINAL LAW §1159—CONVICTION—CONCLUSIVENESS.

Where the evidence for the state, which was apparently believed, was sufficient to sustain a conviction, and that for the defendant, if believed, would have been sufficient to have secured his acquittal, the sufficiency of the evidence was solely for the jury, and a conviction could not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. §1159.]

Appeal from Fayette County Court; George Willrich, Judge.

J. M. Martin was convicted of aggravated assault, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for aggravated assault, with only a fine of \$25 assessed.

There is no bill of exceptions and no complaint of the charge of the court. The sole question is whether or not the evidence is sufficient to sustain the conviction. The testimony of the state's side, which was evidently believed, was amply sufficient to sustain the conviction. That of the appellant's side, if the jury had believed it, would have been sufficient to have secured his acquittal. That question, however, was solely for the jury. We cannot disturb their verdict.

The judgment is affirmed.

CROCKETT v. STATE. (No. 3947.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

CRIMINAL LAW §1090—APPEAL AND ERROR—QUESTIONS REVIEWABLE.

On appeal from conviction of crime, where there is no bill of exceptions, and no complaint is made to the charge of the court, the only question presented is whether or not the evidence is sufficient to sustain the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2853, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. §1090.]

Appeal from District Court, Sabine County; A. E. Davis, Judge.

Wilson Crockett was convicted of manslaughter, and he appeals. Affirmed.

J. W. Minton, of Hemphill, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of manslaughter, and assessed the lowest punishment.

The sole question is whether or not the evidence was sufficient to sustain the conviction. There is no bill of exceptions, and no complaint to the charge of the court.

We have carefully read the testimony more than once, and think it clear that the evidence was sufficient to sustain the verdict. We can see no necessity for detailing the testimony.

The judgment is affirmed.

HOLT v. STATE. (No. 3948.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

CRIMINAL LAW §1124—APPEAL—REVIEW—STATEMENT OF FACTS.

Where no statement of the evidence on the trial accompanies the record, and no bill of exceptions is contained therein, there is nothing in the motion for a new trial which the Court of Criminal Appeals can review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. §1124.]

Appeal from District Court, Sabine County; A. E. Davis, Judge.

B. N. Holt was convicted of burglary, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the state penitentiary.

No statement of the evidence introduced on the trial of the case accompanies the record; neither does the record contain any bill of exceptions. Under such circumstances, there is nothing presented in the motion for a new trial we can review.

The judgment is affirmed.

Ex parte CASTORENA. (No. 3925.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

BAIL §53—HABEAS CORPUS §102—APPLICATION FOR DISCHARGE—AUTHORITY.

Upon an application for discharge from an order binding him over to await the action of the grand jury, the Court of Criminal Appeals looks to see if there is testimony tending to connect defendant with the commission of the offense, and where the crime of robbery and murder was established and the accomplice testimony related only to defendant's connection therewith, and when the bail bond was fixed at only \$1,000, the Court of Criminal Appeals would not discharge, or reduce the amount.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 211; Dec. Dig. §53; Habeas Corpus, Cent. Dig. §§ 87-89; Dec. Dig. §102.]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Application by Martin Castorena for his discharge from an order binding him over to await the action of the grand jury, or to have his bail reduced. From the order denying the application, petitioner appeals. Affirmed.

E. K. Goodrich and Robt. A. Kitchen, both of Brownsville, and E. C. Gaines, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Inasmuch as the record in this case has been supplemented with a certified copy of notice of appeal, the opinion rendered last week dismissing this cause is withdrawn, and the cause is reinstated.

Appellant insists that, as the only person testifying to facts connecting him with the commission of the robbery and murder is a confessed accomplice, and therefore insufficient to sustain a conviction, he should be discharged or his bail reduced. Upon an application to be discharged from an order binding one over to await the action of the grand jury, we look to see if there is testimony tending to connect him with the commission of an offense, and, if so, we have no authority to discharge him from custody. The crime in this case is shown beyond peradventure of doubt by ample testimony, and it is only appellant's connection therewith that is shown by accomplice testimony only. As the crime was a crime upon express malice, doubtless the trial court took into consideration the weakness of the case made against appellant by the state in fixing the bond at only \$1,000. The crime shown is of that character we would not feel authorized to reduce the bond, for, if appellant should be held to bail at all, the bond is a reasonable one.

Judgment affirmed.

Ex Parte GOODMAN. (No. 3956.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

1. EXTRADITION §35—INTERSTATE—AFFIDAVIT—OFFENSE—SUFFICIENCY.

Under the act of Congress (U. S. Comp. St. 1913, § 10126) and the laws of Texas (Vernon's Ann. Code Cr. Proc. 1916, art. 1088) requiring that a fugitive from justice from another state, sought to be held as such, be charged with an offense in the demanding state, an affidavit that affiant had good reason to believe and did believe that a party was a fugitive from justice from Louisiana, where he had on a given date committed a criminal offense under the laws of Louisiana, and that he fled into Texas, where he might be found, was insufficient to justify the alleged criminal's arrest as a fugitive from justice.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 39; Dec. Dig. §35.]

2. EXTRADITION §21—INTERSTATE—FEDERAL JURISDICTION.

The laws of Texas touching the return of criminals to other states are governed by the federal act touching the matter.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 26; Dec. Dig. §21.]

3. EXTRADITION §32—INTERSTATE—COMPLAINT CHARGING CRIME.

A complaint, filed in Louisiana, charging violation of its criminal law, based only upon belief or information, is insufficient as authority

for a requisition demand on the Governor of Texas for the return of the offender.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 38-38; Dec. Dig. §32.]

Application for a writ of habeas corpus on behalf of Bob Goodman. Applicant discharged from custody.

B. Y. Cummings, of Hillsboro, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. This record is very brief, and can be briefly stated. It is an original application for a writ of habeas corpus to this court asking for a discharge under what is supposed to be an extradition proceeding. As a basis for this case Mr. Gross made an affidavit that he had good reason to believe and did believe that Bob Goodman is a fugitive from justice from the state of Louisiana; that he did on or about the 15th of May, 1915, in said state of Louisiana, willfully, maliciously, and feloniously have carnal knowledge with Leona Dally, she being an unmarried female between the age of 12 and 18 years, and that said act so committed by Bob Goodman was then and there and is now a violation of the penal laws of the state of Louisiana, and that said Goodman has fled from that state where he committed said offense to the state of Texas, and is now to be found in Hill county, Tex.

[1-3] It will be noticed that this affidavit only states that the affiant had reason to believe that the applicant is a fugitive from justice from a sister state, and that he had carnal intercourse with a girl between 12 and 18 years of age, she being unmarried, and that said act was a violation of the laws of Louisiana, and that he had fled from that state into Texas, and is now in this state. This is not sufficient. There are no extradition papers in the record, and, so far as the case is concerned, it does not show that any were issued by the Governor of this state honoring a requisition from the Governor of Louisiana, nor is it stated that applicant stood charged in Louisiana by indictment or complaint with this offense. Under the act of Congress (U. S. Comp. St. 1913, § 10126) this is not sufficient, nor is it sufficient under the laws of Texas (Vernon's Ann. Code Crim. Proc. 1916, art. 1088), which, of course, must be governed by the congressional act. Had a complaint been filed in Louisiana charging some violation of the law by reason of sexual intercourse, based only upon belief or information, it would not have been sufficient as authority for the requisition demand on the Governor of this state. This is settled by the authorities, which are not necessary to be cited. But this complaint does not allege or assert, directly or indirectly, that the applicant had been charged in any legal way in Louisiana with an offense; therefore it is not sufficient. Under the act of the Legislature

it is necessary, where the party is a fugitive from justice and is sought to be held as such, that he be charged with an offense in the demanding state. Taking this as a basis, an affidavit may be made holding the alleged fugitive awaiting the requisition demand, but there is nothing in this case indicating those things; therefore we are of opinion that the applicant is entitled to his discharge, which is accordingly ordered.

SPOONER v. STATE. (No. 3944.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

SUNDAY \S 6—PLACES OF AMUSEMENT—STATUTE—VIOLATION.

Defendant, who gave his moving picture show on both the afternoon and evening of a Sunday, after advertising that it was for the benefit of the inmates of a tuberculosis sanitarium, who sold no tickets and demanded no admission fee, and who represented that he would donate to such inmates all receipts over and above his actual expenses, and who displayed at the entrance a large sign reading "Free Contribution," "Pay What You Wish," "Benefit Carlsbad Sanitarium," and who, out of gross receipts of \$33.30, took out his actual expenses for the day, and turned the balance of \$18.55 over for such inmates, violated the statute punishing the proprietor of any place of amusement permitting his place to be open on Sunday and defining places of amusement to include theaters and amusements for which an admission fee is charged.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 11, 12; Dec. Dig. \S 6.]

Appeal from Tom Green County Court; Oscar Frink, Judge.

Dad Spooner was convicted for violating the law in operating a moving picture show on Sunday, and he appeals. Affirmed.

C. E. Dubois, of San Angelo, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for violating the law in operating a picture show on Sunday. The case was tried before the court without a jury on agreed facts. The court assessed the lowest punishment.

The facts are that appellant gave his picture show on both the afternoon and night of Sunday, January 2, 1916. He advertised, in effect, that it was for the benefit of the inmates of the tuberculosis sanitarium located at Carlsbad, near San Angelo. No tickets were sold nor admission fees demanded. He represented he would donate to the trustees for said inmates all he received over and above his actual expenses, and he placed in a conspicuous place, at the entrance where the shows were given, a large sign in these words, "Free Contribution," "Pay What You Wish," "Benefit Carlsbad Sanitarium." The gross receipts from these two entertainments were \$33.30. He took out of this amount his actual expenses for films, electricity, lights,

one day's rent of building and for labor of three hands, total, \$14.75, which was his expenses for that day, thus leaving a balance of \$18.55, which he turned over for said inmates.

There can be no question but this was a plain and direct violation of the statute, and his conviction and punishment were proper. In the recent case of McLeod v. State, 180 S. W. 117, the facts were somewhat similar, but nothing like as strong as the facts in this case. We see no necessity of again discussing the question.

The judgment is affirmed.

HILES v. STATE. (No. 3936.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

CRIMINAL LAW \S 404—EVIDENCE—ADMISSIBILITY.

The clothes worn by decedent at the time he was shot by accused are admissible to show where the wounds took effect in the body of decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. \S 404.]

Appeal from District Court, Culberson County; Dan M. Jackson, Judge.

W. J. Hiles was convicted of crime, and he appeals. Affirmed.

Joe Irby, of Van Horn, and J. W. Parker, of Pecos, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is the second appeal in this case. The first is reported in 73 Tex. Cr. R. 18, 163 S. W. 717, where a sufficient statement of the case is made. There is no substantial difference in the record on this from the other appeal.

Appellant was convicted of manslaughter and assessed the lowest punishment. The evidence was amply sufficient to sustain the verdict.

There are but three bills of exceptions. The first raises again the question of whether or not the testimony of the witness Padlock in substance and effect showing a conditional threat by appellant was admissible. The second bill also raises the question passed upon before of whether or not the testimony of Moorehead, as to what appellant said to him as to the material facts in the case, was admissible; he claiming that he was under arrest at the time. Both these questions were fully discussed and correctly decided against appellant in the former appeal. There is no necessity of further stating or discussing either of them now. The court below correctly ruled on both questions.

The next bill complains of the introduction in evidence of the clothes worn by deceased when appellant shot him. It became necessary for the state to show where the wounds took effect in the arm and body of the de-

ceased, and clearly the clothes were admissible for that purpose. This is so well established, and has been held so many times by this court, we deem it unnecessary to cite the cases.

The judgment is affirmed.

DAVIDSON, J., not present at consultation.

NOE v. STATE. (No. 3916.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

1. ROBBERY — 17 — INDICTMENT — DESCRIPTION OF PROPERTY — SUFFICIENCY.

Under Code Cr. Proc. 1911, arts. 458, 468, providing that a general description of property by name, kind, quality, number, and ownership shall be sufficient, and that in indictments for theft, etc., of coin or paper current as money it shall be sufficient to describe the property in general terms as money, an indictment for robbery of "\$11 in money, which * * * passed current as money of the United States, * * * and of the value of \$11," sufficiently described the property.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16-23, 26; Dec. Dig. —17.]

2. CRIMINAL LAW — 1092 — BILL OF EXCEPTIONS — TIME TO FILE.

Bills of exceptions, approved and filed after the time fixed by orders allowing the filing of bills after adjournment of court, cannot be considered, but must be stricken out on motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. —1092.]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Claud Noe was convicted of robbery, and he appeals. Affirmed.

Louis Wilson, of Dallas, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of robbery, and his punishment assessed at seven years in the penitentiary.

[1] The indictment alleges that appellant robbed R. W. Burden of "eleven dollars in money, which then and there passed current as money of the United States of America, and of the value of eleven dollars." All the other allegations in the indictment are regular and sufficient. Appellant contends that this description of the money was a fatal defect in the indictment. Both under our statute and the many decisions of this court, this description of the money was clearly sufficient. Articles 458 and 468, C. C. P.; Sparks v. State, 177 S. W. 968; Ferrell v. State, 68 Tex. Cr. R. 495, 152 S. W. 901; Sims v. State, 64 Tex. Cr. R. 435, 142 S. W. 572, and the cases therein cited. A large number of others could be cited, but it is unnecessary.

[2] The court below by two separate orders allowed altogether 80 days after the adjournment of court at which appellant was tried for him to file bills of exceptions. They were not filed within that time, but show to have

both been approved and filed several days thereafter. The motion of the Assistant Attorney General to strike them out and not consider them must therefore be sustained, both under the statute and the uniform decisions of this court.

The evidence was unquestionably sufficient to sustain the verdict. Appellant's bills of exception being filed too late and struck out, there is nothing else raised which can be reviewed.

The judgment is therefore affirmed.

DAVIDSON, J., not present at consultation.

WOOD v. STATE. (No. 3909.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

1. CRIMINAL LAW — 1159 — APPEAL — MATTERS REVIEWABLE — CREDIBILITY OF WITNESSES.

On trial of one accused of seduction, the credibility of witnesses, weight of their testimony, and facts established, are questions for the jury, and the court on appeal cannot disturb its finding thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. —1159.]

2. CRIMINAL LAW — 597 — CONTINUANCE — RIGHT OF ACCUSED — ABSENCE OF WITNESSES — SUFFICIENCY OF SHOWING.

Where one accused of seduction moved for continuance on the ground of the absence of two witnesses by whom he alleged in his affidavit he could prove they had had sexual intercourse with the prosecuting witness prior to the alleged seduction, but accused failed to attach the affidavit of either to that effect, and, after conviction, on motion for new trial, the state produced the affidavit of one of them that he had never had such intercourse, and the court qualified the bill of exceptions to the overruling of the motion for continuance by stating that the other witness would not probably testify as accused stated, and that, if he did, the testimony would not probably be true, no error in refusing the continuance was shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. —597.]

3. CRIMINAL LAW — 1124 — APPEAL — MATTERS REVIEWABLE — RECORD ON APPEAL.

Error cannot be predicated on the refusal of a new trial prayed on account of the absence of witnesses, where the record shows that the court in hearing the motion for new trial heard evidence, but the evidence heard is not disclosed by statement of facts, bill of exceptions, or other proper method.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. —1124.]

4. CRIMINAL LAW — 814 — INSTRUCTIONS — EVIDENCE.

Refusal of an instruction that prosecutrix traded her virtue for a promise of marriage, the only promise being to marry if she became pregnant from the intercourse, was not error, where the testimony of the prosecutrix showed the reverse to be true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1823, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. —814.]

5. SEDUCTION—EVIDENCE OF INTERCOURSE—PROMISE OF MARRIAGE—CORROBORATION.

In a prosecution for seduction, the testimony of the prosecuting witness need not be directly corroborated in every element of the offense, and circumstantial evidence is sufficient in corroboration if it connects the accused with the commission of the offense beyond a reasonable doubt, on the questions of intercourse and promise of marriage.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. ¶46.]

6. SEDUCTION—EVIDENCE—ADMISSIBILITY.

In a prosecution for seduction, testimony that witness had a conversation with accused, who asked him for medicine to cause a miscarriage, and said that he was in trouble with a girl "over on the creek," and that he would marry her or leave the country, was admissible, in view of the further evidence that prosecutrix lived close to a stream called "the creek" and was the only girl who in that year in that community became enceinte, and that accused soon left the country.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. ¶40.]

7. SEDUCTION—EVIDENCE—ADMISSIBILITY.

Where prosecutrix testified that accused had exhibited a protector to her, testimony of other witnesses that they had seen such appliances in his possession prior to the alleged seduction is admissible in corroboration.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. ¶46.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Alvin Wood was convicted of seduction, and he appeals. Affirmed.

John W. Moyers of Mineral Wells, J. T. Ranspot, of Palo Pinto, and W. P. Gibbs, of Gordon, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of seduction with the lowest punishment assessed.

[1] We see no necessity of reciting the testimony. It was conflicting on several material points. That of the state was amply sufficient, if believed by the jury, to clearly justify the verdict. It evidently was believed by the jury. That of the appellant was amply sufficient, if it had been believed by the jury, to have secured his acquittal. The jury evidently did not believe him and his side of the testimony. This matter was entirely for the jury and the lower court. The jury, under the law, were the exclusive judges of the credibility of the witnesses, the weight to be given their testimony, and the facts established. We cannot disturb the verdict. *Kearse v. State*, 68 Tex. Cr. R. 635, 151 S. W. 827.

The trial judge gave an admirable charge submitting properly every issue necessary or proper to be submitted to the jury. There were no objections to the court's charge.

[2, 3] Appellant made a motion for a continuance on account of the absence of two witnesses, Ray Morris and Floyd Boarman.

After the trial had progressed and some evidence had been introduced, appellant renewed his motion for a postponement, or a continuance, in order to get these two witnesses. Both these motions were overruled. By each witness he stated that he expected to prove that each of them had had sexual intercourse with Miss Roxie Christian, prosecutrix, prior to the time he is alleged to have seduced her. He claimed that each of these absent witnesses would so testify. On the face of his motions, they were apparently good and showed sufficient diligence. After his conviction, in his motion for new trial, he set up the overruling of his said motions as a ground for new trial. The state vigorously contested the motion, alleging, in substance, that no such proof could be made by either of said witnesses, and that neither of them would testify that they had had sexual intercourse with the prosecutrix. The district attorney attached as a part of his resistance the affidavit of said Boarman, swearing positively that he never at any time had intercourse with the prosecutrix, and that he would not have sworn on the trial that he had had any act of sexual intercourse with her, and that he never at any time even suggested such a thing to her. The motion for a new trial was not acted upon by the court until about four weeks after the trial. Appellant attached no affidavit of the witness Ray Morris that he would have so testified on the trial.

The record shows with certainty that the court heard evidence at the time he acted upon said motion for new trial. What evidence he heard is not disclosed by any statement of facts, bill of exception, or other proper way of bringing the testimony and showing it to this court. Under the circumstances and well-settled law of this state, the court's action therefore, in overruling the motions for a continuance and the motion for a new trial on the ground of the absence and lack of testimony of these witnesses, presents no error. *Jones v. State*, 163 S. W. 76; *Graham v. State*, 73 Tex. Cr. R. 34, 163 S. W. 726; *Hoskins v. State*, 73 Tex. Cr. R. 109, 163 S. W. 426; *Forrester v. State*, 73 Tex. Cr. R. 67, 163 S. W. 87; and where some of the cases are collated, *Roberts v. State*, 180 S. W. 1080.

In explanation of appellant's bills to the overruling of his motion for a continuance as to the witness Morris, the court allowed the bill, with this explanation:

"That the evidence showed that the witness Ray Morris had ceased paying attendance to the prosecutrix long prior to the alleged seduction, and there was not a fact or circumstance in evidence that cast the slightest suspicion on the prosecutrix in connection with the said Ray Morris, nor in connection with any other man except the defendant, and in the opinion of the trial court, in the light of the testimony, the said Ray Morris would not have testified that he did have intercourse with the prosecutrix at any time, and, if he would so testify, that his

said evidence is not probably true and would not have changed the result of this trial."

It is the well-settled law of this state, both by our statute and a very large number of decisions, that an accused is not entitled to a continuance as a matter of right; that the truth, merits, and sufficiency of his motion for a continuance are matters now addressed to the sound discretion of the trial court. Judge White, in his Ann. C. C. P. § 643, lays down the correct proposition that an application for a continuance will be held properly overruled when, in connection with the evidence adduced on the trial, it is apparent that the proposed absent testimony would not be probably true, citing a large number of decisions supporting his proposition. Again, in section 647, he lays down the proposition that this court on appeal will not reverse or reverse the judgment of the lower court refusing a continuance or postponement and the overruling of the motion for new trial based upon such applications, unless it is made to appear by the evidence adduced at the trial that the proposed absent testimony was not only relevant and material, but probably true, citing a great many cases sustaining his proposition. And, further, in section 647, par. 2, he lays down this correct proposition: That this court on appeal will not reverse a judgment on account of the refusal of a postponement or a continuance, unless, in connection with the other evidence adduced on the trial, this court is impressed with the conviction, not merely that the defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that, if the absent testimony had been before the jury, a verdict more favorable to the defendant would have resulted, citing a large number of cases supporting that proposition. The trial judge below, as shown by his qualification, properly acted upon these correct propositions of law applicable in this case, and in no event does his action in refusing a continuance or a postponement or a new trial because of the absence of said witnesses show any reversible error. *Stacy v. State*, 177 S. W. 118.

[4, 5] The court did not err in refusing to give either of appellant's special charges shown by his bill of exceptions:

One, to the effect that:

"The prosecutrix shows she traded her virtue for a promise of marriage; that the only promise made to her was the defendant would marry her if she became pregnant, or anything happened to her from said intercourse. You will therefore find the defendant not guilty, and so say by your verdict."

Another, to the effect that:

"The state must corroborate the testimony of the prosecutrix as to the act of copulation, and, having wholly failed to corroborate her on said point, you are instructed to find the defendant not guilty, and so say by your verdict."

And the other to the effect that:

"The state has failed to corroborate the testimony of the prosecutrix as to the promise of

marriage, and the testimony of the said prosecutrix is before you wholly without corroboration. You are therefore instructed to find the defendant not guilty, and so say by your verdict."

Neither of these charges should have been given.

The law in this state is well settled that in prosecutions for seduction the testimony of the seduced girl does not have to be corroborated in each and all of the necessary elements of the offense. The corroborative evidence may be slight, and the requirements of the statute are fulfilled if there be any corroborative evidence which of itself tends to connect the accused with the commission of the offense. Such corroboration only is necessary as is sufficient to satisfy a jury beyond a reasonable doubt of the truth of the charge in connection with the testimony of the accomplice. *Nourse v. State*, 2 Tex. App. 304; *Jones v. State*, 4 Tex. App. 529; *Tooney v. State*, 5 Tex. App. 163; *Simms v. State*, 8 Tex. App. 230; *Clanton v. State*, 13 Tex. App. 139; *Moore v. State*, 47 Tex. Cr. R. 415, 83 S. W. 1117; *Nash v. State*, 61 Tex. Cr. R. 264, 184 S. W. 709; *Williams v. State*, 59 Tex. Cr. R. 347, 128 S. W. 1120; *Bost v. State*, 64 Tex. Cr. R. 464, 144 S. W. 589; *Murphy v. State*, 143 S. W. 616. This must necessarily be the law and the proper construction of the statute in cases of this character, for acts of intercourse are always as secret and private as can be and under such circumstances as the parties themselves believe will prevent their detection or even suspicion at the time. Also, engagements of young persons to marry are made in private and in secret between them, and very generally, if not entirely, the fact of engagement for at least some length of time is kept as private and secret between them as can well be. Therefore proof, in the nature of things, generally cannot be made other than by the testimony of the accomplice corroborated by such circumstances as to the time and place, opportunity, and the course of dealing or treatment between the parties along about the time as would tend to show such facts. *Holmes v. State*, 70 Tex. Cr. R. 434, 157 S. W. 487, and cases therein cited; *Curry v. State*, 68 Tex. Cr. R. 264, 151 S. W. 319; *Curry v. State*, 72 Tex. Cr. R. 465, 162 S. W. 851; *Nash v. State*, 61 Tex. Cr. R. 259, 134 S. W. 709 (Judge Ramsey's opinion) and on page 281 of 61 Tex. Cr. R., on page 711 of 134 S. W. (Judge McCord's opinion), and cases cited by them; *Warren v. State*, 67 Tex. Cr. R. 273, 149 S. W. 180; *Gillespie v. State*, 73 Tex. Cr. R. 599, 166 S. W. 135. A large number of other cases are collated in those we have just cited above. It is unnecessary to collate them here again. It is also the well-settled law of this state that the corroboration of a witness who is an accomplice can as well be made by circumstantial as by positive testimony. In seduction cases corrob-

oration must be had largely by circumstantial testimony.

We have carefully read and considered the testimony in this case. There are many facts and circumstances testified to by witnesses other than the prosecutrix which corroborate her under the law amply as to every material fact where corroboration was necessary. We think no useful purpose could be served by taking up the testimony of the prosecutrix and each witness to show that she was amply corroborated. Her testimony taken as a whole, alone, or in connection with the other testimony, did not justify the court to tell the jury that she had traded her virtue for a promise of marriage; that the only promise made to her by defendant was that he would marry her if she became pregnant, or if anything happened to her from intercourse, as claimed by one of appellant's charges. Her testimony clearly tends to show the reverse of this.

The court, in submitting the case for a finding, required the jury to affirmatively believe beyond a reasonable doubt from the evidence every fact essential to appellant's conviction before they were authorized to do so, and, in addition to giving the reasonable doubt and presumption of innocence, he gave the converse of this submission of the case to them and told the jury that, "if you do not so believe and find from the evidence beyond a reasonable doubt, to acquit him." And, in addition to all this, the court charged the jury as follows:

"The term 'seduce,' as used in this charge, means to lead away from the path of virtue by a promise of marriage, and the carnal intercourse must occur by virtue of the promise of marriage. It means an enticement of a woman on the part of a man to surrender her chastity by means of a promise of marriage, and the promise must be absolute and unconditional.

"In this connection, you are further instructed that if you believe from the evidence that the defendant had promised to marry prosecutrix, and that thereafter, and while said promise and engagement was still in force, he induced her to have intercourse with him and to permit him to have carnal knowledge of her person, by virtue of said promise, then this would constitute seduction.

"On the other hand, if the defendant induced the prosecutrix to have carnal intercourse with him (if he did have such intercourse with her) upon the conditional promise that if she became pregnant he would marry her, and if she yielded to his embraces and permitted him to have carnal knowledge of her solely upon the condition that he would marry her provided she became pregnant, or if you have a reasonable doubt as to whether or not she did, then this would not constitute seduction, and defendant should be acquitted.

"Moreover, gentlemen, if the defendant had carnal knowledge of the prosecutrix, and in yielding to him she was induced to do so through lust or from any other motive than that of an absolute promise to marry her, he cannot be convicted.

"Our law provides that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it

merely shows that some person has committed the offense.

"In this connection, gentlemen, you are instructed that Roxie Christian is an accomplice, and that a conviction cannot be had upon her testimony, although the jury may believe the same to be true, and that it establishes the guilt of the defendant beyond a reasonable doubt, unless her testimony is corroborated by other evidence tending to establish the fact that the defendant, prior to the alleged intercourse and on or about July 5, 1914, or after said date promised to marry the said Roxie Christian, and unless her testimony is corroborated by other evidence tending to show that the defendant actually had carnal knowledge of her, the said Roxie Christian, by virtue of said promise of marriage, and the corroboration is not sufficient if it merely shows that some person had seduced or had carnal knowledge of Roxie Christian."

[6] The testimony shows that appellant was rather an intimate friend of Harve Brothers and had been for many years; that Mr. Brothers was in no way related to any of the parties, nor shown to have been in any way biased or prejudiced. At the state's instance, he testified:

"I had a conversation with Alvin Woods in January of this year in the Merchandise store at Strawn. I was in the store when he came in. He called me off and asked me if I knew of any medicine to knock a kid, and asked me if I would get it for him, and I told him I had never had any trouble like that and didn't know anything about it. I asked him who he had trouble with, and he said 'a girl on the creek.' He never called the name. He said he was going to marry her or leave, and he said he would leave. I am well acquainted with the people in that neighborhood. I have not heard of any other unmarried woman in that neighborhood that has gotten in a family way except Miss Roxie Christian."

Appellant objected to this testimony, because it did not disclose that prosecutrix was the girl to whom he referred, nor what kind of trouble he referred to, and that the girl over on the creek was too vague and indefinite to locate the residence or whereabouts of the prosecutrix, and it was so general that it might apply to any girl on any creek, and it was calculated to injure and prejudice him before the jury. The court approved the bill, with this explanation and qualification:

"That the evidence showed that in July, August, and September of 1914, the prosecutrix lived within about 300 yards of Ioni creek, and the neighborhood in which she lived was referred to and known by the people generally as 'on the creek.' That the proof further showed that during said time the defendant was paying assiduous attention to the prosecutrix, with her practically every Sunday, spending some nights at her home, and many of the week days. And the evidence further showed that he was paying court to no other girl, and that prosecutrix is the only unmarried woman who got in a family way on that creek or in that section of the country during the year 1914. And the court felt, under the circumstances, that this evidence should go to the jury, and leave them to determine whether or not the defendant's statements alluded to the prosecutrix."

The evidence showed that appellant then did leave Palo Pinto county and went to a distant county. This evidence was clearly admissible.

[7] The appellant, first, on cross-examination of prosecutrix, asked her about appellant's having cundrums and having exhibited them to her. At the instance of the state, said Brothers and Cleve Foreman each testified, in substance, after the prosecutrix had testified, that at the close of the school in the spring of 1914 they were at a dance at Mr. Riebe's; that appellant was there; that they saw him pull a handkerchief from his pocket and drop three or four cundrums on the floor, which he tried to cover up with his foot. Appellant objected to all this for various reasons. In approving this bill, the court did so with this explanation:

"That this incident occurred prior to the time that defendant is alleged to have had intercourse with prosecutrix, and she testified that during the time he was having intercourse with her he exhibited to her some cundrums. Which fact, if true, would show, or tend to show, an undue intimacy between defendant and prosecutrix, and that he was actually having intercourse with her. And evidence that he was in possession of cundrums prior to the time she alleges that he showed them to her was, in the opinion of the trial court, a circumstance tending to corroborate her statement that he did show them to her, and also that he was having intercourse with her."

Under the facts and circumstances of this case and as thus qualified by the judge, the said testimony was admissible.

There is no other question raised requiring discussion.

The judgment is affirmed.

DAVIDSON, J., not present at consultation.

DAVIS v. STATE. (No. 3942.)

(Court of Criminal Appeals of Texas. Feb. 2, 1916.)

1. LARCENY \S 17—ELEMENTS OF OFFENSE—ASPORTATION.

Under Pen. Code 1911, art. 1331, providing that, to constitute taking in theft cases, it is not necessary that the property be removed any distance from the place of taking, the branding by one of the animals of another without removing them from their accustomed range, but with the intent of appropriating the animals, is sufficient evidence of a fraudulent taking to sustain a conviction of theft, without further asportation of the animals.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 30; Dec. Dig. \S 17.]

2. LARCENY \S 55—EVIDENCE—SUFFICIENCY. Evidence held to support a conviction of theft of animals.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 152, 164, 165, 167-169; Dec. Dig. \S 55.]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Jonah Davis was convicted of theft, and he appeals. Affirmed.

S. H. German, of Livingston, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft of two hogs, and his punishment assessed at two years' confinement in the state penitentiary.

[1] There is but one question raised on appeal, and that is the sufficiency of the evidence to sustain a conviction. It is a case depending entirely on circumstantial evidence, and if asportation of the stolen property was necessary to sustain a conviction, it would undoubtedly be insufficient, for it is not shown that the hogs were removed from their accustomed range. Article 1331, Penal Code, provides that, to constitute "taking" in theft cases, it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief. In *Coward v. State*, 24 Tex. App. 590, 7 S. W. 332, it was specifically held that the marking and branding of an animal (without asporting it, or taking it from its accustomed range) for the purpose of appropriation will evidence a fraudulent taking. The facts in that case are quite similar to the facts in this case, and the evidence was held sufficient. In that case, as in this, there was a changing of the marks on the animal, and it was held this could not have been accomplished without reducing the animal to possession. Judge White said:

"We see no good reason, however, why a fraudulent taking of an animal may not be evidenced by an illegal marking and branding for the purpose of permanently appropriating it, since asportation is not necessary to constitute theft (Penal Code, art. 726), and since it is manifest that marking or branding cannot be accomplished without an actual manual possession of the animal by the party engaged in it."

[2] The proof shows that Banks Austin's mark was a smooth crop and a hole in one ear, and a crop with a split in the other ear; the marks on the hogs had been changed; the cropped ear had two splits in it, instead of one, and the other ear with a hole in it was cropped again. The changes showed to have been recently made, as they had not healed. Appellant's father gave the mark that the hogs had been changed to, according to the state's testimony, and appellant testified he had been in charge of his father's hogs for four years; his father was too old and feeble to look after such matter, and appellant always refers to the mark as his (appellant's) mark. Banks Austin positively identified the hogs as his hogs, and he went to see appellant when he found the hogs with the mark changed, and appellant claimed the hogs, and said they were in his mark. Appellant denied having this conversation with Austin, but admitted that the crop in one ear and two splits in the other was his father's mark, and he (appellant) had been and was looking after them, and they were in his control, and that he had been doing all the marking for his father for several years. On the question of in-

tent the state proved this was not the first time appellant had marked another's hogs in his father's mark; that he marked Tom Whisenhant's hog in that way, and had been compelled to straighten the matter up. Tom Whisenhant testifies that a short time before these hogs were found with their marks changed he heard some dogs barking down in the woods, and, upon going down there, he found appellant with a bunch of hogs, and, upon asking him to whom the hogs belonged, he said "mine" or "ours"; that the listed sow and spotted sow Austin says belonged to him, and that the marks changed were in the bunch of hogs that appellant then claimed. Under such circumstances we cannot say the jury, under a proper charge, was not authorized to find appellant guilty. The court required the jury to find beyond a reasonable doubt that the hogs belonged to Austin; that appellant had the intent to appropriate them to his own use and benefit, and further instructed that, even though they find the hogs belonged to Austin, yet if appellant marked them through mistake, thinking they belonged to his father, they would acquit appellant. It is true no one testifies he saw appellant mark the hogs or change the marks, yet Whisenhant puts him in possession of them; the hogs when seen thereafter had their marks changed from Austin's mark to the mark claimed by appellant, and if they had not been found until the marks had healed, he doubtless could have recovered the hogs in a suit for their possession.

The judgment is affirmed.

DAVIDSON, J., not present at consultation.

MIKESKA v. STATE. (No. 3833.)

(Court of Criminal Appeals of Texas. Dec. 1, 1916. Rehearing Denied Feb. 2, 1916. Dissenting Opinion Feb. 17, 1916.)

1. CRIMINAL LAW \S 390—EVIDENCE—INSANITY.

In a prosecution for wife murder, where defendant set up insanity and attempted to prove the defense by evidence of his entire life history, the state could show in rebuttal, by similar evidence, that at no period of his life was defendant's mind so unbalanced as to render him irresponsible for his acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. \S 396.]

2. CRIMINAL LAW \S 393—EVIDENCE—INSANITY.

Testimony of a qualified expert that defendant appeared in court to be playing the part of one afflicted with melancholia, that he was not suffering from such disease, and that he had not so acted while in jail was not improper, as causing the defendant in effect to testify against himself, since experts, in giving an opinion as to a defendant's sanity, may take into consideration his acts, conduct, and demeanor on trial, as well as such matters on other oc-

casions, while the jury may also consider the behavior of a person as observed by them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. \S 393.]

3. CRIMINAL LAW \S 474—EVIDENCE—INSANITY.

The testimony of qualified medical experts on insanity that a person laboring under a sudden attack of insanity or mental aberration brought on by trouble, and having a slip of the mind for an hour or a day, would not, after recovering normal consciousness, know anything he did or anything that happened during the time was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1061; Dec. Dig. \S 474.]

4. CRIMINAL LAW \S 474—EVIDENCE—INSANITY.

Testimony of medical experts that one insane to the extent of not knowing right from wrong would not and could not detail the incidents attendant upon a homicide by him, and the events just before and subsequent to the homicide, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1061; Dec. Dig. \S 474.]

5. HOMICIDE \S 179—EVIDENCE—INSANITY.

In a prosecution for wife murder, defended on the ground of insanity, the jailer's testimony of his conversation with defendant in custody, tending to show that defendant was rational and also having bearing on the question of his guilt or innocence, was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 380; Dec. Dig. \S 179.]

6. HOMICIDE \S 179—EVIDENCE—INSANITY—CONDUCT OF DEFENDANT.

The jailer's testimony as to defendant's demeanor in custody, relating a conversation with defendant which had no bearing on the issue of guilt or innocence, but merely had a tendency to aid the jury in passing upon the question of insanity, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 380; Dec. Dig. \S 179.]

7. HOMICIDE \S 179—EVIDENCE—INSANITY—CONDUCT OF DEFENDANT.

It was proper for the jailer to testify, without giving an opinion as to defendant's sanity, that defendant did not conduct himself in jail like he did on the trial, and that he had never noticed anything peculiar about defendant outside of the courtroom.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 380; Dec. Dig. \S 179.]

8. CRIMINAL LAW \S 452—EVIDENCE—INSANITY—QUALIFICATIONS OF WITNESSES.

Three witnesses, one of whom was defendant's sister-in-law, and had often visited at defendant's home for 15 years, the second of whom had known defendant for four years, lived a neighbor to him, and frequently met and talked to him, and the third of whom had known defendant for 18 or 20 years, during a portion of which time they had worked adjoining farms and met about every day, and during another period about every week, were sufficiently qualified to testify that during their acquaintance with defendant there was nothing that led them to believe there was anything wrong with his mind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. \S 452.]

9. CRIMINAL LAW \S 814 — TRIAL — INSTRUCTION—ABSTRACTNESS.

In the absence of evidence that defendant was suffering from any disease at the time of the homicide or trial, an instruction that if the jury believed he was so afflicted, and that

the disease, in connection with the long-continued use of liquor, and its recent use, produced temporary insanity, they should acquit, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. ¶814.]

10. CRIMINAL LAW ¶829—TRIAL—INSTRUCTIONS—REPETITION.

The refusal of a special charge, on an issue as to which the court fully instructs, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829.]

11. CRIMINAL LAW ¶814—TRIAL—INSTRUCTION—ABSTRACTNESS.

In the absence of evidence that defendant was suffering from delirium tremens or settled insanity from the use of intoxicants, at the time of the homicide, the refusal of a charge, as to his being permanently insane at the time from the long-continued use of intoxicants, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. ¶814.]

12. CRIMINAL LAW ¶53, 57—INTOXICATION AS DEFENSE—STATUTE.

By direct provision of Pen. Code 1911, art. 41, intoxication and temporary insanity produced by the voluntary use of intoxicants are eliminated as defenses to a charge of crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 69, 70, 761; Dec. Dig. ¶53, 57.]

13. CRIMINAL LAW ¶829—TRIAL—INSTRUCTIONS—REPETITION.

Where the court's charge and a special charge of defendant's given at his request, fully and completely presented the issue of insanity as made by the testimony, the refusal of other special charges on the issue was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶829.]

14. CRIMINAL LAW ¶50—INSANITY AS DEFENSE.

The doctrine that one, not otherwise insane, who commits crime from an irresistible impulse, cannot be held accountable therefor is not the rule in Texas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 62-64; Dec. Dig. ¶50.]

15. HOMICIDE ¶237—EVIDENCE—INSANITY.

In a prosecution for wife murder, defended on the ground of insanity, the state need not prove defendant sane beyond a reasonable doubt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. ¶237.]

16. CRIMINAL LAW ¶722—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for wife murder, the argument of state's counsel that while defendant was in a saloon drinking good whisky his wife was out in the field picking cotton to support her children, which had support in evidence, was not improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. ¶722.]

17. CRIMINAL LAW ¶713—TRIAL—ARGUMENT OF COUNSEL.

The intemperate argument of state's counsel that when there is no other defense "you will always find them resorting to the low-down, cowardly, stinking defense of insanity" did not authorize reversal, as it merely characterized the defense, and not defendant, though vituperation

and personal abuse of a defendant, calculated to inflame the passions and prejudices of a jury, is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1678; Dec. Dig. ¶713.]

18. CRIMINAL LAW ¶863—TRIAL—INSTRUCTING AFTER RETIREMENT OF JURY—STATUTE.

Under Code Cr. Proc. 1911, art. 754, providing that the jury, after retirement, may ask further instructions as to any matter of law, by appearing in a body, and, through their foreman, verbally or in writing, stating to the court the point upon which they desire instruction, which the court shall give in writing, where the court, when the foreman verbally stated that some of the jury wanted to know if there was any difference between capital punishment and death, answered verbally, having previously directed the stenographer to take down both question and answer, which was done, the judge signing the written instruction, which was delivered to the jury, there was no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2065-2067; Dec. Dig. ¶863.]

19. CRIMINAL LAW ¶855—MISCONDUCT OF JUROR.

The drinking of a glass of beer by a juror while eating his supper during trial does not constitute error, as the drinking of intoxicants by jurors constitutes reversible error only where some of them become intoxicated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2048-2053; Dec. Dig. ¶855.]

Davidson, J., dissenting.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Frank B. Mikeska was convicted of murder, and he appeals. Affirmed.

H. P. Shead and M. J. Hickey, both of Richmond, C. H. Chernosky, of Rosenberg, and Heldingsfelders, of Houston, for appellant. John H. Crooker, Cr. Dist. Atty., E. T. Branch, T. J. Harris, all of Houston, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the murder of his wife and the death penalty assessed.

[1] The proof would show that deceased, being dissatisfied with the home appellant carried her to, a place near Crosby, in Harris county, said she was going to return to her father's, in Waller county. Appellant in his confession says that the kinsfolk of deceased, before this, had been trying to get his wife away from him, and when, on this morning, she said she was not satisfied with the home he had provided, and that she was going back from where she came, he thought she meant it, and he could not control himself, and he went in another room, got a shotgun, and shot and killed her. On this trial he made no defense of his action further than to plead he was insane, and therefore not responsible for his acts. On this plea of insanity appellant introduced proof of his acts and conduct from his childhood up to and including the day of the homicide, and,

by his father, of his conduct shortly after the homicide. All this evidence of queer conduct and acts during the various periods of his life's history was introduced by appellant to prove that he was insane at the time of the killing of his wife. Appellant does not rely upon any specific cause at the time of or just prior to the homicide to prove that his mind was temporarily unbalanced at the time of the homicide, but appellant begins with his childhood days and takes acts and conduct then occurring, and through all the various years of his life, to prove that at the time, at least, he was of unsound mind and incapable of knowing right from wrong. And as this inquiry embraced this broad a scope, in rebuttal of this testimony, certainly it was permissible for the state to show, if it could, that at no period of his life was appellant's mind so unbalanced as to render him irresponsible for his acts. As the appellant relied on such facts to show that he was mentally unbalanced at the time of the commission of the offense, the state could introduce the same character of proof as tending to show that he was not mentally unbalanced at the time of the homicide, and was sane at that time.

[2] In bills of exception Nos. 1, 6, 9, and 10 objections are made to the introduction of the testimony of Drs. York, Ross, and Martin. As these bills are all of the same character, we will state only what one of the physicians testified. After qualifying as an expert on insanity Dr. Martin testified:

"I talked to this defendant a number of times, talked to him about first one thing and then another, talked to him about his condition, how he felt and how he was getting along, what caused him to get into this trouble, and first one thing and another as it would come up, talked to him on general subjects, the weather, the war, or anything of that kind, current events. The day before this case started last Wednesday I was present when he was talking about his troubles and his early boyhood and life generally, the day before this case started; he has made to me a detailed statement about the events of his life, from his boyhood and up to where he went to school, what he had done, where he had worked, and the name of his children and wife, and went into a history of his mother and father; he went into those subjects at length. In my opinion he is absolutely sane; I know that he knows it is wrong to kill any one. If a person had a slip of the mind for an hour or a day, and then regains consciousness, he would not know anything that took place during that interval; he could not detail anything that he saw or heard during that interval of the disease of his mind. If this defendant, several days after his wife died, made a detailed statement of all the facts and movements of the man and of his wife and his children during the day that she died, during the very time that she died; in other words if he made a detailed statement of those things—would say that he was absolutely sane at the time he committed the offense. The defendant here in the courtroom is a changed man from his appearance and conduct and his actions in the jail since the day before yesterday; he seems to be taking the role of melancholy; he is not suffering from any such disease as that. I observed him closely last night and this morning, and a man suffering from melancholia

is absolutely relaxant, I mean by that he don't bat an eyelid—observed him last night and this morning and he does not look it at all; it is absolutely my opinion that he is trying to simulate melancholy or insanity. Simulate means to take off; make off; pretend; malingering."

Appellant objected to this testimony on the ground that the conduct of appellant in the courtroom was not a proper subject of inquiry to be considered by the jury, and the manifest purpose of the questions propounded was to elicit from them and have them present to the jury a confession of the defendant's conduct while in jail and his conduct while in the courtroom, and the defendant had not offered any evidence for the purpose of showing insanity, his looks, appearance, conduct, expression, or gestures, during the progress of the trial, or while he was in jail, and this was in effect causing the defendant to testify against himself. All the objections here urged were specifically passed on by this court in *Tubb v. State*, 55 Tex. Cr. R. 606, 117 S. W. 858, and decided adversely to his contention. In that case the objection, among others, was urged as here:

"Because it is an effort on the part of the state to use the appearance and conduct of the defendant in the courtroom, against him when he was not placed on the witness stand."

The court in that case said:

"The position maintained by appellant was in effect decisively ruled adversely to him in the case of *Burt v. State*, 38 Tex. Cr. R. 397 [40 S. W. 1000, 48 S. W. 344, 39 L. R. A. 305, 330]. In that case Dr. Davis was placed on the stand as a witness for the state, and was permitted to testify that the defendant was simulating; that is, playing a part, and not acting naturally. This testimony was held not inadmissible. Again, in that case, Dr. Wooten was permitted to testify that while Burt was in jail, he had gone to the jail, had taken the dimensions of his skull, and while there examined the defendant, talked to him, looked at him and observed him. This was held not to be error. Again, in that case, Jack Hughes was placed on the stand for the state, by whom it was shown that he had noticed the fact that defendant had struck his head against the window frame the day before as he passed through the window, and that it was the only time defendant had done so in the many times he had passed through said window during the trial. This was held not to be error. Summarizing on the question generally, the court uses the following language: 'We are not informed of any case holding that because a prisoner is in jail, unwarned, therefore his conduct cannot be observed, so that the expert can give an opinion as to his sanity. It would be a remarkable case, indeed, in which the accused, if insane, would simulate sanity. We cannot comprehend how the fact that he was in jail could affect his conduct in this particular in any manner, and therefore the ruling of the court in regard to the testimony of Dr. M. M. Smith was correct.' See *Adams v. State*, 34 Tex. Cr. R. 470 [31 S. W. 372]. See, also, *Cannon v. State*, 41 Tex. Cr. R. 467 [56 S. W. 351]. Again, as we have seen: 'The conduct and acts of defendant while in jail may be given in evidence, as a basis for an opinion by a nonexpert as to defendant's sanity, though defendant was not warned that his acts and conduct would be used as evidence against him, as they are not a confession.' *Adams v. State*, 31 S. W. 372. The admission of this testimony could, in no proper sense,

be held to be a reference to the failure of the defendant to testify, but was merely the expression of an opinion by the expert, based on the testimony developed at a hearing and having reference to the conduct, appearance, and demeanor of the defendant then present."

Appellant does not dispute this is the rule announced in the Tubb Case, but says that the Burt Case is not authority for such ruling. In that in the Burt Case the court stated that the defendant had "offered in evidence the manner and appearance of the defendant, the way he demeaned himself during the trial, as evidence of insanity at the time of the trial," and the court gave this as a basis for its holding. The record discloses that in the Burt Case the defendant did not testify as a witness any more than did appellant in this case. It may be in that case the defendant's counsel called attention to his acts and conduct during the trial, while in this case it is not shown they did so, yet his acts, conduct, and demeanor during the trial were plainly evident to the jury. By no conceivable freak of the imagination could it be conceived that his acts, conduct, and demeanor during the trial were not and would not be noticed by the jury, and considered by them in passing on the issue of his insanity, and we think the Tubb Case was correct in holding that experts could take into consideration, in giving an opinion as to his sanity, his acts, conduct, and demeanor on the trial as well as his acts, conduct, and demeanor on other occasions. *Guerrero v. State*, 171 S. W. 731; *Kirby v. State*, 150 S. W. 460, and cases cited in Branch's Crim. Code, under article 40, Penal Code (the advance sheets with which we have been favored). This is not only the rule in this state, but also in other jurisdictions. Wigmore in his work on Evidence, § 1160, says:

"On the issue of insanity, it was, from an early period, regarded proper that the person should appear before the chancellor for inspection. Since the chancellor is upon the subject of insanity no less a layman than is a jurymen, it seems equally proper, and has been perhaps equally long established, that an inspection by the jury should be an allowable mode of acquiring knowledge on the issue of insanity. It seems to be universally accepted that, in whatever form the issue of insanity may be presented, the jury may take into consideration the behavior of the person as observed by them" (citing a great number of authorities).

[3, 4] Appellant also contends that it was improper to permit these experts to testify that if a person is laboring under a sudden attack of insanity, mental aberration, brought on by trouble, or anything else, and had a slip of his mind for an hour or a day, he would not know anything he did, anything that took place or happened during that time, when his mind resumed its normal condition. This testimony was clearly admissible. These doctors had qualified as experts on insanity, evidencing that they had often treated this mental disorder, and were familiar with and informed of conditions under such circumstances. And it was also permissible for

them to state that one who was insane to the extent of not knowing right from wrong would not and could not detail the incidents attendant upon the homicide, and the events that happened just before and subsequent to the homicide. It was in evidence in this case that appellant had detailed all these incidents a week after the homicide, and the other evidence demonstrates that he correctly did so.

[5, 6] Bills of exception Nos. 3, 5, 15, 22, and 23 are objections to the admissibility of the testimony of the witness Tom Smith, the jailer, and to various portions of this witness' testimony. This witness testified:

"I am a deputy sheriff; have known defendant ever since he has been in jail; that has been for some time. Have been a deputy sheriff five or six years; have had charge of him since this trial, have been around him. In a way I have had an opportunity to observe him in jail, his conduct in the jail; I go to the jail every morning; saw him every day. I have seen him in jail by serving different papers on different persons, and he was one among many, that is the only way I have observed him; he does not conduct himself in jail like here in the courtroom. From my observation of him in jail he is like any other ordinary prisoner, never noticed anything peculiar about him. During the trial of this case have transferred him from the jail to the courthouse and back and talked to him. I talked to him last night; I asked him if he was ready to go back to jail, and he said, 'Yes, sir,' and Mr. Milam was standing there, and I said: 'Frank, suppose we don't handcuff you; are you going to run?' He said, 'No use to run, you will get me anyhow.' Have noticed him in the hold-over, today at noon, his conduct in there; took him from there to the sheriff's office and he sat around in the office smoking a couple of cigars, came on back in, smoking a cigarette in there; three or four of these witnesses out there came up there to the door and talked to him through the door. I have handled lots of prisoners, and I found him to be an ordinary prisoner like any other man charged with murder; have noticed nothing about his conduct, his conversation, or anything else that would lead me to believe there was anything mentally wrong with him in any way."

If the conversation detailed by the witness had any bearing on the question of his guilt or innocence of the crime charged against him, it would be clearly inadmissible, but as it did not and could not have any bearing on that issue, but would only have a tendency to aid the jury in passing on the question of his plea of insanity, the testimony was admissible. *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372; *Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; *Cannon v. State*, 41 Tex. Cr. R. 486, 56 S. W. 351; *Reinhard v. State*, 52 Tex. Cr. R. 624, 106 S. W. 128.

[7] Neither was it improper to permit the witness to state that the appellant did not conduct himself in jail like he did on the trial, and that he had never noticed anything peculiar about him outside of the courtroom. These various bills were qualified by the court in approving them. The court says:

"The witness was not permitted to give an opinion as to the sanity of the defendant. He testified that he had known defendant ever

since he had been in jail right after the homicide; that he went to the jail every day; that he saw the defendant every day, and he had conversations with him and had noticed defendant while in the hold-over during the trial, and the testimony was permitted to be adduced to support the theory that he was simulating insanity during the trial and before the jury. The witness was merely permitted to testify, having shown sufficient acquaintance to do so, that he never noticed anything peculiar about defendant's conduct, appearance, or speech that would lead him to believe there was anything wrong mentally with the mind of defendant."

As qualified the bills present no error.

[8] Appellant also in various bills objected to the testimony of Miss Annie Stasny, Tom Gasner, and Joe Repka. These witnesses all testify to having known appellant for a number of years. Miss Stasny testified she was a sister of the deceased and often visited her sister at the home of appellant during a period of 15 years. Tom Gasner said he had known appellant for 4 years and lived a neighbor to him, and frequently met and talked to him; that he had seen him every week for 4 years immediately preceding the trial. Joe Repka testified he had known appellant for 18 or 20 years. That during a portion of the time they worked adjoining farms, and during that time met about every day. Saw him about every week after appellant began working in the saloon at Brookshire. Each of these witnesses detail sufficient facts and show sufficient acquaintance with him as authorized the court to permit them to state that during their association and acquaintance with appellant there was nothing that led them to believe there was anything wrong with his mind. We had the question before us in the case of *Jordan v. State*, 64 Tex. Cr. R. 187, 141 S. W. 786, when a nonexpert witness will be permitted to express an opinion as to the sanity or insanity of a person on trial, and we there reviewed the authorities. We do not deem it necessary to do so again, but under the rules there announced the court committed no error in admitting the testimony of the witnesses named above and complained of in the bills of exception stated.

[9] There was no exception reserved to the charge of the court seeking to point out any errors in the charge as given, but exceptions were reserved to the failure of the court to give some six special charges requested. One of them requested the court to charge the jury if they believed the defendant was afflicted with disease, and that such disease, taken in connection with the long-continued use of ardent spirits, and with the recent use of ardent spirits, produced temporary insanity, the jury should acquit. There was no evidence calling for such a charge. There was no evidence that appellant was suffering from any disease at the time he killed his wife, nor at the time of this trial.

[10] As the court fully instructed the jury they could not consider the failure of the defendant to testify as a circumstance against

him in language frequently approved by this court, there was no error in refusing the special charge on this issue.

[11, 12] There was no evidence that appellant was suffering from delirium tremens or mania a potu at the time of the homicide; therefore there was no error in refusing the charge in regard to appellant being permanently insane at the time of the homicide from the long-continued use of intoxicating liquors. Our Code, in article 41, has eliminated intoxication and temporary insanity produced by voluntary use of intoxicants as a defense to crime. There being no evidence of what is defined as "settled insanity" from the use of intoxicants in the record before us, the court did not err in refusing to submit such issue. *Delgado v. State*, 34 Tex. Cr. R. 157, 29 S. W. 1070; *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343; *Evers v. State*, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 87 Am. St. Rep. 811.

[13] The court's charge in presenting the issue of insanity, and special charge No. 3, given at the request of appellant, fully and completely present this issue as made by the testimony to the jury; therefore there was no necessity to give the other special charges requested on this issue.

[14] The doctrine of insanity or nonaccountability from an "irresistible impulse" alone has never received the sanction of this court. *Hurst v. State*, 40 Tex. Cr. R. 387, 46 S. W. 635, 50 S. W. 719; *Cannon v. State*, 41 Tex. Cr. R. 489, 56 S. W. 351; *Lowe v. State*, 44 Tex. Cr. R. 224, 70 S. W. 206; *Thomas v. State*, 55 Tex. Cr. R. 296, 116 S. W. 600; *Kirby v. State*, 150 S. W. 455.

[15] Neither has the doctrine that the state must prove the person on trial sane beyond a reasonable doubt ever received the sanction of this court. While such a rule prevails in some jurisdictions, yet a large majority of the courts of final resort in the United States adhere to the rule recognized and enforced by the decisions of this court—that when the state has proven appellant guilty of the crime charged beyond a reasonable doubt, and he seeks to relieve himself of punishment for having committed the crime by proof that he was insane, the burden is upon him to show by a preponderance of the evidence that his mind was in such condition that he did not know right from wrong as to the particular act committed. Suppose before announcing ready for trial a complaint had been filed charging that he was insane, and a trial had on that issue prior to this trial. Would anyone contend that it would be necessary to prove that appellant was insane beyond a reasonable doubt before a jury would be authorized to so find? We do not think so, but they would be authorized to find him insane upon a preponderance of the testimony, and because he elected to have no such trial, and interposed the plea as a defense to the crime, it would not and should

not change the rule of law as applicable to this issue alone. This matter was thoroughly discussed by this court in the cases of *Webb v. State*, 9 Tex. App. 490, and *King v. State*, 9 Tex. App. 515, and in those cases it was held that the doctrine that the state must prove beyond a reasonable doubt that a person was sane was not to be the correct rule. Judge Hurt entered his dissent to such holding in the *King Case*, supra, but the rule as announced by Judges White and Winkler in the *Webb Case* has always prevailed in this court, and in subsequent decisions adhered to by Judge Hurt as well as the other members of the court. This question is no longer an open one in this state, and we think the rule a correct one under the provisions of our Penal Code and Code of Criminal Procedure.

[16] In bill of exceptions No. 8 it is made to appear that counsel for the state in argument said:

"While the defendant was in a saloon drinking good whisky, his wife was out in the field picking cotton to support her children"

—and the court refused to instruct the jury not to consider the remarks. Such remarks had basis in the testimony. Witnesses for appellant, testifying to conditions tending to show he was insane, testified to him tending bar for one of the witnesses for some two years; that at times he became intoxicated, while other witnesses testified that his wife had picked cotton for them while appellant was tending bar. Comments upon testimony legitimately in evidence, and deductions drawn therefrom, are never improper.

[17] In bill No. 17 it is shown that counsel for the state in the closing argument said:

"When there is no other defense, you will always find them resorting to the low-down, cowardly, stinking defense of insanity."

Appellant's only defense was that he was insane. So reference to the fact that this was his only defense was legitimate. If the remarks were improper, it consists in the fact that he termed this defense a "low-down, cowardly, stinking defense." In the *American & English Ency. of Law and Practice*, vol. 5, p. 366, it is said:

"Just and fierce invective, based upon the facts in evidence and all legitimate inferences therefrom, is not discountenanced by the courts. Thus new trials have been refused when the error assigned was the application to parties or witnesses by counsel in argument of the terms 'assassin,' or 'murderer,' 'fiend' or 'scoundrel,' 'low-down whore,' 'liar,' 'thief' or 'robber,' 'tramps,' and other denunciatory epithets apparently warranted by the evidence in the case"—citing cases from almost every state in the Union, including many from this court, to wit: *Glasgow v. State*, 50 Tex. Cr. R. 635, 100 S. W. 933; *Tune v. State*, 49 Tex. Cr. R. 445, 94 S. W. 231; *Choice v. State*, 54 Tex. Cr. R. 517, 114 S. W. 132; *Vann v. State*, 48 Tex. Cr. R. 11, 85 S. W. 1064; *Martinez v. State*, 57 S. W. 838; *Mason v. State*, 81 S. W. 718; *Love v. State*, 78 S. W. 691; *Johnson v. State*, 53 S. W. 106; *Miller v. State*, 47 Tex. Cr. R. 329, 83 S. W. 393; *Ball v. State*, 78 S. W. 508; *Drye v. State*, 55 S. W. 65.

However, vituperation and personal abuse of a person on trial, calculated to inflame the passions and prejudice of a jury, disconnected with the trial, is highly improper and will not be tolerated. The remarks in this instance had no further reference to appellant than to characterize the defense interposed, and could and would only be taken by the jury as the opinion of counsel of such defense, and is not of the character that would authorize us to reverse a case because of such intemperate remarks.

[18] The only other bill of exceptions in the record complains of the action of the court in permitting the jury to propound certain questions, which he had the stenographer take down in writing, and then had the stenographer to take down his reply to such questions, which were then handed to the jury in the following form:

"Court: What is it you want to know of the court?"

"Jurors: Some of the jury want to know if there is any difference between capital punishment and death—the definition of capital punishment."

"Court: A capital offense means one that the death penalty can be inflicted in. Any offense for which the death punishment can be assessed is a capital offense. Capital punishment means the excessive punishment—the death punishment."

"Juror: A man that voted capital punishment, that would mean to inflict the death penalty."

"Court: Capital punishment is the death punishment. C. W. Robinson, Judge."

Code Cr. Proc. art. 754, provides that the jury, after having retired, may ask for further instructions touching any matter of law. The jury shall appear in a body, and through their foreman, either verbally or in writing, state to the court the particular point of law upon which they desire instruction, and the court shall give such instruction in writing. This statute was complied with in this case. The fact the court permitted the jury to propound the question orally was authorized by this article, but he gave them no oral answer. He had the stenographer write out the question and his answer thereto, signed same, and this written instruction was delivered to the jury. All the court did was, at the request of the jury, define a capital offense and capital punishment. He could have refused to define these terms had he so desired; but, as he saw proper to answer the questions, and defined the terms properly, no error is presented.

[19] The only other question presented by the court is on affidavit, attached to the motion for new trial, of Mr. Chenoski, of counsel for defendant, in which he says:

"That he received information from a reliable source that on the evening of the 9th of April, while the jury was at their supper, some of the jurors drank one or two steins of beer."

The fact that a jurymen in eating his meal drank a glass of beer as a part of the meal presents no error. It is only where some of the jurors become intoxicated that the drink-

ing of intoxicants becomes reversible error. *Jack v. State*, 26 Tex. 1; *Tuttle v. State*, 6 Tex. App. 561; *Rider v. State*, 26 Tex. App. 334, 9 S. W. 688; *Brown v. State*, 45 Tex. Cr. R. 139, 75 S. W. 33.

The death penalty being assessed in this case, we have carefully reviewed each assignment in the record. Appellant made no defense other than he was insane, and therefore not responsible for his act. The court admitted no improper evidence on this issue, fairly submitted it to the jury, and the jury found that he was sane, and from the testimony adduced at the hearing it is not surprising that they did so find. Under the evidence the writer, had he been a member of the jury, would have been loth to assess the death penalty. It is true the record discloses no justification for the act, and we are firmly convinced that appellant was not insane. Yet he was a man given to drinking intoxicating liquors; had drunk some whiskey that morning; he had been worried and harassed by the lingering illness and death and burial of his oldest girl; he believed that some people were trying to separate him and his wife, and when she told him she was going to quit him and go home, he was in that frame of mind which doubtless rendered him reckless of consequences, and while in such frame of mind he shot and killed his wife. There were, so far as this record discloses, no antecedent menaces or grudges on his part. It was an act done from an impulse arising from no sufficient or just cause. It is true our law takes no notice of length of time in the forming of an intent to kill. It may be formed in an instant of time, and, if formed, it is murder. There is no doubt of appellant's guilt of murder, and he should be severely punished, but whether or not the circumstances called for the highest punishment known to the law is a matter of doubt in the mind of the writer. This is a question, however, that the law has confided to the jury; and, as there is evidence authorizing a finding of a fixed and determined intention to kill upon a provocation that should not have provoked that degree of anger or rage as would render appellant incapable of not knowing what he was doing and the consequences of his act, we do not feel authorized to disturb the verdict of the jury because of the punishment assessed.

The judgment is affirmed.

DAVIDSON, J. I am of opinion this judgment ought not to be affirmed, either on the law or the facts, and may write on motion for rehearing.

DAVIDSON, J. (dissenting). Insanity was the defense relied upon by appellant. Upon that issue the case of defendant was mainly fought in the trial court. No contest was made as to the fact that appellant killed his wife. That issue gathered about it many

facts upon which the jury had to pass. Kindred to, a part of, and incidental to insanity was the mental condition and the facts and circumstances attending the homicide which indicated the mental condition, if the evidence should not be held to show insanity. This was of supreme moment to the defendant as it was to the fairness of the trial and the justness of the verdict and judgment. That issue brought forcefully the question of the mental status of the accused at the time that he fired the shot that took the life of deceased. It placed it in the forefront of this tragedy. This evidence shows the act was surrounded by facts that indicate appellant was not in condition mentally to have that cool, sedate, and deliberate mind which would manifest such mental condition or the degree of malice which would justify, demand, or authorize the jury to assess the death penalty.

I cannot believe under this record that the defendant ought to be hanged, even though he was not insane at the time he slew his wife. These two questions, however, were in the case: Insanity, first; and, second, a want of such coolness, sedateness, and deliberation as proved that a capital crime had been committed. There were no former grudges or menaces incident or prior to the killing. It is true appellant slew his wife, but all the circumstances show the slaying occurred without deliberation, and under a rash, sudden impulse. The evidence shows that he had not anticipated his wife's acts, conduct, and statements and her fixed determination to leave and not live with him until immediately before the homicide. He sought to persuade her not to take that step. He threw his arms around and begged her. She, however, informed him of her fixed determination to leave him and go to her parents. He fired the fatal shot at once. He had prepared a new home for their future residence. Her dissatisfaction with this home led her to quit her husband. She disapproved sharply of the home he had secured, stating she would not live in it. He seized a gun, fired the fatal shot, and then cut his throat with a view of taking his own life. His life, however, was saved by timely assistance. Just prior to this he had lost his little child, and on account of the heavy expenses incidental to its lingering illness he sold his home to meet that indebtedness. The facts will further show, without recapitulation substantially, that he had been worried and harassed and anxious about his child; not only so, but about his wife, who had permitted the transfusion of blood from her body into that of her sick child to save its life. Some of these matters came suddenly upon him unexpectedly, and whether he was insane or not, it certainly showed a want of the ingredients that our law fixes as a basis for capital punishment. The determination to kill, formed in a mind thus situated and envi-

roned, and so suddenly executed, ought not to constitute basis for death penalty. If insanity be ignored as an issue, the facts, as I understand them, do not show any coolness of deliberation, premeditation, or preparation for the homicide, and such malice as justifies capital punishment is absent. The fact that a woman is killed is not per se or perforce evidence that death penalty should be awarded. There may be absence of adequate cause that produces sudden passion to reduce to manslaughter, but still there must be evidence that would constitute a capital offense in order to authorize a capital verdict. If under such circumstances his mind could be cool, sedate, and capable of cool reflection, it would be a remarkable incident. In this connection, I wish to quote from the prevailing opinion written by Judge HARPER for the majority in this case, as follows:

"Under the evidence the writer, had he been a member of the jury, would have been loth to assess the death penalty. It is true the record discloses no justification for the act, and we are firmly convinced that appellant was not insane. Yet he was a man given to drinking intoxicating liquors; had drunk some whisky that morning; he had been worried and harassed by the lingering illness and death and burial of his oldest girl; he believed that some people were trying to separate him and his wife, and when she told him she was going to quit him and go home, he was in that frame of mind which doubtless rendered him reckless of consequences, and while in such frame of mind he shot and killed his wife. There were, so far as this record discloses, no antecedent menaces or grudges on his part. It was an act done from an impulse arising from no sufficient or just cause. * * * There is no doubt of appellant's guilt of murder, and he should be severely punished, but whether or not the circumstances called for the highest punishment known to the law is a matter of doubt in the mind of the writer."

I agree with the above statement as far as it goes, but think the verdict ought not stand. In this connection I wish to state that appellant, upon shooting his wife, cut his own throat, thus seeking to destroy his own life; and on the morning of the occurrence, and before they reached their home, he stopped at the doctor's office and had the wound of his wife treated. It was the wound made when the transfusion of blood from her to the child occurred. This showed solicitude and attention to her comfort, health, and happiness.

I shall not enter into a discussion of the mental status of a suicide further than to say that fact does not afford evidence such as would lead to the belief that the suicide was in such mental condition as to justify the conclusion that he was legally guilty of capital homicide. I, therefore, cannot concur in affirming the judgment on the facts. I do not believe the life of this man should be taken by solemn trial upon this character of evidence. I have a great respect for the verdict of a jury. It is a part of the law of Texas that they should be the exclusive

judges of the facts proved, the credibility of witnesses, and the weight to be given the testimony. It is the province of the court to charge the law, and this question is as exclusive in the court as it is in the jury to pass on the facts. One is no more solemn than the other. One is no more binding than the other. We unhesitatingly reverse judgments where the court has ruled erroneously to the detriment of the defendant, either in his charges or in the admission and rejection of testimony, yet the statute says that the jury shall receive the law from the court and be governed thereby. The jury may pass on the facts, and are required to do so; and where the evidence shows beyond a reasonable doubt the guilt of the party of the offense of which he is convicted, this court should sustain that verdict, or if upon appeal it appears to us with reasonable certainty that defendant is thus guilty, the verdict should be sustained, but the jury has no more authority, legal or otherwise, to convict on insufficient facts than has the court to authorize a conviction on an erroneous charge or admission of illegal evidence. This court is empowered by the statute and required by its terms to reverse and remand, or reverse and dismiss, or affirm, as the facts and the law and justice require, but it all hinges around the great central proposition that the accused is entitled to a fair trial by an impartial jury, and the record must show that he had had the fair trial, and in addition the facts must sustain the verdict rendered. This court is not powerless to remedy the errors even of a jury, and our reports are full of cases where we have reversed for want of sufficient evidence. It is a part of the solemn duty of this court to prevent injustice as well upon the testimony as upon the law. The obligation is as binding on one proposition as upon the other. A fair trial and a just verdict on the law and the facts is the ultimate criterion. Both law and facts must overcome the presumption of innocence and reasonable doubt. I cannot agree to sanction this verdict on this record.

The question of temporary insanity was a serious issue on the trial, and testimony was introduced to sustain it. He may or may not have been temporarily insane. The majority opinion, as did the verdict of the jury, finds that appellant was not insane. The majority opinion finds that the killing occurred under sudden impulse, but finds no error in the rulings of the trial court in regard to the issues of law or fact. I cannot agree with their conclusion with reference to some of the questions arising on the issues of insanity. It will be noticed from the record that the only phase of insanity set up by appellant was that he was insane or crazy at the time of the homicide. There was no claim made and no issue tendered by him that he was insane at the time of the trial, or that he became insane after the commis-

sion of the offense, as set forth in articles 39 and 40 of the Penal Code. Article 39 of the Penal Code provides thus:

"No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offense while in such condition."

Of the three phases set out in the above-quoted article only one was presented by appellant. He made no other issue on the question of insanity, presented no contention, and introduced no fact that he was insane at the time of the trial, or after he "committed the offense." He presented the sole issue on that matter that he was insane at the time he committed the act. To this end he introduced evidence as shown by the record. The state was permitted to introduce evidence of varying character to show he was not insane subsequent to the homicide; that he was not insane while he was in jail, and not insane during his trial. The state was permitted to prove that he was simulating insanity during the trial before the jury. Timely objection was interposed to all this, but promptly overruled by the court. Temporary insanity was the only issue presented by the defendant. The issue of permanent insanity was not in the case. On the issue as to temporary insanity, the evidence must be more particularly and specifically directed to the mental status of the accused at the time and with reference to the particular act charged or committed. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Fisher v. State*, 30 Tex. App. 503, 18 S. W. 90.

I wish to notice two cases (*Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 89 L. R. A. 305, 330; and *Tubb v. State*, 55 Tex. Cr. R. 606, 117 S. W. 858), cited in support of the ruling of the trial court admitting acts and conduct of appellant after the homicide, while in jail, and during the trial, and that he was then simulating insanity, and also to sustain expert testimony covering the same time. Other cases are also cited, but I notice casually the *Burt* and *Tubb* Cases because of their prominence. *Burt*, in his trial, or his attorneys for him, set up insanity generally, and he further set up insanity at the time of and before his trial and after the homicide. In fact, his insanity as shown by that record, made an issue in the case, covered his life. I do not purpose to go into the facts of that case, as the report of the case shows it with sufficient distinctness. It was therefore proper for the state to meet the issue as presented by *Burt* in that case. The state may meet any phase

of an issue that is presented, and so may the defendant, but we have various phases of insanity in Texas, but as only one is relied upon in the trial, the others cannot be issues. As I understand the record, the defendant objected by all legal methods he could command, and presents it to this court for reversal, that such testimony was introduced against him to meet his plea of temporary or partial insanity. His case was fought on the proposition that he was crazy only at the time of the homicide. Had he urged permanent insanity, as did *Burt*, in his trial, the state could meet it by such evidence as was at its command, but the state cannot set up such issue for the purpose of showing it did not exist. It would be a straw man built by the state to be destroyed by its own testimony—a false issue with false effect. The issue in the *Tubb* Case, *supra*, was that he was a paranoiac. The general doctrine of paranoia, without going into detail, is a growing, developing phase of insanity. If once it has fastened itself upon the mind, it remains and continues to grow and develop. If a patient should become free of insanity, it would seem to prove that he was never affected with paranoia. Of course it is unnecessary here to go into the different phases of this peculiar class of insanity. It was not in the case. These two cases, *Burt* and *Tubb*, cannot be legitimately used in this case. They do not bear upon the issue here. I do not care to follow these lines of discussion. I have written briefly my views, showing, as I understand the record, why the case should not be affirmed: First, on the facts; and, second, on the rulings of the court in reference to insanity. I have not discussed his guilt otherwise than as it pertains to the death penalty.

There is another phase of the case which I have not discussed. It was the speech or argument of one of state's counsel complained of in the record and by bill of exceptions. I am not clear that I understand just when a speech is reversible error and when it is not, but I think that the speech in this case was wrong, and appellant did what he could to get rid of it by objections, requested charges, etc., but it proved of no avail. If these steps had not been taken, it might be said, under some of the cases, that he should have asked special charges and taken other steps to rid himself of the obnoxious speech, but appellant did all this, and the speech is certainly, or ought to be held at least, outside of the pale of legitimate argument. As I stated, I do not care to elaborate my views. I have stated briefly these reasons, and I believe the case ought to be reversed and the cause remanded for another trial.

GILLIARD v. STATE. (No. 8886.)

(Court of Criminal Appeals of Texas. Jan. 12, 1916. On Motion for Rehearing, Feb. 9, 1916.)

1. CRIMINAL LAW §1086—APPEAL—RECORD—SENTENCE.

The record must show a sentence, the final judgment, to give the appellate court jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. §1086.]

On Motion for Rehearing.**2. EMBEZZLEMENT §32—INDICTMENT.**

An indictment for embezzlement being required to allege defendant's agency, and that he was charged with the duty of receiving the property, the receipt thereof, its receipt by virtue of his agency, and its embezzlement, an indictment, charging that defendant was agent of a church, that certain persons were trustees thereof, that as such trustees they had the custody and control and were the special owners of funds, and that defendant embezzled money which was the property of said trustees as such special owners, and which had come into the possession, and was under the care, of defendant, by virtue of his said agency, is insufficient, as it should have alleged not only the ownership by such trustees, as such, and their possession and control of the money, but that it was received by defendant from them in some fiduciary relation, and that thereafter he embezzled and appropriated it to his own use.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 47-50; Dec. Dig. §32.]

Appeal from Criminal District Court, Williamson County; A. S. Fisher, Judge.

J. H. Gilliard was convicted, and appeals. Reversed and dismissed.

J. F. Taulbee, of Georgetown, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. [1] This conviction was for embezzlement. An inspection of the record discloses that it does not contain a sentence or final judgment. For this reason the jurisdiction of this court has not attached, and the appeal as presented by this record will be dismissed.

On Motion for Rehearing.

On a former day of this term, the appeal herein was dismissed because the record failed to show that appellant had been sentenced in the trial court. Without this sentence, which is the final judgment, the jurisdiction of this court could not attach. Since the appeal was dismissed, a motion has been filed for rehearing, with the correct certificate and copy of the sentence in the trial court showing the fact that appellant was properly sentenced; but that part of the record was omitted in the transcript for this court. With this satisfactory evidence before the court, that appellant was sentenced in the trial court, and that therefore the jurisdiction of this court does attach, the judgment dismissing the appeal is set aside

and the cause reinstated, and the cause will now be heard upon the questions involved in the appeal.

Appellant was convicted of embezzlement, his punishment being assessed at two years' confinement in the penitentiary.

[2] The first count in the indictment alone was submitted to the jury by the charge of the court. Omitting formal parts, this count charges that:

Appellant was "the clerk, agent, servant, employé, and officer of Mt. Cavalry Baptist Church at Taylor, Tex., a voluntary association of persons, and Wm. Harrison, A. Nelson and J. S. Slider were trustees then and there of said Mt. Cavalry Baptist Church, and as such trustees they had the custody and control and were the special owners of the fund and property and money hereinafter mentioned, and the said J. H. Gilliard did then and there fraudulently embezzle, misapply, and convert to his own use without the consent of the said Wm. Harrison, A. Nelson, and J. S. Slider, or either of them, \$350 in money of the value of \$350, which said money was the property of said Wm. Harrison, A. Nelson, and J. S. Slider, special owners as above alleged, and which said money had come into the possession and was under the care of the said J. H. Gilliard by virtue of his said office, agency, and employment."

It will be noticed that this indictment does not charge any fiduciary relation between Harrison, Nelson, and Slider and the defendant. In order to constitute a party guilty of embezzlement, the indictment must allege, and the evidence show, four things: First, the defendant's agency, and that he was charged with the duty of receiving the property; second, the receipt of the property; third, its receipt by virtue of his agency; and, fourth, its embezzlement. *Webb v. State*, 8 Tex. App. 310; *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 789; *Leonard v. State*, 7 Tex. App. 417; *Griffin v. State*, 4 Tex. App. 390; *State v. Johnson*, 21 Tex. 775; *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462; *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302. In order to have made this indictment sufficient under the law, it should have alleged, not only the ownership by these three parties named as trustees and their possession and control of the money, but it should have alleged that the money was received by appellant from them in some fiduciary relation as agent, employé, etc., and that, after alleging the fact of this fiduciary relation and agency, he then subsequently after receiving the money embezzled and appropriated it to his own use. This indictment does not so charge, and under these authorities we are of opinion that the indictment is insufficient to charge the offense of embezzlement as stated in the first count. This being the only count submitted to the jury by selection of the trial judge, the other counts are not noticed.

There is another question in the case of some moment. This can be avoided upon the filing of another indictment, and it is just simply mentioned in passing. The indict-

ment charged the property to belong to a Baptist Church known as Mt. Cavalry Baptist Church. The evidence, without any dispute or question, shows the name of the church to be Mt. Calvary and not Mt. Cavalry. The pleader, if another indictment is found, should take time and precaution to allege the proper name of the real owner or the Baptist Church, which is Mt. Calvary, and not Mt. Cavalry. This latter question is raised in various ways both on objection to testimony and in charges, and in fact presented in every way it could be presented. We have not discussed this, though a serious question, for the reason of the fact it will be cured upon another trial, if another indictment is found.

Believing the indictment is insufficient in regard to the matters pointed out, the judgment will be reversed, and the prosecution ordered dismissed.

MANSELL v. STATE. (No. 3935.)

(Court of Criminal Appeals of Texas. Feb. 9, 1916.)

1. HOMICIDE \S 187—EVIDENCE.

In a prosecution for manslaughter, where defendant killed deceased in a quarrel over a standing difficulty, testimony of defendant's wife, that when she was made aware of the quarrel she said it was nothing more than she expected, was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 390, 390½; Dec. Dig. \S 187.]

2. WITNESSES \S 287—REDIRECT EXAMINATION.

In a prosecution for manslaughter, where defendant, cross-examining deceased's widow, proved by her that she ran a hotel after her husband's death, and sought to leave the impression on the jury that her character was not good, the widow's testimony on redirect, that her husband left her no property and she ran the hotel to make a living, was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 930, 1000-1002; Dec. Dig. \S 287.]

3. HOMICIDE \S 174—EVIDENCE.

In a prosecution for manslaughter, testimony of the officer who arrested defendant, that at the latter's instance he searched him and found no knife or weapon of any character, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 359-371; Dec. Dig. \S 174.]

4. CRIMINAL LAW \S 396—EVIDENCE.

In a prosecution of a hackman for manslaughter of another whom he had previously reported for a violation of law in crossing a line at the railroad depot, where defendant introduced evidence to show such violation of the law, and that it was the reason for his reporting the matter to an officer, testimony that deceased had violated no ordinance in fact was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 861, 862; Dec. Dig. \S 396.]

5. HOMICIDE \S 174—EVIDENCE.

In a prosecution for manslaughter, where defendant introduced evidence that deceased refused to make a dying declaration or statement,

the county attorney was properly allowed to testify that deceased did not refuse, but said that he felt too weak, and asked the attorney to come back later.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 359-371; Dec. Dig. \S 174.]

6. HOMICIDE \S 202—EVIDENCE—DYING DECLARATION.

In a prosecution for manslaughter, where defendant introduced evidence that deceased refused to make a statement or dying declaration, testimony of deceased's sister as to his dying statement voluntarily made when deceased had no hope of recovery, and was sane, was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 429; Dec. Dig. \S 202.]

7. HOMICIDE \S 164—EVIDENCE.

In a prosecution for manslaughter committed in the course of a quarrel, where defendant introduced evidence that deceased was a strong man and an expert boxer, the state was properly permitted to show that he suffered from rheumatism, had done so since he was 11, that it had affected his back, and that he walked in a stooping position, carrying one of his hands on his back.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 318; Dec. Dig. \S 164.]

8. HOMICIDE \S 109—SELF-DEFENSE.

In considering the plea of self-defense of a defendant charged with manslaughter, the appearances must be viewed as they appeared to defendant at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 138, 139; Dec. Dig. \S 109.]

9. HOMICIDE \S 262—DEMONSTRATIVE EVIDENCE.

In a prosecution for manslaughter, decedent's clothing should not be displayed in front of the jury unless virtually in the same condition as at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 557; Dec. Dig. \S 262.]

10. HOMICIDE \S 174—EVIDENCE.

In a prosecution for manslaughter, testimony that when the body of deceased was being shipped by railroad, defendant was at the depot, talking and laughing to his relatives, standing within a few feet of the corpse, was inadmissible as not aiding the jury in determining the legitimate issues and having a tendency to prejudice defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 359-371; Dec. Dig. \S 174.]

11. CRIMINAL LAW \S 595—CONTINUANCE—ABSENCE OF WITNESS.

In a prosecution for manslaughter, where it was a contested issue whether deceased had a knife in his hand during the quarrel in which he was killed, defendant and his son both so testifying, the refusal of continuance on account of the absence of a witness who would have testified that deceased was armed with a knife during the difficulty was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1311, 1323-1327; Dec. Dig. \S 595.]

12. HOMICIDE \S 250—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

In a prosecution for manslaughter, evidence held sufficient to support verdict of guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 515-517; Dec. Dig. \S 250.]

13. CRIMINAL LAW \S 594—CONTINUANCE.

Defendant, charged with crime, is entitled to a continuance for the absence of a witness,

whose testimony, material to the defense, he has used due diligence to secure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1822, 1832; Dec. Dig. § 594.]

14. HOMICIDE § 39—MANSLAUGHTER.

Where defendant committed an assault with a specific intent to kill, but, at the time of the killing, was laboring under such a degree of anger, rage, resentment, or terror as to render his mind incapable of cool reflection, he was guilty of manslaughter, and not aggravated assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59-61; Dec. Dig. § 39.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Wade Mansell was convicted of manslaughter, and he appeals. Judgment reversed, and cause remanded.

J. T. Ranspot, of Palo Pinto, W. P. Smith and W. H. Penix, both of Mineral Wells, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of manslaughter, and his punishment assessed at 3 years' confinement in the state penitentiary.

The evidence would show appellant owned a hack line plying between the depot and the hotels in Mineral Wells, and drove one of the hacks; that the Davidson brothers also owned a hack line, engaged in the same character of business, and that deceased, C. A. Jackson, was driving one of their hacks. It appears that in Mineral Wells they have an ordinance which will not permit the drivers to cross a certain line at the depot to solicit business. Appellant at one time in the past had crossed this line and been compelled to pay a fine for so doing. On Thursday or Friday before the homicide, deceased had crossed this line, as appellant thought, to solicit business, and thereby secured a passenger. Appellant reported this to an officer, but deceased was not arrested, as Mr. Davidson testified deceased did not cross the line to solicit the passenger, but the passenger had motioned to deceased to come and get his baggage, and deceased only crossed it to get the baggage. The evidence would further show that there was some rivalry and perhaps ill will existing between the local hack lines, which existed not only between the owners, but also extended to the drivers of the hacks. There is no evidence that appellant made any threat, except that he would again report deceased if he crossed the line soliciting business. The defendant's testimony would have deceased make several threats—one that when appellant reported him to the officer he said, "I will get even with that man if I have to kill him." Mr. Huddleston testified that on Friday before the difficulty he was present when Davidson and appellant were discussing a stand at the depot, when appellant said: "Come here,

Arthur, I will show you I am right, where I am," when deceased remarked, "I am going to stop there next time if I get killed over it." The state's witnesses say when their attention was attracted to the parties that deceased was backing while appellant was advancing; that both parties were fighting, but they saw no knife in the hands of deceased, while some say they saw a knife in the hands of appellant; that after backing across the sidewalk deceased fled across the street, defendant following him to the edge of the sidewalk, when defendant turned and started to his hack; that after deceased got across the street he picked up a plank about 1x3, three feet long, and came back across the street, when the parties again started to fighting. Deceased struck appellant across the head with the plank, and appellant struck deceased with a knife; the knife had a blade variously estimated from three to four inches in length. Deceased fell, and when examined he was found to have a number of wounds in his body. One witness says:

"There were three wounds in Mr. Jackson's left side that penetrated the left lung, and there was a stab to the hollow on the right side and a stab through the arm, and the nerve of the left arm was cut in two. The three wounds on the left side penetrated the pleural cavity and collapsed the left lung. We couldn't tell the depth of the wounds in the lung on account of the collapsed condition of the lung. What I mean by the lung's being collapsed, the air was out, and it went down just like a football or anything with the air out. Mr. Jackson had a stab wound under the left arm, which wound penetrated the pleural cavity—the three wounds penetrated the cavity, while it seems that the wound under the arm was the most serious."

One of these wounds slightly penetrated the covering of the heart. While deceased lived several days, it is made apparent these wounds caused his death.

Appellant and his son testify that on Sunday, while waiting at the hotel with their hacks, deceased drove up and said, "I want to know why in the hell you tried to have me arrested at the depot the other day;" when appellant replied, "I did it because it is a violation of the law." Other remarks ensued, when deceased called him a d—d son of a b—h, and struck appellant and continued to rain blows on him, throwing him back, when appellant's son ran against deceased and knocked him back. Appellant contends that deceased had a knife, and when deceased was knocked by his son he (appellant) drew his knife, and they again began fighting, deceased backing at this time. Deceased then fled across the street, getting a plank and returned and renewed the difficulty, striking appellant on the head and arm, when appellant continued to strike him with his knife. The doctor who dressed appellant's wounds says:

"I found on his left side of his head an abrasion—that is, a stroke or a blow on the side of his head about 2¾ inches wide and about 3¾

inches long. The blow had been struck and was all raised up, swelled up, and spotted with blood underneath the skin, and there was a little cut upon the forehead and a cut about $1\frac{1}{2}$ inches long under the left eye and a cut on the inside of the left thumb, taking part of the nail, and the outside of the left thumb and a cut on the left hand, inside—a snag, deep snag, as if a nail had snagged it. * * * That was on the day this cutting of Mr. Jackson occurred. I measured the wound on Mr. Mansell's head and it was $2\frac{3}{4}$ inches wide and $3\frac{3}{4}$ inches long, beginning about half an inch back of where the eyelashes extend and came back over the ear, very puffed and swelled and the blood spots under the skin. As to how heavy the lick or stroke was, I remarked at the time it was enough to fracture an ordinary man's skull—I should judge it was a heavy stroke. The wound on the front of the head was small but bleeding freely—had him covered with blood—I should judge it was half an inch long. The wound under the left eye cut through the skin and into the muscles—it was comparatively a shallow cut, but it was a raking cut. That wound was a little too large to have been done with the finger nail. His thumb nail was slit and a cut in the left thumb and ball of the thumb was a jag like it had been jagged with a nail, and in the left thumb was a lineal cut which I wouldn't judge was over a quarter of an inch long, and it nicked the nail possibly half an inch; and the nail on the right hand was cut about the same. He had an abrasion on the arm, as if a slanting blow had come down on his arm—an abrasion for several inches—the skin was peeled off on the outside of the arm for several inches, as if a sliding blow had struck him."

This sufficiently states the case to discuss the various questions raised.

[1] Appellant desired to prove that, when appellant's wife was made aware of the difficulty, she said, "It was nothing more than I was expecting." This was an expression of the wife after the difficulty, and could not and would not have any influence on appellant, and would tend to throw no light on the difficulty, and the court did not err in holding this expression of the wife inadmissible under the circumstances.

[2] There are several bills objecting to the court permitting the deceased's wife to testify that her husband left her no property, and after his death she ran a hotel in Mineral Wells to make a living. Before this testimony was admitted, appellant in cross-examination of Mrs. Jackson had proved by her that she ran this hotel after her husband's death, and by his examination sought to leave the impression on the jury that her character was not above reproach. Under such circumstances, there was no error in the court permitting the state in redirect examination to show that she ran the hotel in order to earn a livelihood, and that it was necessary that she do so.

[3] There was no error in permitting the officer who arrested appellant to state that, at appellant's instance, he searched him and found no knife or weapon of any character on him. This was contemporaneous with his arrest.

[4] As appellant introduced evidence to show that deceased in crossing the line at the depot to secure baggage had violated the

law, and this was the reason for his reporting the matter to the officer, there was no error in permitting it to be shown he in fact had violated no ordinance.

[5, 6] Appellant had three witnesses testify that deceased refused to make a statement or dying declaration. After this testimony had been adduced by appellant, there was no error in the court permitting the county attorney to testify that deceased did not refuse, but said he at that time felt too weak, and asked the county attorney to come back later; nor in permitting Mrs. Drew to testify to a dying statement in which deceased stated: "Sister, I tried to get away." It is made clear that deceased had no hope of recovery at the time this statement was made; that he was sane, and the statement was a voluntary one. Appellant, by attempting to prove that deceased had refused to make a statement, was endeavoring to create the impression on the jury that deceased recognized he was in the wrong, and for this reason was refusing to make a statement about the difficulty.

[7, 8] Again, the physical condition of deceased was made an issue in the case. Appellant introduced witnesses, who testified that deceased would weigh 175 to 180 pounds; that he was an expert boxer; that he was well-muscled and solid, and a strong man. Under such circumstances, there was no error in permitting the state to show that he suffered from rheumatism, and had suffered from it since he was a child 11 years old; that it had affected his back, and he walked in a stooping position, carrying one of his hands on his back. Appellant was contending that he killed in self-defense, and the ability of deceased, under the circumstances, to inflict death or serious bodily injury was an issue in the case. It is true the appearances must be viewed as they appeared to defendant at the time, but it is shown that he knew deceased's condition before and at the time of the difficulty. The court in approving the bill says:

"Approved with the qualification that the state's testimony showed that deceased was a cripple afflicted with rheumatism that permanently impaired his strength and use of his arms, legs, and body. The defendant introduced testimony showing the deceased to be a strong and active man and a skilled boxer a few days before the homicide, and the court then permitted the state in rebuttal to show by the sister of deceased that the deceased's affliction had existed from the time he was 11 years old, and had continued up to his death."

[9] As the court excluded the clothing when proper objection was made by defendant and before it was introduced in evidence, there is no need to discuss the bill complaining of this matter. However, unless it can be shown that the clothing is now virtually in the same condition it was at the time of the difficulty, on another trial it will not be displayed in front of the jury.

[10] By one bill it is shown that some 4 or

5 days after the difficulty, and when the body of deceased was being shipped from Mineral Wells, appellant was at the depot talking and laughing to his relatives, standing in a few feet of the corpse. This may, and perhaps did, appear heartless to deceased's relatives, yet it could not and would not be of any aid to the jury in determining the legitimate issues in the case; it may have had a tendency to prejudice the jury against appellant, and testimony as to his conduct on this occasion should not have been admitted.

[11-13] We think the bill complaining of the refusal of the court to grant a continuance on account of the absence of the witness H. T. Eustace presents an error that will necessitate a reversal of the case. Attached to the motion for a new trial is an affidavit of this witness, made in Alabama, showing that he would testify that deceased began the difficulty by making the first remark, and that deceased struck the first blow, and, further, that the witness would testify that deceased was armed with a knife during the difficulty. This was a seriously contested issue on the trial—the state contending that deceased had no knife, and had made no effort to cut appellant; that, if he had anything in his hands, it was a metal comb which he carried in his pocket. Appellant and his son both testified that deceased was armed with a knife, and, if Eustace would swear that deceased was thus armed, it would have a strong tendency to cause the jury to believe that, if it was in fact a metal comb in deceased's hands, it really appeared to appellant at the time to be a knife, and it is as the matter appeared to the defendant at the time that his acts must be judged. The testimony of this witness would support the testimony of appellant and his son directly and pertinently on the issue of self-defense, and we cannot say that it would not result in a different verdict. Of course, the testimony of the state would support a verdict of guilty, but in passing on whether or not a continuance should be granted, we look to see if he has been deprived of testimony material to his defense, and if he has used diligence to secure the testimony. The showing of diligence we think sufficient, and when, on motion for a new trial, appellant shows the witness would in fact testify as he contends, and the testimony is of a material character, that it is cumulative of his own testimony and that of his son, but appellant had no other witness not related to him who would so testify, we are inclined to the opinion a new trial should be granted.

[14] The court did not err in refusing to give the charge wherein appellant requested the court to instruct the jury that:

"Even though defendant committed an assault with a specific intent to kill, but at the time of the commission thereof the defendant's mind from an adequate cause, and the defendant was laboring under such a degree of anger, rage, resentment, or terror, such as rendered his mind

incapable of cool reflection, you will find the defendant guilty of an aggravated assault."

Under such circumstances, the appellant would be guilty of manslaughter, and not aggravated assault.

The judgment is reversed, and the cause remanded.

SULLENGER v. STATE. (No. 3883.)

(Court of Criminal Appeals of Texas. Jan. 19, 1916. On Motion for Rehearing, Feb. 23, 1916.)

1. CRIMINAL LAW \S 814—TRIAL—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE—NECESSITY.

Where defendant admits that he did the killing in a murder case, or the taking in theft, or that he did the act which constitutes the factum probandum, whatever be the offense charged, it is unnecessary to charge on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. \S 814.]

2. CRIMINAL LAW \S 814—TRIAL—CHARGE ON CIRCUMSTANTIAL EVIDENCE—NECESSITY.

In a prosecution for cattle theft, where the taking of a cow by defendant was shown directly, but circumstantial evidence was introduced to show the intent with which the taking was committed, a charge on circumstantial evidence was not required, since, where an act has been proved by direct evidence, such a charge is not requisite because the intent with which the act was committed is sought to be established by circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. \S 814.]

3. CRIMINAL LAW \S 829—TRIAL—INSTRUCTION—REPETITION.

In a prosecution for cattle theft, where the court properly submitted the defense of defendant's claimed purchase of the cow from a third party, the refusal of the specific charge that, if defendant bought the cow, to acquit him was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

4. LARCENY \S 43—PROSECUTION—EVIDENCE.

In a prosecution for cattle theft, where defendant claimed that he bought the black muley cow charged to have been stolen, testimony as to his taking and possession of a red cow was admissible.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 130, 133; Dec. Dig. \S 43.]

5. ANIMALS \S 10—PROSECUTION—EVIDENCE—STATUTE.

Under Rev. St. art. 7160, as amended by Acts 33d Leg. c. 69 (Vernon's Sayles' Ann. Civ. St. 1914, art. 7160), providing that unrecorded brands shall not be recognized as evidence of the ownership of live stock, except in criminal cases, in a prosecution for larceny of a cow, testimony as to the brand on the stolen cow in defendant's possession was admissible.

[Ed. Note.—For other cases, see Animals, Cent. Dig. \S 8-12; Dec. Dig. \S 10.]

6. JURY \S 43—QUALIFICATION—KNOWLEDGE OF LANGUAGE.

A juror, who had lived in America only five years, could read, write, and understand English only a little, and did not understand all that was asked him touching his qualifications as a juror, and who would have to guess at what was

said on trial, was not qualified to sit in a criminal case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 248; Dec. Dig. ¶43.]

On Motion for Rehearing.

7. JURY ¶85—QUALIFICATIONS OF JUROR—DISCRETION OF COURT.

A large discretion is vested in the trial judge in passing upon the qualifications of a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 405; Dec. Dig. ¶85.]

8. CRIMINAL LAW ¶1152—REVIEW—QUALIFICATIONS OF JUROR—DISCRETION OF COURT.

Where a bill of exceptions clearly shows that a juror was disqualified and that defendant properly objected and preserved the question by proper bill, the Court of Criminal Appeals cannot hold that the trial judge properly exercised his discretion in holding the juror qualified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. ¶1152.]

9. CRIMINAL LAW ¶1092—TRIAL—AMENDMENT OF BILL OF EXCEPTIONS.

During the term in which conviction is had, upon proper motion and service thereof, the court, having the proceedings and judgment still in his control, can, if through mistake or otherwise a bill of exceptions is untruthful, or certifies to facts and matters which did not occur, upon proper notice to the interested parties, make the matter appear of record as it occurred in fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. ¶1092.]

10. CRIMINAL LAW ¶1092—APPEAL—AMENDMENT OF BILL OF EXCEPTIONS PENDING REHEARING—STATUTE.

Under Code Cr. Proc. 1911, art. 916, providing that the effect of an appeal is to suspend and arrest all further proceedings in the trial court until the judgment of the appellate court is received by the court from which the appeal was taken, the trial court could not, pending rehearing, on motion of the state, amend defendant's bill of exceptions to overruling of his objection to a juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. ¶1092.]

11. CRIMINAL LAW ¶1092—TRIAL—AMENDMENT OF BILLS OF EXCEPTIONS AFTER TERM—FRAUD.

Where bills of exceptions and statements of facts have been properly agreed to and approved and filed in the lower court, after term has expired they cannot be amended or attacked without showing fraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. ¶1092.]

Appeal from District Court, Randall County; Hugh L. Umphres, Judge.

Rube Sullenger was convicted of cattle theft, and he appeals. Reversed and remanded.

R. R. Hazlewood, of Amarillo, Frank Ford, of Decatur, and Veale & Lumpkin, of Amarillo, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for cattle theft, with the lowest punishment assessed.

In view of the disposition we shall make of this case, we see no necessity of making any statement of the testimony. We have carefully considered all of the special charges requested by appellant. Those presenting any proper charge were covered by the court's charge. None of the others should have been given.

[1, 2] Mr. Branch, in his Criminal Law, § 203, so aptly lays down the rules which show when a charge on circumstantial evidence is unnecessary, we quote them with approval:

"If defendant admits that he did the killing in a murder case, or the taking in theft, or that he did the act which constitutes the factum probandum, whatever be the offense charged, it is not necessary to charge on circumstantial evidence."

"Where an act has been proved by direct evidence, a charge on circumstantial evidence is not required because the intent with which the act was committed is sought to be established by circumstances."

Mr. Branch cites many cases of this court, which are in point, establishing both these rules. We deem it unnecessary to copy them here, but cite the following, some of which he cites: Usher v. State, 47 Tex. Cr. R. 93, 81 S. W. 309; Huffman v. State, 28 Tex. App. 174, 12 S. W. 588; Flagg v. State, 51 Tex. Cr. R. 603, 103 S. W. 855; Houston v. State, 47 S. W. 468; Alexander v. State, 40 Tex. Cr. R. 407, 49 S. W. 229, 50 S. W. 716; Barnes v. State, 53 Tex. Cr. R. 629, 111 S. W. 943; Baxter v. State, 43 S. W. 87. A large number of additional cases could be collated, but we deem it unnecessary.

Several witnesses testified, in substance, that appellant admitted the taking of the cow with which he was charged by the indictment of stealing a black muley cow, the property of H. M. Jackson. His defense was that he bought the cow, and that his taking of her was under a claim of right by reason of his purchase. These questions were properly submitted in his favor by the court's charge. The circumstantial and positive evidence was amply sufficient to sustain the verdict that appellant stole the cow, and was also amply sufficient to show that his claimed purchase was false, and that his claim that he took the cow under such claim was also false.

[3] Paragraphs 5 and 6 of the court's charge also covered appellant's said defenses sufficiently, so that it was unnecessary to charge specifically that, if appellant bought the cow from one Smith, to acquit him. Under the testimony his defense of claimed purchase from Smith necessarily embraced his claimed possession by virtue of his claimed purchase.

[4, 5] Appellant has various bills to the testimony of several witnesses about his taking and possession, etc., of a red cow. This testimony was all admissible, because of his claimed defenses. And the court correctly ruled in every instance, as presented by his

bills on that subject. Neither does any of his bills about Jackson's brand and the testimony of the several witnesses on that subject show any error. This character of testimony is admissible, since the amendment of article 7160 of the Revised Statutes by the act of March 31, 1913, p. 129, the amendment to that article providing that it shall not apply in criminal cases. Neither does any of appellant's bills to testimony that was offered present any error. They are numerous. We have considered them all, but think it unnecessary to discuss any of them in detail.

[8] Appellant's first bill of exception to the court's refusal to sustain his objection to the juror Herman Meyers shows that said juror was a German, had lived in America only about five years, that he could read and write the English language a little bit only, and that he could only understand a little English, just enough to tell what people were talking about, and did not understand all that was asked him touching his qualifications as a juror, and that, if he was taken on the jury, he could not understand all that was said, and would have to guess at a part of it from what he heard. The bill further shows that this juror was forced upon appellant, over his objections after he had exhausted all of his peremptory challenges on other jurors more objectionable than he was. This question has been so thoroughly considered and discussed by the opinions of this court and of the Supreme Court when it had criminal jurisdiction that we deem it unnecessary to discuss it here. We merely cite the cases where the question has been discussed and decided. *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *Etheridge v. State*, 8 Tex. App. 133; *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726; *Nolen v. State*, 9 Tex. App. 419; *Mitchell v. State*, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456. For this error alone it will be necessary to reverse and remand this cause.

Appellant's bill challenging the juror Currie presents no error.

Reversed and remanded.

On Motion for Rehearing.

The state urges that this court erred in holding that the juror Meyers was disqualified as shown by appellant's bill No. 1, as held in the original opinion. We have again examined this question and the authorities applicable thereto, and are confirmed in our opinion that the holding of this court was correct.

[7, 8] The state contends, and we think properly, that a large discretion is vested in the trial judge in passing upon the qualification of a juror. While this is true, when an appellant's bill, properly allowed and approved by the trial judge, clearly shows that a juror is disqualified, and the appellant made the proper objection and preserved the question by proper bill, then the trial judge could not be held to properly exercise his discretion in holding the juror qualified. If the

law is that a juror is disqualified, this court could not sanction the holding of a trial court to the reverse, or in the very face, of the law. *Counts v. State*, 181 S. W. 723.

[9, 10] The state further seeks to have this court postpone action on its motion for a rehearing in order to enable it to make a motion in the trial court to, in effect, amend said bill of exceptions by now adding thereto all of the testimony of said juror on his voir dire examination, claiming that, if now permitted to so add to and amend said bill, the whole examination of said juror will show that the action of the court in holding him qualified was correct, and thereby prevent a reversal. The state does not contend that any fraud or bad faith on the part of the appellant or his attorney was practiced in procuring and the judge allowing and approving said bill. In fact, as we understand, the reverse of this is conceded. At least since the adoption of our Code of Criminal Procedure in 1856 our statute has been (article 916):

"The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal was taken"

—with certain provisos and exceptions since added, not applicable to this question. It has always been held by this court that this statute means what it says and says what it means. It is true that, during the term of court at which a conviction is had, upon the proper motion and service thereof, the court, having the proceedings and the judgment still in his control, can make the record and every part thereof—

"speak the truth; and if, through mistake or otherwise, a bill of exceptions is shown not to be truthful, or to certify facts and matters which did not occur, the court, upon proper notice to the interested parties, has authority to make the matter appear of record as it actually occurred." *Cain v. State*, 42 Tex. Cr. R. 211, 59 S. W. 275.

But this must be while the trial court has jurisdiction and control over its orders and the papers in the cause. It may be that, even after the adjournment of court, upon proper motion and notice, where a fraud has been perpetrated on the court, it would have power and authority to correct it, and this court might recognize such power and authority under such circumstances, but we are not called upon in this case to make any such holding, because no such question arises here.

[11] The state, in its motion, attaches the affidavit of the trial judge, in which he swears the juror Meyers did answer as shown in bill of exceptions No. 1, but he says all of his answers and the questions to him are not included in the bill. If that be true (and we have no question as to the truthfulness of the judge's statement), it was his duty, before approving that bill, to include all the questions and answers, and to so modify and qualify the bill as to make it give all of the facts; and, if he did not do so at the

proper time, this court cannot sanction such a practice as is asked by the state in this case of delaying a decision here to await the action of the lower court at another term to so amend the bill of exceptions, which was allowed and filed in time as authorized and required by law. We again will state we are not discussing a question where fraud and imposition is charged in procuring a bill. This court has always held that, after bills of exceptions and statements of facts have been properly agreed to and approved and filed in the lower court and the term has expired, they cannot be amended nor attacked without showing fraud. It is unnecessary to collate the cases, but as to statement of facts, see some of the cases collated in Vernon's C. C. P., in his notes on pages 811, 812. The same principle applies to bills of exceptions. See, also, *Howard v. State*, 178 S. W. 506; *Bizzell v. State*, 72 Tex. Cr. R. 442, 162 S. W. 865; *Pye v. State*, 154 S. W. 226; *Merrill v. State*, 70 S. W. 982; *Lara v. State*, 50 Tex. Cr. R. 163, 93 S. W. 1083; *Rainey v. State*, 20 Tex. App. 473; *Lindley v. State*, 11 Tex. App. 284.

The motion is overruled.

HERRERA et al. v. MARQUEZ. (No. 521.)
(Court of Civil Appeals of Texas. El Paso.
Jan. 27, 1916.)

1. SEQUESTRATION — 16—VERDICT—TITLE.

In a suit to recover 127 hides alleged to be of the value of \$4.50 each or a total value of \$571.50, in which plaintiff issued a writ of sequestration under which they were seized, and where they were replevied by defendant, a verdict for plaintiff should have disposed of the issue of title, rather than finding for him in a sum certain.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 33, 34; Dec. Dig. —16.]

2. SEQUESTRATION — 16 — VERDICT — VALUE OF PROPERTY.

In such suit, and in view of Rev. St. 1911, art. 7107, giving the defendants the right to return all of the hides in satisfaction of the judgment or part of them in satisfaction pro tanto, the verdict, if resolving the issue of title in favor of the plaintiff, should have found the value of each of the replevied hides.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 33, 34; Dec. Dig. —16.]

3. SEQUESTRATION — 16—MEASURE OF DAMAGES—MARKET VALUE.

In a suit to recover hides, where plaintiff issued a writ of sequestration, and defendants replevied, the damages were to be determined by their market value at the time of trial, when the question arises in the original suit and under Rev. St. 1911, art. 7106, relating to the return of the bond and judgment thereon.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 33, 34; Dec. Dig. —16.]

4. SEQUESTRATION — 16 — DAMAGES — EVIDENCE.

In such suit, where the only evidence of value was that of a deponent that the hides were of the market value of \$5 each, but whose testimony did not show when they were of such value, there was no evidence before the jury by which they could correctly measure plaintiff's

damages, and a peremptory charge that the undisputed evidence showed the hides to be of a certain value was error.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 33, 34; Dec. Dig. —16.]

5. ANIMALS — 10—BRANDS—EVIDENCE.

In such suit plaintiff's brand, even if not properly recorded in the county, was admissible to prove the identity of the animals from which the hides were taken if the ownership of the animals with that brand was otherwise proven, and, if the brand was not recorded at all, it would be admissible as a fact tending to establish the identity of the animals from which the hides came.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 8-12; Dec. Dig. —10.]

Appeal from Presidio County Court; H. H. Kilpatrick, Judge.

Action by Rafael Marquez against D. Herrera and others, with writ of sequestration by plaintiff and replevy by defendants. Judgment for plaintiff against defendants, and the surety on their replevy bond, and they appeal. Reversed and remanded.

C. E. Mead and K. C. Miller, both of Marfa, for appellants. Belcher & Sutton, of Marfa, for appellee.

HIGGINS, J. Marquez brought this suit against D. Herrera and Theo. Ehrenberger to recover 127 hides, alleged to be of the value of \$4.50 each, or a total value of \$571.50. Judgment was prayed for the title and possession of said hides or the value thereof aforesaid. A writ of sequestration was issued under which the hides were seized. Thereafter same were replevied by defendants.

Upon trial, a verdict was returned as follows: "We, the jury, find for the plaintiff for the amount prayed for, \$571.50." Judgment was thereon rendered in plaintiff's favor against defendants and the surety upon their replevy bond in the sum of \$571.50.

[1] By proper assignments, appellants question the sufficiency and correctness of the verdict and judgment herein. The verdict should have disposed of the issue of title, rather than finding in plaintiff's favor for a sum certain.

[2] If the issue of title was resolved in favor of plaintiff, the verdict in addition should have found the value of each of the replevied hides. The judgment should have shown such value as the defendants had the right to return all of the hides in satisfaction of the judgment or part of them in satisfaction thereof, pro tanto. R. S. art. 7107; *Blakely v. Duncan*, 4 Tex. 184; *Cook v. Halsell*, 65 Tex. 1; *Avery & Sons v. Dickson*, 49 S. W. 662; *Ratliff v. Gordon*, 149 S. W. 196; *Bateman v. Hipp*, 111 S. W. 973.

This is always the case, unless it is shown the property has been disposed of by the parties who replevied it, or that for some other reason it cannot be produced. *Herder v. Clothing Co.*, 37 S. W. 784; *Pipkin v. Tinch*, 97 S. W. 1077.

[3] Error is assigned to that portion of the court's charge upon the measure of damage. The measure of damage announced was the reasonable market value of the hides at the time they were taken. This was error. The value of property sequestered and retained by defendants under replevy bond should be determined by its market value at the time of trial when the question arises in the original suit and under the statute. R. S. art. 7106; *Luedde v. Hooper*, 95 Tex. 172, 66 S. W. 55; *Talcott v. Rose*, 64 S. W. 1009.

[4] This portion of the charge also peremptorily instructed the jury that the undisputed evidence showed the hides to be of the value of \$571.50. The only evidence of value called to our attention is that of G. A. Harvard who, by deposition, testified the hides were of the market value of \$5 each. His testimony does not show at what date they were of this value, and hence there was no evidence before the jury by which, under the authorities above noted, they could correctly measure plaintiff's damage, if he were otherwise entitled to recover.

[5] In view of a retrial, we deem it proper to say—with reference to the assignment complaining of the evidence offered of plaintiff's brand—that such brand, even if not properly recorded in El Paso county, is admissible for the purpose of proving the identity of the animals from which the hides were taken, if the ownership of the animals with that brand be otherwise proven by the testimony of plaintiff or in any other proper way. If not recorded at all, it would be admissible as a fact tending to establish the identity of the animals from which the hides came. *Poage v. State*, 43 Tex. 454; *Gregory v. Nunn*, 25 S. W. 1083; *Lockwood v. State*, 32 Tex. Cr. R. 137, 22 S. W. 413.

The fifth assignment questions the sufficiency of the evidence. In view of a retrial, we refrain from commenting upon the probative force of the evidence, and therefore do not pass upon this assignment.

Reversed and remanded.

HAMLETT v. COATES. (No. 7426.)
(Court of Civil Appeals of Texas. Dallas.
Dec. 18, 1915. Rehearing Denied
Feb. 12, 1916.)

1. TRESPASS TO TRY TITLE §35—PLEADING TITLE.

If either party in trespass to try title pleads specially his title, he must recover, if at all, on the title pleaded.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 50-52; Dec. §35.]

2. TRESPASS TO TRY TITLE §44—PLEADING TITLE—DIRECTION OF VERDICT.

In trespass to try title, where there was evidence supporting plaintiff's claim that the renting to defendant was by the month, and defendant's that it was by the year, and that she paid rent after the year's expiration, the court properly declined to direct verdict for plaintiff, though a party in trespass to try title

pleading his own specially must recover on it, while defendant's plea in reconvention relied on a rental contract for a year which had expired before suit.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 66; Dec. Dig. §44.]

3. LANDLORD AND TENANT §22—VERBAL CONTRACT TO EXTEND LEASE—UNILATERAL CHARACTER.

Where land was rented verbally, and, after entry upon the premises by the tenant, the landlord stated that as long as the tenant paid her rent she could have the place, the contract was not unilateral.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 55-59; Dec. Dig. §22.]

4. FRAUDS, STATUTE OF §58—VERBAL EXTENSION OF EXECUTED LEASE.

Such contract was not obnoxious to the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 90, 91; Dec. Dig. §58.]

5. SEQUESTRATION §21—WRONGFUL SEQUESTRATION—DAMAGES.

Where the business of a boarding house keeper was destroyed by a wrongful sequestration, she could recover for loss of profits, since the same damages are recoverable for the wrongful suing out of writs of sequestration and of attachment.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 50-54; Dec. Dig. §21.]

6. ATTACHMENT §375—WRONGFUL ATTACHMENT—DAMAGES.

The general rule that one injured by a wrongful attachment cannot recover for loss of business or future profits applies only where the measure of damages is the value of property taken, and not where the recovery is for detention of the property or interruption of its use.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1378-1385, 1387, 1393, 1394, 1398, 1399; Dec. Dig. §375.]

7. DAMAGES §62—DUTY TO REDUCE.

A boarding house keeper, against whom a writ of sequestration was wrongfully sued out, destroying her business, was under duty to use all reasonable means at her command to secure another place in which to conduct a boarding house and thereby mitigate her loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-131; Dec. Dig. §62.]

8. HUSBAND AND WIFE §270—COMMUNITY PROPERTY—SUIT BY WIFE.

A married woman cannot sue in her own name without joining her husband to recover community property, excepting where she has been abandoned by the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. §270.]

9. HUSBAND AND WIFE §239—ACTION AGAINST WIFE—JUDGMENT—EFFECT.

Judgment in trespass to try title, taken against a wife, sued as a feme sole, who did not plead her coverture, in its operation and effect was the same as if rendered against a feme sole.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 855, 856, 860, 862, 983; Dec. Dig. §239.]

10. HUSBAND AND WIFE §230—ACTION BY WIFE—PLEADING COVERTURE IN DEFENSE—NECESSITY.

In trespass to try title against a married woman sued as a feme sole, where her plea in reconvention did not disclose her coverture, plaintiff's objection, that defendant, on account of coverture, could not sue for and recover the

damages set up in the plea of reconvention, came too late, when first made in the motion for new trial, as it was plaintiff's duty, if facts existed defeating defendant's right to maintain her cross-action, to allege and prove them.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 804, 835, 840, 842; Dec. Dig. § 230.]

11. PRINCIPAL AND AGENT §159—TORT OF AGENT—MALICE.

The owner of premises was not liable for exemplary damages on account of the malice of her agent in wrongfully suing out a writ of sequestration against her tenant, unless the evidence showed that she participated in the malice, or afterwards with knowledge of the facts ratified the act, since in such cases malice on the part of an agent is not imputable to the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 598-612; Dec. Dig. § 159.]

12. SEQUESTRATION §21 — WRONGFUL SEQUESTRATION—INFERRING MALICE.

When a want of probable cause for the suing out of a writ of sequestration is shown, malice may be inferred therefrom.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 50-54; Dec. Dig. § 21.]

13. SEQUESTRATION §21 — WRONGFUL SEQUESTRATION—"MALICE."

In suit for a wrongful sequestration, where the evidence shows want of probable cause for suing out the writ, yet shows honesty of purpose and no intention on the part of the suitor to injure or recklessly disregard the rights of the party against whom the writ is issued, the conclusion that the writ was sued out maliciously is unwarranted, since "malice" is where the facts and circumstances show not only that the grounds upon which the writ issued were untrue and that there was no probable cause for believing them to be true, but evidence bad motives and such reckless disregard of the rights of the party against whom it is sued out as satisfies the mind that the unlawful act was willfully and purposely done to injure such party.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 50-54; Dec. Dig. § 21.]

For other definitions, see *Words and Phrases*, First and Second Series, *Malice*.]

14. SEQUESTRATION §21 — WRONGFUL SEQUESTRATION—DAMAGES—HUMILIATION.

In suit for a wrongful sequestration, the award, as actual damages, of \$500 for humiliation and grief, could not stand, since the rule that physical and mental suffering may be presumed to follow as a material and necessary consequence upon a serious bodily injury, and damages therefor be recovered as actual damages, has never been extended to justify the recovery of actual damages for distress of mind, humiliation, or mortification of feelings, for a seizure of property under legal process, though injury to feelings caused by such a seizure, under some circumstances, may be taken into consideration in estimating exemplary damages.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 50-54; Dec. Dig. § 21.]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Trespass to try title by Mrs. M. E. Hamlett against Mrs. M. B. Coates. From a judgment for plaintiff to recover possession of the property sued for, and, in accordance with the jury's verdict against her, for damages awarded defendant on her plea in re-

convention, plaintiff appeals. Affirmed in part, and reversed and rendered in part.

G. C. Groce, of Waxahachie, for appellant.
J. T. Spencer, of Waxahachie, for appellee.

TALBOT, J. The appellant, Mrs. M. E. Hamlett, brought this suit against the appellee, Mrs. M. B. Coates, in the form of trespass to try title to recover possession of a house and lot in the town of Italy, Tex., and sued out a writ of sequestration. The affidavit for the issuance of the writ of sequestration was made by T. B. Hamlett, agent of the plaintiff, Mrs. Hamlett, and the ground alleged therefor is that the affiant fears the defendant, Mrs. Coates, will use her possession of the property in controversy to injure the same, or to convert to her own use the fruits or revenues produced by the same. The defendant answered by a general demurrer, and pleas of denial and not guilty. She also filed a plea in reconvention for damages, alleging, in substance, that she rented the property in controversy from plaintiff, through her agent, T. B. Hamlett, about April 30, 1912, for a term of one year, at \$15 per month, and with the understanding and agreement at the time of entering into such contract that if she paid her rent during such term, she might have the premises as long as she desired; that in pursuance of said agreement and understanding and with the consent of the plaintiff she held over the premises upon the terms of the prior rental contract and paid the rent up to the time she was dispossessed of the rented premises by the execution of the writ of sequestration herein; that said renewal contract began May 1, 1913, and would expire May 1, 1914, and that by the terms of said contract defendant was entitled to the possession of said premises during the whole of said time, but that plaintiff in violation of said contract, knowingly, willfully, and maliciously and without probable cause procured and caused the writ of sequestration herein sued out to be executed, and defendant and her family ejected from said premises, and her furniture, household goods, and wearing apparel piled in the street, whereby said property was damaged in the sum of \$100; Defendant further alleged that at the time of the execution of said writ of sequestration she was engaged in the boarding house business and had a large number of boarders, who were paying her a total of \$88 a week; that by reason of being dispossessed of the premises in question she was forced to discontinue her said business, whereby she was damaged in the sum of \$1,000. Defendant further avers that by reason of the execution of the writ of sequestration "she was humiliated, aggrieved, distressed, and made to suffer in mind and body, which injured and impaired her health," for which she had

sustained the further damage in the sum of \$2,500; that by reason of said writ of sequestration having been sued out, willfully, maliciously, and without probable cause she has been damaged in the further sum of \$2,500. Defendant prays that she recover of plaintiff as actual damages the sum of \$3,600, and as exemplary damages the sum of \$2,500. A jury trial resulted in a verdict in favor of the defendant on her plea in reconvention for the sum of \$1,940 apportioned as follows: Damages to furniture \$20; damages for loss of business \$420; humiliation and grief \$500; exemplary damages \$1,000. Judgment was entered that plaintiff recover possession of the property sued for and in accordance with the jury's verdict against the plaintiff for the damages awarded, and she appealed.

The first assignment of error complains of the court's refusal to give appellant's special charge instructing the jury to return a verdict in her favor. The propositions advanced under this assignment are, in substance: (1) That while neither party in trespass to try title is required to plead his title specially, yet, if he does, he must recover, if at all, on the title pleaded, and that defendant having by her plea in reconvention specifically relied on an alleged rental contract for a year "with the further understanding and agreement at the time of entering into said contract that if defendant should pay her rent during said term, she might have the premises as long as she desired," and the evidence failing to show any such agreement, but showing that the year for which the defendant had rented had expired before suit, and plaintiff's ownership of the property being admitted, the jury should have been instructed to find for plaintiff; (2) that the proof failing to show any agreement extending beyond the year, but showing at most only a unilateral promise without consideration appellee did not sustain the issue tendered by her, and the jury should have been instructed to find for appellant; (3) that when there is a lease of lands for a yearly term at a fixed monthly rental, and the tenant holds over after the end of the term, the landlord has an election to dispossess him, or treat him as a tenant for a new term; that the election is with the landlord, and not with the tenant; and, rent being paid and received according to the terms of the expired lease, there is a presumption that the new holding is upon the terms of the expired contract; but this is only a presumption of fact, and may be rebutted by proof of a different state of facts, and in every case of holding over the nature of such holding, and the relations created thereby, are questions of fact, to be determined from all the circumstances.

[1-4] It is unquestionably true in our practice that if either party in an action of trespass to try title pleads specially his title he

must recover, if at all, on the title pleaded, but we do not believe the rule under the appellee's pleadings should be applied in this case. That there was a rental contract between the appellant and appellee for the renting of the premises in controversy to begin April 30, 1912, is undisputed. The real questions at issue were whether the renting, under the terms of the contract, was by the month or by the year, and whether, if by the year, the appellant, without objection, permitted appellee to hold over after the expiration of the rental term and continued to receive the same rent for the use and occupancy of the premises. The question of title, within the meaning of the rule of practice referred to, was not involved. The appellee set up no such title, and in the trial appellant's title was practically admitted, but appellee asserted an extension of the rental period beyond the year, and her right to possession of the premises on the terms of the rental contract by a holding over without objection on the part of appellant, and acceptance by her of the same monthly rent provided for in said contract. In *City of San Antonio v. French*, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763, it is held that:

"The tenant who holds over after the end of the term under which he entered with consent of his landlord is deemed to be in possession upon the terms of his prior lease, upon the ground that the parties are presumed to have tacitly renewed the former agreement."

The English doctrine, as stated by Mr. Smith on *Landlord and Tenant*, and quoted in the case of *San Antonio v. French*, supra, is as follows:

"But though at the end of the lease if the tenant holds over he holds as a tenant at sufferance, still if, when the period for the payment of the rent becomes due, he pay the landlord the rent reserved by the expired lease he becomes a tenant from year to year, the payment of such rent by him and the receipt of it by his landlord being considered indicative of their mutual intention to create a yearly tenancy."

The parties in the case before us entered into a verbal contract for the renting of the property in controversy, and, while the evidence was sharply conflicting as to whether the renting was for a year or by the month, it was sufficient to warrant the conclusion that it was for a year, and that appellee continued in possession of the rented premises after the expiration of her time with the tacit or implied consent of the appellant. And the testimony is undisputed that appellant accepted from appellee, for several months after the expiration of one year from the date of the rental contract, the same rent paid prior thereto, and made no demand, according to appellee's testimony, for possession of the rented premises until about the time this suit was instituted. Appellant's contention is that the renting was by the month, and that upon that theory alone the rent paid by appellee after the expiration of the year was accepted. On the other hand, the appellee contends that she had rented the

premises for a year, and that without objection on the part of the appellant she paid the rent as she had formerly done. These respective contentions involved, under the evidence adduced, issues of fact for the determination of the jury, and the court properly declined to instruct the jury to return a verdict for the appellant. There was some testimony to the effect that subsequent to the making of the rental contract and the entry upon the rented premises by appellee, appellant said to appellee that as long as she paid her rent she could have the place, but there is no testimony that at the time said contract was entered into it was agreed and understood between appellant and appellee that if appellee paid her rent during the term beginning April 30, 1912, and ending April 30, 1913, she might have the premises as long as she desired. The issues were substantially as we have stated, and no question as to the contract being unilateral or obnoxious to the statute of frauds arises.

It is next urged by appellant that the trial court erred in admitting evidence tending to show damage from loss of business by appellee as a boarding house keeper, and in submitting as an element of damage, which might be recovered, loss of profits to her as a boarding house keeper, because such loss of profits were not the measure of her damages, in that it was not alleged that appellant knew or had reason to expect that such damages would accrue to appellee from being dispossessed of the property sued for, and because the evidence on these points was insufficient, too vague and uncertain to support a recovery for such damages; and, further, because it developed in the testimony that the defendant was a married woman at the time of the transaction, made the basis of this suit, and no facts were shown which would authorize her to maintain a suit for the recovery of such damages, as such damages, if recoverable at all, constituted a community claim of appellee and her husband, the right of action for which was in him and not in her.

[5-7] We think the court did not err in admitting evidence to show that the appellee had suffered damage from loss of her business as a boarding house keeper, and in submitting to the jury as an element of her damages such loss of business and resultant loss of profits. Writs of sequestration and of attachment are regarded as standing on the same footing with respect to the rights of the defendants to recover damages for the wrongful suing out of them in this state (*Harris v. Finberg*, 46 Tex. 79), and the general rule is well established that in attachment cases loss of business, and future profits as a consequence thereof, is not an element of actual damages. It is recoverable under a claim for exemplary damages. *Kirbs & Spies v. Provine*, 78 Tex. 353, 14 S. W. 849. The rule, however, that future profits in suits for

wrongful attachment and similar suits do not enter into the actual damages recoverable, applies only, it seems, in those cases in which the measure of damages is the value of the property taken. It does not apply where the recovery is not for the value of the property, but merely with reference to its detention or interruption of its use. Thus where the business of a ginner, in the ginning season, was interrupted by the seizure of an indispensable part of his machinery whereby his business was stopped or delayed for a time, it was held that he was entitled to recover for the profits lost through such interruption. *Wilson v. Manning*, 35 S. W. 1079. The appellee alleged and proved, in effect, that the rented premises seized and taken from her under and by virtue of the writ of sequestration sued out in this case, were secured and used not only as a home for herself and family, but for the purpose of conducting thereon a boarding house as a means of support. Her business was thereby destroyed, and the actual damages sought to be recovered in this action and awarded by the jury to her as a consequence thereof were the proximate and natural result of the wrongful act charged. Of course it devolved upon appellee, as in other cases of injury, to use all reasonable means at her command to secure another place in which to conduct her boarding house and thereby avoid or mitigate her loss, and this the record shows she did.

[8-10] The contention that because it was developed on the trial that appellee was a married woman when this suit was instituted and no facts appeared which would authorize her to sue and recover the damages claimed, her husband alone could maintain an action therefor, will also be overruled. That a married woman cannot maintain a suit in her own name, her husband not being a party, to recover community property, except where she has been abandoned by the husband, is thoroughly established by the decisions of this state. The appellee testified on cross-examination by appellant:

"I don't know where my husband is now. We are not living together, and were not when this suit was instituted, and have not been living together since. I have never requested him to join me in this suit. He does not know anything about it one way or the other."

It may be conceded that this testimony, which is all that was offered on the subject, fails to show such an abandonment of the appellee by her husband as authorized her to maintain a suit for a recovery of the damages sued for in this action, and yet we think appellant is in no position to urge her incapacity to do so. Appellee is sued by appellant as a feme sole, and nowhere in the record does it appear that her coverture was unknown to appellant at the time the suit was brought. The appellee did not plead her coverture, and the judgment taken against her for the title and possession of the house and lot sued for by appellant, in its operation

and effect, is the same as if rendered against a feme sole. *Focke v. Sterling*, 18 Tex. Civ. App. 8, 44 S. W. 611. The appellee contends that inasmuch as her husband was not made a party defendant herein, and the suit prosecuted against her alone, she not only was authorized to defend the action brought against her, but also to sue for and recover the damages by reason of the wrongful suing out of the sequestration therein. This seems fair and reasonable, but we do not find it necessary to decide that question. In the case of *Caldwell v. Brown*, 43 Tex. 216, it is held that one sued as a feme sole, who is at the time married, but who appears and answers without pleading her coverture, cannot avail herself of the fact that she was a feme covert when the same is for the first time alleged in the assignments of error. *Phelps v. Brackett*, 24 Tex. 236. In *Margaret Hab v. Johnston & Co.*, 1 White & W. Civ. Cas. Ct. App. 336, § 624, it is held that an objection to a judgment that it was improperly rendered against a married woman, her husband not being joined in the suit, comes too late when made for the first time on motion in arrest of judgment. And in *Rosenbaum v. Harloe*, 1 White & W. Civ. Cas. Ct. App. 489, § 849, in which the wife sued alone, it is held that if facts exist which will defeat the right of the wife to sue alone, but such facts do not appear upon the face of the petition, they must be pleaded and proven; that the burden is upon the defendant to make good the plea. In the case at bar the appellee in her cross-action or plea in reconvention to recover the damages alleged to have been sustained by the execution of the writ of sequestration sued out by appellant occupied the position of plaintiff, and her coverture did not appear upon the face of her pleadings, and it devolved upon appellant, if facts existed which would have defeated her right to maintain said cross-action, to allege and prove them. So it not appearing by pleading or proof that appellant was not aware of the coverture of the appellee until the fact was disclosed by the evidence in the trial of the case, objection that she was not authorized to sue for and recover the damages set up in her plea of intervention came too late when made for the first time in the motion for a new trial filed in the district court, and now urged in this court as ground for reversal of that court's judgment.

[11-13] The next contention is that the trial court erred in submitting to the jury an issue of exemplary damages. It is claimed that the record in this case not only shows no basis whatever for a recovery of exemplary damages, but shows beyond question to any reasonable mind that the action was instituted in good faith and without malice; and furthermore that it appears that the writ of sequestration was sued out by an agent, and not by the plaintiff, and there was neither allegation nor proof that would make

the plaintiff responsible for the malice of such agent, even had there been such malice. This contention, we think, should be sustained. The statutory affidavit for the issuance of the writ of sequestration was made by T. B. Hamlett as agent of appellee and said writ otherwise sued out by him. If in suing out the writ T. B. Hamlett was actuated by malice, he is responsible for his wrongful acts; "but his malice will not be imputed by presumption to his principals, while his bad judgment in wrongfully suing out the writ would be." *Wallace v. Finberg*, 46 Tex. 35. If, therefore, it should be conceded that the sequestration was sued out maliciously and without probable cause by the agent, Hamlett, still appellant would not be liable for exemplary damages caused by the malice of her agent, unless the evidence showed that she had knowledge of, and participated in, the malice, or afterwards ratified the malicious act. This is clearly the law of this state in such cases. *Wallace v. Finberg*, 46 Tex. 35; *Hays v. Railroad Co.*, 46 Tex. 272; *Willis & Bro. v. McNeill*, 57 Tex. 465. As stated above, the ratification must have been with knowledge of the existence of the agent's malice. For a principal who was not himself actuated by malice is not liable in exemplary damages for the wrongful act of his agent in suing out and causing to be levied a writ of sequestration maliciously and without probable cause, even though he ratified and approved the same by accepting the benefits thereof, unless at the time of such ratification and approval he had knowledge of such facts as showed the wrongful acts of the agent. *Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. 784. Our conclusion is, that even if T. B. Hamlett, the agent of appellant, was actuated by malice in suing out the sequestration in this case, and the same was sued out without probable cause, the evidence is insufficient to warrant a finding that appellant had knowledge of, or participated in, his malice, or afterwards with knowledge of his malice ratified and adopted his malicious acts. But we think it may be gravely doubted that appellant's agent was actuated by malice or evil motive in causing the sequestration to be issued and levied. In saying this we are not unmindful of the decisions in this state which hold that when a want of probable cause is shown malice may be inferred therefrom. It does not follow from this, however, that in the absence of a showing of probable cause for suing out the writ malice must necessarily be inferred. *Lister v. Campbell*, 46 S. W. 876. Malice is where the facts and circumstances show not only that the grounds upon which the writ of sequestration issued were untrue and that there was no probable cause for believing them to be true, but evidences bad motives or such reckless disregard of the rights of the party against whom it is sued out as satisfies the mind that the unlawful act was willfully and purposely done to the injury of

such party. Hence, although the evidence may show a want of probable cause, yet if it shows honesty of purpose and no intention on the part of the person suing out the writ to injure or to recklessly disregard the rights of the party against whom the writ was issued, the conclusion that the writ was sued out maliciously would not be warranted. So strongly are we of the opinion that the facts and circumstances shown in evidence in this case establish the absence of malice on the part of appellant's agent in suing out the writ of sequestration in question that we would probably so hold if it were necessary to a reversal of the judgment for exemplary damages, yet for the clearer reason that the evidence wholly fails to justify a finding that the appellant participated in the malice of her agent, Hamlett, if indeed he was actuated by malice in suing out the writ of sequestration or that she afterwards, with knowledge of this malice, approved and ratified it, we hold exemplary damages should not have been allowed.

[14] Appellant's next proposition is that the court erred in submitting, as elements of actual damage, humiliation, grief, distress, or mental suffering on the part of appellee from being dispossessed of the premises in question, when such damages, if recoverable at all, could be recovered only in this character of case, as exemplary damages, and the record fails to show any right to recover exemplary damages. The record shows that the jury awarded the appellee as actual damages for "humiliation and grief" \$500, and that judgment therefor was rendered by the court. This was error and the proposition of appellant must be sustained. It is well settled in this state that physical and mental suffering may be presumed to follow as a material and necessary consequence upon a serious bodily injury, and be recovered as actual damages; but this rule has never been carried to the extent, so far as we are aware, of holding that the seizure under legal process of real or personal property, even though such property be exempt from forced sale, will necessarily cause the owner distress of mind, humiliation, or mortification of feelings. On the contrary, it has been expressly held by our appellate courts that injury to feelings, or mental suffering caused by such seizure, is not recoverable as actual damages, though it may, under some circumstances, be taken into consideration in estimating exemplary damages. *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. 504; *Ainsa et al. v. Moses et al.*, 100 S. W. 791; *Evans Co. v. Kingsbury*, 25 S. W. 729; *Landes v. Eichelberger*, 2 Willson Civ. Cas. Ct. App. §§ 183, 134. In *Trawick v. Martin-Brown Co.*, supra, the Supreme Court, in holding that the defendant therein, who had reconvened for actual and exemplary damages for the alleged wrongful suing out of an attachment, was not entitled to recover for injury to his feelings, said:

"It is too plain for argument that this does not belong to either of the classes of cases in which compensation has been allowed for mental suffering."

We have said that exemplary damages were not recoverable under the facts of this case, and in no event then were damages for "humiliation and grief" caused the appellee by the issuance and execution of the sequestration complained of an element of appellee's damages.

The judgment of the court below awarding appellee actual damages in the sum of \$440 for injury to her furniture and for "loss of business" will be affirmed, and the judgment awarding appellee actual damages in the sum of \$500 for "humiliation and grief," and in awarding her \$1,000 as exemplary damages, will be reversed, and judgment here rendered in favor of appellant as to those items of damage.

Affirmed in part; reversed and rendered in part.

STANDEFER v. MILLER. (No. 909.)

(Court of Civil Appeals of Texas. Amarillo. Jan. 26, 1916.)

1. DEEDS ⇨120—CONSTRUCTION—ESTATE GRANTED.

Every part of a deed must be given effect, if possible; and, when all of the parts are harmonized, the largest estate that its terms will permit will be conferred upon the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-383, 401, 407-412, 416-454; Dec. Dig. ⇨120.]

2. DEEDS ⇨95—CONSTRUCTION—AMBIGUITY.

Where the language of a deed cannot be harmonized, from which an ambiguity arises, so that the instrument is susceptible of two constructions, the interpretation most favorable to the grantee will be adopted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241-254; Dec. Dig. ⇨95.]

3. DEEDS ⇨115—CONSTRUCTION—REJECTION OF FALSE MATTER.

Where the description of the property in a deed contains false matter, without which the description would be sufficient to identify the property conveyed, such false matter will be rejected and effect given to what remains.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 325; Dec. Dig. ⇨115.]

4. DEEDS ⇨114—DESCRIPTION—CONTROL BY RECITAL OF QUANTITY.

Mention of the acreage conveyed by a deed describing the land specifically by metes and bounds does not control as to the property conveyed, since calls for quantity are generally regarded as descriptive, and will be resorted to only in the absence of monuments of courses and distances to identify the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. ⇨114.]

5. DEEDS ⇨114—CONSTRUCTION.

Where a deed, following the field notes calling for the length of the lines east and west and for the north and south boundary lines of the section of which the land conveyed was a part, the amount conveyed lying between the designated boundaries, recited that the intention of the parties was "to convey said amount of land,"

such recital did not refer alone to the quantity of the land conveyed, first mentioned in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.]

6. DEEDS §115 — CONSTRUCTION — INCONSISTENCY.

Where there was an inconsistency in a deed, in that the boundaries of the land included a greater acreage than the deed recited was intended to be conveyed, the trial court, having found the fact, could treat the statement of the quantity as false; the description being sufficient without it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 325; Dec. Dig. § 115.]

7. EVIDENCE §461 — PAROL EVIDENCE AFFECTING WRITING.

Where the general description of a deed recited an amount of land intended to be conveyed less than the specific boundaries given therein included, parol evidence was not admissible to alter the calls given in the description of the land to include only the recited amount, although it is admissible to explain a latent ambiguity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.]

8. EVIDENCE §461 — PAROL EVIDENCE — MISTAKE IN CALLS OF DEED.

Where the calls of a deed were made by mistake, so that it conveyed too great an acreage, correction of the instrument under the rules of pleading in such cases is the proper remedy, and not the introduction of parol evidence as to the correct calls in an action to recover part of the land conveyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.]

9. DEEDS §38 — INVALIDITY — PATENT AMBIGUITY.

Where the ambiguity in a deed as to the land conveyed is patent, and so inconsistent and contradictory that the deed is inoperative, no land passes by it, unless the deed is corrected to conform to the actual agreement of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.]

10. DEEDS §114 — CONSTRUCTION.

Where a general description in a deed of the acreage intended to be conveyed is inconsistent with the particular locative calls identifying the land, such deed should be construed most favorably to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by J. H. Standefer against W. S. Miller. From a judgment for defendant, plaintiff appeals. Affirmed.

Ferguson & Puckett, of Lubbock, for appellant. W. F. Schenck, of Lubbock, for appellee.

HUFF, C. J. The appellant, Standefer, brought this action against the appellee, Miller, to recover about 16 acres of land. He alleged that he owns all of section 112 in block 20, except 240 acres off of the west end of the section, and that appellee owns the 240 acres. About January 4, 1906, appellant sold and conveyed to J. F. Robinson 240 acres of the land, to be taken from the west

end of the section; that it was stipulated in the deed that it was agreed that it should convey 240 acres off the west end of the survey, so that in no event would the purchaser obtain either more or less than the 240 acres by reason of any change of the boundaries of the section, making it either wider or narrower than it was then estimated. It is alleged also that appellee had both actual and constructive notice of the agreement; also that the section is in fact 1,488 varas wide, and that the 240 acres extends east from the northwest corner of the survey 907 varas; that is, the 240 acres is 907 varas, and extends entirely across the west end, and that the east line is parallel to the west line; that appellee, without right, has placed his east line east of the correct location so as to make the portion claimed by him 256 acres, 16 acres in excess of the amount to which he was entitled, and he has taken possession thereof, asserting title thereto. The prayer is that appellant have judgment, and that his line, with appellee's east line, be established at a point 907 varas 89° 37' east from the northwest corner of the section; thence south to the south line of the section, which is 1,488 varas. The appellee answered by general and special exceptions, general and special denial, not guilty, and set up that he is the owner of the land sought to be recovered under a regular chain of transfers from the state and from the appellant; and he prayed to have the land decreed to him, and that he be quieted in his title. The trial court instructed a verdict for the appellee, in accordance with which judgment was rendered for the appellee as prayed, giving therein the field notes as given in the patent to the land issued to appellee as assignee of appellant. The field notes and description of the land in the deed from Standefer to J. F. Robinson, is as follows:

"240 acres of land off of the west end of section 112, abstract No. 1115, in block 20, in Lubbock county, located about 11 miles S. 23' east of the county seat and more particularly described as follows: Beginning at a stake and earth mound on S. line of Ben Ficklin I a Mfg. Co. survey No. 77 and 379, varas east from the S. W. corner of said sur. and at the most easterly northeast cor. of J. L. Obannon survey No. 104 and the N. W. corner of said survey No. 112, thence east along S. line of sur. No. 77, 967 varas to a point. Thence south 1432 varas to a point in the S. line of said survey 112; thence west 967 varas to S. W. corner of said Sur. No. 112; thence north along W. line of said survey No. 112 to the place of beginning. The intention of this deed being to convey said amount of land off of the west side of said survey No. 112. Said survey 112 block 20 above described was awarded by the commissioner of the General Land Office of the state of Texas, to J. H. Standefer."

The clause, "the intention of this deed being to convey said amount of land off of the west side of said survey No. 112," is not included in the description in the deed from Robinson to Miller.

Appellant presents three assignments of

error: (1) That the court erred in excluding the evidence offered by appellant to show the intention of the parties to the above deed, dated January 4, 1906, and to identify the land intended to be conveyed by the deed; (2) that it was error to direct a verdict for appellee, thereby placing a construction on the deed in violation of its express terms; (3) that the court erred in refusing appellant's charge to find for him because the deed conveys only 240 acres, which the deed shows was the expressed intention of the parties, and that it is admitted that appellee claims 255 acres, and by reason of the ambiguity caused by changing the boundaries of the land conveyed. The evidence offered by appellant and rejected was to the effect that when the deed was made by appellant to Robinson, the land was not surveyed and the line and corners to section 112 established. At that time there had been two or three surveys of the adjoining surveys, and none regarded as established; that the appellant made an agreement to sell Robinson 240 acres, with no boundaries agreed upon. The description was not discussed until they went to write the deed. The appellant testified:

"I told Robinson the land might widen or be wider when the lines were established and he said, 'Yes, and it might be narrower,' and I said I wanted to put in the deed so that if it widened, I would get my quantity of land and he would get 240 acres of land."

The testimony of W. R. Standefer was offered, to the effect that he had surveyed the land and that he told Miller that the field notes in his deed were not correct, and that the land was wider than it was supposed to be when the deed to Robinson was made. Miller said he had bought 240 acres of land, and at that time did not claim any more. The northwest corner of section 112 was at the trial established 55 or 60 varas north of where it was supposed to be when the deed was made. J. J. Dillard, who wrote the deed, says it was his understanding there was to be 240 acres, no more and no less; that he made the calculation himself so as to get the number of acres; that there was some difference as to where the survey was on the ground, and, being in doubt as to that, he wrote in the deed it was to be 240 acres. The appellee objected to the above testimony, because the statements made were not carried into the deed; that the suit was not brought to reform the deed; that the deed itself is not ambiguous and the evidence would tend to contradict the deed and contradict the field notes thereof; and that the evidence was irrelevant and immaterial. The court thereupon excluded the evidence.

[1-3] It will be noted the deed calls for the northwest corner and the southwest corner of section 112, for the west line of the land conveyed; that for its south and north line it calls for the adjoining surveys to section 112. The distance from the north line of the section to the south line called for is 1,432 varas; for its east line it called to run

with the north and south boundaries of the section 967 varas east from the northwest, and from the southwest corners of the section. It appears from the patent introduced in evidence that the land was patented to appellee, and that the east line of the land so patented is 1,488.4 varas, and the west line is 1,484.6 varas in length. The field notes in the deed definitely fix and locate the land. The calls for the corners of section 112 on the west will carry the boundaries of the land to those points. The north and south lines must follow the adjoining surveys called for the distance given in the deed. There is no ambiguity in the field notes: The land actually conveyed, can be readily located by them. It is contended, however, that the recitals, "240 acres of land off of the west end of Sec. 112," and, "the intention of this deed being to convey said amount of land off of the west side of said survey No. 112," render it certain that only 240 acres were conveyed and no more, or, if not, it is an ambiguity which will admit parol testimony. It will be seen by the petition appellant sought to shorten the length of the north and south boundary lines 60 varas, or instead of running them 967 varas, called for in the field notes, seek to have them run only 907 varas. He seeks this, we presume, on the ground that 240 acres was conveyed off of the west end, and because the section is wider than thought at the time of making the deed and those lines should be shortened to conform to the survey as later ascertained. To give 240 acres, either the north and the south lines or the east and the west lines must be shortened. The course and distance called for must be disregarded on one or the other of the lines if appellant is to prevail; and appellant has selected the north and south boundary lines for that purpose. Judge Brown, in *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930, gives some of the rules which must govern in the construction of the deed, as follows:

"Every part of the deed must be given effect if it can be done; and, when all of the parts are harmonized, the largest estate that its terms will permit of will be conferred upon the grantee. *Hancock v. Butler*, 21 Tex. 816. If the language cannot be harmonized, from which an ambiguity arises in the deed, so that it is susceptible of two constructions, that interpretation will be adopted which is most favorable to the grantee. *Dev. Deeds*, § 848. If there be that in the description of the property conveyed which is false, without which the description would be sufficient to identify the subject-matter of the deed, the false part of the description will be rejected, and effect given to that which remains. *Arambula v. Sullivan* [80 Tex. 615] 16 S. W. 436."

[4] In the case of *Cullers v. Platt*, 16 S. W. on page 1005, 81 Tex. on page 264, it is said:

"Where a grantor conveys specifically by metes and bounds, so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person,

or, as in this case, all of a survey except a tract belonging to another person, cannot control; for there is a specific * * * description, about which there can be no mistake, and no necessity for invoking the aid of the general description. * * * A general description may be looked to in aid of a particular description that is defective or doubtful, but not to control or override a particular description about which there can be no doubt. There can be no doubt about what land Purinton conveyed to Collins, whatever he may have intended to convey, and it is entirely unnecessary to look to the general inference that it was all the balance of the Tyson survey, which might be true or not true without affecting the parcels really conveyed. It was supposed at the time that the tracts conveyed did comprise the balance of the survey, but it subsequently developed that the Tyson survey overran in quantity, and that the recital was in point of fact not true." *Davis v. George*, 104 Tex. 107, 134 S. W. 328; *Boggs v. Allen*, 56 S. W. 195; *Wadsworth v. Vineyard*, 131 S. W. 1174, 1175.

Where a deed describes land by metes and bounds, the mention of the quantity conveyed will be treated as a mere matter of description, and will not have controlling effect. *Dalton v. Rust*, 22 Tex. 134; *Hatch v. Garza*, 22 Tex. 176; *Railway Co. v. Richards*, 11 Civ. App. 95, 32 S. W. 96-100; *Leon v. Dunlap*, 4 Civ. App. 315, 23 S. W. 475; *Jordan v. Young*, 56 S. W. 762-764; *Ridgell v. Atherton*, 107 S. W. 129. Calls for quantity are generally regarded as descriptive, and will be resorted to in the absence of monuments or course and distance to identify the land. *Welder v. Hunt*, 34 Tex. 44, 45.

[5] The contention of appellant is that the recital that the intention was "to convey said amount of land" refers alone to 240 acres. The recitation follows the field notes, which call for the length of the lines east and west, and for the north and south boundary lines of the section. The amount conveyed lay between the designated boundaries which were thereinabove set out by the field notes. It does not follow as a necessary sequence that "amount" refers alone to the quantity, 240 acres, first mentioned in the deed.

[6-10] The trial court was authorized to adopt that construction most favorable to the grantee in the deed. If he found within the designated boundaries there was more than 240 acres, he could treat the statement of the quantity as false, as without it the description of the land was sufficient to identify the land. He could reject the quantity called for. The appellant in this case contends that, there being an ambiguity in the deed, parol evidence was admissible to show the true intention of the parties. If the parol evidence offered had been admitted in the case, it would have contradicted the call for the lines running east and west, and shortened them 60 varas, or it would have contradicted the calls for the northwest or southwest corners, and the adjoining surveys, and the calls for the north and south lines of section 112. In other words, it would have

reconstructed the deed so that it should read to begin at the northwest corner of the section; thence south with its west line to the southwest corner thereof; thence east a sufficient number of varas to make 240 acres, no more and no less.

Appellant cites us to the case of *Sloan v. King*, 33 Civ. App. 537, 77 S. W. 48. It is substantially held in that case that parol evidence is not admissible to alter the calls given in the description of the land in the deed, but may be admitted to explain the land by such call, explain discrepancies from their application to the land, etc. In other words, this would be admissible to explain a latent ambiguity. If the calls as made in the deed were made by mistake, then a correction of the deed, under the rules of pleading, in such cases, should have been sought. This is clearly pointed out by Judge Fisher in the above case. If the ambiguity is patent and so inconsistent and contradictory that the deed would be inoperative, then no land passed by it (*Linney v. Wood*, 66 Tex. 22, 17 S. W. 245), unless the deed was corrected to conform to the actual agreement of the parties; but, where a general description is given which is inconsistent with the particular locative calls which will identify the land, then the rule of construction should be adopted which will be most favorable to the grantee.

We believe the trial court ruled correctly in this case, and the judgment will be affirmed.

SOWELL et al. v. HOFFMAN et al.*
(No. 906.)

(Court of Civil Appeals of Texas, Amarillo,
Jan. 19, 1916. Rehearing Denied
Feb. 16, 1916.)

1. LIMITATION OF ACTIONS §100—FRAUD—DISCOVERY.

In case of fraud the cause of action accrues when the fraud was, or by the use of reasonable diligence might have been, discovered, and the limitation begins then, and the right of relief is barred when the statutory period, reckoned therefrom, has expired; and where it appears the defrauded party has the means to readily discover the fraud, which ought to have been used by person of ordinary care and prudence in the transaction of his business, he will be held to have had notice of everything which a proper use of such means would have disclosed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. §100.]

2. LIMITATION OF ACTIONS §100 — DILIGENCE IN DISCOVERING FRAUD — QUESTION OF LAW.

Plaintiff, who was living on the land when he purchased it, afterwards fencing the entire tract, joining fences with adjoining neighbors, and erecting his barn on what he claimed would be a street if the land had been platted as represented, in view of the reference in his deed to a plat of the addition in which the block was situated for a description, the fact that the deed showed the land to be acreage property and did not convey it as lots, his failure to examine

his deed or to know its contents for some time after it was delivered to him, the plat showing that the land had not been platted into lots and that there was no such street west of it, and his receipt of the deed more than three years and six months before filing his suit for damages for false representations inducing his purchase of the land, in that it was platted into lots, each with a frontage, etc., was as a matter of law wanting in reasonable diligence, so that his cause of action accrued when he received his deed, and limitation was to be computed from that time, and he was precluded from relying on the exceptions suspending the running of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.]

3. LIMITATION OF ACTIONS § 21—ACTION FOR FRAUD—STATUTE APPLICABLE.

In such case, the cause of action, not founded on a written contract, but based on oral representations made to induce the purchase, was an action of deceit based on such representations, to which the four-year statute of limitations did not apply, but it was governed by the two-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99; Dec. Dig. § 21.]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Suit by L. D. Sowell and others against C. C. Hoffman and others, with cross-petition by defendants. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. A. Baldwin, of Slaton, and W. F. Schenck, of Lubbock, for appellants. Benson & Spencer, of Lubbock, for appellees.

HUFF, C. J. On January 23, 1915, appellants instituted suit for damages against appellees, alleged to have been occasioned by fraudulent representations inducing appellants to purchase a certain parcel of land; that appellees offered to sell to appellants a number of town lots in the south addition to the town of Slaton, "representing to plaintiffs that said lots which he wished to sell were located in block No. 85 in said addition to said town, that he had already sold 7 lots located in said block and that there were 21 lots remaining unsold in said block, and that, if plaintiff would purchase all of said 21 lots, defendants would sell same at a very reasonable price; * * * that said lots, which he wished to sell them, were in three rows, with 7 lots to the row, each lot being 50 feet wide, 140 feet in length, with a good well and windmill and two tanks located on said lots; that each and all of said lots in said block 85 face upon the public street, with an alley 20 feet in width at the rear of said lots, and that all were duly platted, laid out, and dedicated to the use of the public," etc.; that appellants relied upon these representations and purchased the land; that the representations were false, in that the land was not so platted; that the appellees executed a deed and caused it to be placed of record; and that appellants did

not see the deed until about four months after its execution. The deed is alleged to have been executed the 4th day of December, 1911.

Appellees answered by general and special exceptions, and denied the several matters set up by appellants specifically, and specially excepted to the petition because it showed on its face that the alleged cause of action was barred by the two-year statute of limitation; and they also pleaded the two-year statute of limitation as a bar to the cause of action set up. Appellees also by cross-petition sought to recover on certain vendor's lien notes given as part of the consideration for the land and to foreclose the vendor's lien. There is no plea made by appellants of failure of consideration for said notes sued upon.

Upon a trial before a jury, the trial court instructed a verdict for the appellees.

The deed executed by appellees to appellants describes the land as follows:

"All that certain tract or parcel of land in Lubbock county, Texas, being the west seven-ninths ($\frac{7}{9}$) of block eighty-five (85), according to the originally recorded plat of South Slaton addition to the town of Slaton, in Lubbock county, Texas, now on file in the county clerk's office of said county and state."

This deed is dated December 4, 1911, and recites a consideration of \$850 paid down and 40 vendor's liens notes, payable the 4th day of each and every month, consecutively, with interest at 10 per cent. from date; interest payable on all of said notes unpaid each month. Seventeen of these notes were paid, with interest as stipulated on the remaining notes. Foreclosure was sought on the remaining 23 notes, which was granted by the trial court. The plat referred to by the deed was recorded in the county clerk's office and was introduced in evidence. It shows that block 85 was not platted into lots, with the alley as represented; that on the west there was no street, as represented by appellees, but blocks 91 and 85 join each other, without any street between them; and that on the north of 85 there is no street between block 85 and block 84, north of the block sold, but that the two blocks join, without any intervening street. There were no platted lots 50 by 140 feet, as represented, shown by that plat.

Appellant testified substantially to the representations made by appellees, as pleaded by him; that he did not get his deed until about four months after its date; that he did not examine it when he received it, and did not learn the true condition of the block until about February, 1914. He fenced the land purchased, without reference to the streets, and placed his barn where he claims the street was represented to be. He had lived on the land some time before the negotiation and purchase of the same. There is no allegation or proof of concealment of the fraud by the appellees, further

than a failure to deliver the deed for four months after its execution. This suit for damages was instituted and filed January 23, 1915.

The trial court instructed a verdict against the appellants, doubtless on the ground that his cause of action was barred by the two-year statute of limitation. The briefs of the parties hereto only present that question for consideration.

[1] In cases of fraud the cause of action will be deemed to have accrued when the fraud was, or by the use of reasonable diligence could have been, discovered, and limitation is put in motion from such date; and the right of relief will be barred when the statutory period, reckoned from that time, has expired. *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48; *Standford v. Finks*, 45 Tex. Civ. App. 80, 99 S. W. 449; *Bass v. James*, 83 Tex. 110, 18 S. W. 336. If from the allegations, or the evidence, it appears that appellant had the means at hand to readily discover the fraud complained of, and that such means would have been used by a person of ordinary care and prudence, in the transaction of his own business, he will be held to have had notice of everything which proper use of such means would have disclosed.

[2, 3] The appellant was living on the land when he traded for it. He afterwards fenced the entire piece of ground, joining fences with adjoining owners, and his barn was erected on what he claims would be the street, if the land had been platted into lots. The deed referred to the plat of the addition in which the block was situated for description, and the land is shown by the deed to be acreage property, and was not conveyed by the deeds as lots. The deed was turned over to the appellant, and he says he never examined it and did not know its contents for some time after it was delivered to him. The plat referred to by the deed was duly recorded and was introduced in evidence in this case. It shows that block 85 is simply a block of ground, and not to have been platted into lots; and it further shows that there was no street north of it, between it and block 84, or west, between it and block 91. It occurs to us that a man with ordinary prudence would, upon receiving the deed, have read the same, and would have seen that it purported to convey acreage property, and that the plat was part of the description of the land so conveyed. The plat to the addition of the town was of record, and any sort of diligence would have disclosed there was no street on the west and on the north, and there was no alley platted through it, and no lots designated in the block.

It is not contended that the appellant could not read or understand the description given in the deed. If the appellant accepted the statement that it was platted,

as alleged, after having lived on the land before he purchased it, in placing his fence on the line and building his barn, he would not have placed them in the streets, which he contended were represented to him as streets, if he had been acting as a reasonably prudent man would have done. He must have known the situation of the block long before the time claimed by him. If he did not, he should have known that it was not platted, by any sort of diligence.

He received his deed more than three years and six months before filing his suit for damages. His cause of action then, in our judgment, accrued and limitation should be computed from that time. These undisputed facts made the question of reasonable diligence a question of law for the court. We do not think there was any issue of fact on the question of the statute of limitations to be submitted to the jury. In this case, the deed, the recorded plat, the adjoining blocks, and the appellant's residence on the land he bought at the time he did buy, abundantly furnished him with notice that the representations were false, and will preclude the appellant from relying on the exceptions suspending the running of the statute. *Rowe v. Horton*, 65 Tex. 89; *Powell v. March*, 169 S. W. 936; *Mounger v. Daugherty*, 138 S. W. 1070; *Smith v. Talbot*, 18 Tex. 774; *Cleveland v. Carr*, 40 S. W. 406; *Presnall v. McLeary*, 50 S. W. 1068.

We do not think the four-year statute applies in this case. The cause of action is not founded on a written contract, but is based on oral representations made to induce the trade, and is therefore an action of deceit, based on such representations. We think this cause is controlled by the two-year statute. *Bass v. James*, 83 Tex. 110, 18 S. W. 336; *Gordon v. Rhodes*, 102 Tex. 300, 116 S. W. 40; *Bostic v. Heard*, 164 S. W. 34.

We find no reversible error. The judgment of the trial court is affirmed.

WHITE v. BARROW et al. (No. 3284.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 22, 1916.)

1. COURTS \S 169—COUNTY COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Under the express provision of Act Thirty-Third Legislature, increasing the civil jurisdiction of the county court of Stonewall county by giving it original concurrent jurisdiction with the justice courts in all civil matters, such court had jurisdiction of an action for \$150, alleged to be due upon an oral lease of land with claim of a pasturer's lien.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. \S 413-425, 428-436, 448, 456, 458, 465; Dec. Dig. \S 169.]

2. TRIAL \S 327—VERDICT—PARTIES.

In action, a verdict for one of two defendants, silent as to the other defendant, was sufficient to sustain a judgment for both defendants.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 768½-770; Dec. Dig. \S 327.]

3. APPEAL AND ERROR ~~648~~—TRANSCRIPT— TIME OF FILING—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. art. 1608, providing that in any appeal the appellant shall file the transcript with the clerk of the Court of Civil Appeals within 90 days from the perfection of the appeal, the court could not consider an exception to the charge, when the part of the transcript containing the purported bill of exceptions was inserted by the clerk of the county court after the transcript had been filed in the Court of Civil Appeals, without authority of the latter court, and more than 90 days after the appeal bond had been perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2803-2806; Dec. Dig. ~~648~~.]

4. APPEAL AND ERROR ~~1001~~ — REVIEW — VERDICT.

In a suit for the sum alleged to be due upon an oral lease of pasture land for six months, and for a pasturer's lien upon defendant's cattle, where defendant denied the contract pleaded, the verdict for defendant would not be disturbed by reason of his admission that he had put cattle in the pasture, and that he owed pasturage for same head of cattle.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ~~1001~~.]

5. CONTRACTS ~~346~~—PLEADING—RECOVERY ON QUANTUM MERUIT.

Under a petition based on an alleged oral contract for the lease of pasture land, plaintiff could not recover on a quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181-1188; Dec. Dig. ~~346~~.]

Appeal from Stonewall County Court; R. S. Tillotson, Judge.

Action by George E. White against Will Barrow and another. Judgment for defendants, and plaintiff appeals. Affirmed.

T. E. Knight and J. M. Carter, both of Aspermont, for appellant. McCart, Curtis & McCart, of Ft. Worth, for appellees.

BUCK, J. [1] On December 4, 1915, this appeal was dismissed, on the ground that, inasmuch as the record failed to contain a transcript of any justice court proceedings, and the amount involved did not exceed \$200, such record failed to affirmatively show how the trial court had acquired appellate jurisdiction, and it appeared that it did not have original jurisdiction of the amount involved. But the appellant calls our attention to an act of the Thirty-Third Legislature, increasing the civil jurisdiction of the county court of Stonewall county, giving said court original concurrent jurisdiction with the justice courts in all civil matters. This statute being in the nature of a local or special law, and our attention not having been directed thereto in the brief of either appellant or appellee, or in the transcript, we did not take into consideration its enactment. Therefore we hereby withdraw our original opinion, set aside the order of dismissal, grant the motion for rehearing, and proceed to consider the appeal on its merits. Geo. E. White brought this suit against Will and W. E. Barrow for the sum of \$150, alleged to be due upon an oral lease contract covering

three sections of land in Stonewall county; it being alleged that the lease was made by and between W. H. Lee, agent of and acting for said White, and W. E. Barrow, who acted for himself and his son Will. Said contract was alleged to have been made on August 31, 1913, and was to begin September 1st, thereafter, and to continue for six months. Plaintiff alleged that, in pursuance of said contract, the defendants did pasture their cattle on the lands described, beginning on September 1, 1913. He further alleged a pasturer's lien upon some 20 head of cattle. Defendants specially denied the making of the contract pleaded by plaintiff, and denied owing plaintiff any sum of money; they further alleged that if in fact any of their cattle grazed upon the lands of plaintiff, they did so because the fences were down and insufficient to keep said cattle out. Upon a general charge, the jury returned the following verdict: "We, the jurors, find for the defendant," whereupon, the court entered judgment for both defendants. Plaintiff appealed.

[2] In his first assignment appellant questions the sufficiency of this verdict to sustain the judgment rendered. We think the assignment must be overruled. In *Lawson v. Robinson*, 68 Kan. 737, 75 Pac. 1013, it is held that a verdict which is silent as to one defendant is equivalent to a verdict in his favor. To the same effect is the holding in *Railway v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743. In *Trammell v. Rosen*, 157 S. W. 1161, our Supreme Court holds that a final judgment can be based upon a verdict which does not expressly, but only by implication, dispose of all the issues. See *Railway v. Gallaher*, 79 Tex. 685, 15 S. W. 696; *Railway v. Lightfoot* (writ denied) 48 Tex. Civ. App. 120, 106 S. W. 395; *Tom v. Sayers*, 64 Tex. 843.

[3] We cannot consider the exceptions to the charge, to the giving of which the second assignment is urged, because it appears, by reference to the transcript, that the portion of the transcript containing what purports to be the bill of exception, complaining of this charge, was inserted by the clerk of the county court of Stonewall county after the transcript had been filed in this court, and more than 90 days after the appeal bond had been perfected and without authority from this court, and without any motion filed herein. We cannot believe that the clerk or the counsel for appellant intended by this act, committed, evidently, while the transcript was in the custody of appellant's counsel, any impropriety, and therefore we do not think it necessary to further refer to the matter, except to say that we can give the assignment no consideration. Article 1608, Vernon's Sayles' Tex. Civ. Stat.; *Davis v. McGehee*, 24 Tex. 210; *Wells v. Driskell*, 105 Tex. 77, 145 S. W. 333.

[4, 5] The fourth assignment attacks the verdict and judgment as contrary to the law and evidence because W. E. Barrow, one of the defendants, "testified that he made the lease contract with plaintiff's agent, W. H. Lee, under which he the next day put some 60 head of cattle upon the alleged premises," etc. By reference to the statement of facts, it will be seen that, while Mr. Barrow admitted that about the latter part of August, 1913, having some cattle in the "shinnery," and having no water for them, he called up Mr. Lee over the phone and asked him about leasing the pasture described, yet he states that Mr. Lee told him he had sold the land to Mr. White, who lived at Ft. Worth, and that he (Lee) would see White about it the next time he came up from Ft. Worth, and let Barrow know what he said, but that Lee never said anything more about the lease; that, however, the next morning after this conversation, he did put some 65 head of cattle in this pasture; that the next day, or the second day thereafter, some 35 head got out of the pasture, and he "threw them back in the 'shinnery.'" He admitted owing White pasturage for the remaining 30 head for something like 40 days at 50 cents a head. But since Barrow denied the contract pleaded by plaintiff, we think the verdict and judgment cannot be disturbed by reason of this evidence and admission by defendant. Plaintiff could not recover on quantum meruit under his petition, which was based upon an alleged contract. *Walker v. Dickey*, 44 Tex. Civ. App. 110, 98 S. W. 659; *Thornton v. Moody*, 24 S. W. 332.

Finding no error, the judgment of the trial court is affirmed, but by reason of such judgment the plaintiff below is not denied the right to recover, in another suit based upon quantum meruit, any money due him for pasturage by the defendants.

Affirmed.

PHELPS v. PECOS VALLEY SOUTHERN RY. CO. (No. 525.)

(Court of Civil Appeals of Texas. El Paso. Feb. 3, 1916.)

ADVERSE POSSESSION §82—"COLOR OF TITLE"—UNRECORDED DEED—"VOID."

Under Rev. St. art. 6824, providing that unrecorded deeds shall be "void" as to subsequent purchasers without notice, but valid between the parties, an unrecorded deed is "color of title" against a good-faith subsequent purchaser within articles 5672, 5673, providing a three-year limitation in case of color of title, and defining it as a deed not regular, but not wanting in intrinsic fairness and honesty; the word "void" in the statute being used in the sense of voidable, and the nonrecording not amounting to a want of fairness, etc.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. § 82.

For other definitions, see Words and Phrases, First and Second Series, Color of Title; Void.]

Appeal from District Court, Ward County; S. J. Isaacks, Judge.

Trespass to try title by J. C. Phelps against the Pecos Valley Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. A. Hudson, of Pecos, and Short & Field, of Dallas, for appellant. J. W. Parker, Clay Cooke, and Ross & Hubbard, all of Pecos, for appellee.

HIGGINS, J. This is an action of trespass to try title, brought by Phelps against the appellee. J. W. Parker is the common source of title. On January 4, 1909, he conveyed the premises in controversy to M. L. Swinehart. This deed was not recorded. By deed dated May 6, 1910, recorded February 14, 1911, Swinehart conveyed the same to appellee. Appellee went into possession on or about March 1, 1910, and remained in continuous, peaceable, and adverse possession until the filing of this suit on May 21, 1914. By deed dated November 10, 1909, recorded November 10, 1909, Parker, for a valuable consideration, conveyed the premises to the Jesse French Piano & Organ Company, who, in turn, conveyed same to Phelps by deed dated October 30, 1914, recorded November 4, 1914. This deed was executed in ratification of a prior ineffective deed of said company to Phelps, dated December 29, 1909, which was filed for record January 5, 1910. On November 10, 1909, and December 29, 1909, the Jesse French Piano & Organ Company and Phelps had no notice, actual or constructive, of the deed from Parker to Swinehart, and the entry upon the land by the appellee on March 1, 1910, was the first notice Phelps had of its claim to the land. The only question presented is whether appellee acquired title under the three-year statute of limitation.

Article 6824, R. S., provides that all conveyances of land shall be void as to subsequent purchasers for a valuable consideration without notice unless they shall be acknowledged and filed for record as required by law; but the same, as between the parties and their heirs, and as to subsequent purchasers with notice thereof, or without valuable consideration, shall nevertheless be valid and binding. By article 5672 R. S., it is provided that every suit to recover real estate, as against one in peaceable and adverse possession thereof under title or color of title, must be brought within three years next after the cause of action shall have accrued. The point at issue between the parties resolves itself into this: Does an unrecorded deed constitute color of title within the meaning of articles 5672 and 5673, R. S.? If so, judgment was properly rendered for appellee.

Appellant calls to our attention the cases of *Cox v. Bray*, 28 Tex. 247, *Wall v. Lubbock*, 52 Tex. Civ. App. 405, 118 S. W. 886,

Watson v. Watson, 55 S. W. 183, and Lynn v. Burnett, 34 Tex. Civ. App. 335, 79 S. W. 64, where it was held that void deeds were insufficient to support the three-year statute; also to Latimer v. Logwood, 27 S. W. 960, where a like holding was made with respect to a void judgment. Upon the authority of these cases; it is insisted appellee could not acquire a prescriptive right under the statute because the unrecorded deed from Parker to Swinehart was void as to him; he having purchased the premises for value and without notice thereof. The cases cited are distinguishable. In each of them the instrument relied upon as the basis of the prescriptive right was void ab initio and a complete nullity. Such is not the case here. The deed from Parker to Swinehart was valid and binding between the parties, as well as to subsequent purchasers with notice or without a valuable consideration. The word "void" means that which has no force or effect. It is often used as in effect meaning voidable only; and it is seldom, except in a very clear case, to be regarded as implying a complete nullity, but, in a legal sense, is to be taken subject to a large qualification in view of all the circumstances calling for its application and the rights and interests to be affected in a given case. The term "void" can only accurately be applied to those contracts that have no effect whatever; which are mere nullities and incapable of confirmation or ratification. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act. The distinction between void and voidable transactions is a fundamental one, though it is often obscured by carelessness of language. As applied to contracts, the distinction between the terms is often one of great practical importance, and, whenever accurately used, the term "void" can only properly be applied to such contracts as are mere nullities and incapable of confirmation or ratification. These rules to which we have just adverted are well settled, and it is apparent that an unrecorded deed is not to be considered a void instrument as against a subsequent purchaser in the sense that it has no force or effect, or as a mere nullity, which is incapable of ratification or confirmation. Upon the contrary, it is plain that the term "void" in article 6824 is used in the sense of "voidable." It is undoubtedly true that a void deed is lacking in that intrinsic fairness and honesty demanded by article 5673 in order to constitute color of title. The cited cases are referable to this principle. It is equally true, however, that an instrument valid between the parties thereto is intrinsically fair and honest, although it may be voidable at the suit of a third party for proper cause. Hence the soundness of appellant's contention may be admitted—that a void deed is

so lacking in intrinsic fairness and honesty that it does not constitute color of title—but this is beside the question when we consider that the deed from Parker to Swinehart was not void, but voidable merely at the instance of the subsequent vendee of Parker, the Jesse French Plano & Organ Company, and its vendee, Phelps.

In order to determine whether appellee's unrecorded deed constitutes color of title, it is only necessary to inquire whether it is intrinsically fair and honest. The deed is clearly valid as between Parker and Swinehart, and therefore neither void in the correct sense of the term, nor lacking in intrinsic fairness and honesty. The fact that it was unrecorded is what constitutes it color of title. Had the instrument been duly recorded, appellee would have had title to the premises notwithstanding appellant's subsequently acquired and subsequently recorded deed. It is apparent that Swinehart's failure to record his deed did not operate to make it void as between him and his grantor, nor did such failure affect the fairness and honesty of the transaction between them. While he undoubtedly would be estopped to assert title as against one holding under a subsequently acquired deed for value without notice, this does not render his deed "void" in the technical sense of that term nor make it lacking in intrinsic fairness and honesty. Article 5673, R. S., not only defines "color of title," but aptly illustrates it as follows:

"And by 'color of title' is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty."

Chief Justice Stayton, speaking for our Supreme Court in Grigsby et al. v. May et al., 84 Tex. 240, 19 S. W. 343, and discussing the definition of "color of title" as given in article 5673, says:

"This definition doubtless was intended to give instances in which the chain of transfer would not be regular, within the meaning of the statute; but want of registration or of due registration in the chain giving color of title could have no operation in the matter of notice, and evidently was not intended to affect the right of a person holding under color of title; for, notwithstanding such irregularities may exist, the same protection is given as would be were the party holding under 'title.'"

Continuing, and still discussing the definition as illustrated by the words of the statute, Judge Stayton says:

"The other illustration is where one or more of the muniments of title 'be only in writing,' which evidently was intended to cover cases in which the evidence of right, though in writing, was not executed in the manner prescribed by law; and, under the statute, these are not defects which make the muniments wanting in 'intrinsic fairness and honesty.' The statute, however, in effect, does declare that like defects in regularity will cause the claim to be only 'color of title,' and does not deprive those of this effect unless they be wanting in intrinsic fairness and honesty."

In the same case, the court refers to the case of *Pearson v. Burditt*, 26 Tex. 173, 80 Am. Dec. 649, and quotes and adopts the explanation there given of the words "intrinsic fairness and honesty," embraced in the definition of "color of title" in the statute, in the following language:

"All the examples of irregularity given have relation to the muniment of right, and for this reason it was decided in *Pearson v. Burditt* that 'the term, "intrinsic fairness and honesty," embraced in the definition of color of title in our statute, relates to the means of proving the right of property in the land, so as to make the title equitably equal to a regular chain.' By 'equitably equal to a regular chain' we understand to have been meant simply that, if the muniments in the chain of transfer were in fact freely executed by the persons whose acts they appear to be, then they are sufficient if, upon their faces, they show such right to land as a court of equity would enforce as between the parties to the instrument; and that this is what was intended is evident from the facts of the case then under consideration by this court."

As between Parker and Swinehart, the deed of January 4, 1909, was in all respects regular and binding upon both, and as a result possessed the intrinsic fairness and honesty which is demanded by the statute of all the links in a regular chain of transfer from and under the sovereignty. This deed, therefore, although unrecorded, is not in any sense void, as contended for by appellant, and proof of its execution, together with proof of three years' peaceable and adverse possession, was a complete bar to plaintiff's action. As is indicated above, an examination of the adversely cited authorities will show that in every instance, the instrument attacked was void in the strictest sense as between the parties thereto, and therefore lacking in intrinsic fairness and honesty. It has never been held, so far as we are advised, that a deed which is valid and binding between the parties is, because unrecorded, void in the strict sense of that term, or that it is so lacking in intrinsic fairness and honesty that it does not constitute color of title. Indeed, such a holding would be manifestly incongruous, in view of article 5673, which expressly defines color of title as a consecutive chain of transfer, down to the person in possession, without being regular, and instances such an irregularity as failure to register, or duly register, one or more of the muniments.

Affirmed.

FREEMAN et al. v. TEXAS & P. RY. CO.
(No. 515.)

(Court of Civil Appeals of Texas. El Paso.
Jan. 20, 1916. Rehearing Denied
Feb. 19, 1916.)

APPEAL AND ERROR \Leftrightarrow 760—ASSIGNMENTS OF ERROR—BRIEF.

Under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making the grounds assigned in the motion for new trial to consti-

tute the assignments of error, the assignments of error in the brief must be true copies of the corresponding paragraphs of the motion for new trial, and not rewritten or reconstructed assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. \Leftrightarrow 760.]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by Mrs. M. E. Freeman and others against the Texas & Pacific Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

John T. Hill and O. L. Bowen, both of El Paso, for appellants. Geo. Thompson, of Dallas, and Russell & Gillett, of El Paso, for appellee.

WALTHALL, J. This suit was brought by appellants to recover of appellee the value of a race horse shipped by W. B. Freeman, from Dallas, Tex., to El Paso, Tex., on appellee's line of railroad. It is alleged that while en route the horse was taken with shipper's fever from exposure and want of attention, and died in a few days after reaching its destination. Appellee is charged by appellants with negligence in not properly caring for the horse while in its care and custody, negligence in failure to exercise ordinary care in transporting the horse within a reasonable time. The view we take of the case we need not further state the issues. The case was submitted to a jury. A verdict was returned in favor of appellee under a general charge submitting only the issue of negligence in the alleged failure to exercise ordinary care to transport the horse within a reasonable time. Appellants filed an amended motion for a new trial, which the court heard and overruled.

Appellants submit two assignments of error, each referring to paragraphs in the motion for new trial, as the basis for the assignments, and each assignment followed by several propositions thereunder, but neither of the assignments conform to the statute and rules for the preparation and submission of cases to appellate courts. They each fail to correctly copy in the brief as the basis for the errors assigned, the corresponding ground for a new trial as stated in the motion. Article 1612 of the Revised Statutes, as amended by the Thirty-Third Legislature (chapter 136, p. 276), makes the grounds assigned in the motion for a new trial, where such motion is filed, to constitute the assignments of error. The Courts of Civil Appeals have uniformly held that the rules for briefing cases contemplate that the assignments of error in the briefs shall be true copies of the corresponding paragraphs of the motion for new trial, and not rewritten or reconstructed assignments or grounds. *Ruth v. Cobe*, 165 S. W. 530; *Coons v. Lain*, 168 S. W. 981; *Overton v. Colored Knights of Pythias*, 163 S. W. 1053; *Hayes v. Groes-*

beck, 146 S. W. 327; Smith v. Bogle, 165 S. W. 35; Dees v. Thompson, 166 S. W. 56; J. B. Farthing Lumber Co. v. Illig, 179 S. W. 1092. Prior to the amended statute, it was held that the assignments filed with the clerk in the trial court must be correctly copied in the briefs, and that it was not permissible to present assignments as to either form or substance not correctly copied. Stephenville Oil Mill Co. v. McNeill, 57 Tex. Civ. App. 252, 122 S. W. 911; Horseman v. Coleman County, 57 S. W. 304. The above is the construction the courts place upon rule 29 (142 S. W. xii) for the submission of cases. Again, material matter not found in the corresponding paragraph in the motion for new trial is stated in the assignments in the briefs. Chief Justice Key, in Pate v. Vardeman, 141 S. W. 317, strongly criticizes such practice and holds that a ground in the assignment of error incorrectly copied in the brief should not be considered. We expressly disclaim any reflection upon the motives of counsel in the instant case in this matter. We are quite sure there was no improper motive upon their part in presenting reconstructed assignments, but adhering to a practice which this court has adopted and which is deemed salutary, we decline to consider the assignments.

We deem it unnecessary to copy the grounds stated in the motion for new trial, and the corresponding assignments in the briefs, as the grounds in the motion and the assignments in the briefs are lengthy; but an inspection of the two discloses that no effort was made to correctly copy in the briefs as assignments of error the grounds stated in the motion. Judge Hendricks, of the Seventh Court of Civil Appeals, in Edwards v. Youngblood, 162 S. W. 1164, gives some most excellent reasons why the assignments should be distinct and correct copies of the corresponding grounds in the motion for new trial, holds as mandatory the statute making the grounds of error in the motion for new trial to constitute the assignments of error, and refused to consider assignments not the same in form or substance as those in the motion. Appellee, in its objections to a consideration by this court of the assignments, points out other objections to the appellants' two assignments, some of which are well taken, and others are not so clear, but we deem it unnecessary to consider them.

For the reasons stated in this opinion, the assignments cannot be considered. The case is affirmed.

ST. LOUIS, B. & M. RY. CO. v. JENKINS.*
(No. 5552.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 19, 1916. Rehearing Denied
Feb. 16, 1916.)

1. TRIAL \S 260—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In an action for the death of a railway engineer, killed when his engine left the track,

wherein the track was alleged to have been uneven and unsafe, where the jury found that the track was unsafe and that the defendant was negligent in having it in such condition, and that the locomotive by which deceased was killed was not a reasonably safe one for use along the track when handled with ordinary care, defendant's requested charge as to whether the locomotive operated by deceased at the time of the wreck in which he was killed was dangerous for the character of the work in which it was then used, was properly refused, as it could have added nothing to the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651-659; Dec. Dig. \S 260.]

2. TRIAL \S 350—SPECIAL ISSUES—SUBMISSION.

In such action where the jury found that the track was not safe and that defendant had not used ordinary care to keep it safe for such a locomotive as deceased was using when killed, and that the locomotive was not a reasonably safe one, the submission of a special issue as to whether or not the unsafe track, if it was unsafe, or the unsafe locomotive, if it was unsafe, was the proximate cause of the accident, or whether both were the proximate cause, was not injurious to defendant, as no intelligent jury could have been misled thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 828-833; Dec. Dig. \S 350.]

3. TRIAL \S 350—SPECIAL ISSUES—SUBMISSION.

In such action where the court submitted an issue as to whether the engineer at the time of the derailment was using ordinary care in handling the locomotive by which he was killed, and where the rate of speed was found in answer to another issue, the defendant's requested issue as to whether deceased was exercising ordinary care to run his engine at a safe rate of speed was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 828-833; Dec. Dig. \S 350.]

4. TRIAL \S 260—ACTION FOR DEATH—REQUESTED CHARGES—GIVEN CHARGES.

A special charge was properly refused when it was covered by the other charges given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651-659; Dec. Dig. \S 260.]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by Jesse F. Jenkins against the St. Louis, Brownsville & Mexico Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Claude Pollard and E. H. Crenshaw, Jr., both of Kingsville, and H. R. Sutherland and Robt. W. Stayton, both of Corpus Christi, for appellant. John C. Scott and W. L. Dawson, both of Corpus Christi, for appellee.

CARL, J. This is the third time this case has been before this court, the first opinion being reported in 163 S. W. 621, and the second in 172 S. W. 984. The first of those opinions is referred to for a statement of the nature of the case. Such other matters as it may be necessary to mention will appear as we proceed with this opinion.

[1] Appellant complains that the court erred in refusing its requested special issue No. 1, which is:

"State whether or not the locomotive which was being operated by Harvey E. Jenkins at

the time of the wreck in which he was killed was dangerous for the character of work in which it was then being used."

Plaintiff alleged that the locomotive with which his son was supplied was a yard or switch engine, intended for use in the yards and at stations, that it had no pony trucks or pilot, and that on account of its nature and construction it was not safe to use as an ordinary engine on the main line of defendant's road; that, notwithstanding these facts, defendant carelessly and negligently used said engine on its main line for the purpose of drawing cars long distances, and was causing deceased to use it at the time of his death; and that the track was unsafe for that kind of locomotive and it was dangerous to operate such locomotive on said main line as an ordinary engine used for the usual traffic on the main line. The fact that the roadbed was not in proper condition and that said engine was unsuited to the main line work are the grounds of negligence causing the wreck. The track was alleged to have been uneven and unsafe for locomotives to pass over, because it was not properly ballasted and had sunken joints at and near the place of the wreck.

The jury found that the roadbed was in an unsafe condition for the use and passage of a locomotive thereon such as the one being used by deceased at the time he was killed; and that the railway company had failed to use ordinary care to have its track and roadbed in a safe and proper condition for the use and passage thereon of such a locomotive as the one being used, when handled with ordinary care.

The train crew was stringing telegraph wire on the main line, and, at the time of the wreck, were going to the place where they were working. The engine did not have a pilot or pony trucks, and the evidence is sufficient to show that it was unsuited to main line runs, because it was not protected and balanced by pony trucks. If appellant means by the requested charge that the actual work of stringing wires was not unsafe for such an engine, it is sufficient answer that they were not engaged in that character of work at the time of the wreck, but were pulling a string of cars on the main line going to that place where the work was being done, at the time the accident happened. And we are unable to see that this engine would come under a different rule than would apply to an ordinary engine on the main line. If they had been at the place and doing the work they intended to do, it might be different. The jury said in answer to special issue No. 3 that the locomotive by which Harvey E. Jenkins was killed was not a reasonably safe one for use along defendant's track at and near the place where the engineer was killed, when handled with ordinary care. This was the issue, and not what it would have been if it

had been actually engaged in the construction work. The requested charge would have added nothing to the charge actually given, which covered the proper issue to be submitted and there was no error in refusing to give same.

The first and second assignments are overruled.

[2] Special issue No. 6 submitted to the jury and the jury's answer are as follows:

"Say whether or not unsafe track, if it was unsafe, or unsafe locomotive, if it was unsafe, was the proximate cause of the accident, or whether both of these causes combined were the proximate cause of the accident.

"Answer: Both."

The objection, as pointed out in the third assignment, is that same is a comment on the weight of the evidence. The jury had been asked and had found in answer to issue No. 1 that the track was not safe, and in response to issue No. 2 that ordinary care had not been used by the appellant to keep its roadbed in a safe condition for the use and passage of such a locomotive as that one deceased was using at the time he was killed. And in response to the third special issue the jury found that the locomotive was not a reasonably safe one. On the whole we cannot see that appellant was injured or could have been injured by the manner in which the issue was framed. No jury of intelligent men would have been misled thereby, and the assignment is overruled, and it follows that the fourth and fifth assignments are without merit and are overruled.

[3] The sixth assignment complains of the refusal by the court to submit special issue No. 16 requested by defendant, which is:

"State whether or not Harvey E. Jenkins, at the time of his death, was exercising ordinary care to run his engine at a safe rate of speed."

The court did submit issue No. 5, which is:

"Say whether or not the engineer, at the time of the derailment, was using ordinary care in handling and operating the locomotive, by which he was killed, in view of the kind of locomotive it was."

And the rate of speed was found in answer to another issue. There was no error in refusing this charge; nor was there error in refusing to submit special issues Nos. 16 and 17 requested by the defendant. The sixth and seventh assignments are overruled.

The verdict and judgment were for \$5,040, and in view of the facts disclosed by the record we do not think it excessive. The eighth assignment is overruled, and the ninth being without merit is also overruled.

[4] The refused special charge complained of in the tenth assignment was covered by other charges given, and it was not necessary to give same.

This is three times this case has been passed upon within two years by this court; the writer having written the opinion on each appeal. The issues were clearly, concisely, and fairly submitted to the jury, and the finding is again against appellant. It is

time to put an end to the matter, especially since no substantial error is shown; and we therefore affirm the judgment.

TEXAS & P. RY. CO. v. FRAZER.*
(No. 513.)

(Court of Civil Appeals of Texas. El Paso.
Jan. 20, 1916. Rehearing Denied
Feb. 17, 1916.)

1. TRIAL — 139—DIRECTING VERDICT.

There should not be a directed verdict unless the evidence is undisputed, and of that conclusive nature that leaves no room for ordinary minds to differ as to the conclusions to be drawn from it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.]

2. WATERS AND WATER COURSES — 172—DIVERSION AND IMPOUNDING.

Defendant to be liable for damages from the breaking of a dam, by which it impounded waters which it diverted, need not have been negligent.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 233-236; Dec. Dig. § 172.]

3. WATERS AND WATER COURSES — 172—DIVERSION AND IMPOUNDING — ESCAPE — LIABILITY—UNPRECEDENTED RAIN.

The unprecedented character of the rainfall will not relieve defendant from liability, where it diverted waters from their natural channel and impounded them, and then permitted them to escape on plaintiff's land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 233-236; Dec. Dig. § 172.]

4. WATERS AND WATER COURSES — 172—DIVERSION AND IMPOUNDING—ESCAPE—ESTOPPEL.

Plaintiff, not having joined or acquiesced in the request of other citizens that defendant build a dam to impound water which it had diverted, is not estopped, because thereof, to claim damages to his land from the escape of water therefrom.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 233-236; Dec. Dig. § 172.]

5. WATERS AND WATER COURSES — 179—DIVERSION AND IMPOUNDING—ESCAPE—ACTION FOR DAMAGES—EVIDENCE.

The action being only for damages from escape to plaintiff's land, by the breaking of the dam, of waters which defendant diverted and impounded, and plaintiff not pleading as an element of damages that the dam was a menace to his land, defendant's offered evidence, that it was a benefit rather than a menace thereto, is inadmissible.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 249; Dec. Dig. § 179.]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Action by Ella Frazer against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Howard, of Pecos, for appellant. Ponder S. Carter and Will P. Brady, both of El Paso, and Ben Palmer, of Pecos, for appellee.

HARPER, C. J. This is an action instituted in the district court of Reeves county, Tex., by the appellee, Ella Frazer, on the 5th day of November, 1914, to recover damages from the appellant, the Texas & Pacific Railway Company, to certain real and personal property, and injury to the person of said appellee, caused by, as alleged by the appellee, the breaking of the reservoir and dam of appellant at Toyah, Tex., on the 29th day of May, 1914. Mrs. L. W. Durrell, joined by her husband, pro forma, under permission of the court, intervened, alleging that she was part owner of the said real property alleged to have been injured. Appellee alleged that, without regard to her rights, appellant wrongfully and improperly constructed a large reservoir or artificial lake about 400 yards from her premises, by erecting a large dirt dam across a ravine, and thereby held the water from flowing down said ravine, as it had theretofore done; that said dam was so negligently and defectively constructed and provided with such insufficient spillways or other means to permit the surplus water to escape as to be wholly insufficient to withstand the pressure of the large body of water impounded thereby; that in addition to the dam, appellant constructed a levee about 1,400 yards long, and that a ditch was dug along said levee which, with the levee, diverted the water from its natural drainage on the north side of the railway track, to the south side of the track into the said reservoir, near to which appellee's property was situate; that by reason of the faulty construction and the negligent manner in which the dam was maintained the waters impounded overflowed the banks and destroyed her property, etc. Appellant answered by general and special denial, and specially answered that the reservoir is situated upon its own property, was skillfully constructed, with proper outlet for flood waters; that the levee complained of was constructed for the protection of the town of Toyah at the instance and request of the citizens thereof; that the rain which caused the dam to break was unprecedented; that the flow of water over plaintiff's property would have been as high or higher had there been no dam across the ravine; that the levee or dam is no part of the embankment of the railway right of way, but separate and distinct, used for storing water for use in the shops at Toyah. Appellees denied that the rain was unprecedented, also denied that the dam and levee were a benefit to the town, and alleged it to be a detriment. The cause was submitted to a jury by general charge, and resulted in verdict and judgment for appellee, Frazer, for \$1,433.33, and for intervener, Durrell, for \$266.67, from which an appeal is perfected.

[1] The first assignment is that:

"The court erred in refusing to give a requested peremptory instruction for the defendant be-

cause the uncontroverted proof was that the water, which caused the alleged damages, would have risen as high and to as great a depth and over as great an area if the dam, levee, and reservoir had not been constructed."

The evidence conclusively shows that the dam and levee were constructed as alleged; that the waters of the natural drainways, both south and north of the railway tracks, were diverted from their natural flow into the reservoir; that the dam broke and the waters which destroyed appellee's property came through the break in the dam; and there is evidence in the record that if the levee had not been constructed, which diverted the water across the track from the north to the south side thereof, it would not have reached the property of appellee. Therefore the court did not err in refusing to give the peremptory instruction.

The trial court should not instruct the jury to return a verdict unless the evidence is undisputed, and of that conclusive nature that leaves no room for ordinary minds to differ as to the conclusions to be drawn from it. *Choate v. Railway Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 819; *Mustain, Ex'r, v. Stokes*, 90 Tex. 358, 38 S. W. 758.

[2] The second, third, and tenth assignments charge that it was error to refuse to give special requested charges, submitting whether or not the dam and levee were negligently constructed; the proposition being that, in all actions sounding in tort to enforce a common-law right, the plaintiff must allege and prove some negligent act of the defendant which caused the damage. The proposition contended for has expressly been held to be unsound, in cases such as is here presented. *Texas & Pacific Ry. Co. v. O'Mahoney*, 50 S. W. 1049; *Id.*, 24 Tex. Civ. App. 631, 60 S. W. 908.

[3] Fourth assignment: The court did not err in refusing to charge upon the defense pleaded of unprecedented rainfall. The waters which caused the damage having been diverted from their natural channel and impounded, and from the reservoir permitted to escape upon plaintiff's property, defendant is not relieved from liability because of the unprecedented character of the rainfall. *G., H. & S. A. Ry. Co. v. Riggs*, 107 S. W. 589.

[4] The fifth assignment charges that the court erred in refusing to permit witness to testify that the citizens of the town of Toyah, in which the property of plaintiff is situate, had requested the railway company to construct the dam to protect the town from overflow. There is no pleading nor proof that the plaintiff made or acquiesced in such request, if made; therefore she is in no way estopped from claiming damages which were proximately caused by the diversion of the waters from their natural drainage basins and permitting them to flow upon her property.

[5] The sixth and seventh assignments con-

tend that it was error to exclude the testimony of witnesses to the effect that the dam, levee, and reservoir were a benefit to the property of plaintiff, instead of being a menace to her life and a detriment, and that it had been built at the request of the inhabitants of the town; the proposition being:

"Appellees pleaded that the construction of the 1,400-yard levee on the north side of the track was for the purpose of diverting the water north of Toyah into this appellant's reservoir, and that said levee was a detriment to their property and a menace to the life of the appellee, Miss Frazer, and caused her property to be proclaimed as worthless; this appellant having pleaded in answer to their said allegations that the levee protected their property and was a protection to all property, and was placed there at the request of the property owners. Under these pleadings, the testimony, sought to be introduced, tended to establish that said levee was beneficial and enhanced the value of appellee's property. The same should have been submitted, and it was error in the court to exclude same."

We fail to find that the fact that the dam, levee, and reservoir was a menace to the property of appellee was pleaded by appellee as an element of damages. The statement of facts does not show any evidence adduced to that effect, and the charge of the court confines the jury to a consideration of the actual damages suffered and the proximate cause thereof. There is no attempt to enjoin the maintenance of the structures, so there is no phase of the case upon which the testimony was admissible.

Besides, it is conceded in this case that the dam broke; that the waters therefrom washed against and damaged, if not destroyed, plaintiff's property; so testimony from witnesses that at the time of the trial the structures were a menace or a benefit to the property could not in any way have affected the verdict of the jury.

The eighth assignment reads:

"Because the court erred in permitting the plaintiff to testify over the objection of the defendant that she could have gotten certain sums for rent out of her residence after the overflow or flood because the same was not the proper measure of damage in this cause and was highly prejudicial to the rights of this defendant."

The questions and answers, as they appear in the bill of exceptions, are as follows:

"Now, since the flood happened, have you been able to use it for that purpose? No, sir.

"Have you collected anything, gotten anything out of it, since that time for roomers? No, sir.

"Could you have gotten anything out of it? (Counsel for defendant object to, 'Could you have gotten anything out of it?') Court overruled.) Answer: Could have."

There seems to have been no reason given for the objection. Besides, the questions and answers appear to have no definite meaning as they appear in the bill of exceptions. It is clear that plaintiff has not received any rentals from the premises since the flood. But the question, "Could you have gotten anything out of it?" has no meaning, without qualifying it with, "if the property had been in the same condition as before the injuries," or by, "in the condition it was after the in-

juries." If the idea is that the property had a rental value before the injury and none after, then the testimony was admissible as a circumstance tending to show the extent of the injuries to it.

The ninth is that the verdict and judgment are excessive. There is ample evidence in the record to sustain the amount found by the jury.

Affirmed.

PEOPLE'S ICE & MFG. CO. v. INTERSTATE COTTON OIL REFINING CO. (No. 7420).*

(Court of Civil Appeals of Texas. Dallas. Jan. 22, 1916. Rehearing Denied Feb. 19, 1916.)

1. VENUE ⇐7—CONTRACT IN WRITING—BROKER'S MEMORANDUM.

Where a broker negotiates a sale by phone, and reduces to writing and signs a memorandum thereof, sending a copy to each of the parties, which they retain without objection, the contract is in writing, within Rev. St. 1911, art. 1830, subd. 5, as to venue, where a person has contracted in writing to perform an obligation in a certain county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 13-16; Dec. Dig. ⇐7.]

2. VENUE ⇐7—CONTRACT IN WRITING—BILL OF LADING AND ATTACHED DRAFT.

Where oil was shipped by defendant to G. county, for plaintiff, with draft on plaintiff attached to the bill of lading, which obligated plaintiff to deliver possession of the oil in G. county, there was a contract in writing to perform an obligation therein, within Rev. St. 1911, art. 1830, subd. 5, as to venue, so as to permit plaintiff to sue in G. county to recover the price paid, because of the oil not being as agreed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 13-16; Dec. Dig. ⇐7.]

3. TRIAL ⇐350—SPECIAL ISSUES—IMMATERIAL MATTER.

The proof being that the oil was not sold by sample, but as "prime crude cotton seed oil cold pressed," defendant, in an action to recover the price because of the oil not being as sold, was not entitled to submission to the jury of the question of it being like the sample in the broker's possession.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. ⇐350.]

4. SALES ⇐358—CONTRACT—QUALITY—PLACE OF DELIVERY.

Where a seller agreed to deliver to the buyer in a certain county oil of a certain grade, which it failed to do, it is immaterial what grade it delivered to the carrier in another county.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. ⇐358.]

5. SALES ⇐59—CONTRACT—BROKER'S MEMORANDUM.

The parties to a sale of oil having received and retained the broker's memorandum of sale, stating that the contract was made subject to the rules of a certain association, are bound thereby; there being no fraud or misrepresentation, though in the negotiation nothing was said of such rules.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 159; Dec. Dig. ⇐59.]

Appeal from District Court, Grayson County; Jas. P. Haven, Judge.

Action by the Interstate Cotton Oil Refin-

ing Company against the People's Ice & Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Hassell, of Sherman, and Rentfro & Cole, of Brownsville, for appellant. Head, Dillard, Smith, Maxey & Head and J. F. Holt, all of Sherman, for appellee.

RAINEY, C. J. Appellee, a domestic corporation, with its principal place of business at Sherman, in Grayson county, Tex., instituted this suit against appellant, another domestic corporation, with its office and place of business in Brownsville, Cameron county, Tex., to recover as damages the entire purchase price paid by appellee to appellant for the purchase of a tank car of crude cotton seed oil, together with certain charges for freight and demurrage. Appellee alleged that it had purchased two tank cars of prime crude cotton seed oil, cold pressed at 46¼ cents per gallon, f. o. b. Brownsville, said tank cars to be shipped at specified times in tanks furnished by appellee and to be paid for by sight draft on appellee with bills of lading attached for full amount of invoice. The contract plead by appellee was alleged to be in writing, and was also alleged to have been made subject to the rules of the Texas Cotton Seed Crushers' Association. The tank car in question was loaded with the oil in Brownsville, and the draft of appellant for the full amount of the purchase price of the oil was paid by appellee. Appellee in its petition alleged that the grade and quality of the oil was not of the character it had purchased, and that it had thereby been damaged in a sum representing the difference in the value of the oil received and the value of the oil it should have received had same been up to the standard in quality. Appellee also alleged that this difference was the entire purchase price paid by it, together with the freight and certain demurrage charges; the tank car not having been unloaded, but remaining in Sherman on the tracks of the railroad. The case was submitted to the jury on special issues and a verdict returned, upon which verdict a judgment was entered by the court for the sum of \$4,352.23; said sum being the said entire purchase price paid by appellant for the oil, together with the freight, demurrage charges, and interest. Appellant appeals to this court.

[1] Appellant's first assignment of error is: "The court erred in overruling this defendant's plea of privilege in this cause on the day of October, 1914, for the reason that the undisputed evidence in this case, on the hearing of said plea of privilege, showed that this defendant was a domestic corporation with its only office and place of business in Cameron county, Tex., and with no officers or agents residing in any other county than in said Cameron county, Tex., and that plaintiff's cause of action was controlled by none of the subdivisions of article 1830 of the Revised Statutes of 1911, permitting suit to be maintained against de-

fendant in some county other than its residence, all of which appear from defendant's bill of exception No. 1, which bill of exception is here referred to."

The first proposition submitted is:

"A contract of sale conducted by a broker in which the negotiations for same are conducted through telephone communications and telegrams had by the purchaser and seller, respectively, with said broker, and in which, through the medium of said broker, an agreement is finally reached by which the buyer becomes the purchaser from the seller of a tank car of oil, such contract is not a contract in writing within the meaning of subdivision 5 of article 1830 of the Revised Statutes of Texas of 1911, notwithstanding after said contract has been consummated between the principals the broker undertook to make a written memorandum of the terms of sale."

The facts presented in the petition are, in effect, that appellant's principal place of business was at Brownsville, Tex., and that it had no agent in Grayson county. The first transaction was initiated between the parties by John H. Halley & Co., brokers, of Houston, Tex. (by phone), with whom appellant had placed its samples of oil, whereupon Halley & Co. wrote in triplicate the following memorandum, sending one copy to each of the parties, and retaining one copy; the one received by appellant being received by it before the oil was shipped. The memorandum reads as follows:

"Houston, Texas, Nov. 3, 1913.

"People's Ice & Mfg. Co., Brownsville, Texas—Gentlemen: In accordance with exchange of communications, we beg to confirm having this day sold to Interstate Cotton Oil Refining Co., Sherman, Texas, the following for your account: Two (2) tanks 160 bbl. capacity, prime crude cotton seed oil cold pressed, at 46¼c. per gallon, f. o. b. Brownsville, Texas.

"Shipment: One by fifteenth; one November.

"Tanks: To be furnished by buyer.

"Routing: Buyers.

"Terms: Sight draft on buyer, bills of lading attached, for full amount of invoice.

"Commission: 10c. per bbl. to be paid by sellers.

"This contract is made subject to the rules of the Texas Cotton Seed Crushers' Association—made in triplicate; one copy being sent to the seller, one to the buyer, and one retained on file in this office. Thanks.

"Yours very truly, John H. Halley Co.,
"As Brokers Only."

Appellee's manager testified:

"We received the broker's contract and accepted it as the contract and knew no other. Neither defendant nor any one else notified us that it was not the contract."

Appellant's manager testified:

"On cross-examination the witness stated that he received the broker's contract, a copy of which is set out in the petition, in due course of mail, and he made no exceptions to the terms of the contract; that said witness, as agent for defendant, sold through John H. Halley, as brokers, two tank cars of prime crude cotton seed oil to the Interstate Cotton Oil Refining Company of Sherman, Tex.; that said deal through said broker was consummated by means of telephone communications, telegrams, and letters on or about the 3d day of November, 1913; that all the telegrams, letters, and what the brokers style a memorandum of contract were attached to his deposition and made exhibits thereof."

Said oil was shipped with sight draft attached to bill of lading, which draft was presented to appellee and paid before the shipment reached Sherman.

Appellee alleged that this contract was made by the said Halley Company as brokers, and was fully authorized by appellant; that appellant received the copy thereof sent to it by said broker, he executing the same in triplicate, one being sent to appellant, one to appellee, and one retained on file in the broker's office; that said written contract truly stated the terms of the sale; that appellant accepted said contract as written by said broker, who was, in fact, the agent of appellant, and did not make the slightest objection thereto; that appellant acted on said contract shipping both tanks of oil sold under the terms thereof, and that, acting thereon, it shipped the tank of oil in controversy and collected the purchase price thereof, all this without making any objection to said contract, and that it is now estopped, and that under certain rules of the Texas Cotton Seed Crushers' Association, subject to which said contract was made, the weight and quality of the oil was guaranteed at destination, Sherman, in Grayson county; that said oil was shipped under a shipper's order bill of lading with draft for purchase price attached, which draft was paid in Grayson county; that when the car arrived at Sherman, which it did after the draft reached Sherman, and after it had been paid without any opportunity of inspection of the oil, it was found not to be of the quality sold; that, in fact, it was so contaminated with mineral oil that it was utterly worthless for any purpose; that it could not be unloaded from the car and mixed with cotton seed oil, because so to do would destroy the oil with which it was mixed.

Under the evidence in this case we are of the opinion that the memorandum executed by Halley Company constituted a written contract between the parties and formed the basis for the right of action. Halley was acting for both parties, and, as such, he was authorized to reduce the terms of the trade to writing and place his signature to the same, which became the contract of both parties and binding upon both. Both evidently relied on it as the only contract between them. Had they not relied on it it was incumbent on them to disavow it when it was first received, and, not having done so, at that time both are shut off from now doing so, but must abide thereby. Said contract by its terms required the performance thereof partly in Grayson county, which gave appellee a right of action for its breach in said county. *Floresville v. Refining Co.*, 55 Tex. Civ. App. 78, 118 S. W. 194.

[2] For another reason we think venue was properly laid in Grayson county; that is, that the oil was shipped by appellant to Sherman in Grayson county for appellee with

draft drawn on appellee attached to the bill of lading, which obligated the appellant to deliver possession of oil in Grayson county. *Seley v. Williams*, 20 Tex. Civ. App. 405, 50 S. W. 399; *Floresville v. Refining Co.*, supra; *Harris v. Salvato*, 175 S. W. 802; *Callender v. Short*, 34 Tex. Civ. App. 364, 78 S. W. 366; *Planters' Co. v. Whitesboro Co.*, 146 S. W. 225. The plea of privilege was properly overruled.

[3] Appellant complains that the court erred in not submitting to the jury the following requested question, to wit:

"Was the oil in question, when loaded into the tank car and delivered by defendant to the carrier in Brownsville, Tex., of the grade and quality of the sample of same in the possession of the broker, John H. Hailey, when the sale was consummated with the plaintiff?"

The undisputed proof shows that the oil was not sold by sample, and also shows it was sold by appellant as "prime crude cotton seed oil cold pressed." We think no issue was raised whether the oil when loaded in the car at Brownsville was of the same grade and quality of the sample in the possession of the broker, Hailey, when the sale was consummated?

[4] Error is also assigned for refusing the following:

"Was the oil, when loaded into the tank car at Brownsville, Tex., and delivered in said city by defendant to the carrier, of the grade known as prime crude cotton seed oil?"

The contract obligated the appellant to deliver "prime crude cotton seed oil" at Sherman, Grayson county, and it is immaterial what grade was delivered to the carrier; the evidence showing that the grade delivered at Sherman was not the kind contracted to be delivered.

[5] Error is assigned in the action of the court for refusing to submit to the jury the following:

"Question No. 1: Did defendant or its agent, S. C. Tucker, at the time of the making of the contract of the sale of the said tank car of oil at the time the controversy arose with reference to the grade of said tank car of oil, know the rules of the Texas Cotton Seed Crushers' Association? Answer.

"Question No. 2: Did defendant or its agent, S. C. Tucker, after the receipt from the broker of what purports to be a written memorandum of the contract for the sale of said oil, with a knowledge of the significance of the term, 'Subject to the rules of the Texas Cotton Seed Crushers' Association,' acquiesce with said clause in said contract? Answer.

"Question No. 3: After the receipt by defendant and its agent, S. C. Tucker, of the said memorandum from the broker, John H. Hailey, which memorandum stated that said sale was subject to the rules of the Texas Cotton Seed Crushers' Association, would an ordinarily prudent man, situated and circumstanced as the said S. C. Tucker was, have been put on inquiry to ascertain what was the significance of such clause in said contract? Answer.

The proposition made by appellant is:

"Where a trade is consummated by a broker between the seller and the purchaser of a commodity, and, where after said trade has been consummated, the said broker undertook to make a written memorandum of the terms of the

contract thus entered into between the seller and the purchaser and inserted in said written memorandum a clause making said trade subject to the rules of the Texas Cotton Seed Crushers' Association, and where the undisputed evidence disclosed that at the time of the consummation of said trade through the medium of said broker no mention was made of said trade being subject to such rules, and where the undisputed evidence further showed that, when the seller received such written memorandum, he made no objection by reason of such clause being thus inserted, and where upon the trial of a suit based on said contract of sale in which it is a material inquiry as to whether such contract should be governed by the rules of such association, it was error for the court to refuse to submit to the jury for its findings the issues raised by the requested charge forming the basis of this assignment; said suit being submitted on special issues, and such issues embraced in said charge being raised by the pleading and the evidence."

In answer to this assignment we adopt the proposition of appellee as follows:

"No fraud or misrepresentation on the part of any one making said contract is claimed by appellant. Appellant, through its manager and authorized officials, accepted said broker's contract as the contract of sale to appellee in this case. Said contract expressly and very plainly shows to have been made subject to the rules of the Texas Cotton Seed Crushers' Association, and after accepting the same it is immaterial whether: (1) At the time of making the contract or at the time the controversy arose with reference to the grade of oil in the tank car appellant knew said rules; or (2) whether S. C. Tucker, with a knowledge of the significance of the term 'subject to the rules of the Texas Cotton Seed Crushers' Association,' acquiesced therein; or (3) whether an ordinarily prudent person situated as he was would have been put on inquiry to ascertain the significance of said clause of the contract.' The reference to said rules was amply sufficient to make the same a part of the contract."

Appellant's president and manager testified as follows:

"I did not make any objection to the clause there that reads: 'This contract is made subject to the rules of the Texas Cotton Seed Crushers' Association—made in triplicate; one copy being sent to the seller, one to the buyer, and one retained on file in this office.' I did not make objection to any living man. I recall that that came to me. That is dated November 3, 1913, and reached me the 4th or 5th. I did not tear it up, but kept it. I attach it to my deposition in this case."

As the contract specifically referred to the rules of the Texas Cotton Seed Crushers' Association, appellant is estopped from avoiding the effects of said rule when he had the opportunity of informing himself as to its import; there being no fraud or misrepresentation pleaded or proven. *Box Co. v. Spies*, 109 S. W. 432.

Appellant's assignments of error from 5 to 14, inclusive, have all been duly considered by us, and we conclude they present no reversible error.

The court submitted all material issues presented by the pleadings and evidence. These were answered by the jury in favor of the appellee. The evidence supports the findings of the jury, and the judgment is affirmed.

Affirmed.

OPIELA v. MANKA. (No. 5587.)

(Court of Civil Appeals of Texas. San Antonio.
Jan. 26, 1916. Rehearing Denied
Feb. 23, 1916.)

APPEAL AND ERROR — 254 — ERROR APPARENT OF RECORD — OBJECTION.

Where an exception was erroneously sustained to plaintiff's first amended petition, on the ground that it did not state an action within the jurisdiction of the county court, and all costs accruing up to and including such petition were assessed against plaintiff, the error is one apparent of record which will be corrected, though plaintiff did not then except or except on trial to a similar order, or raise the matter in his motion for new trial; the petition clearly showing that it stated a cause of action within the jurisdiction of the county court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1486, 1487; Dec. Dig. § 254.]

Error from Karnes County Court; C. L. Bell, Judge.

Action by Frank C. Opiela against Frank Manka. There was a judgment for plaintiff, but all costs up to and including the first amended petition to which exceptions were sustained were assessed against plaintiff, and he brings error. Reversed and rendered.

M. B. Little, of Alto, for plaintiff in error. Williamson & Klingemann, of Karnes City, and A. J. Prichard, of Asherton, for defendant in error.

FLY, C. J. Plaintiff in error, who was plaintiff in the court below, has prosecuted this writ of error from a judgment in his favor for \$125, but in which all costs accruing up to and including the first amended petition, to which exceptions were sustained, were assessed against plaintiff. In the order sustaining the exceptions to the first amended petition, the costs were assessed as indicated, and, in the final judgment from which the writ of error is prosecuted, the costs accruing prior to the filing of the second amended petition were again assessed against plaintiff. From that judgment this writ of error has been perfected.

No exception was taken to the action of the court in assessing the costs against plaintiff, and no motion for a new trial was filed. It is recited in the judgment that the court had no jurisdiction of the amount set out in the first amended petition, and that is given as the reason why the costs up to that time were assessed against plaintiff in error. The first amended petition clearly alleges a cause of action for \$205 actual and \$500 punitive damages, a sum undoubtedly within the jurisdiction of the county court. A sum in excess of \$1,000 could not have been arrived at except by doubling the punitive damages. This was probably done because the punitive damages are mentioned in the body of the petition and again in the prayer, but in the latter only \$705 damages actual and exemplary are prayed for. The order was clearly

erroneous, but it was not objected to when first done, nor later when the aftermath of costs was repeated in the final judgment, and the question is presented as to whether this court has the power to pass upon the error.

The record clearly and unequivocally indicates the error and is one that we believe an appellate court should correct even in the absence of any exception being reserved in the lower court. The injustice of it is apparent, especially when the record shows that the costs assessed against plaintiff amount to more than the amount recovered by him. The error is one of law apparent of record, and no notice for new trial was required. *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329. We are unwilling to allow such an injustice as would be sustained by plaintiff, if technical rules were strictly enforced, to prevail, and, exercising that broad power inherent in every court to promote the ends of justice and right, we will reverse the judgment of the lower court and here render judgment that plaintiff recover of defendant the sum of \$125, together with interest at 6 per cent. per annum thereon from August 20, 1914, together with all costs in this behalf in the lower court as well as in this court.

Reversed and rendered.

BEAN v. COOK et ux. (No. 62.)

(Court of Civil Appeals of Texas. Beaumont.
Jan. 27, 1916. Rehearing Denied
Feb. 23, 1916.)

1. APPEAL AND ERROR — 931, 934 — REVIEW — PRESUMPTION.

All reasonable intendments will be indulged on appeal to support the judgment and findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771, 3777-3782; Dec. Dig. § 931, 934.]

2. VENDOR AND PURCHASER — 223 — IMPROVEMENTS BY VENDOR'S LESSEE.

A purchaser of land with notice that his vendor's lessee put improvements thereon under oral agreement that he might remove them, preventing him from doing so, is liable to him for their value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 223.]

3. APPEAL AND ERROR — 704 — REVIEW — FINDING OF FACT.

Without the evidence, a finding of the value of improvements put on land cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2900, 2939-2941; Dec. Dig. § 704.]

Appeal from Jasper County Court; C. C. Brown, Judge.

Suit by I. S. Bean against G. W. Cook and wife. From an adverse judgment, plaintiff appeals. Affirmed.

Smith & Lanier, of Jasper, for appellant. J. T. Beaty and Chas. C. Ingram, both of Jasper, and R. S. Sanders, of Center, for appellees.

BROOKE, J. This suit was instituted by appellant herein by way of an injunction sued out on the 24th day of November, 1914, against appellees, in which application for injunction it was alleged that the appellant was the owner in fee simple of the improvements in controversy and also the premises upon which the same were situated, by reason of having purchased same from J. A. Bohler and wife on the 31st day of October, 1914; that appellees were occupying said premises at the time of said purchase, as tenants at will of the appellant and his vendors; that about the 21st day of November, 1914, appellees began to tear down and remove from off said premises said improvements. Appellees were prevented by the injunction from remaining upon said premises or removing any part of said improvements from off them. Appellees, by answer filed January 5, 1915, set up general demurrer and general denial, and also pleaded specially that about the 18th day of June, they had a verbal contract with the said Bohler, appellant's vendor, in which contract it was agreed that any improvements which might be erected by appellees should remain upon the property, and that they should have the right to remove same at any time they should see fit; that appellant had notice of said contract, and thereby was estopped to set up his claim thereto; that the injunction was knowingly, willfully, and maliciously sued out. Wherefore they claimed actual damages in the sum of \$100 as expense, by reason of having to travel from place to place and live in hotels, etc., and the further sum of \$500 by reason of appellant holding said improvements, and by way of pain, inconvenience, humiliation, etc., they suffered further damages in the sum of \$350. Appellant, by supplemental petition, set up the suing out of the injunction as having been done without malice and ill will, and that it was done in good faith, and upon the statement of J. A. Bohler that the improvements in controversy were included in said sale to appellant by said Bohler, and they also filed a second supplemental petition, denying the verbal contract pleaded by appellees, and pleading an estoppel against appellees, by reason of certain misrepresentations made by appellees to appellant, to wit, that appellees had an agreement with said Bohler, by the terms of which appellees were to retain the title to any improvements that might be placed upon said premises, and that they should have the right to remove the same from off said premises at any time they saw fit, and that they had said agreement in writing and had it witnessed, and, further, that these representations were made at two different times, and that at each time appellant asked to see the same, but was refused, and that appellees failed to furnish appellant with the name of any witness to said agreement in writing. Appellees filed their first supplemental answer,

alleging, in addition to the matters theretofore set out, claim for damages by way of rent in the sum of \$10 per month for a period of five months, and, further, that if the court should hold them not entitled to their damages, they be given the privilege of going upon said premises and removing such improvements as they own. The case was tried before the court without a jury, and judgment rendered, dissolving the injunction and awarding appellees judgment against appellant for \$150, as the value of the improvements.

There is no statement of facts in this record. Therefore, we are not furnished with the testimony on which the judgment was based. The court, however, filed conclusions of law and fact as follows:

"I find that the improvements in controversy are situated upon a tract of land purchased by plaintiff, I. S. Bean, from one J. A. Bohler, first payment therefor being made on the 31st day of October, 1914, in the sum of \$40, and that final payment was made on the date of the delivery of the deed, to wit, 16th day of November, 1914, in the sum of \$2,960, and that said improvements were included in said purchase.

"I find that said improvements were placed thereon by G. W. Cook and wife, Sallie Cook, and that before said improvements were placed thereon by defendants, they entered into a verbal agreement with plaintiff's vendor, J. A. Bohler, that said improvements should remain the property of defendants, and that they should have the right to remove same from off said premises at defendants' pleasure.

"I find that defendants were living upon said land and occupying said improvements as their home at the time of the purchase of said land and improvements, as above stated, but that they were preparing to vacate same, and had declared their intention to so vacate at the time of the institution of this suit, and they were preparing to remove said improvements.

"I find that defendants had never rendered said improvements for taxes, but that the same were rendered by plaintiff's vendor, J. A. Bohler.

"I find that defendants attempted to tear down said improvements and remove same from off said premises on the 4th day of November, 1914, that plaintiff then inquired of defendants what interest they claimed in said improvements, and was informed that they owned said improvements by reason of having placed same on the premises, and by reason of having an agreement with plaintiff's vendor, Bohler, that they should have the right to remove said improvements at their pleasure, and that they had said agreement in black and white and had it witnessed; that plaintiff requested defendants that he be allowed to see said agreement, and defendants refused to let him see same, and failed to inform plaintiff of the name of any witness to said agreement.

"I find that the plaintiff understood the defendants to mean by the terms 'black and white' that the agreement was in writing.

"I find that plaintiff then inquired of Bohler, concerning said agreement, and was informed by said Bohler that defendant had no such agreement, in writing or otherwise.

"I find that plaintiff again, before making final payment, accosted the defendants concerning their rights, and were again informed that they had the agreement; that they failed to make known to plaintiff the names of any witnesses, and refused to let plaintiff see said agreement, but stated to plaintiff that if he could not take their word for it they could go.

"I find said defendants did not tell plaintiff

that they were claiming said improvements by reason of any verbal agreement.

"I find said improvements to be of the value of \$150."

[1-3] All reasonable intendments will be indulged to support the judgment of the court and its findings.

The appellant, by his first assignment, assails the judgment as being contrary to the law and the evidence. The said assignment is overruled.

By his second assignment, appellant assails the action of the court in rendering a money judgment against appellees for the sum of \$150, as being the value of said improvements. The record is silent, other than the findings of the court, on this proposition, and the same must be held conclusive.

Finding no reversible error, this case is, in all things, affirmed.

BISWELL v. GLADNEY et al. (No. 900.)*

(Court of Civil Appeals of Texas. Amarillo. Jan. 26, 1916. Rehearing Denied Feb. 16, 1916.)

1. VENDOR AND PURCHASER ⇐265—RIGHTS OF PARTIES—NOTICE.

The purchaser of vendor's lien notes without actual notice of a conveyance by the purchaser was not charged with any fact upon which, on the doctrine of inquiry, notice of such deed could be imputed to him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. ⇐265.]

2. VENDOR AND PURCHASER ⇐281—BONA FIDE PURCHASER—PAYMENT.

In a suit by the assignee of a vendor's lien note against the purchaser and a purchaser from him, evidence held not to establish the defense of payment as against the assignee's position of bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 792-794; Dec. Dig. ⇐281.]

3. VENDOR AND PURCHASER ⇐281—LIEN NOTES—HOLDER IN GOOD FAITH—BURDEN OF PROOF.

The possession of a vendor's lien note, together with its indorsement by the vendor "without recourse," put the burden of proof upon the purchaser and his grantee to show that the assignee was not an innocent transferee of the note.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 792-794; Dec. Dig. ⇐281.]

4. MARSHALING ASSETS AND SECURITIES ⇐5—RIGHTS OF PURCHASERS OF PART OF TRACT OF LAND.

In marshaling securities in favor of a prior grantee, the rule is that where, from the character of his conveyance, it is inequitable that his land should primarily bear the burden of the common charge, either in whole or in part, equity will presume an intention of the parties that the part conveyed should be free from such burden until the grantor's land is first exhausted, and the grantee has the superior equity.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 10; Dec. Dig. ⇐5.]

5. MORTGAGES ⇐287—SALE BY MORTGAGOR—QUITCLAIM DEED—EQUITIES.

Where one purchases part of a mortgagor's land by quitclaim deed and pays an agreed valuable consideration, without the mortgage debt in any way becoming a part thereof, the presumed intention between the parties is that the grantor will pay his own debt, and equitably his land should be first condemned for that purpose; the rule not depending upon the existence or nonexistence of covenants of warranty.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 782, 783; Dec. Dig. ⇐287.]

6. VENDOR AND PURCHASER ⇐265—ASSIGNMENT OF VENDOR'S LIEN NOTE—VENDOR'S SUBSEQUENT QUITCLAIM DEED—NOTICE.

The record of a quitclaim deed, not on its face showing that the grantor and grantee contracted in regard to the grantor's debt for purchase money of a larger tract, as a part of the real consideration, affords notice of the equities to a subsequent assignee of the vendor's lien notes, as a vendor with notice of his purchaser's subsequent deed is not bound to impart his knowledge to his assignee, or to notify his grantee that he has sold the lien notes, so that the grantee can notify the assignee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. ⇐265.]

7. VENDOR AND PURCHASER ⇐231—EQUITIES—NOTICE—SUBSEQUENT DEED.

A subsequent deed of record does not afford constructive notice to an anterior holder of an interest in the land, since record notice goes forward, and not backward.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. ⇐231.]

8. VENDOR AND PURCHASER ⇐231—BONA FIDE PURCHASER—NOTICE.

A subsequent purchaser of part of land affected with a common charge has constructive notice of the equities of a prior grantee, who has bought another part of the same land and placed his deed on record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. ⇐231.]

9. VENDOR AND PURCHASER ⇐265—BONA FIDE PURCHASER—SEARCH.

A subsequent purchaser of land subject to a vendor's lien is not required to go further than the record in searching the vendor's lien note, if he does not know it has been assigned.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. ⇐265.]

10. VENDOR AND PURCHASER ⇐261—VENDOR'S LIEN—ASSIGNMENT—REGISTRATION.

The assignment of a vendor's lien is within the registration statutes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. ⇐261.]

11. VENDOR AND PURCHASER ⇐265—LIEN—RELEASE—EFFECT.

B. conveyed land to G., retaining an express vendor's lien. G. thereafter quitclaimed to M. a part of the land for a consideration which was paid by M.'s conveyance of other land to G.; the parties to the deed agreeing between themselves that the land conveyed should be discharged from the vendor's lien. The quitclaim deed was upon record before W. acquired the vendor's lien notes. B., together with C., a prior assignee of the notes, with notice of the conveyance and before W. acquired the notes, released another part of the land exceeding in value the notes held by W. Held that the land conveyed to M. was discharged, and such dis-

charge inured to M.'s grantee under a general warranty deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. § 285.]

Appeal from District Court, Potter County; Hugh L. Umphres, Judge.

Action by W. H. Biswell against R. L. Gladney and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Ben H. Stone, of Amarillo, for appellant. Jas. N. Browning and Kimbrough, Underwood & Jackson, all of Amarillo, for appellees.

HENDRICKS, J. On May 19, 1905, Charles Brinkman conveyed to Gladney a section of land situated in Potter county, Tex., upon the cash consideration of \$1,000 and a deferred consideration of four vendor's lien notes; the first two for \$1,000 each, and the last two for the sum of \$740 each, being negotiable in form and recognizing the vendor's lien, which was also expressly retained in the deed. On the 9th day of October, 1905, Gladney executed a quitclaim deed to Will A. Miller, Jr., to 157.47 acres of said land, which was recorded November 22, 1905. The land was school land, and it was agreed between Gladney and Miller, in the trade producing the conveyance above mentioned, that Miller's land should be relieved of the vendor's lien and that the land should be patented, Gladney to furnish the consideration for the patent, which, after the execution of said deed, was obtained in 1906.

The two \$740 notes matured, on their face, respectively, the 1st day of January, 1907, and the 1st day of January, 1908. In 1907, probably the latter part of May of that year, W. H. Biswell, the plaintiff in this suit, acquired the possession of the two \$740 notes, thereafter transferring the same to one Cooper. When Cooper was in possession of the notes, he executed with Brinkman a release of a part of the land, which, it is agreed, was of the value of \$2,400 at the time of the release. At the time Biswell received the notes they were in the possession of the First National Bank of Amarillo, as collateral security for the payment of indebtedness evidenced by Brinkman's note to the bank, and which provided for the sale of collateral.

[1] When Biswell received the notes there was no transfer in writing from Brinkman, or the bank, assigning the lien. Biswell had no actual notice at that time of the conveyance from Gladney to Miller, executed in October, 1905; nor does this record charge him with any fact by which, on the doctrine of inquiry, notice of said deed could be imputed to him. The only notice of which he could be charged is constructive notice by the record, which will be discussed later. Biswell reacquired the two notes from Cooper, and we find from his testimony that he knew of the execution of the Cooper-Brinkman release of the debt remaining to another por-

tion of the land than Miller's, of the value as stated, "before he reacquired said notes. The note in suit was indorsed upon the back with Brinkman's signature, with a further indorsement, "Without recourse," immediately preceding his name. Biswell asserts that he is an innocent purchaser of the note in suit in due course of trade, paying full value therefor, without any knowledge of the Gladney-Miller deed, executed in October, 1905.

In the trial court it was litigated as a jury question whether Biswell, when he acquired the possession of the note, was a transferee or assignee of the same, or whether the money furnished him was used for the purpose of paying said note, thereby operating as an extinguishment of same. The jury found upon special issues that the note sued upon was "paid" while owned by the payee and before plaintiff acquired the same, and further responded that Biswell, the plaintiff, paid the note. Judgment was rendered against Gladney for the debt evidenced by the note, but plaintiff was denied a foreclosure of the lien against any of the defendants.

[2, 3] Plaintiff asserts that the testimony was insufficient to permit the submission of the issue that the note was paid, and not assigned, and considered from the angle that the indorsement upon the back of the negotiable note, with the possession in Biswell, placing the burden of proof upon defendants to show that he was not an innocent transferee of the note, we would reverse and remand this case upon plaintiff's exceptions, that the testimony was insufficient to show that the note was paid as against his claim of innocent purchase, if we were not of the opinion that the judgment should be affirmed upon another ground.

Appellees say that Brinkman gave the bank no authority to sell the note, and that the president of the bank testified that it was not customary to sell securities to a collateral note unless with the consent of the owner. The president could not recall the transaction, if it occurred, but said, however:

"That sometimes, when we don't think the party that owes us would object, and that it would be agreeable if we would get all of his money and stop the interest, that (meaning the sale of the note) would be all right."

Appellee asserts that Gladney paid the note and sold it to Biswell, or, further, as we inferred from the argument, that he received the funds from Biswell and paid the note at the bank, and then forwarded it to Biswell, and that in either event, as between Gladney and the bank, it was a payment, and not a transfer. It is noted that the jury found that Biswell paid the note, which means that he furnished the money, notwithstanding it was found that he paid the note. Brinkman said that he merely placed the notes in the bank for collection. The particular note had not matured. "Payment can only be made before ma-

turity by consent of both debtor and creditor." Daniel, Neg. Inst. vol. 2, § 1233. Of course, it is really true that a sale of a note is a contract requiring the meeting of minds, the same as any other agreement.

It is asserted that Brinkman's testimony that he only placed the note in the bank for cancellation, in connection with the testimony of the president of the bank as to the custom of the bank in matters of that kind, precludes the idea of a sale. There is no fact in the statement of facts connecting Gladney with the payment of the note at the bank. Brinkman never testified that he authorized the payment of the note before maturity. The fact that Gladney requested or wrote to Biswell to carry the notes for him does not justify the inference that Biswell sent the money to him, or that Gladney took his own money to the bank, paid the note before maturity, and then sold the same to Biswell. Who put the indorsement, "Without recourse," on the back of the note, is not shown. Brinkman said he did not do it; a great many of the letters of Gladney were attached to Biswell's deposition; we assume the letters were not introduced; neither do we find any attempt to prove that Gladney wrote the indorsement. Gladney was not believed by the jury in regard to a part of the transaction with Miller; but we find nothing to "build to" in the record that Gladney or Biswell paid the notes at the bank, except that Brinkman said he placed the notes in the bank merely for collection, and the testimony of the bank president that it was not customary, without the owner's consent, to sell the collateral, and at that time such a matter would probably have been referred to him, and the further fact that Gladney requested Biswell to carry the note. This transaction was eight years old, and whatever occurred, and whether the note was paid or sold, the president of the bank had no recollection whatever of any such transaction, and the president's testimony necessarily was opinionative.

There seems to be no question but what the form of collateral note gave the power to sell the paper. He did say that "sometimes," where they thought it would be agreeable to the owner, for the purpose of getting all of his money and stopping the interest, they would sell the paper. If Biswell furnished the money, the question left is how he furnished it. The bank had more power, according to this record, to sell the note than to receive payment before maturity. The president said:

"When a note is placed in my bank for collection, and when it is paid before maturity, my bank ordinarily stamps 'Paid' on such note, * * * unless there was a request to the contrary."

This note was not stamped "Paid." Biswell testified that to the best of his recollection he purchased the note through one of the banks at Amarillo during the first half

of 1907, and did so at the request of Gladney: that he trusted the matter to the bank, and sent the funds, and the bank procured the note and mailed it to him. His recollection was that Gladney requested him to send the money and instructions to the First National Bank, and that he was not sure whether the Amarillo National, where he had an account, or the First National, forwarded the notes.

Without detailing further facts and inferences, applicable to the jury's finding that the note was paid, we would reverse this case upon appellant's assignment questioning the sufficiency of the facts to submit the defense of payment as against his position of bona fide purchase, but conclude that it should be affirmed upon another ground. We find the facts on this issue for appellant's benefit, referable to future proceedings to the Supreme Court, without, of course, anticipating any future action on our part.

Relative to the proposition upon which we affirmed the judgment of the trial court, the record is in this condition: Brinkman conveyed to Gladney, retaining an express vendor's lien for the deferred consideration. Gladney thereafter, by quitclaim, transferred whatever interest he had to Miller, reciting a consideration of \$2,200, in payment of the land. This consideration was paid by the conveyance of other land to Gladney. This deed was upon the record before Biswell acquired the notes. Brinkman had notice of the sale to Miller before Biswell acquired the notes. Cooper, with Brinkman, relinquished 160 acres to Gladney, out of the mortgage (different land from that conveyed to Miller), of which Biswell had notice, and the land released to Gladney exceeded in value the debt when released. All the land, except Miller's, was released from the lien, but we shall argue the case referable to the one release mentioned, of which Biswell had actual notice.

The appellant and appellee tender a controversy over the doctrine of inverse order of alienation; the appellant contending that it does not apply to this record for two reasons: First, Cooper or Biswell must have had actual notice of the conveyance from Gladney to Miller; and, second, Miller, acquiring his interest by a quitclaim deed, is not in a position to invoke the equitable principle. The last proposition will be discussed first.

Strictly speaking, inverse order of alienation is not applicable to this record, though argumentatively involved. There is no proof that there were any other purchasers of this land from Gladney except Miller. Plaintiff did allege that all the land except the 157 acres had been previously released and that it was done for the benefit of the "then" owners of the land; still this record presents the question merely of the equality or inequality of the equities between Miller and Gladney, and whether or not the assignee of the vendor's lien had sufficient notice of the

same, and, if superior, in favor of Miller, whether the release by Cooper and Brinkman disturbs such equities, thereby releasing the land to Miller. It will be conceded, we assume, that, if the equities of Miller are superior to the equities of Gladney, who, so far as this record shows, was the owner of the balance of the land when the releases were made, and if the mortgagee or his assignee is chargeable with notice of such equities, the release of Gladney's land, being in value more than the amount of the debt, would release Miller's land. Where the owner of a parcel of land, who has previously executed a mortgage upon the same, sells one parcel to another and retains a part, where the contract between the parties is such, with the aid of equity, that it can be presumed that the part retained should first bear the burden, preferable to the land of his vendee, the mortgagee, with notice of these equities, disturbs them at his peril. In case of successive purchasers, with the owner the latter retaining a part, where neither has the right that the other's portion should be primarily subjected to the mortgage debt, the equities between all the parties are then equal; and if a purchaser redeems the mortgage, the others are entitled to a pro rata contribution, and a pro rata subjection of the land to the payment of said debt. *Beck v. Tarrant*, 61 Tex. 405, 406. This latter fundamental rule, as between different portions of the premises subject to a common charge, assists in the birth of the maxim that "equality is equity," and, where applied, ratable contribution always follows. Same case.

Where the mortgagee sues the owner and successive purchasers from him to foreclose his mortgage, and one defendant has a prior equity over another defendant as to the land liable primarily, if no release is made by the mortgagee to the land primarily liable, he is not interested, whether he had notice, or not, of the equities between them. If he has done no act to prejudice the right of the holder of the superior equity, his mouth is closed as to the enforcement of the equity and the sale of the land in accordance therewith, unless the foreclosure sale of the land in parcels would prejudice his debt and prior rights, where his mortgage is a blanket one on the land as an entire tract; and in that character of case first stated the equities are unequal; one has a superior equity.

[4] In marshaling securities in favor of a prior grantee, it is true you may not base it on the simple fact of the earliest grant; however, the rule is, and properly, deducible from equitable principles, that where, from the character of the first conveyance, it is inequitable that the grantee's land should primarily bear the burden of the common charge, either in whole or in part, equity will then presume the intention of the parties to the conveyance that the portion conveyed should be free from the common bur-

den, until the grantor's land is first exhausted; the grantee has the superior equity.

For the moment eliminating the matters of the Cooper-Brinkman release to Gladney's land, we will present the condition as follows: If Gladney owned all but 157 acres of the land, and the holder of the vendor's lien notes had sued both Gladney and Miller, instead of Miller, for the purpose of foreclosure on both tracts, and the issues were presented, which land, under considerations of equity, should be first subjected? This condition may assist some in the solution of the case. If the equities between the parties were equal, the burdens would be equal; but, if superior in favor of Miller, Gladney's land should be sold first. If they are equal, the whole land would be subjected as a whole; if Gladney's were superior, making the equities unequal in his favor, Miller's land should be sold first. The inequality of the equity would destroy the equity of burden. Appellant has Pomeroy in his favor. He says:

"The doctrine * * * is one of purely equitable origin, and is not an absolute rule of law, and if the peculiar equitable reasons on which it rests are wanting, it ceases to operate. Whether it does or does not apply to any particular case may be sufficiently determined by a careful consideration of the following principles: The doctrine, in its full scope and operation, primarily depends upon the relation subsisting between the mortgagor or other owner of the entire mortgaged premises and his grantee of a parcel of land. This relation, in turn, results from the form of the conveyance, which, being a warranty deed, or equivalent to a warranty, shows *conclusively* an intention between the two that the grantor is to assume the whole burden of the incumbrance as a charge upon his own parcel, while the grantee is to take and hold his portion entirely free." Section 1225, vol. 3, Equity Jurisprudence.

We assume, of course, that a warranty deed, or a deed equivalent to a warranty, would show *conclusively* an intention that the grantor is to bear the whole burden as a charge upon his own land. He further says:

"When the deeds to the successive grantees are not warranty, or equivalent thereto, but simply purport to convey the mortgagor's right, title, and interest in the parcels, the intention is clear that the grantees respectively assume their portion of the burdens. Their several parcels are *all liable ratably, and not in the inverse order*." Same section, *supra*. (Underlining is ours.)

[5] Pomeroy is speaking more particularly probably of the subjection of land against grantees in the inverse order of their alienation, when he refers to the character of the instruments conveying the mortgagor's interest. If it is meant, however, by this language that the interest of one who purchases a part by quitclaim deed and pays a valuable consideration for the interest purchased as agreed upon between the parties, without the mortgage debt in any manner becoming a part of the consideration, and without anything showing that the grantee and grantor intended that the land of the grantee should be so charged, we think that

the presumed intention between the parties is that the grantor will pay his own debt, and equitably his land should be first condemned for that purpose, and that his grantee should not be compelled to pay it out of his land as between the immediate parties. The cases under note 4 and note "e," under section 1225, vol. 3, Pomeroy, Eq. Jurisp., cited by the great jurist, in so far as they are accessible to us, do not support the doctrine. We are unable to obtain 2 Leading Cases in Equity (4th Am. Ed.) p. 304, and Aiken v. Gale, 37 N. H. 501. Erlinger v. Boul, 7 Ill. App. 40, is the nearest case on the facts supporting the doctrine accessible to us, and in that case the purchaser bought the land at execution sale.

The Supreme Court of Michigan, in the case of Cooper v. Bigly, 13 Mich. 474, at a time when Justices Campbell and Cooley were members of that court, said that:

The doctrine "rests chiefly, perhaps, upon the grounds that, where one who is bound to pay a mortgage confers upon others rights in any portion of the property, retaining other portions himself, it is unjust that they should be deprived of their rights, so long as he has property covered by the mortgage out of which the debt can be made. In other words, his debts should be paid out of his own estate, instead of being charged on the estates of his grantees. Any other rule would be, in effect, to enable him to enjoy for his own benefit that which he has once vested in another, and in a measure to recall his own grant. The rule cannot, therefore, depend upon the existence or nonexistence of covenants of warranty. It depends simply on the fact whether he has or has not seen fit, in making a disposition of a part of his incumbered premises, to charge it primarily with the payment of the incumbrance. * * * It has, indeed, in several cases cited at the bar, been held that the covenant of warranty was very important, in determining the intent of the mortgagor not to charge the mortgage on the property sold. *But there is no satisfactory authority holding that, in the absence of such a warranty, no such intent could be presumed.* On the contrary, wherever the doctrine of priority is respected at all, it has been enforced unless an opposite intent was made out. And such appears to us the common-sense inference; for a man owing a debt, for which his own property remains liable, must naturally be supposed to expect to have it paid out of his own means, unless he has bargained to the contrary. And this equity, having arisen in favor of the first purchaser, must remain in his favor against any subsequent equities of other parties derived from his grantor."

We are unable to find a case deciding, where the point was involved, that the equity could not be founded upon a quitclaim deed; and in combing the authorities, according to the best investigation we are able to make, neither can we find a case which affirmatively decides that the rule depends upon the existence or nonexistence of covenants of warranty. We find cases abundant deciding, where the owner of land conveys by deed "with covenants of warranty," the part retained by him is charged primarily. The intention is then conclusive as Pomeroy states; but the genesis of the rule should be an answer to the question—like other equitable rules—what are the equities derivable

from the relation of the parties? We find, wherever the mortgage debt enters into the contract of conveyance between the parties, generally one way or the other, the equities become unequal in favor of one or the other. If the mortgage debt is deducted from the consideration, the grantor's land is not primarily charged with the burden. If the grantee assumes the debt, of course, his land is charged with the burden. If the conveyance uses language "subject to the mortgage," some of the courts construe that the grantee's land is also charged, because the intention is manifested by the use of such language, or expressions equivalent thereto, that it is intended that his land will be first subjected thereto. In other words, if the mortgage debt enters into the deed in some manner, affecting the consideration, different rules of burden and contribution result; but if a man sells his land, or all of his interest in same, it being the same land and the same interest he has previously mortgaged, but the previous mortgage debt does not enter into or become a part, contractually speaking, of the trade between the parties, and the vendor receives his agreed consideration for the land or his interest, we are unable to see why he should not be compelled first to pay his own debt out of his own land, and think that, as between him and his grantee, the latter should not be compelled to again pay for the land in whole or in part, or more than the value agreed upon between the parties. We are unable to say, neither does the law justify, upon careful consideration, as a matter of evidence, that a man pays less for a quitclaim deed than for any other deed—that fact alone considered.

Hence, back to the case put, where the mortgagee sues the owner and his grantee under the conditions mentioned, the latter holding under a quitclaim, to hold that the equities are equal as between the mortgagor and his grantee is to hold that the grantee in equity should be compelled to pay more than he originally agreed to pay to the owner of the land for his parcel, and is required to pay in whole or in part his grantor's debt, for which the latter is alone responsible. If such were equity, an owner of 100 acres, who sold nine different 10-acre tracts to different grantees, by quitclaim deeds, receiving \$1,000 for each tract, and retained 10 acres, when sued by a mortgagee upon a \$5,000 mortgage, with the other owners, and the mortgagor's tract retained by him were the least valuable, the mortgagor would, by the doctrine of equal equities, if the whole land brought the debt, practically have his debt paid and receive \$9,000 for the land; and upon the doctrine that his equity was superior, and the grantee's land should be first subjected, others would pay the debt for which he alone is responsible. This would not be equity. It would be injustice.

It may be that, if a mortgagor were to

pay the debt before suit, the same would be extinguished, and in that event he would not be able to proceed against the other grantees. Washburn on Real Property, vol. 2, c. 16, § 8, subsec. 4. But if one of these successive grantees were to agree to pay off the whole mortgage, and the mortgagor, on account of the default of his obligor, would then be required to pay it, and thereby raise an equitable assignment to him of the mortgage, such an owner of the land and assignee of the mortgage, in proceeding against the whole land for subjection to the mortgage, would be in a splendid position, selfishly, if his obligor were insolvent, to add to his assets. Eight of them have paid for their land. If the equities were even equal, requiring a ratable contribution, the mortgagor and owner of the remaining tract, who had become the equitable assignee, would have sold \$8,000 worth of land, and have the right to proceed upon his own debt against his own grantees, who had not assumed it, absorbing their land for the payment thereof. If the mortgagor's equity were superior, his land would not be subjected; he would pay nothing, have his own debt paid, keep his own land, and receive \$8,000. Indirectly, he would make his grantees pay his own debt and also recall his own grant. Neither do we think this would be equity. Equities are equal where there is equality. This would be inequality of the grossest nature.

There are cases, where a part of a greater tract is sold under execution and the whole is subject to a blanket mortgage, holding that the purchaser at sheriff's sale has no superior equities; the holding, it is true, is rather placed upon the ground that the purchaser at sheriff's sale bought only the equity of redemption. It is apparent, however, that a substantial distinction exists between such a purchaser and one under voluntary sale directly from the owner, where he pays the agreed consideration. It is also true in this state that an owner, who sells a part of his tract by quitclaim deed, merely conveys the equity of redemption and the title he then owned; but that should not be a criterion creating the equality or inequality of the equities between the parties. The owner has sold all that he possessed, and the purchaser pays that which the owner demands. At sheriff's sale the law condemns and sells the land, and the owner is the beneficiary only to the extent of the money paid by the higher bidder. When the owner sells with a warranty, the purchaser has made it conclusive that his land should not be incumbered with the whole burden of the debt as between him and the mortgagor; but we see no equitable reason, as between a grantee under a quitclaim and his vendor, when the outstanding mortgage does not enter into the consideration in the face of the deed, and he receives from the grantee what he demands for the land, that such grantee's land should

be primarily charged with the burden of the debt, or equally charged with the grantor with an equal burden. The consequences derivable result in injustice. When a grantor receives his price for the land, he should not be paid again indirectly, through the medium of a mortgage foreclosure by a cancellation in whole or in part of his own indebtedness with his grantee's land, and resulting in a benefit to him, more than the consideration for which he has sold his interest in the land. There is no necessity of becoming confused with the rights of holders of unrecorded deeds, or equitable or legal outstanding titles, from a common source, not passing by a quitclaim deed, and the grantee not being an innocent purchaser of such title under such deed.

Under the law of this state a holder under a general warranty, or a deed conveying the land, unless he has notice, is of course in a better position than the other. But because such deeds are of more strength for such purposes, and may be stronger evidence for the purpose of proving more conclusively the equities of the grantee, is no sound reason against the equity. But, though a covenant of warranty runs with the land, even to the extent of passing to a holder of a quitclaim, however, as to the indemnity feature between the parties, it is, at last, only a personal covenant; and when an owner conveys a part of his land, with covenants of general warranty, and retains a part, the mortgagee does not become a party to the covenant, and has the right of lien just the same, except that he must not disturb the equities, if he knows, and providing it is not prejudicial to his debt to enforce the equity. The owner, legally speaking, does not contract with his grantee, even under a warranty deed, that the land retained by him shall bear the whole burden. Equity permits the grantee to place the burden primarily upon his grantor's land, not because the contract of the grantor did so, for there is nothing in the warranty, or the deed, or in the contract, making the land retained bear such burden. Strictly speaking, there is no breach, nor does the grantee have to show a breach. *Hawkins v. Potter*, 130 S. W. 644, 645 (writ of error denied). It has been the history of equity to create rights where a contract does not really provide for them. The equitable vendor's lien is a notable example. The parties do not contract for a lien, but a court of equity says it is unjust for a grantee upon a deferred consideration, though the deed does not provide for the lien, and though the instrument may recite that the consideration has been paid, to keep the land freed from such a lien. Equity charges it upon the land on account of the relation between the parties because it is just.

Again, under appropriate conditions, where a prior mortgagee has two funds, and a junior mortgagee has only one, without the semblance of contractual relation between

the two lienholders, equity stays the hand of the prior mortgagee upon the latter fund until he has exhausted the other fund. Whenever by the evolution of juridical conscience an equitable rule is deducible from the relation of the parties, the province of equity, though sometimes slow in development, is to apply that rule.

It may be said that to permit such a rule would produce this result: The first purchaser gets his part of the land by quitclaim; a second purchaser might receive his parcel by a conveyance of warranty; and if you make the first grantee's equity superior to the grantor's, you would make his deed, in cases of inverse order of alienation, superior to the warranty deed. We do not think this should complicate the real equities between the first parties. It is a settled rule that, if the superior equity exists, a subsequent purchaser, though buying a different portion of the same tract, is charged with notice of the first deed and the equity created by the relation between that holder and the common grantor. The principle causing the subjection of land by the inverse order of alienation is based upon this condition: When, between the first grantee of a parcel out of a large tract the relation between these parties makes it equitable that the land retained by the grantor, covered by a previous mortgage, should bear the burden first, that burden is transmitted to succeeding purchasers, and the last is first, and first last, in the order of condemnation and sale. Hence, if you once establish logically the premise that it is truly equitable, between the grantor and his first grantee, that the land retained by the former should primarily bear the burden, such an equity is fixed, and the personal covenant in a subsequent deed should not necessarily destroy the prior equity produced by a quitclaim considered alone. Equity, if the rule of right really exists, has already burdened the land sold to the next purchaser.

Of course, as stated, the real question in this record is not strictly one of inverse order of alienation, but is one of equitable right between Gladney and Miller, and the assignee of Brinkman's lien, though, as a matter of logical result, the principle may be involved.

[8-11] As to the other mooted question: Does the record of a quitclaim, which does not upon its face show that the grantor and grantee contracted in regard to the mortgage debt as a part of the real consideration, afford notice to a subsequent assignee of such prior lien of the equities? It is true the authorities are unanimous that a prior mortgagee is not affected with notice by the record only of a subsequent deed, and the equities created thereby, against the mortgagor. The reason of the rule is simple and apparent: a subsequent deed of record does not afford constructive notice to an anterior holder of an interest in the land. The record

notice goes forward, and not backward. The mortgagee does not have to be running to the record to ascertain if his lien has been subsequently affected.

It is also as thoroughly well settled that, if the prior mortgagee has actual notice of a subsequent deed, he is affected with the equities. It is likewise the unanimous rule that a subsequent purchaser of part of the land, though he is not purchasing the same land as a previous grantee, has, however, constructive notice of a prior grantee's equities who has bought a part of the same land covered by prior mortgage. It is the policy of the registration statutes to give constructive notice of such equities to subsequent purchasers.

Hence, take the actual case in this record: Brinkman, the original holder of the lien, has notice of Miller's deed before the assignment of his lien. If a purchaser of a part of the tract has afforded actual notice to a prior mortgagor, if thereafter the mortgage is assigned, is such grantee, who has a deed of record previous to the assignment, compelled to constantly inquire of the mortgagee if he has assigned his mortgage? A subsequent purchaser of the land is not required to go further than the record in hunting the note, if he does not know it has been assigned. *Moran v. Wheeler*, 87 Tex. 183, 27 S. W. 54. We know of no duty upon the mortgagee, who has thus been notified, to transfer his knowledge to his assignee; neither is the duty imposed upon him to notify such grantee that he has sold the mortgage, so that the latter can notify the assignee of the mortgage. If the assignment of the lien is in writing and placed of record, it is a subsequent record, not affording notice to a prior deed holder; either duty you would force upon the grantee, situated as Miller, is equally unreasonable and illogical. What should be the true rule? The assignment of a lien is within our registration statutes. Because a vendor's lien note is negotiable does not afford immunity to subsequent assignees, when the assignment is not of record, if the record embodies an instrument from the original holder of the lien, affecting the land, though subsequent to the mortgage, if made and placed of record, without knowledge of the assignment. *Moran v. Wheeler*, 87 Tex. 179, 27 S. W. 54; *Drumm v. Core*, 47 Tex. Civ. App. 216, 105 S. W. 843. The real holding of those cases, of course, is not just as stated, but clearly supports the proposition, and we are using them to enforce the position that parties buying liens, and interest in lands, should go to the record. Careful purchasers do. The record of a quitclaim deed affords notice within the scope of the instrument as much as any other deed. If, when purchasing, the subsequent assignee had gone to the record, he would have seen a deed conveying all the interest Gladney possessed to Miller, which is covered by the lien he is purchasing, and which deed on its

face does not purport to contract in regard to the lien debt as a part of the consideration, and which deed he cannot presume is a voluntary instrument. He must presume on the face of the record, though we are not holding that he is bound by the amount of the consideration stated in the deed, that Gladney has sold to Miller that which he possessed for a valuable consideration. The record supports the inference and negatives on its face, every other inference than the one stated. If our premise is correct, that a grantee of a mortgagor's interest, who has paid the consideration, where the instrument does not show that the mortgage debt has not so entered into the consideration as to change the equity—that such grantee, who has once paid the grantor, should not be compelled, primarily, to pay the grantor's personal debt with his land (it being the grantor's duty to pay his own debt), and if Miller's deed presumptively shows that he paid a valuable consideration for the grantor's interest in the land, the subsequent assignee of the mortgage should be charged with notice of the record of that deed, and the holder's equity created thereby, the same as the record of any other deed.

The value of the land released being more than the balance of the debt, we think Miller's land should be discharged, and of course the same right would inure to Muncie, his remote vendee under Miller's general warranty deed.

The judgment is affirmed.

WM. D. CLEVELAND & SONS v. JAMISON.
(No. 8307.)

(Court of Civil Appeals of Texas. Ft. Worth.
Jan. 15, 1918. Rehearing Denied
Feb. 19, 1918.)

1. FACTORS — DUTIES — SALE OF GOODS — LIABILITY IN DAMAGES.

Where a factor, to whom no instructions are given, exercises ordinary care, skill, and diligence to obtain the fair market value of his principal's goods, placed in his hands for sale, he is not liable in damages, though he sells the goods for less than their market value.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 28; Dec. Dig. —25.]

2. FACTORS — SALE OF GOODS — REIMBURSEMENT FOR ADVANCES.

Where there is no agreement or direction to the contrary before any advances are made, a factor, who has made advances on goods consigned to him for sale, may sell enough of the goods, over his principal's objection, to reimburse himself for the advances; his right of sale not being limited by any subsequent order of the principal, except as to the surplus not necessary to effect the reimbursement.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65-71; Dec. Dig. —47.]

3. FACTORS — SALE OF GOODS — RIGHTS OF FACTORS — REIMBURSEMENT FOR ADVANCES.

Where cotton was consigned to factors to sell, without any special instructions or agreement that same should be held for a specified price, and they advanced sums approximately

equal to the value of the cotton, and the principal expressly authorized them to sell the cotton the best they could, using their own judgment in the matter, and the principal, though notified that the advancements were in excess of the value of the market price of the cotton and requested to remit the difference, failed to remit and asked for more time, the factors had a right to sell at what seemed to them the market price.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65-71; Dec. Dig. —47.]

4. CUSTOMS AND USAGES — RULES OF COTTON EXCHANGE — FACTORS — KNOWLEDGE OF PRINCIPAL.

Where a principal, with knowledge, actual or constructive, of a rule of the Cotton Exchange that, after a purchaser of cotton has rejected bales for defects, he may, before a resale to others, reconsider and accept the rejected bales at the price first agreed upon, consigns cotton to factors to sell, he is estopped to deny the binding effect of such rule.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 23, 24; Dec. Dig. —12.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by Wm. D. Cleveland & Sons against J. B. Jamison. Judgment for defendant in justice court, and on appeal to the county court, and plaintiffs appeal. Reversed and rendered.

Huff, Martin & Bullington, of Wichita Falls, for appellants. T. R. Boone, of Wichita Falls, for appellee.

BUCK, J. This suit was filed in the justice court of Wichita county by Wm. D. Cleveland & Sons, of Houston, against J. B. Jamison, of Wichita county, upon a verified account for \$197.50, for money advanced by plaintiffs as cotton factors to defendant, who was the owner and shipper of 101 bales of cotton consigned by defendant to plaintiffs at Houston, in September, 1911. The defendant denied owing the plaintiff anything and reconvened for damages, claiming that plaintiffs owed him a balance of \$173.38, damages for selling 61 of the 101 bales of said cotton below the market price and without the authority of the defendant. From a judgment in favor of defendant on his cross-action for the amount claimed, the plaintiffs appealed to the county court, and there, in a trial before the court, the defendant likewise recovered the full amount claimed on his cross-action. Plaintiffs appeal.

In September and October, 1911, Jamison, who then lived at Sylvester, in Fisher county, Tex., consigned to Cleveland & Sons 101 bales of cotton, and drew drafts on them, with bills of lading attached, for some \$45 per bale, said cotton being consigned in the usual way, without agreement or instructions as to the price, time, or terms of sale. These drafts were paid by Cleveland & Sons, and aggregated some \$4,606, for which advancement or loan Jamison agreed to pay 6 per cent. interest. On September 30, 1911, Jamison wrote Cleveland & Sons that he did

not expect to hold his cotton long and that he would wire them when to sell. On November 25th Cleveland & Sons wrote Jamison that the market had declined to such an extent that he had an overdraft with them of \$214, and asked him to send them \$2 or \$3 per bale margin to cover this overdraft; that the 101 bales of cotton at 9 ⁹/₁₆ cents basis middling would amount to \$4,527, while Jamison owed them \$4,740. In this letter they advised Jamison to sell inasmuch, as stated, they did not see very much future in the price of cotton. On November 28th, in reply to the last-mentioned letter, Jamison wrote Cleveland & Sons that he would sell the cotton in December, and asked them to wait 10 days or 2 weeks, until he could get his cotton seed loaded out, and promised to send them a check for the amount claimed. On December 9th Cleveland & Sons wrote, acknowledging Jamison's letter of November 28th, and reminded Jamison that it was rarely that they were asked to hold cotton with an overdraft against it, and expressed a dislike to do it in his case, and a hope that it would be convenient for him to send the amount of the overdraft, and a little margin in addition thereto, if he desired to continue to hold his cotton. On December 17th Jamison answered the last letter from Cleveland & Sons, and stated that he was going to Sylvester, the letter being written from Cleburne, in a day or two, and that, as the market was advancing some, he would like very much to hold his cotton until January, but stated further:

"However, if you do not want to do so, I will tell you to sell it the best you can. That is, will ask you to use your own judgment in the matter. I thank you for waiting on me, and will show you my appreciation in the future."

On December 19th Cleveland & Sons wrote to Jamison, acknowledging receipt of his last letter and further stated:

"Carrying out your instructions, we have this day sold your cotton at 9 ⁹/₁₆ cents basis middling."

On January 6th Cleveland & Sons wrote Jamison that they had sold his cotton on the 19th day of December, 1911, but had not been able to deliver it until the 5th of January following, on account of the long spell of rainy weather, and that the purchaser, on examining it, rejected 61 bales on account of it being sandy, and that the purchaser would not take these 61 bales, and they had it on hand and would hold it until they heard from Jamison. On January 9th the original purchaser agreed to take the 61 bales of rejected sandy cotton at the same price as the other 40 bales, the price of cotton having advanced to 9 ⁹/₁₆ cents basis middling, and Cleveland & Sons delivered the 61 bales of cotton to this original purchaser at the same price as the other 40 bales, to wit, 9 ⁹/₁₆ cents basis middling. On January 12th Cleveland & Sons wrote Jamison, inclosing account sales for the 101 bales, with state-

ment of account showing Jamison's indebtedness to them for advancements, freight charges, storage, insurance, commissions, etc., in excess of the amount received for the cotton of \$197.15, for which amount they drew on Jamison. On January 14th Jamison wrote Cleveland & Sons, acknowledging their letter of the 6th inst., and stating that he was surprised at the amount of cotton refused on account of sand, etc., and asked them to hold the 61 bales and he would try to come down to Houston soon. However, he did not go to Houston, but on January 21st wrote Cleveland & Sons to send him the number of bales refused on account of sand, and also date of delivery, and that he would have a man come to Houston in a short time to call upon them. On January 24th Cleveland & Sons again wrote Jamison that, if he doubted their statement as to the manner in which they had sold and delivered his cotton, to send a man to Houston to talk to the purchaser. On February 21st a fire destroyed the compress and warehouse of Cleveland & Sons, together with 30,000 bales of cotton on hand. On March 11th Cleveland & Sons sent out to all their customers a printed circular letter, announcing the fact that they had settled with the insurance company, at 10 ¹/₂ cents basis middling, and that as soon as account sales could be made up they would be sent out to the customers, and asking them to ship more cotton, etc. One of these letters was received by Jamison, and he replied on the 13th of March that he would accept their offer of 10 ¹/₂ cents basis middling, and asked for remittance to cover. Cleveland & Sons replied on March 15th that Jamison had no cotton on hand, and referred him to their letter of January 24th, in which they explained the sale and delivery of the cotton, and again requested him to send a man to see them if he was not satisfied.

Upon these facts the trial court found that the 61 bales of cotton were sold by Cleveland & Sons without authority of law, and that the difference between what Jamison owed Cleveland & Sons for advancements, storage, insurance, etc., and the aggregate of what the 40 bales brought at 9 ⁹/₁₆ cents basis middling, and the 61 bales should have brought, if sold at the market price, was \$173.38, for which he gave defendant judgment.

No objection was made to the introduction of evidence by either party, and no bills of exception are contained in the record. Appellants rely on alleged errors occurring to their prejudice in the court's conclusions of law, which conclusions are in part as follows:

"(1) I find that during the fall of the year 1911 the defendant shipped to the plaintiff 101 bales of cotton upon consignment.

"(2) I further find that plaintiff made defendant advances on said cotton so consigned in the sum of \$4,740."

"(4) That on December 19th plaintiffs notified

defendant that said cotton had been sold at 9⁹/₁₆ cents basis middling.

"(5) That none of the cotton sold on the 19th of December, 1911, was delivered until January 6, 1912, on which date 40 bales were delivered to the purchaser, who refused to accept 61 bales at 9⁹/₁₆ cents basis middling, on account of sand in said cotton, and that on said date plaintiffs notified defendant by letter of the action of the purchaser, and told defendant that they would hold said cotton until plaintiffs heard from defendant.

"(6) That plaintiffs, without waiting to hear from defendant, on January 9, 1912, sold the remaining 61 bales to the original purchaser of the other 40 bales at the same price, to wit, 9⁹/₁₆ cents basis middling."

Appellants' first assignment is leveled at the court's conclusion of law in paragraph 1 above set out. The proposition under this assignment is that:

"Where an owner consigns cotton to a factor who advances the owner money upon such cotton to an amount equal to or in excess of the value of said cotton, and there is no agreement between them as to price or time of sale of such cotton, and all the instruction given by the owner is for the factor to use his own good judgment as to when to sell, the time of sale and price at which the cotton shall be sold is within the sound discretion of the factor, exercised in good faith and with ordinary care and prudence."

[1-3] We believe it to be well established, no instructions being given, that where a shipper's agent, or factor, exercises ordinary care, skill, and diligence to obtain the fair market value of the shipper's goods consigned or placed in his hands for sale, such agent or factor is not liable in damages to the shipper, although the goods were sold for less than their market value. *Drumm-Flato Commission Co. v. Union Meat Co.*, 33 Tex. Civ. App. 587, 77 S. W. 634; *Webster v. Richardson*, 55 Tex. Civ. App. 391, 119 S. W. 142. We further believe it to be the rule that in the absence of an agreement to the contrary, or instructions from the shipper, before any advancements are made, to the contrary, that a factor who has made advances on the credit of the goods consigned to him for sale has the right to sell enough of the goods to reimburse himself for his advances, and that after the advancements are made the factor is not bound to obey the subsequent instructions of his principal as to the sale of the goods. His right of sale is not limited by any subsequent order of his principal, except as to the surplus not necessary to effect the reimbursement. *John Flannery Co. v. James*, 13 Ga. App. 425, 79 S. E. 912; *Duffy v. England*, 176 Ind. 575, 96 N. E. 704; *Justice v. Brock*, 21 Wyo. 281, 181 Pac. 38, 183 Pac. 1070; *Blaisdale v. Lee*, 127 N. C. 365, 37 S. E. 509; 19 Cyc. 126; 11 *Mechem on Agency* (1914) §§ 2537, 2540, 2587. Therefore we conclude that, by reason of the fact that the cotton was consigned to appellant company by Jamison, without any special instructions from him, or agreement between him and Cleveland & Sons, to hold for a specified price, and by reason of the further fact that Cleveland & Sons had advanced to Jamison large sums of money almost equal to, if not in excess of,

the full value of the cotton, even if sold at the highest market price claimed by appellee, and the further fact that by his letter of December 17, 1911, Jamison expressly authorized the defendant company to sell the cotton the best it could, and to use its judgment in doing so, and the further fact that in spite of notices to Jamison that the advancements made were in excess of the value of the cotton at the price then obtaining, and requests to remit to cover the difference, said Jamison failed to do so, but contented himself with writing various letters asking for more time, that the factors had the right to sell the 61 bales at what seemed to them the market price. We are of the opinion that the trial court erred in rendering judgment for defendant on his cross-action, and in failing to render judgment for plaintiffs on their verified account. It is true that by their letter of January 6, 1912, plaintiffs, after notifying defendant that 61 bales of cotton had been refused on account of sand, stated that they had said 61 bales on hand, and would hold it until they heard from him, yet, since Jamison had already authorized the factors to exercise their judgment in the sale of the cotton, even if the question of advancement was not in the case, we think they would, in the absence of further instructions, have the right to sell the 61 bales at a price which, in the exercise of good faith and good judgment, they deemed a fair one.

[4] Moreover, it might be well to note that plaintiffs' witness, Victor Snyder, who had charge of the sale of this cotton, testified that under the rules of the Cotton Exchange a purchaser of cotton, where he had rejected certain bales on account of claimed defects, such as the presence of sand, had the right, before the sale of the cotton to other parties, to reconsider and accept the rejected bales at the price first agreed upon. There is nothing in the record which even tends to contradict the truthfulness of this statement, or to question the binding effect of such a rule upon defendant. We are inclined to think that if a principal selects an agent to handle and sell his goods, and has knowledge, constructive or actual, of the existence of certain rules, customs, or usages pertaining to the business in which the agent and the purchaser of the goods is engaged, and the agent, in the exercise of good faith, submits to the operation of such rules in the handling and sale of his principal's goods, that the principal could not be heard to deny the binding effect of such rules. There is nothing in the record in the instant case to suggest that the defendant did not know of the custom or rule as to the right of the purchaser to reconsider his refusal, and to take the cotton at the price theretofore agreed upon prior to the sale by the agent to other parties, or that in dealing with his chosen agents he did not do so with full knowledge of the existence of such rule. If we are correct in this conclu-

sion, it affords us a further sound reason why the judgment of the trial court was erroneous.

For the reasons hereinabove set forth, the judgment of the trial court is reversed, and inasmuch as the evidence seems to have been fully developed, and the claim of the plaintiff on his verified account is practically acknowledged to be just and due, if not to be defeated by defendant's counterclaim, no good purpose could be subserved by remanding the cause for another trial, and therefore judgment is here rendered for appellants in the sum of \$197.50, with interest from date of judgment in the trial court, and all costs, including costs of this appeal, and that the appellee take nothing by reason of his cross-action.

MANSSELL v. WESTERN UNION TELEGRAPH CO. (No. 524.)

(Court of Civil Appeals of Texas. El Paso. Feb. 10, 1916.)

1. EVIDENCE 352—TIME-TABLE—ADMISSIBILITY.

In an action for delay in the delivery of a telegram, resulting in inability of the addressee to attend his brother's funeral, where it was shown that a time-table admitted in evidence was issued by the railroad company to the public for guidance with respect to its trains and was in force on the date in question, its admission was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1398-1403; Dec. Dig. 352.]

2. APPEAL AND ERROR 1050 — REVIEW — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in the admission of parol evidence of the contents of railroad time-tables is not ground for reversal, where another witness testified to the same facts without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. 1050.]

3. NEW TRIAL 103 — GROUNDS — NEWLY DISCOVERED EVIDENCE.

In an action for delay in delivering a telegram, preventing the addressee from attending his brother's funeral, newly discovered evidence that a time-table admitted in evidence was not in force at the date in question is not ground for new trial, where the testimony of the plaintiff and another witness showed that there was a train which plaintiff could have taken on the afternoon of the day when he received the message, that he did not start until the next morning, and that he reached his destination in time to attend all the burial and funeral services shown to have taken place except the removal of the remains from the home to the vault at the cemetery, and the time of removal is not shown.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. 103.]

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Action by Walter Mansell against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jones, Jones & Hardie, of El Paso, for appellant. Beall, Kemp & Nagle, of El Paso, for appellee.

WALTHALL, J. This is a suit by appellant against appellee for \$3,000 damages alleged to have been sustained by reason of its failure to promptly deliver a message sent from Cumberland, Md., by appellant's sister, addressed to appellant, notifying him of the serious illness of appellant's brother and requesting him to come at once and not delay. The message was received at appellee's office at Cumberland, Md., on the 2d day of June, 1913, and was forwarded by appellee to its El Paso, Tex., office on the same day at 7:41 o'clock p. m. The message was addressed to Walter Mansell. When the message reached appellee's El Paso office, it was placed in an envelope, sealed, and addressed to Walter Marshall, care El Paso & Southwestern Shops, El Paso. By reason of the change in the name of the addressee, the delivery of the message was not made until the next day at 1 o'clock, June 3d. If the message had been promptly delivered, appellant could and would have left El Paso in time to have reached Cumberland, Md., before his brother's funeral and burial. The damages sued for are alleged to have been sustained in consequence of the disappointment, grief, and mental anguish suffered by reason thereof. Appellant alleged that the act of appellee in changing the name of the addressee from Mansell to Marshall, and thereby causing the delay in the delivery of the message, was gross negligence on the part of appellee and its employes.

Appellee answered denying that it was guilty of gross negligence, alleged that it exercised ordinary care, admitted that it had made the mistake of writing the name Marshall on the envelope inclosing the message, instead of the name Mansell, traversed the facts alleged in the petition, and pleaded the laws of Maryland, and alleged that under said laws appellant is not entitled to recover damages by reason and in consequence of having suffered disappointment, grief, and mental anguish, as mental anguish unaccompanied by physical injuries are not recoverable under the laws of Maryland, which govern in this case. Appellee further alleged in its answer that the message was an interstate message, and the recovery of appellant is governed by the laws of the United States, under which no recovery can be had for mental anguish unaccompanied by physical injuries. We think we need not more fully state the issues. The case was submitted to the jury on special issues. The jury found that the telegram was not delivered with dispatch; that Mansell was prevented from attending the funeral, but that the failure to promptly deliver the message was not the proximate cause; that Mansell suffered great disappointment, grief, and mental anguish caused by his being prevented from attending the funeral; that no sum of money would reasonably compensate Mansell for the mental

anguish suffered and assessed no damages; that, if the message had been delivered with reasonable dispatch, Mansell could and would have been present at the funeral. Judgment was rendered for appellee.

Appellant presents three assignments of error; the first, to the admission in evidence of that portion of a time-table of the El Paso & Southwestern Railroad Company, purporting to give schedules of all trains between El Paso, Tex., and Chicago, up to the 1st of March, 1913, without evidence to prove that same was a correct time-table, or that trains ran in accordance therewith. The second assignment complains of the introduction in evidence of portions of a time-table relating to the schedule of trains between El Paso and Chicago and between Chicago and Cumberland, Md., by interrogating appellant as to the contents of said time-table. The third assignment questions the ruling of the court in overruling appellant's motion for a new trial, the ground in the motion being newly discovered evidence of a corrected folder and time card of the El Paso & Southwestern Railway Company, showing that the folder introduced by appellee was not in force in June, 1913, at the time represented in the folder introduced.

Witness H. D. McGregor testified that he was city ticket agent for the El Paso & Southwestern Railway Company, and had been for eight years. In reference to the morning train in June, 1913, continuing on to Chicago, it was his recollection that the train was taken off from Tucumcari about that time. The next train after the morning train would be the Golden State Limited. Was familiar with the railroads running out of El Paso to the east and the connections they make between El Paso and Cumberland, Md. The most direct route is the El Paso & Southwestern and Rock Island through to Chicago. They have the fastest trains and make the quickest time. The time-table, as to the "Golden State Limited" and "Californian," was the correct time-table for said road even as to June, 1913; that had Mansell left El Paso on June 3d on the "Californian" which left El Paso at 5:25 p. m., he would have arrived in Chicago at 4:50 p. m., on June 5, 1913. Then if the train from Chicago to Cumberland left at 5 or 6 o'clock in the afternoon and got to Cumberland about 6 or 7 o'clock the next morning, it would be immaterial whether Mansell took the Golden State Limited or the Californian, according to the time-table. The Baltimore & Ohio, according to the time-table, left Chicago at 5:45 in the afternoon. If Mansell went on the Californian, he would have, practically, one hour's time at Chicago. Witness could not say whether any other trains were changed in the schedule except the train that was laid off; but his recollection was that was the only one; no changes were made in the summer time; just whenever it was necessary. Witness' testimony about the trains

from Chicago to Cumberland are based on the time-table. The same train is running now, and witness did not think it had been changed in several years. Knew the time only by the time-table. "This time-table is the schedule tendered us for our folder, for our use. It was tendered to us by the Baltimore & Ohio Railway Company."

The plaintiff testified that he did not leave El Paso on June 8d on the 5:25 p. m. train, but did leave about 7:45 o'clock the next morning on the Golden State Limited. Reached Chicago on the morning of the 6th between 10 and 11 o'clock. Left Chicago about 6 o'clock that afternoon, and reached Cumberland about 7 o'clock on the morning of the 7th. His brother's remains were put in the ground about 9 o'clock on the day he arrived. There is nothing in the record to show why he did not leave El Paso on the 5:25 o'clock p. m. train.

[1] It having been shown by the uncontradicted evidence that the time-table admitted in evidence was issued by the El Paso & Southwestern Railway Company to the public for guidance with respect to its trains and was in force on June 3, 1913, its admission was not error. Western Union Tel. Co. v. O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406.

[2] The facts stated in appellant's second assignment do not seem to be fully sustained by the bills of exception; but, however that may be, the witness McGregor had testified to about the same facts, without objection, and under Galveston, Harrisburg & San Antonio Ry. Co. v. Norton, 55 Tex. Civ. App. 478, 119 S. W. 702, and Galveston City Ry. Co. v. Chapman, 35 Tex. Civ. App. 551, 80 S. W. 856, the evidence, if objectionable, would not be reversible error.

[3] We think the ground in the motion for a new trial, the overruling of which is made the basis for the third assignment, must be overruled. Mansell testified:

"I saw the telegram that has been introduced in evidence, I should judge it was just before noon; it was when they called me to the office on the morning of the 3d day of June. * * * After I had seen this telegram out at the shops, I knocked off work, told them I was through and wanted to go east as quick as possible. I made arrangements with the shops for transportation. * * * I got a slip for my money in the office. Then I left the office and went and changed my clothes and then proceeded to come to the city to send a telegram back. * * * I saw the Golden State Limited leaving before I got to the telegraph office. I saw it when I was on the street car. * * * I did not take the afternoon train, the Golden State Limited, the day I received the telegram. I saw the train passing as I was coming down Myrtle avenue. I was right there close to the Elk's Club. That is probably a mile from Union Depot. Yes, sir; there was a train known as 'The Californian' leaving about 5 o'clock in the afternoon; at 5:25 p. m. Yes, sir; that train is No. 2. The Californian, leaving at 5:25, would reach Tucumcari at 4 the next morning, and would reach Chicago 4:50 p. m. of the second day. It takes more than two days, doesn't it? It looks that way, that you would reach Chicago 4:50 p. m. on the second day. The Golden State Limited got out before I got to town. I

didn't leave on the 5:45 train that day. I left the next morning on the early morning train and stopped over at Tucumcari and took the Golden State Limited."

Mansell also testified as to what took place at Cumberland in the matter of his brother's burial after he reached Cumberland at 7 o'clock on the morning of the 7th of June.

"My brother's remains were put in the ground the same day I arrived there; about 9 o'clock. When he was taken from the house to the cemetery, I was not there. I was at the cemetery before he was put in the ground. I possibly did state on direct examination that I was not at his funeral. When he was put in the ground, I was there at that time. The remains before I got there had been removed from the house to the vault. The vaults are overground things with doors that you can go into."

The record does not disclose whether any funeral service was had other than placing the body in the ground. The petition alleges that the damages suffered were occasioned by the sorrow, grief, and mental anguish because of the fact that "he was deprived of being at his brother's funeral and the burial of his brother's remains."

Whatever the newly discovered time-table might show with reference to movements of the trains, the evidence of the witness McGregor and the plaintiff shows that the Californian, as a matter of fact, left El Paso on the 3d of June at 5:25 p. m.; also, the evidence discloses that Mansell reached Cumberland in time to attend all of the burial and funeral service shown to have taken place, except the removal of the remains from the home to the vault at the cemetery, and the evidence does not disclose when that occurred.

The cause is affirmed.

HOUSTON & T. C. RY. CO. v. HOLBERT. (No. 5383.)

(Court of Civil Appeals of Texas. Austin.
Jan. 5, 1916. Rehearing Denied
Feb. 9, 1916.)

1. RAILROADS \S 443—KILLING STOCK—RECOVERY—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a railroad for damages for killing a horse on the track, alleging negligence in operating a train at a dangerous and rapid rate of speed and in failing to ring the bell and blow the whistle, held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1608-1620; Dec. Dig. \S 443.]

2. RAILROADS \S 415—ANIMALS ON TRACK—CARE.

Where a place within defendant's switch limits, where it was not required to fence its track, was grassed, and was a favorite place for stock to graze, as known to the defendant's engineer and employes, they were bound to keep a lookout for stock, and exercise greater care to discover them and avoid injury while passing such place than would be necessary if the stock were not in the habit of grazing there.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1476-1482; Dec. Dig. \S 415.]

3. RAILROADS \S 441 — ACTION FOR KILLING STOCK—BURDEN OF PROOF—FENCES.

In an action for damages for a horse killed by defendant's engine, the burden was on defendant to show that it could not fence its track at the point where the injury occurred, even though within the switch limits.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1575-1595; Dec. Dig. \S 441.]

4. RAILROADS \S 441 — KILLING STOCK — FENCES.

Where there was nothing to show that defendant railroad could not have fenced its tracks at the point where plaintiff's horse was killed, though within its switch limits, without inconveniencing the public, it was not necessary for plaintiff to show negligence in order to recover, the mere killing being enough.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1575-1595; Dec. Dig. \S 441.]

Appeal from Robertson County Court; J. L. Goodman, Judge.

Action by R. R. Holbert against the Houston & Texas Central Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botta, Parker & Garwood, of Houston, Perry & Woods, of Franklin, and A. P. McCormick, of Waco, for appellant. H. S. Morehead, of Franklin, for appellee.

RICE, J. This suit originated in the justice's court, and was brought by appellee against appellant to recover damages for killing a horse of the alleged value of \$199. There was a judgment in said court for defendant, from which appellee appealed to the county court, where judgment was rendered in his favor for the sum of \$150, from which the railway company has prosecuted this appeal.

The negligence alleged consisted in operating the train at a dangerous and rapid rate of speed, and also failing to ring the bell and blow the whistle. Appellant denied that it was guilty of negligence as charged, and also defended on the ground that the injury occurred within the switch limits of the town of Bremond, where it was not required to fence its track.

[1, 2] The case is presented here upon one assignment of error only, which urges that the verdict of the jury is contrary to the evidence and wholly unsupported thereby. While there is some conflict in the evidence, it is shown on the part of appellee that at the time of striking the horse the train was running at a rapid rate of speed, to wit, about 30 to 35 miles an hour, and that there was a failure on the part of appellant to ring the bell or blow the whistle. It also appears by the uncontradicted evidence that grass was growing in and about the tracks where the injury occurred, and that this was a favorite place for stock to graze, which fact was known to the engineer and the employes of the railway company, the engineer testifying that he rarely ever passed there without seeing stock, which made it incum-

bent, we think, upon the employes of appellant to keep a lookout for stock, and exercise greater care to discover their presence and avoid injury to them while passing said point than would be necessary if stock was not in the habit of grazing there. Upon this evidence the jury found for the appellee. We think the evidence was sufficient to raise the issue as to whether appellant was guilty of negligence, under all the circumstances shown, and see no reason to disturb the verdict. See *H. & T. C. Ry. Co. v. Garrett*, 160 S. W. 111.

[3, 4] The burden of proof was upon appellant to show that it could not fence its track at the point where the injury occurred. It is true that the animal was killed within the switch limits, but there is nothing to show that the railway could not have been fenced at this point without inconveniencing the public; and, if this were true, then it is not necessary for appellee to show negligence on the part of appellant in order to recover; the mere killing being enough. See *St. Louis, B. & M. Ry. Co. v. Dawson*, 174 S. W. 850; *I. & G. N. R. R. Co. v. Williams*, 175 S. W. 486; *I. & G. N. R. R. Co. v. Cocke*, 64 Tex. 155; *Gulf, C. & S. F. Ry. Co. v. Weems*, 38 S. W. 1028. But it is not necessary to place our holding upon this point alone, since the verdict, we think, was amply sustained by the evidence, as above indicated, for which reason the judgment of the court below is affirmed.

Affirmed

McCARTHY v. McELVANEY et al.
(No. 7621.)

(Court of Civil Appeals of Texas. Dallas.
Jan. 22, 1916. Rehearing Denied
Feb. 19, 1916.)

1. MUNICIPAL CORPORATIONS — 917—INDEBTEDNESS—“RESOLUTION.”

Under the charter of the city of Denison, providing by article 4, § 4, that when the city council deems it advisable to issue bonds it shall, by resolution, declare the purpose for which it deems the issue advisable, the amount of bonds which it deems advisable to issue and sell, the rate of interest, and the denomination of the bonds, and shall thereupon order an election on the question of issuing bonds, a resolution reading, “Whereas the city council of the city deems it advisable to issue certain of said bonds for the purpose and of the amounts hereinafter set forth,” without reciting, “Be it resolved,” and without containing the word “resolution,” was a sufficient “resolution,” which is a mere expression of the opinion or mind of the council concerning some matter of administration coming within its official cognizance, and for which no set form of words is essential if the requirement calling for such expression is met, and was not objectionable in that it did not in express terms declare that the council deemed it advisable to issue the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1913-1918, 1941; Dec. Dig. ¶ 917.

For other definitions, see *Words and Phrases*, First and Second Series, *Resolution*.]

2. MUNICIPAL CORPORATIONS — 917—BONDS — PRELIMINARY RESOLUTION — DENOMINATION.

Under the Denison City Charter, art. 4, § 4, requiring a resolution of the city council to issue bonds to declare the denomination in which such bonds shall be issued, a resolution, not expressly stating the denomination of the bonds to be issued, but stating the amount of bonds, the rate of interest, and when payable, and the date of maturity, in connection with the mayor's proclamation for the holding of an election pursuant to the resolution stating the denomination of the bonds, was sufficient, and did not invalidate the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1913-1918, 1941; Dec. Dig. ¶ 917.]

3. MUNICIPAL CORPORATIONS — 917 — BONDS — PRELIMINARY ORDINANCE—TIME OF PAYMENT.

Under the Denison City Charter, art. 4, § 4, providing that after a vote in favor of issuing bonds, an ordinance shall be passed providing for the issuance thereof and naming the purpose of the issue and the amount of the aggregate issue, no bonds to run for more than 40 years, an ordinance declaring that the bonds should be dated as of July 1, 1915, prior to the time they were authorized to be issued, and that they should bear interest from date at the rate of 5 per cent. per annum, while an irregularity, did not invalidate bonds which had not been issued and were still in the city's hands.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1913-1918, 1941; Dec. Dig. ¶ 917.]

4. MUNICIPAL CORPORATIONS — 921—ISSUANCE OF BONDS—PRELIMINARY ORDINANCE—SALE PRICE.

Under the statute, requiring municipal bonds to be sold for not less than par and accrued interest, an ordinance, passed after a vote authorizing a city bond issue, providing that they should be sold at par, meant the same as the statute, thereby giving the taxpayers the principal and accrued interest stated on the face of the bonds, and did not invalidate the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1932-1935; Dec. Dig. ¶ 921.]

Appeal from District Court, Grayson County; M. H. Garnett, Judge.

Action for injunction by C. C. McCarthy against C. T. McElvane and others. From an order refusing a temporary injunction, plaintiff appeals. Affirmed.

Jas. P. Haven and G. D. Hunt, both of Dallas, for appellant. John T. Suggs, of Denison, and Head, Dillard, Smith, Maxey & Head, of Sherman, for appellees.

RAINEY, C. J. This suit was brought by appellant against the city of Denison, Tex., to enjoin the issuing and selling of certain bonds for the building of a viaduct. The application for a temporary injunction was made to the judge in vacation, on which day it was refused. An appeal was duly perfected.

The first assignment of error presented is: “The trial court erred in refusing to grant the relief by injunction asked for by plaintiff on the ground that the resolution of the city council was fatally defective and wholly insufficient to authorize a submission by said city

council to the electors of the city of the question of the issuance of certain municipal bonds, and that the election attempted to be held pursuant to such resolution was illegal and void."

The proposition is made that the charter provisions require certain necessary steps to be taken by the council as a precedent for the issuance of bonds, and that those requirements were not observed; hence the issuance of said bonds would be invalid; that no such resolutions as contemplated by the charter for holding such an election were passed by the council; hence the election was void. The council of Denison, on August 12, 1915, passed a resolution as follows:

"At a regular meeting of the city council of the city of Denison, Texas, held at 3 o'clock p. m., August 12, 1915, the following proceedings were had: Alderman F. G. Coleman offered the following resolution: Whereas, the city council of the city of Denison, Texas, deems it advisable to issue certain bonds of said city for the purpose and in the amounts hereinafter set forth, it is hereby directed and ordered by the city council of the city of Denison that an election be held in said city on the 9th day of September, 1915, at which election the following proposition shall be submitted: Shall the city council of the city of Denison be authorized to issue the bonds of the said city of Denison in the sum of fifty thousand dollars, to be payable from one to twenty years after date, twenty-five hundred dollars of such bonds maturing each year, bearing interest at the rate of five per cent. per annum, interest payable semiannually, and to levy a tax sufficient to pay the interest on said bonds as it matures and to create a sinking fund sufficient to redeem them at maturity, for the purpose of constructing permanent street improvements, to wit: A viaduct connecting Rusk avenue from a point near the intersection of same with Morgan street with Austin avenue at a point near its intersection with Munson street, all in the city of Denison, said viaduct to be constructed in a permanent and substantial manner of steel, stone and concrete, all in accordance with plans and specifications to be prepared therefor."

The resolution then specified the places where the election was to be held, naming the respective presiding judges, and stating that the election was to be held subject to the laws of the state and charter of Denison, and that only qualified property owners and taxpaying voters of said city would be allowed to vote. It stated what should be printed on the ticket, and provided for the mayor issuing a proclamation for holding said election in accordance with said resolution and publishing same as provided by law. In accordance with said resolution the mayor issued his proclamation, which was duly published, and an election was duly held; the proposition to issue bonds being duly carried. The mayor's proclamation, after reciting said passage of the resolution, further recited that it is—

"determined that it is advisable that there be issued the negotiable bonds of the city of Denison, Texas, for the purpose of construction of permanent improvements to streets by the construction of a viaduct connecting Rusk and Austin avenues between Munson and Morgan streets; that the total amount of such issue shall be \$50,000.00 and bonds so issued shall bear interest, payable semiannually, at the rate of five per cent. per annum, and to be of

the denomination of \$500.00 each when issued and to be payable from one to twenty years after date; \$2,500.00 of such bonds maturing each year."

The charter of Denison bearing upon the proposition in question is as follows:

"Article IV. Sec. 1. The city of Denison is hereby authorized and empowered to issue bonds as herein provided but not otherwise and all bonds hereafter issued shall be authorized by ordinance duly passed and each ordinance providing for the issue of bonds shall specify the precise purpose for which the bonds are issued and the use to which the money realized from said bonds shall be put. The city council of the city of Denison may, of its own motion, and without any vote of the people, issue bonds to refund and take up old bonds theretofore issued and to extend the time of payment of the debts represented by bonds heretofore issued and to be refunded. But it is expressly provided that all the above-named bonds which may be so issued by the city council shall not bear interest at a rate exceeding five per centum per annum and said interest shall be paid semiannually as it accrues, and it is further expressly provided that the principal aggregate amount of the above-named bonds which may be hereafter issued by the city council shall be divided into fifteen different portions and one portion of the principal amount of each issue of bonds shall be paid each year and the bonds represented by said payment shall be duly canceled and a record of the same made and the said bonds when paid and canceled shall be kept as evidence of payment and of the cancellation thereof.

"Sec. 2. Power and authority is hereby granted to the city of Denison to issue other bonds than those above provided for but no bonds other than those above provided for in section 1 of this article shall ever be issued unless the issuance of the same shall be authorized by a vote of the inhabitants of the city of Denison as herein provided for.

"Sec. 3. No bonds shall ever be issued under section 2 of this act except for the making of permanent improvements and for furnishing public utilities such as are named in this act, and no such bonds shall ever be issued which shall bear interest exceeding the rate of five per cent. with said interest payable semiannually as it accrues, nor shall any such bonds be issued except upon ordinance made by the city council after a majority vote of the electors of the city of Denison in favor of said ordinance and the issuance of said bonds as hereinafter determined.

"Sec. 4. Whenever the city council may deem it advisable to issue bonds other than those provided for in section 1 of this article, the council shall by resolution declare the purpose for which it deems the issuance of bonds advisable, the amount of bonds which it deems advisable to issue and sell to raise money to execute said purpose, the rate of interest which said bonds shall bear and the denomination in which said bonds shall be issued. The city council shall thereupon order an election of the qualified property owning voters in said city to be held not later than thirty days after the date of the resolution and at said election the ballot of the qualified voters shall be taken and those voting for the issuance of said bonds shall have written or printed upon their ballot 'in favor of issuing bonds in for the purpose of ' and blanks in said ballot herein shown shall state in one the amount of issue and in the purpose following the resolution made by the city council and those voting against the issue shall vote a like ballot except the words against the issuing of bonds in amount and for the purposes set forth. If at such election a majority of the voters shall have voted for the issuance of bonds then an ordinance shall be passed providing for the issuance and the said bonds shall be issued, but in every instance an ordinance shall be

duly passed providing for the same and naming the purpose for which said bonds are issued and the amount of the aggregate issue thereof and no bonds herein provided for shall run for a longer time than forty years."

[1] It is claimed by appellant that the resolution in its expression differs materially from what the charter of the city of Denison intended in granting the right to issue municipal bonds:

First. It is contended that the resolution does not recite, "Be it resolved," in the beginning thereof, "that," etc. This is true, nor is there contained therein the word "resolution," but it was introduced as a resolution, and on its face it purports to be a resolution, and we think it is one. The law regards not so much the form of an instrument as it does the substance, where the intention is expressed by plain and intelligible language, which is done by this resolution.

"A resolution is a mere expression of the opinion or mind of the council concerning some matter of administration coming within its official cognizance, and no set form of words is essential, if the requirement which calls for such expression is met."

Second. It is further contended that said resolution does not, in express terms, declare that the council deems it advisable to issue the bonds, as required by section 4, art. 4, of its charter, which provides that:

"Whenever a city council may deem it advisable to issue bonds, * * * the council shall by resolution declare the purpose for which it deems the issuance of bonds advisable," etc.

The resolution reads:

"Whereas, the city council of the city deems it advisable to issue certain of said bonds for the purpose and in the amounts hereinafter set forth," etc.

If the language of the resolution does not express that the city council deemed it was advisable for the issuance of bonds and effect a declaration for the purpose thereof, which at least is a substantial compliance with said charter, then we fail to grasp its meaning.

[2] Third. It is further contended that the resolution does not state the denomination of the bonds to be issued. While the resolution as passed did not expressly state the denomination of the bonds to be issued, it did state the amount of bonds, the rate of interest, and when payable, the time the bonds were to mature, and the amount to mature each year. The proclamation issued by the mayor in pursuance of said resolution for the holding of an election stated the denomination of the bonds to be issued. The people were duly informed as to the denomination of the bonds, and consequently there can be no claim that they were misled. Un-

der the circumstances, this omission was immaterial, and should not require a holding that the issuance of the bonds would be invalid.

[3] The second assignment of error is:

"The trial court erred in refusing to grant the relief by injunction asked for by plaintiff, on the ground that the action of the city council in providing in its ordinance that the bonds should bear a date prior to the time the bonds were to be issued, and prior to the time the electors had authorized their issuance, and in dating same pursuant to such ordinance, was illegal and unauthorized, and the bonds themselves invalidated."

The election on the issuance of said bonds was held on September 9, 1915. On September 20, 1915, the city council of Denison passed an ordinance to the effect that "said bonds shall bear date of July 1, 1915," and, further, "all of said bonds shall bear interest from date at the rate of 5 per cent. per annum." Neither in the ordinances passed nor in the proclamation issued by the mayor for the election held to determine whether or not bonds should be issued was there a time specified for the bonds to bear date. While the dating of the bonds July 1, 1915, was prior to the time the bonds were authorized to be issued, which appears to be irregular, yet we are unable to see that the issuance thereof affects their validity, as no injury resulted therefrom. The bonds had not been issued and were still in their hands.

[4] No claim was made in appellant's petition that he feared the council would sell the bonds for less than par and accrued interest, or that it intended to. The ordinance passed required that said bonds should be sold at par, and it is to be presumed that the council in so doing will conform to the law. The language of the ordinance is not in the exact language of the statute, which requires bonds to be sold for not less than par and accrued interest; but we think the ordinance means the same thing—that is, the bonds shall be sold for not less than par and accrued interest. This being so, the bonds, when sold, cannot legally be issued until then, and the council should receive par value; that is, the principal and interest as shown by the face of the bonds. If this is done, the taxpayers will receive the full value of the principal and accrued interest stated on the face of the bonds, which will be in conformity with their instructions expressed by the vote at the ballot box.

We think the city council has in every material particular substantially complied with the law for the issuance of said bonds, and the judgment refusing the issuance of an injunction is affirmed.

BAKER et al. v. BLEDSOE et al. (No. 916.)
(Court of Civil Appeals of Texas. Amarillo.
Feb. 9, 1916.)

GIFTS —49—INTER VIVOS—EVIDENCE.

In an action on vendor's lien notes, evidence held to sustain the finding that the notes had not been given to the maker by the payee thereof since deceased.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. —49.]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by W. H. Bledsoe and others against E. C. Baker and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Ferguson & Puckett, of Lubbock, for appellants. W. F. Schenck, W. H. Bledsoe, R. A. Sowder, and Benson & Spencer, all of Lubbock, for appellees.

HENDRICKS, J. The appellees sued the appellants, alleging the execution of three vendor's lien promissory notes, averring ownership of said notes, by virtue of certain probate proceedings over the estate of one D. McDonald, deceased, transferred by the administrator of said estate, under an order of the probate court, in consideration of a debt claimed against the estate. The appellants who executed the notes to D. McDonald, the payee, since deceased, alleged that McDonald in his lifetime made a gift to them of said notes, and that the same, by virtue of said gift, were canceled.

An agreement in the case recognized ownership of the notes in plaintiff, with a subsisting lien on the property described by them, and that plaintiffs are entitled to judgment for the debt, together with a foreclosure of the lien, "provided that said notes were not canceled and satisfied by the purported gift of the notes by D. McDonald to the defendant E. C. Baker." McDonald died December 8, 1909, and defendant E. C. Baker filed the purported will for probate, executed by D. McDonald, naming the said Baker as executor. The county court and the district court of Lubbock county denied the probate of said will, and, upon appeal to this court, the judgment of the district court was affirmed. *Baker v. McDonald*, 159 S. W. 450.

On the trial of this particular cause E. C. Baker and his brother-in-law Schmidt testified in substance: That on Saturday following the execution of the notes, D. McDonald, who was in a hospital at that time, in his last illness, arranged to leave said hospital and to return to his home, but was unable to do so. That on the following Monday he gave the notes to defendant Baker, saying: "Baker, you take these notes and keep them until I call for them." That Baker asked him: "In case anything happens to

you, what shall I do with them? Shall I give them to Aunt Mattie?" (meaning the wife of D. McDonald). That McDonald replied: "If anything happens to me do not give them to her or any one else. Keep them for yourself."

The case involving the probate of the will of D. McDonald was twice tried in the probate and district courts, and twice appealed to the appellate court. One of the attorneys who represented Mrs. McDonald, the wife of deceased, in contesting the will, testified that he was intimately connected with the case at all times and was present and assisted in every trial of said cause; that he never at any time heard that E. C. Baker, who was named as executor in said will, or Leah Maud Baker, claimed that the note sued on in this cause had ever been given Baker by McDonald, and that Baker never at any time, within the knowledge of the attorney, made any such claim until after the filing of this suit; that he was present at the trial of the cause in the district court when the depositions of E. C. Baker were used in said cause, in which Baker admitted that he still owed the \$2,590 to D. McDonald's estate for said land. The following is the interrogatory propounded to Baker in the former cause and his answer thereto:

"Cross-Interrogatory No. 3: What property do you now own? Where is it situated? Do you own it individually, or in connection with some other property, and what is its value, and what do you owe on it? Give your answer in detail to this, and be certain to give all that you own. A. I own one hundred and sixty (160) acres of land in Lubbock county. It is worth about three thousand (\$3,000) dollars. I owe two thousand five hundred and ninety (\$2,590.00) dollars on it. The deed was made December 3, 1909, the price was sixteen and ⁵⁰/₁₀₀ (\$16.50) dollars per acre. I paid fifty (\$50.00) dollars cash, and executed three (3) notes, aggregating the sum of two thousand five hundred and ninety (\$2,590.00) dollars. The notes were made payable to D. McDonald, or order, and the notes were signed by E. C. Baker and Leah Maud Baker."

The trial court found that the notes were never given to Baker, and the only assignment in this cause is the sufficiency of the testimony to sustain the finding, and the judgment based thereon.

The judgment of the trial court is affirmed.

FT. WORTH BELT RY. CO. v. JONES et al.*
(No. 8283.)

(Court of Civil Appeals of Texas. Ft. Worth.
Jan. 8, 1916. Rehearing Denied
Feb. 12, 1916.)

1. APPEAL AND ERROR —301— REVIEW — WAIVER OF ERROR.

Under Rev. St. 1911, art. 1612, constituting the motion for new trial the assignments of error, an objection to the submission of a special issue whether the "cut of cars" upon which deceased and his fellow switchman were at work was engaged in moving or handling in-

terstate commerce is waived, where it is not continued in the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.]

2. APPEAL AND ERROR § 1073 — REVIEW — HARMLESS ERROR.

That in form the recovery in an action for causing death is in the name of the executrix, as authorized by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), instead of the surviving wife, children, and parents of deceased, as required by the state statute, is not material where the verdict and judgment specify the particular amounts to which the wife, children, and surviving parent are entitled; both statutes requiring the action to be brought for the benefit of the same persons.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.]

3. MASTER AND SERVANT § 276, 278—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for causing death of a servant, evidence held insufficient to show negligence of the employing railroad in permitting excavations near the railroad track by a third party, or failing to keep a watchman at the point, or that such negligence, if any, was the proximate cause of the injury to deceased.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 956-972, 976, 977; Dec. Dig. § 276, 278.]

4. MASTER AND SERVANT § 279—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for causing the death of a railroad employé, evidence held to authorize the jury to find that the stop signal, which resulted in the fall of deceased, was given by his fellow servant, and not by deceased himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.]

5. LIMITATION OF ACTIONS § 127—COMPUTATION OF PERIOD—AMENDMENT OF PLEADING.

Amendment of the complaint for causing the death of an employé by the intervention of the administratrix and allegation of a cause of action under the federal Employers' Liability Act more than two years after the death of deceased does not show a new cause of action barred by section 6, which provides that no action shall be maintained under the act unless commenced within two years from the accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.]

6. LIMITATION OF ACTIONS § 127—COMPUTATION OF PERIOD—AMENDMENT OF PLEADING.

The amendment of a complaint for causing the death of a railroad employé by alleging as an additional ground of recovery the negligence of a fellow servant based upon Rev. St. 1911, art. 6640, providing that every person operating a railroad shall be liable for damages sustained by an employé by reason of the negligence of a fellow employé, while the original cause was based solely on articles 4694, 4695, which, in effect, provide that death will not abate an action for personal injuries, does not state a new cause of action so as to bar recovery thereon under the two-year statute of limitations (Rev. St. 1911, art. 5687, par. 7).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by Helen Jones and others against the Ft. Worth Belt Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed. See, also, 166 S. W. 1130.

Lassiter, Harrison & Rowland and Slay & Simon, all of Ft. Worth, for appellant. McLean & Scott and Carlock & Carlock, all of Ft. Worth, for appellees.

CONNER, C. J. This suit was instituted in the district court on the 21st day of May, 1910, by the widow, children, and mother of Frank Jones against the Ft. Worth Belt Railway Company, seeking to recover damages in the sum of \$50,000 on account of the death of said Frank Jones on March 2, 1910, while working as a switchman for the defendant company. The fatal accident occurred while the switching crew was handling a long string of cars. The engine was pushing the cars ahead of it, and Jones and another switchman were riding on top of the car farthest from the engine. Jones and the man with him discovered a piece of iron pipe lying across one of the rails a short distance in advance of the train, and, fearing that the pipe would derail the cars, Jones arose from a sitting position and started to go down the ladder on the forward end of the forward car, with the evident purpose of removing the pipe before the train reached it. At or about the time, however, that he started down the ladder, Jones, or his fellow switchman, signaled to the engineer, who in obedience to the signal applied the emergency brakes, with the result that Jones was thrown forward to the ground, and before he could arise the train resumed its onward motion and ran over him and killed him.

The grounds of negligence alleged in the original petition were that the defendant company had permitted its track to become so obstructed with piles of dirt and iron pipe that the place of the accident was unsafe, and that it negligently failed to have the engine equipped with the proper brakes.

The defendant railway company pleaded the general denial, pleas of assumed risk and of contributory negligence, and impleaded Armour & Co., alleging that that company was engaged in the work of excavation near the track at the place of the accident, and that, if the pipe got on the track through the negligence of any one, such negligence was primarily that of the employés of Armour & Co., and the prayer was that, if the defendant railway company should be held liable on account of the presence of the pipe on the track, it be permitted to recover over against Armour & Co.

On November 7, 1910, the plaintiffs filed an amended petition, alleging substantially as before, except that the allegation of negligence in a failure to have the engine equipped with the proper brakes was abandoned, and it was added that the enginer was neg-

ligent in suddenly and violently stopping the train. It was also alleged that the defendant was guilty of negligence in failing to have a watchman at the place. On the day of this amendment the case was first tried, and resulted in a directed verdict in favor of Armour & Co. as against the cross-action asserted by the railway company, and in a verdict for the plaintiffs against the railway company for damages in the sum of \$10,863. The only issue of negligence submitted to the jury on that trial was whether or not the iron pipe referred to got on the rail through the negligence of the defendant railway company. On appeal to this court it was held by us that the evidence failed to support the issue of negligence on the part of the defendant railway company in obstructing its track with the iron pipe as submitted by the trial court, and, the Supreme Court having answered on certificate from us that the directed verdict in favor of Armour & Co. was correct (see *Ft. Worth Belt Ry. Co. v. Jones* [Sup.] 166 S. W. 1130), the case was remanded for a new trial as between the defendant railway company and the plaintiffs only.

Thereafter, on February 8, 1915, the plaintiffs filed an amended petition in which, after alleging negligence on the part of the defendant, as before, in permitting the obstruction of the railway track, they for the first time further alleged that Swope, the fellow switchman who was with deceased at the time, was negligent in giving the engineer the signal to stop, which, having been obeyed, resulted as before stated. The defendant, pleading as before, also alleged that the deceased and Swope were engaged in interstate commerce at the time, whereupon Helen Jones filed a plea of intervention as administratrix of the estate of the deceased, and prayed that she might be permitted to recover in that capacity in event it was found that the plaintiffs' right of recovery rested upon the federal act regulating the liability of railroads for injuries to employes while engaged in interstate commerce. See *Fed. Stat. Ann. Supp. 1909*, bottom page 584 et seq.

The case was submitted upon numerous special issues, all of which were determined in favor of the plaintiffs, and judgment in the sum of \$12,000 was awarded to Mrs. Helen Jones, as administratrix, for the benefit of herself and the deceased's mother and children; the verdict and judgment specifying the particular amounts to which each was entitled. The defendant railway company has appealed.

[1] We will first briefly dispose of several questions about which we think there can be but little, if any, controversy. A number of questions are presented by the assignments which relate to the issue of defendant's plea that the deceased was engaged in interstate commerce at the time of his death. The

jury found in answer to a special issue that the "cut of cars," referring to those upon which the deceased and his fellow switchman were at work, was not at the time engaged in "moving" or "handling" interstate commerce. The submission of this issue was objected to, among other things, and the verdict of the jury thereon is attacked on the ground that the undisputed evidence shows that the parties were employed in interstate commerce at the time of the accident in question. We will not review the evidence relating to the subject; for, if in any view the issue can be said to be material, we find that the appellant's motion for new trial failed to continue the objection to the submission of the issue, and also wholly failed to question the finding of the jury thereon. So that, in view of the statute constituting the motion for new trial the assignments of error (*R. S. art. 1612*), it must be held that the previous objections have been waived, and that, as between the parties herein, the finding against appellant on the issue is conclusive. See *Revised Statutes, art. 1986; Weinstein v. Acme Laundry*, 166 S. W. 126.

[2] The fact that in form the recovery in this case was in the name of the executrix, as authorized and required by the federal Employers' Liability Act, instead of in the name of the surviving wife, children, and parent of the deceased, as required under our statute, can be of no material moment in view of the fact that the verdict and judgment in this case specifies the particular amounts to which the wife, children, and surviving parent were entitled, both statutes alike requiring the action to be brought for the benefit of the persons named, with exception now unnecessary to notice.

[3] As alleged and shown in the testimony, employes of Armour & Co. had been engaged in some excavations near the track and about the place where the iron pipe was found upon the track, and one of the hotly contested issues was whether the defendant railway company was guilty of negligence proximately causing the injury under consideration in permitting the dirt from the excavations to be so piled near the track as to afford an opportunity for an iron pipe to fall thereon and roll down upon the track, and whether, under the circumstances, it was the duty of the appellant to have a watchman at the place in question to see that the track was kept clear. Appellant has presented numerous assignments relating to these issues and to the jury's findings thereon. We will not incumber our opinion with the recitation of all of the evidence relating to the subject, which is substantially set out in the opinion of the Supreme Court hereinbefore referred to. 166 S. W. 1130. That court held that the evidence was insufficient to establish negligence proximately causing the injury on the part of Armour & Co., and we fail to see how it can be said

that there was negligence on the part of the railway company in permitting the excavations, or in failing to have a watchman at the particular place, and the evidence is particularly wanting in sufficiency to establish that, if there was negligence in these particulars, such negligence could have been the proximate cause of the injury. The evidence fails to show that the dirt was piled upon the track, or that the presence of the piles of dirt near the track had anything to do with the accident, except possibly, as insisted upon by the appellees, that its formation was such as to enable an iron pipe, such as the one in question, to roll from the top down upon the track. The evidence shows that this same switching crew had passed up and down the track but a short time before, some 20 or 30 minutes perhaps; that the track at that time was unobstructed; at least there is nothing in the evidence indicating an obstruction at that time, and there is no evidence indicating that a train had passed loaded with iron pipe from which the pipe in question could have fallen upon the dirt, and from thence down upon the track; nor is there any evidence that the employes of Armour & Co. were displacing iron pipe in the excavations they were making. In short, the evidence is wholly silent as to how, when, or by whom the iron pipe was placed upon the track. It is a mere supposition to say that it rolled from the embankment, or that it was placed there negligently or otherwise by any employé of the defendant company, or that, had a watchman been appointed generally for the purpose of keeping the track clear, the pipe got upon the track at such time and under such circumstances as that he could or ought, in the exercise of ordinary care, to have seen it or removed it in time. So that, we think that if, by any reasonable construction of the evidence, it could be said that the defendant company was guilty of negligence in the respects mentioned, it wholly fails to show that therefrom an obstruction or an injury such as under consideration could have been anticipated by the defendant company, and hence that such negligence, if any, could have operated as a proximate cause of the result. *T. & P. Ry. Co. v. Bigham*, 90 Tex. 226, 38 S. W. 162; *Ft. Worth Belt Ry. Co. v. Jones* (Sup.) 166 S. W. 1130. These conclusions, of course, must result in upholding appellant's assignments and contentions relating to the issues of negligence in permitting the piles of dirt and in failing to have a watchman, and we are thus brought to the only remaining issue upon which the verdict and judgment can rest, to wit, the issue of Swope's negligence in giving the signal to the engineer to stop the train, and we will now address ourselves to that subject.

[4] There was a sharp conflict in the evidence as to whether the stop signal was given by the deceased or by his fellow switch-

man, Swope. The engineer and several other witnesses testified that the signal was first given by Jones, the deceased, and later repeated by Swope. There was another witness, however, whose testimony seems to be direct, to the effect that Jones did not give the signal, and that Swope did. The jury found in answer to special issues that Swope gave the signal instead of Jones, that it was negligence under the circumstances to do so, and that such negligence was the proximate cause of the injury. Without displaying the evidence relating to this subject, we content ourselves with saying that the evidence has been carefully considered, and, while it may seem to preponderate in favor of the contention that Jones himself gave the signal instead of Swope, yet the jury were the exclusive judges of the credibility of the witnesses who testified and of the weight to be given to their testimony, and we cannot say that they were unauthorized or unsupported in the conclusions reached by them in appellee's favor.

[5] A further contention of appellant is that the cause of action predicated upon Swope's act in giving the stop signal was barred by limitation: First, because the case was one arising under the federal Employers' Liability Act, and the intervention of the temporary administratrix introduced a new cause of action more than two years after the death of the deceased, and which, hence, was barred by section 6 of the federal statute, which reads: "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." See *Fed. Stat. Ann. Supp.* 1909, p. 585. And, second, that the cause of action based upon negligence on the part of Swope in giving a stop signal was a new one under either state or federal statute, and, not having been set up until February 8, 1915, more than two years after the cause of action accrued, the plaintiffs' right of recovery upon that ground of negligence was barred by limitation, regardless of whether the case was controlled by the federal or state law. The state law on the subject also provides that actions for injury done to the person of another where death ensues from such injury shall be commenced within two years after the cause of action shall have accrued, it being considered in such cases that the cause of action accrues at the death of the party injured. *Revised Statutes*, art. 5687, par. 7.

Even if we should disregard the jury's finding hereinbefore discussed to the effect that this case does not arise under the federal law, and should further adopt the appellant's contention that the undisputed evidence shows that at the time of the occurrence in question Jones was employed in interstate commerce, yet we think the contention first made is conclusively settled by the cases of *R. v. Wulf*, 226 U. S. 570, 33

Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *Railway v. Casey*, 172 S. W. 734; *Love v. Southern Ry.*, by the Supreme Court of Tennessee, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471; *Railway v. Goode*, 163 Ky. 60, 173 S. W. 330. In the *Wulf* Case the action was brought by the sole surviving party in her individual capacity to recover damages from an interstate railway carrier for the death of her unmarried, childless son, while engaged in its employ in interstate commerce. After more than two years after the institution of the suit she amended, and, without setting up any new facts as the ground of action, for the first time set up and sought to recover under her appointment as the personal representative of the deceased, in which capacity alone her action under the Employers' Liability Act could be maintained. It was distinctly held that the amendment was not equivalent to the commencement of a new action for the purpose of applying the two-year limitation prescribed by the federal statute. We have not found that this decision has been modified or qualified in the respect under consideration by any other case. Indeed; the other cases that we have cited, and so far as we have been able to ascertain, follow the case of *Railway v. Wulf*.

[8] The remaining contention, however, presents greater difficulty. We have a statute (Revised Statutes, art. 4694) which gives a right of action against a railroad company (among others) where the death of any person is caused by the negligence or carelessness of its servants or agents; but the next article (4695) provides that:

"The wrongful act, negligence, carelessness, unskillfulness, or default, mentioned in the preceding article, must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

By the common law a right of action for personal injuries proximately caused by the negligence of another was given, but the right did not survive to the personal representatives or heirs of the deceased in case of death, so that, construing the two articles of the statute together, their principal effect apparently is merely to declare that death will not abate the action, leaving the right of the party at last dependent, to a very material extent, upon the common-law principles governing such cases. Hence it was that this court held that under these articles of the statute there could be no recovery for an injury resulting in death where the negligence of the deceased proximately contributed thereto; such being a principle of common law. See *Stephenville, N. & S. Ry. Co. v. Voss*, 159 S. W. 64. It is likewise true, under the common law, that an employé, as a part of his contract of employment, assumes the risk resulting from the negligence of a coemployé. So that this suit, as originally instituted, was made by

the pleadings to depend, in part at least, upon common-law principles, that is to say, upon the negligence of the master in failing to provide a safe place for the deceased to work, in failing to see that the railway track was safe and free from obstructions, and in failing to supply the engine with proper brakes; all of which were duties that the railway company could not delegate to another, and for a violation of which, when established, the company was responsible under common-law principles. But the right of action in the case before us for the negligence of Swope in giving the stop signal rests upon a somewhat different foundation. If the case is properly to be regarded as one arising under the federal Employers' Liability Act, then the right of recovery is dependent upon the terms of that act, which provides (section 1) that every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce which results, in whole or in part, from the negligence of any of the officers, agents, or employes of such carrier, etc. If, on the other hand, the case is to be disposed of, as we think it must be under the findings of the jury, on the theory that the deceased was not employed in interstate commerce at the time of his death, then the right of action of the plaintiff in this suit based upon the negligence of Swope must depend upon article 6640 of our Revised Statutes, which reads:

"Every person, receiver, or corporation operating a railroad or a street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servants or employes were fellow servants with each other shall not impair or destroy such liability."

It is with very much force, therefore, that appellant contends that the cause of action based upon the allegations of Swope's negligence was a new one presented for the first time after the period at which, under our statute, it was barred by limitation. True, we have a statute permitting amendments of pleadings, which it will be found has been very liberally construed by our courts, and when allowed the amendment relates back to the original institution of the suit, but such amendments have not been allowed so as to cut off a defendant's right to a plea of limitation in cases where it is held that the amendment sets up a new cause of action. *Eagle Pass Lumber Co. v. G., H. & S. A. Ry.*, 164 S. W. 402; *S. A. & A. P. Ry. Co. v. Bracht*, 157 S. W. 269; *Phoenix Lumber Co. v. Houston Water Co.*, 59 S. W. 552. So, too, it is said in 25 Cyc. p. 1308:

"An amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies, although the two causes of action arise out of the same transaction, and where by the practice of the states a plaintiff is only required in his pleading to state the fact which constitute his cause of action."

Was, therefore, Swope's negligence a new cause of action so as to be barred? The cases last above cited seem at least to strongly tend to show that it was, and this view is strongly supported by the case of *Union Pacific Ry. v. Wyler*, by the Supreme Court of the United States, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. In the case last mentioned it appeared that, as the action was originally instituted, the case was based upon the common and general laws governing the relation of master and servant, but that later, by an amendment filed after the period of limitation there involved, a statute was invoked which, as in the case of our own, made the employers operating a railroad liable to one servant for the negligence of another, which statute, it was stated, was in derogation of the common law. The court held that the question of limitation was to be determined by an ascertainment of whether the amended petition presented a new cause of action, and it was said that the latter question must be solved by an application of the principles which belong to the law of departure. Numerous citations are then given which illustrate the test applied. Thus it was said, quoting from 1 Chitty on Pleading, 674:

"A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempted to maintain it by a special custom, or act of Parliament."

Quoting from Stephen on Pleading, pp. 412, 414:

"These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also a departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law in his declarations, and on a custom in his replication, or on the effect of the common law in his plea, and a statute in his rejoinder."

Quoting from Gould on Pleading, pp. 423, 424, it is said:

"When the matter first alleged as the ground of action or defense is pleaded as at common law, any subsequent pleading by the same party supporting a particular custom is a departure."

Other authorities of like tenor were cited, and it was held that the amendment under consideration set up a new cause of action, and was hence barred under the plea of limitation there presented.

We confess to some difficulty in avoiding the force and logic of these authorities, and, except for the decision of one of our own

courts in the case of *G. & S. A. Ry. v. Perry*, reported in 38 Tex. Civ. App. 81, 85 S. W. 62, we would be inclined to apply them in the case before us. In the *Perry Case*, as presented in original petition filed May 1, 1900, the plaintiffs sought to recover for Perry's death on the ground of the defendant's negligence in permitting the presence of a piece of board upon the railway track against which a hand car upon which Perry was riding at the time was projected. Later, by an amendment on September 3, 1903, more than two years after the original petition had been filed, plaintiff filed an amended petition alleging the same accident as resulting from the same act of negligence formerly alleged, and also upon the negligence of the servants of the defendant on the car in failing to observe an order to stop. The cause was submitted alone upon the ground of negligence last named, and which was for the first time set up in the amended petition. The court, however, in disposing of the question of limitation presented, held that the amendment did not present a new or different cause of action. It was said:

"The purpose of the original petition was to recover of defendant damages sustained by plaintiffs from the death of Perry in the particular accident, through the negligence of the defendant, alleging the negligence to be in a particular respect. It would be immaterial in any case what form the negligence took, so long as it was negligence of defendant causing the injury complained of. Hence it cannot be said that any particular form of negligence is an essential element of the cause of action, nor that a change of allegations as to negligence really affects the cause of action"—citing *Mexican C. Ry. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282; *S. P. Ry. Co. v. Wellington*, 36 S. W. 1114; *Sherman Oil & Cotton Co. v. Stewart*, 17 Tex. Civ. App. 59, 42 S. W. 241.

The judgment for the plaintiffs so predicated was affirmed, and a writ of error was refused by our Supreme Court, as will be seen by reference to page xvii of 38 Tex. Civ. App. While it seems to us that the cases cited in support of the *Perry Case* are distinguishable from it, we fail to see how in passing upon the petition for a writ of error our Supreme Court could have avoided a consideration and determination of the question of limitation there presented, and, not feeling able to distinguish the *Perry Case* from the one now before us, we feel constrained to hold that the amendment here under consideration did not present a new cause of action so as to make appellant's plea of limitation on that ground available. In aid of this conclusion it may not be amiss to also observe that in all the petitions in this case the same state of facts was substantially presented, except that in the last amendment an appeal was made to a statute not therefore necessary to a recovery. The cause of action, however, as presented in the original and first amended petitions, was materially dependent upon our general statute providing liability in cases of injury re-

sulting in death, as found in title 70, art. 4694 et seq. The amended petition presented substantially the same facts, save that Swope's negligence was alleged, to which Chapter 14 of the Revised Statutes applied, including article 6640, which we have already quoted in full, and which in express terms renders the master liable for the negligence of a fellow servant. In the liabilities imposed in the two chapters we see but little, if any, material difference; the difference principally being that in chapter 14 recovery may be had, under circumstances such as obtain in this case, for the negligence of fellow servants. So that, in the petition before us, as also in the Perry Case, it may be said that the changes asserted in the different petitions are not, strictly speaking, from law to law, that is, from the general or common law to a statute, but, instead, from one statute to another, both appeals to the law being the same, save that in the last statute invoked a defense was cut off that would have been available under the first.

What we have said, we think, disposes of the important questions presented on this appeal. There are some other complaints, such as of the argument of counsel for appellee, and of alleged misconduct on the part of the jury, but, after a careful examination of the circumstances relating to these questions, we conclude that no reversible error is presented in these respects.

Having, for the reasons given, upheld the jury's finding on the issue of Swope's negligence, we conclude that the judgment must be affirmed.

COONEY v. VAN DEREN et al. (No. 519.)
(Court of Civil Appeals of Texas. El Paso.
Feb. 10, 1916.)

JUDGMENT — 106 — DEFAULT — SUBSTITUTION OF NEW PLAINTIFFS — EFFECT.

On the substitution of new plaintiffs on motion alleging assignment to them of the cause of action by the original plaintiffs, and the adoption by the substituted plaintiffs of the petition of the original plaintiffs without adding any allegations relating to the assignment, the entry of judgment by default against the defendant without service and without permitting an opportunity to answer, his offer to answer the original plaintiffs and to deny the cause of action and the assignment having been refused, was error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180–197; Dec. Dig. § 106.]

Error from District Court, Reeves County; S. J. Isaacks, Judge.

Action by F. O. Van Deren and others against P. Albert Cooney. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

This suit was filed on October 7, 1913, in the district court of Reeves county, Tex., by Frank O. Van Deren, as trustee, by Charles H. Thorpe, as his attorney in fact, and Clell

Q. Thorpe, against P. Albert Cooney, all alleged to be nonresidents of this state, alleging that on the 5th of June, 1911, the plaintiff Van Deren entered into a written contract with the plaintiffs, of date 5th of June, 1911 (supposedly in the several capacities in which the petition designates them, but not so alleged in the petition, nor is the alleged contract attached to nor made a part of the petition) by which contract Cooney contracted to purchase from plaintiffs 2,250 acres of land in Reeves county (the land not further described), and agreed to pay therefor to plaintiffs \$20 per acre, a total consideration of \$45,000, upon terms as follows: The sum of \$5,000 on delivery of deed; to pay off and discharge incumbrances on the land, by agreement approximating the sum of \$15,000; on or before 18 months after date, the further sum of \$15,000. The petition alleged the delivery of sufficient deeds and abstracts to said lands in accordance with the terms of the contract, and that same were accepted by Cooney and under which Cooney took possession and placed the deeds of record. The petition alleged a failure to pay the said items of \$45,000 and \$15,000, and that Cooney had paid only a small amount to plaintiffs (the amounts not stated), and alleged that there was a balance due from Cooney to plaintiffs of \$14,784.92, and interest thereon (the amount not named), for which plaintiffs sue and pray judgment and for costs. On the day of filing the suit, on the affidavit of Charles H. Thorpe that Cooney was indebted to plaintiffs in the sum of \$14,784.92 then due, and that Cooney was a nonresident of the state, plaintiffs caused an attachment to issue and be levied upon, the return reciting:

"All of the described judgment, to wit, in cause No. 781 in the district court of Reeves county, P. Albert Cooney v. E. Leslie Cole et al., said judgment recovered in said court of date 20th day of November, 1912, said judgment being for the amount of twenty-five thousand two hundred and forty-six and ²²/₁₀₀ dollars, with interest thereon from the 20th day of November, 1912, at the rate of seven per cent. per annum; and also on the 9th day of October, 1913, at 2:30 o'clock, p. m., levying upon and taking into my possession the following described real property, situated in Reeves county, Texas, and levied upon as the property of P. Albert Cooney" some 20 parcels of land.

The petition, the affidavit for attachment, and the attachment bond all show on face of the several papers filed to be signed in person by Charles H. Thorpe, acting for himself and as attorney in fact for the other plaintiffs, Van Deren and Clell Q. Thorpe. Cooney filed a petition and bond for removal of said cause to federal court, which was granted, and the cause removed and thereafter remanded to the state court. At the April term of the state court, on a demand for a jury by Cooney, the cause was placed on the jury docket. On May 29, 1914, Clell Q. Thorpe, acting for Van Deren and himself, and Charles H. Thorpe, assigned their

cause of action to John H. Morrow, subject to a prior assignment of said cause to the Pecos Valley Bank for payment of about \$4,500, and in said assignment to Morrow empowered him as trustee to settle or satisfy any judgment and sign the names of the assignors to any and all papers in connection therewith, which assignment was filed with the clerk of the court, noted on the trial docket, and placed among the papers of the cause. At the April term, 1914, the cause was continued by operation of law. On November 24, 1914, Cooney, by attorney, filed a motion to quash the attachment, which motion the court overruled. On same day, Cooney filed an answer in said cause, consisting of a general and special exception to the petition, and on said day (file mark showing November 24th) Cooney filed in the cause a pleading indorsed, "Original answer of the defendant, P. Albert Cooney," consisting of a plea in abatement, and an answer traversing the allegations in plaintiffs' first amended original petition, the answer consisting of 25 paragraphs, and duly verified, the affidavit showing to have been made on the 28th day of November. On the 25th of November, the court heard the exceptions to the petition and overruled all except the third special exception, which the court sustained and gave plaintiffs leave to amend. Cooney excepted to the action of the court in overruling the general and special exceptions.

On the 30th of November, plaintiffs' first amended original petition was filed by "John H. Morrow, Leslie A. Needham, attorneys for plaintiffs," alleging that on June 5, 1911, Cooney entered into a contract with Van Deren, trustee, Percy R. Fennell, trustee, Frank W. White, by Clell Q. Thorpe, their attorney in fact, and with Clell Q. Thorpe, in which Cooney contracted to purchase 2,300 acres of land at \$20 per acre, aggregating \$46,080, free of all liens, or subject to certain liens mentioned, at Cooney's election, Cooney to be furnished complete merchantable abstracts of title, all objections to be cured within 60 days, Cooney to pay \$1,000 earnest money, and the balance on terms as follows: Upon the acceptance of the lands subject to such liens and incumbrances as Cooney might elect and deduct the amount from the purchase price, Cooney to make to parties or whomsoever they might direct his two notes for \$2,500 each payable on or before the maturity of a certain mortgage of \$20,000 in certain real estate in Chicago; the two notes Cooney agreed to purchase back at any time after four and within six months, for their face value without accrued interest, after deducting from the purchase price the amount of all liens and incumbrances and the two notes; Cooney was to pay the balance of the purchase price in cash on the consummation of the deal, the petition alleged the payment of the \$1,000 earnest money; that Cooney made an inspection of said

lands; that plaintiffs delivered to Sherman M. Booth, as agreed, merchantable abstracts of titles; that Booth prepared various conveyances and instruments desired by him as attorney for Cooney to be executed, all of which plaintiffs executed and delivered to Booth as attorney for Cooney, which deeds and instruments vested title in Cooney to all said lands, subject only to liens and incumbrances specified in the contract, excepting the Dixie Land Town-site Bonds, less than \$3,000, the total value of all said liens and incumbrances upon said lands then aggregating less than \$25,835; that Cooney elected to accept said lands, took possession of the lands, and caused the conveyances to be placed of record, subject to said incumbrances, and thereupon became liable to pay plaintiffs the balance of the purchase price, naming the amounts; that Cooney refused to execute the said two \$2,500 notes, but has paid in cash not to exceed \$3,250, and owed on the 15th of September, 1911, to plaintiffs, an amount in excess of \$17,995; that Fennell died in November, 1912, and that Charles H. Thorpe was the sole beneficiary under the trust of Fennell, trustee, and that said Thorpe is the owner by assignment of the White interest; that at the date of the filing of the original petition, and now, Cooney owes plaintiffs the said sum of \$14,784.92, for which they sue.

On December 28, 1914, plaintiffs filed a motion for judgment by default for \$14,784.92, interest and costs, on their first amended original petition and for foreclosure of their attachment lien. This motion is signed by Needham and Morrow as attorneys for plaintiffs. On December 29, 1914, plaintiffs, Van Deren, individually, and as trustee, Charles H. Thorpe and Clell Q. Thorpe, "by their duly authorized attorney, Clay Cooke, and also in their own proper persons," filed a motion in the case in which it is stated:

They "move the court to dismiss this cause upon the stipulations filed herein, dated December 14, 1914, each party to pay his own costs incurred herein, and that all attachments and garnishments issued or prosecuted hereunder be released and dissolved. Said plaintiffs further withdraw and annul all pleadings filed in this cause heretofore by them by Leslie A. Needham and John H. Morrow, either or both, and say that all such pleadings are without authority of these plaintiffs, and show to the court that said Needham and Morrow have no authority further to prosecute this suit on behalf of these plaintiffs, and these plaintiffs disclaim and deny all pleadings filed on behalf of them by said Needham and Morrow, either or both. Said plaintiffs further represent that all the matters involved in said pleadings so filed in this cause were settled and adjusted long prior to the filing of this suit between the parties hereto, as will appear from the personal motion of Clell Q. Thorpe, one of the plaintiffs, filed herewith and marked 'Exhibit A.' There is also filed herewith written authority to Clell Q. Thorpe on the part of Frank O. Van Deren, marked 'Exhibit B.' There is also attached hereto stipulation signed by Frank O. Van Deren that said suit is instituted, prosecuted without his knowledge, consent, sanction or approval, and agreeing

that same may be dismissed, marked 'Exhibit C.' There is also attached hereto, marked 'Exhibit D,' power of attorney from the plaintiffs, Charles H. Thorpe and Clell Q. Thorpe. There is also attached hereto contract of accord and satisfaction entered into by and between the parties, dated January 13, 1913, marked 'Exhibit F.' There is also attached hereto revocation of power of attorney to Leslie A. Needham, signed by Clell Q. Thorpe, marked 'Exhibit G.'

"Wherefore plaintiffs pray that no further action be taken in this cause, but that same be dismissed in accordance with said stipulation, marked 'Exhibit E.'

"[Signed] Clay Cooke, Authorized Attorney
"for said Plaintiffs to Obtain
"this Dismissal."

Then follow the exhibits referred to in the motion. Without stating the exhibits in full, as they constitute about 20 pages of the record, we deem it best to give a condensed statement of some of them.

Exhibit A is a statement signed and acknowledged by Clell Q. Thorpe, one of the plaintiffs, in which he asserts that he is the agent and attorney in fact for Van Deren and Charles H. Thorpe, the other plaintiffs in the original petition. He states that he personally had charge of all the negotiations with defendant Cooney concerning the matters referred to in the pleadings; that the power of attorney to him, Clell Q. Thorpe, was revoked on August 10, 1911; that thereafter additional negotiations were entered into with Cooney, and on January 26, 1912, a supplemental agreement was made between Cooney and all parties to the original agreement by Clell Q. Thorpe, an agent of plaintiffs; that on April 5, 1912, all of the parties entered into a second supplemental contract, he (Clell Q. Thorpe) representing plaintiffs, and that all of the matters and things done were fully discussed and understood and ratified by all parties; that on January 13, 1913, Cooney and all parties at interest, through him as agent and attorney in fact, entered into still another or fourth contract with reference to the subject-matter of the suit, and in the motion to dismiss referred to as a memorandum of accord and satisfaction and settlement agreement, of which fourth agreement all parties at interest were informed and they approved, ratified, and confirmed the same; that Van Deren, Charles H. Thorpe, and himself constitute all of the parties at interest in the cause, and all approve his acts in his effort to dismiss this cause, the costs having been paid. Then comes the prayer to make such orders, decrees, and judgment as may be necessary to dismiss the suit and release the bondsmen.

Exhibit B is a receipt of date 9th day of January, 1913, signed by Frank O. Van Deren, trustee, and individually, and sworn to before a notary public, acknowledging full payment of all contracts for the sale of the lands to Cooney, and a release of all claims growing out of the contract of June 5, 1911, and supplemental contracts thereto.

Exhibit C is an agreement of date May 11, 1914, between Van Deren and Cooney, that

this cause of action and all attachments and garnishments shall be dismissed, and that Van Deren will no longer prosecute same, either individually or as trustee, and a declaration by Van Deren that the suit and attachments thereunder "were instituted and are now prosecuted without the knowledge, sanction, consent or approval of him, said Frank O. Van Deren, trustee or individually," and that he desires the same discontinued as to him. The statements in the exhibit are sworn to by each.

Exhibit D is a general power of attorney of date 10th December, 1914, duly acknowledged, in which Charles H. Thorpe makes Clell Q. Thorpe his general attorney to transact for him any and all business of any and all kinds and nature in which his signature is necessary, and especially to make any settlement with Cooney in the manner of the sale of the lands involved in this suit.

Exhibit E is an agreement of date 14th of December, 1914, duly acknowledged, between Van Deren and Clell Q. Thorpe on one part and P. Albert Cooney, that this cause of action and all attachments, garnishments, or other proceedings therein shall be dismissed, and all liabilities on attachment or garnishment executed in the cause are relieved and discharged from any liability.

Exhibit F is a "memorandum of accord and satisfaction and settlement agreement" of date 13th day of January, 1913, between Van Deren, Fennell, Clell Q. Thorpe, and Cooney, referring to the contract for the sale of the lands on June 5, 1911, and the supplemental contracts thereto, and a "whereas" that the parties have "adjusted and compromised all matters in controversy or dispute between them from the beginning of the world to and including the day of the date hereof, and desire to preserve a written record thereof," they state a discharge and release each to the other, and Edmond W. Pottle, Sherman M. Booth, R. G. Werner, and Louis B. Randall, and each of them, their agents and attorneys, of and from "any and all claim, demand, action, cause of action, and liability of whatsoever nature or description from the beginning of the world to and including the date hereof," and a statement that each will exert their best efforts to release and discharge Cooney from the "lien, claim, liability or suits and claims of John M. Byers and his attorneys pending in the courts of Reeves county, Tex., and from the lien, claim, liability or cloud created by certain judgments heretofore rendered in favor of Frederick Findelsen, against some of the first parties hereto, and the Dixie Irrigation Company, Chas. H. Thorpe and John B. Dandridge and others, in the courts of Reeves county." The agreement embraces many other matters.

Exhibit G is a revocation of a power of attorney made by Clell Q. Thorpe to Leslie A. Needham, executed and acknowledged on the 14th day of December, 1914. The motion to dismiss this cause "came on to be heard"

on the 29th day of December, 1914, and the record states that:

"It appearing to the court that said Clay Cooke is the attorney of record for the defendant in said cause and, in presenting said motion, appeared to be acting for both plaintiffs and defendant. Wherefore, the court declined to consider said application, and it is hereby ordered by the court that said application be and the same is stricken from the record and files of this cause."

On December 30, 1914, what purports to be an assignment of this cause of action by the plaintiffs, acting by and through Charles H. Thorpe, as attorney in fact, to the Pecos Valley Bank, was filed and noted on the trial docket. The assignment bears date the 8th day of October, 1913, and authorizes the bank to prosecute the cause of action in plaintiff's name for the benefit of the bank, and states that the assignment is to be construed to be "collateral and additional security" to judgments and liens then held by the bank.

On December 8th, Cooney filed a motion to dismiss this cause, based on the motion and exhibits of the plaintiffs, and that there is no one before the court having any interest in the subject-matter of the cause other than plaintiffs and defendant. As a part of said motion, an affidavit was filed by Cooney on the 30th of December, 1914, to the effect that he had not paid plaintiffs anything to obtain said stipulations to dismiss the cause, and that the settlement, satisfaction releases, etc., shown, were made prior to the filing of the suit; that he had no knowledge or information or any facts putting him on notice of the assignment to the Pecos Valley Bank or John H. Morrow. On December 23, 1914, Clell Q. Thorpe, in writing, duly acknowledged, appointed Clay Cooke his attorney and substitute attorney for John H. Morrow (reciting authority so to do under his power of attorney from Morrow), authorizing Cooke to do whatever was necessary to be done to dismiss this cause of action. On December 30th, a motion signed by Needham, Morrow, and Ross & Hubbard was filed to strike out and exclude from the record and files the last eight pages of Cooney's answer to the amended petition, on the ground that same were not a part thereof when filed, and inserted without leave of the court. The motion to strike out the eight pages of the answer was sustained by the court, and Cooney excepted. Cooney, by motion, requested of the court permission to file the matter pleaded in answer as an amendment on the ground that the answer as filed was done in the manner agreed upon in open court; and in another motion Cooney asked leave to substitute his answer filed at a previous term of the court; and in another motion, on the ground that the answer filed at the previous term had been lost, requested permission to substitute his answer filed on appearance day, same having been substituted by the stricken answer; and in another motion, on the ground that the

striking out of the answer would deprive him of the specific denials of the petition required by the law, that he should not be forced into trial with no answer under the circumstances. Cooney requested the court to permit him to file an answer containing specific denials. The motions were overruled by the court. Cooney asked leave of the court to file denials that the assignments to the Pecos Valley Bank and John H. Morrow were genuine and valid assignments, and to deny that any right or interest passed under the assignments, and offered evidence thereon. The motion was overruled. Cooney, by motion, requested of the court permission to file an answer contesting the right of Morrow and the bank to substitute themselves as plaintiffs on the ground that the assignments were fictitious and were not made at the time nor for the consideration stated and were not delivered, but were executed by plaintiff Thorpe for his own protection, he taking a power of attorney back to deal in person with same. The motion was overruled. Cooney, by motion, asked permission to substitute his answer filed in the federal court in place of his answer stricken out. The motion was overruled. Morrow and the Pecos Valley Bank, on December 30, 1914, filed a motion praying to be substituted as plaintiffs in place of Van Deren, and the two Thorpes, representing in the motion that they were the assignees of the cause of action as the real parties at interest, as evidenced by the assignments filed in the cause.

Morrow and the Pecos Valley Bank, on the 30th of December, 1914, by permission of the court, were substituted as plaintiffs in the place of Van Deren and the two Thorpes and by pleadings simply adopted the pleadings of the previous plaintiffs, and on the same day the court, Cooney not answering, nor waiving service, entered judgment by default in favor of Morrow and the Pecos Valley Bank, substitute plaintiffs, and against Cooney, for the sum of \$15,976.53, with interest from date of judgment, ordered the foreclosure of the attachment lien on the land described. Cooney filed a motion for a new trial, assigning as grounds in the motion the various matters above, and attached thereto his affidavit as to the truth of the matters set out. The court refused to consider or make any order on the motion for new trial on the ground that the petition and bond for removal to the federal court had been filed and approved, after judgment by default had been entered and before the motion for new trial had been filed.

Clay Cooke, of Pecos, and J. F. McKenzie, of El Paso, for plaintiff in error. Leslie A. Needham, of Chicago, Ill., Ross & Hubbard, of Pecos, and John H. Morrow, of Abilene, for defendants in error.

WALTHALL, J. (after stating the facts as above). The transcript in this case is quite

lengthy, containing in all some 556 pages, and we have stated the above as a basis for what we might say. We have concluded that this case must be reversed and remanded, and we deem it unnecessary to consider any of the 25 assignments of error.

To the amended petition, the defendant Cooney undertook to reply, but his answer was contained in the eight pages struck out by the court on motion, leaving Cooney without answer to the amended petition, in which new parties and many facts additional to the facts alleged in the original petition are enlarged and brought into the case. The court, on the motion of Morrow and the bank, by its order, substituting them as plaintiffs in the case, brings into the case additional new parties and by their pleadings adopting the amended pleadings of the former plaintiffs, to which no answer had been made and to which none was permitted to be made, and without any additional notice to or appearance or answer by Cooney, to the new cause of action set up by the new plaintiffs, entered a judgment by default, for the amount claimed to be owed by Cooney to the plaintiffs in the amended petition, in favor of the new plaintiffs and against Cooney. We make no ruling on any of the questions raised by the action of the court refusing the plaintiffs permission to dismiss their suit, nor any of the other questions raised, as we think those questions may not arise on another trial; but we hold that the court was in error in entering a judgment by default, on the amended petition, with new parties and new issues brought into the case by the amended pleadings, and by the substituted plaintiffs, and to which Cooney had made no answer. The amended petition put Cooney to additional answer and production of proof. *Lee v. Hamilton*, 12 Tex. 413; *Morrison v. Walker*, 22 Tex. 18; *Ward v. Lathrop*, 11 Tex. 287.

Again, it is only by the motion of Morrow and the bank and the assignments referred to in the motion that they are shown to be owners of the plaintiffs' interests in the cause of action. The pleadings they filed do not allege that they own the interest in the cause of action. Their petition is as follows:

"Now come the Pecos Valley Bank, of Pecos, Texas (a corporation), and John H. Morrow, trustee, of Dallas, Texas, substitute plaintiffs in the above entitled and numbered cause, and adopt and make their own for the purpose of this cause all pleadings heretofore filed herein by their predecessor plaintiffs." [Signed by attorneys.]

The former pleadings adopted allege the ownership of the interests alleged to be in themselves, and there is nothing in any of the pleadings by any of the parties to suggest an interest in the subject-matter of the suit to be in Morrow or the bank. *Brown v. Marquez*, 30 Tex. 76, and cases there referred to. In *Armstrong v. Bean*, 59 Tex. 492, the original petition was filed by A. H. Bean, in trespass to try title. Thereafter, Cora L. Bean, the real owner, claiming under con-

veyance from A. H. Bean, filed an amended original petition. The amended petition, except the substitution of the name of Cora L. Bean, contained the same averments found in the original petition. The defendant excepted to her petition and, among others, "that he had not been served," and that up to the filing of the amendment "had a valid defense of a subsisting and valid outstanding title in Cora L. Bean," and that her appearance deprived him of it. Defendant then pleaded not guilty, limitation, and valuable improvements. A. H. Bean was dismissed, and judgment was entered for her. Judge Stayton said:

"Had the defendant not answered to her petition, which was filed with leave of the court, it is true no judgment could have been rendered against him in the case, without service upon him."

Conceding that Morrow and the bank were properly substituted as plaintiffs for the plaintiffs in the amended pleadings, the only ground upon which judgment could have been rendered for them, and that by the substitution they asserted the same facts as are found in the amended pleadings with the additional fact of their ownership of the interest sued for, it could well be said that Cooney had never been cited to answer such suit, and the court did not have jurisdiction over the person of the defendant at the time judgment by default was entered. In *Lee v. Hamilton*, supra, where all parties were in fact before the court, it was held that an amendment which would necessarily put the other upon the production of proof could not be made without notice to the party to be affected by it, and that, if so made, it might be treated as a nullity. In *Pendelton v. Colville*, 49 Tex. 525, the Supreme Court held that an amendment setting up a new cause of action, on which judgment was entered without notice, was fundamental error.

It is not our intention in what we have said to hold that Morrow and the bank could be substituted as plaintiffs for an amount in excess of their claims. Some of the plaintiffs sue as trustees, and others as representatives of trustees. Nor are we holding that the levy of the attachment at the suit of the original plaintiffs could be foreclosed and inure to the benefit of the substitute plaintiffs. The questions are not presented here. The entry of the judgment without service of process or appearance of Cooney was fundamental error. The verbiage of the judgment indicates that a judgment by default was announced by the court and noted on the docket before the order was made substituting Morrow and the bank as plaintiffs, and the record shows no order setting aside the former judgment; but, subsequently to such announcement and entry, Morrow and the bank filed their petition to be substituted as plaintiffs, the petition granted, and judgment entered in their favor, and for their benefit, and no part of the judgment was entered in

their names for the use or benefit of the former plaintiffs. Without allegation and proof as to their ownership of the entire cause of action, we doubt the correctness of such judgment entry. *Avery v. Popper*, 92 Tex. 341, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

There are a number of other errors in law apparent upon the face of this record, which would require a reversal; but we forego discussion of same, as there is no occasion for them to occur upon a retrial.

The cause is reversed and remanded.

GASS v. GASS. (No. 5610.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 9, 1916.)

1. MARRIAGE —58—VALIDITY—DURESS.

A marriage taking place through fear of, or to stop a prosecution for seduction, will not be set aside for duress.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 115-123; Dec. Dig. —58.]

2. MARRIAGE —59—VALIDITY—DURESS.

A marriage induced by fear of physical violence will not be set aside where the parties lived together as husband and wife after the threatening influences were removed.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. —59.]

3. MARRIAGE —60—ANNULMENT—EVIDENCE.

In an action to annul a marriage, evidence held sufficient to support either the theory that plaintiff married to escape prosecution, or that he recognized defendant as his wife for a considerable time.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. —60.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Suit by Fred Gass against Helen Lindner Gass. From a judgment for defendant, plaintiff appeals. Affirmed.

O. J. Adams and Hertsberg, Barrett & Kercheville, all of San Antonio, for appellant. Wm. A. Wurzbach and C. C. Wurzbach, both of San Antonio, for appellee.

CARL, J. Appellant, Fred Gass, filed this suit in the district court of Bexar county against appellee, Helen Lindner Gass, to annul and set aside their marriage, which was consummated in Kendall county about August 1, 1914. This is what is known in common parlance as a "military marriage," and appellant relies upon the allegation that this marriage was under duress, and therefore void, or at least voidable.

Appellee meets this allegation by laying down the proposition that a prosecution was pending for seduction, and that their marriage was consummated on the part of appellant for the purpose of avoiding criminal prosecution. Of course, denial is made that force was used. She answers further that,

even if the marriage could have been avoided at the time on account of duress, appellant has waived the right to relief on account thereof, and is estopped to set the same up now because of the fact that he recognized her as his wife and lived with her a considerable time after such evidences of marital law had disappeared.

The facts in this case, briefly stated, are that the father of appellee and her brother-in-law, in company with a deputy sheriff of Kendall county, went to the home of appellant's father, where he was staying, and went upon the gallery, that is some of them did, in a determined, if not an angry manner, and demanded that appellant go with them and marry appellee, to which he demurred. But upon the statement, substantially, that he had to go, that they would take him either dead or alive, he decided that it was the part of wisdom, not to resort to flight, but to accompany his visitors, doubtless bearing in mind the disastrous results which come to some of our Mexican brethren under an application of the "Ley Fugitivo." The testimony is sufficient to sustain a finding that the deputy sheriff then held a warrant for his arrest under a complaint made before the justice of the peace of Comfort. He was taken in an automobile with the parties above named to the home of appellee's father, where he stayed overnight, and we think it safe to say that he was practically under guard, because the old man slept in the adjoining room to which the door led, and the brothers of appellee were sleeping around on the gallery and in the yard under such circumstances as to indicate to a prudent man that flight might at least be dangerous. The next day appellee's father put him in a buggy and took him to Boerne, where he told the clerk, "This young man wants a license," and it is evident that he intended to see that he got this license. After the license was obtained appellee's father took him back to his house, and on the way telephoned to a justice of the peace to be there at 7 o'clock, and upon the arrival of that functionary the happy event was solemnized. That was on Saturday evening. He remained there until Monday, and went away to his father's, where he stayed for about two weeks, until the appellee and her people made their demands so vigorously over the telephone and otherwise that he deemed it prudent to return to his recently wedded bride. He then took her to his father's house, and they lived there somewhere between two weeks and a month, when he again left her and went to Schertz, in Bexar county, where he has since remained, and thereafter he failed to live with her any more. The evidence is conflicting as to the relations they maintained after their marriage and while at the houses of their respective parents, appellant maintaining that, while they occupied, perforce, quarters to-

gether, they did not cohabit as husband and wife, and she maintaining the contrary. There are also in evidence some letters which he wrote to his wife and to her relatives from Sisterdale and from Schertz couched in the most endearing terms and such as to indicate an intention on his part to continue to live with his wife when he got in a position to do so, or got work.

We have not stated in detail the evidence, nor shall we discuss all the law questions which we might under this record; for we think the judgment of the trial court may well be sustained upon two theories:

[1] 1. There is no doubt that appellant knew of the intended prosecution at the time he consented to, even under duress, and did marry the appellee, and it has been held that, even though a marriage should take place under duress, or through fear of, or for the purpose of stopping a criminal prosecution for seduction, the same will not be set aside. As said in *Johns v. Johns*, 44 Tex. 42:

"The plaintiff appears to have understood that the marriage would cancel the offense with which he was charged and release him from custody. He knew whether he was guilty or not of the charge against him when he married, and he cannot now cancel the marriage and rid himself of his wife, as he did the prosecution, without showing a better reason for it than he has given in his petition."

[2] 2. We might be willing to hold that the father and relatives of appellee were maintaining such a threatening attitude and that the danger was so real or apparent that it amounted to duress independent of the fear of the prosecution. If such were true, and it was not the criminal prosecution which caused him to enter into the marriage, but fear of bodily harm, we would hold that such would be sufficient to annul the marriage, because we doubt very much whether a man whose thoughts are taken up with the speculation as to what an angry parent has in mind to do with him is in a frame of mind to have his judgment meet the other contracting party in a valid and binding agreement. But appellant did live with his wife afterwards, and even after he had gone to Schertz, where he was removed from any threatening influences, if they had in fact existed, still treated her as his wife. On August 6th he wrote her from Spring Branch, addressing her as "My Dear Helen," and tells her that he is trying to rent a farm, and congratulates her on her approaching birthday. In this letter he sends his regards to "all the folks," and it will be borne in mind that she was then under her father's roof. On September 23d he wrote her from Schertz, and addressed her as "Mrs. Fred Gass," and tells her:

"I am looking around now what I can find to suit me, and I will come up as soon as possible and that I got me a place to suit me, but I guess I will find something before long."

He winds this letter up by saying:

"But will come up as soon as possible. I am, as ever, Fred."

[3] It is needless for us to prolong this opinion. We think the evidence is amply sufficient: First, to support the theory that he married appellee to avoid criminal prosecution; and, second, even if he did not do so, he certainly recognized her as his wife and lived with her as such for a considerable time afterwards; that is, the testimony is sufficient to establish that theory. And on either of these theories, the evidence being sufficient, we would not be authorized to disturb the finding of the trial judge before whom the case was tried.

The judgment is affirmed.

GULF, C. & S. F. RY. CO. v. TIPS et al.
(No. 5574.)

(Court of Civil Appeals of Texas. Austin.
Jan. 20, 1916.)

APPEAL AND ERROR \Leftrightarrow 750—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

An assignment of error complaining of the refusal to direct a verdict for defendant, a carrier, based on the fact that the shipment in question did not originate at S., as alleged in the petition, but at A., must be limited to the question of variance between the pleading and proof, and cannot be considered as an objection to the court's charge directing a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. \Leftrightarrow 750.]

Appeal from Travis County Court; Wm. Von Rosenberg, Jr., Judge.

Action by Walter Tips, prosecuted after his death by Mary J. Tips and others, his heirs, against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. H. Cavin, Terry, Cavin & Mills, and A. H. Culwell, all of Galveston, for appellant. Allen & Hart and Frederick C. Von Rosenberg, both of Austin, for appellees.

KEY, O. J. Walter Tips brought this suit against appellant to recover the value of an engine and certain other property, which he alleged the defendant had contracted to transport from San Angelo and deliver to him at Austin, Tex.; and from a judgment in favor of the plaintiff, the defendant has appealed. Walter Tips died, and his heirs were substituted as plaintiffs.

The court instructed a verdict for the plaintiffs, and, as appellant has assigned no error upon that charge, it must be held to have assented thereto, and the case must be disposed of upon the assumption that the charge referred to was properly given. It is true that the appellant requested the court to instruct a verdict in its favor, and error is assigned upon the failure to do so. The only question presented by that assignment

is the contention that the shipment in question did not originate at San Angelo, as alleged in the plaintiff's petition, but at Austin, Tex.; and if it should be held that the assignment complaining of the refusal to give that charge constitutes an objection to the court's charge directing a verdict for the plaintiff, such objection would be limited to the question of variance between the pleading and proof. We have considered that question and decide it against appellant.

The only other questions presented for decision relate to certain rulings in reference to the admissibility of testimony. Those questions have been duly considered and are decided against appellant. The record shows that appellant's counsel admitted in open court that appellees were entitled to recover unless its sale of the property for freight charges was legal, and we agree with the trial court that the sale referred to was not legal.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

COMMONWEALTH BONDING & CASUALTY INS. CO. v. STEARNS. (No. 898.)*

(Court of Civil Appeals of Texas. Amarillo. Jan. 19, 1916. Rehearing Denied Feb. 23, 1916.)

JUDGMENT \Leftrightarrow 143—DEFAULT JUDGMENT—VACATING DEFAULT—GROUNDS.

Denial of a motion to set aside a default judgment and for new trial for the absence of the attorney employed by the general counsel for defendant was within the court's discretion, where there was no excuse for the absence of the attorney or for the failure of the general counsel to call the matter to the attention of the attorney, and where no reason was given for the absence of the general counsel.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. \Leftrightarrow 143.]

Appeal from District Court, Motley County; Jo A. P. Dickson, Judge.

Action by L. A. Stearns against the Commonwealth Bonding & Casualty Insurance Company. There was a default judgment for plaintiff, and, from an order denying a motion for new trial and to set aside the default judgment, defendant appeals. Affirmed.

Speer & Brown, of Ft. Worth, for appellant. T. T. Bouldin and G. E. Hamilton, both of Matador, for appellee.

HALL, J. This suit was filed April 9, 1914, by appellee, in the district court of Motley county, for the purpose of canceling certain notes given to appellant company, and to recover the sum of \$312.50 cash, paid to the alleged agents of said company. For the purposes of this opinion, it is sufficient to say that the facts alleged, if true, constituted a good cause of action and entitled appellee to the relief prayed for. On April 9, 1915, defendant answered, first by plea of

privilege, to be sued in Tarrant county, set up the statute of two years' limitation, and alleged other facts, which, if true, would be a defense to a part, if not all, of the cause of action. On May 15, 1915, judgment by default was rendered against appellant, canceling the notes described in plaintiff's petition. On May 28th thereafter, appellant filed its motion for new trial and to set aside the default judgment, which was overruled by the court on May 29th, and from such ruling this appeal is prosecuted.

The motion for new trial was filed on the last day but one of the May term of the court. Appellant set up, in substance, that it had a general attorney, who resided in the city of Ft. Worth, but that it was not the duty of said general attorney to represent it in trial courts outside of Tarrant county, except in cases of emergency; that after being cited its general counsel prepared an answer and filed the same on November 9, 1914, setting up its defenses; that the town of Matador, in which the suit was filed, had only two competent resident attorneys, who were both employed by the plaintiff, and appellant had to seek counsel elsewhere; that prior to appearance day it employed a certain attorney in Paducah, Cottle county, the nearest town by rail, where competent counsel could be procured, who appeared in the cause at the appearance term and procured a continuance of the cause to the May term, 1915; that thereafter its said attorney residing at Paducah died in January, 1915; that, learning of the death of its Paducah attorney, defendant, through its general counsel, employed an attorney residing at Quanah, Hardeman county, Tex., who was the nearest available competent attorney to said town of Matador, and instructed and requested him to appear for the defendants at the May term of the court and look after the setting of the cause and notify the defendant of the day of trial, so it could be present with its witnesses and to represent defendant in the trial and present its defenses; that said Quanah attorney accepted the employment and promised to be in Matador for the trial; that said attorney, without any fault of appellant, failed to appear, and, when the case was called for trial in the first week of the May term of the court, judgment was rendered against appellant, without its knowledge and without an opportunity to present its defenses; and that appellant had no notice of that fact until May 27, 1915. The motion alleges that appellant had a complete defense as set out in its answer, which is made a part of the motion.

In our opinion, the trial court did not abuse its discretion in overruling the motion. To have granted the motion would have resulted in a continuance of the case to the next term of the court. The motion nowhere attempts to excuse its Quanah attorney for

not being present when the case was called; nor does it offer any excuse for the failure of the general attorney at Ft. Worth to call the matter to the attention of the Quanah attorney. No reason is given for the absence of its counsel. Under such circumstances, the court should not have granted the motion for new trial. As was said by Judge Bell, in *Freeman v. Neyland*, 23 Tex. 530:

"The motion shows no reason for the absence of the attorney. It is not shown that the cause was called for trial out of its order, or that the plaintiff practiced any imposition upon the defendant or his attorney. The motion was properly overruled. So far as the record speaks, the appellant seems to have no cause to complain of any one but himself and his attorney. Courts cannot undertake to extend relief to the negligent, at the expense of those who have been diligent in pursuing the remedies of the law. All trials of causes in courts of justice are, to some degree, at the public expense, and courts cannot be called upon to set aside what has been solemnly and fairly done, merely to afford parties an opportunity to be heard, who had neglected to present their defenses or claims at the proper time. It is the duty of parties who have causes in court to attend to them, and, if they neglect to do so, they must bear the consequences." *Nevins v. McKee*, 61 Tex. 412; *Ames Iron Works v. Chinn*, 20 Tex. Civ. App. 382, 49 S. W. 665; *Verschoye v. Darragh*, 67 S. W. 1099; *Drummond v. Lewis*, 157 S. W. 266; *Niagara Fire Insurance Co. v. Lollar*, 156 S. W. 1140.

The judgment is affirmed.

MEMORANDUM DECISIONS.

DRAKE v. STATE. (No. 3914.) (Court of Criminal Appeals of Texas. Jan. 19, 1916.) Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge. Jackson Drake, alias Jack Drake, was convicted of manslaughter, and appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the state penitentiary. As no statement of facts nor any bill of exceptions accompany the record, there is nothing presented for review. The judgment is affirmed.

HARRIS v. STATE. (No. 3949.) (Court of Criminal Appeals of Texas. Feb. 2, 1916.) Appeal from District Court, Red River County; Ben H. Denton, Judge. Edgar Harris was convicted of perjury, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for perjury, with the lowest penalty assessed. There is neither a statement of facts nor any bills of exceptions, and nothing is presented which can be reviewed in the absence of these. Therefore the judgment must be affirmed.

DAVIDSON, J., not present at consultation.

NOONAN v. STATE. (No. 3927.) (Court of Criminal Appeals of Texas. Jan. 28, 1916.) Appeal from District Court, Galveston County; Robt. G. Street, Judge. T. Noonan was con-

victed of sodomy, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of sodomy. There is no statement of facts nor bill of exceptions. Nothing is presented which can be reviewed in the absence of these. Therefore the judgment must be affirmed.

DAVIDSON, J., absent.

Ex parte PIZANA. (No. 3892.) (Court of Criminal Appeals of Texas. Jan. 19, 1916.) Appeal from District Court, Cameron County; W. B. Hopkins, Judge. Application by Ramon Pizana for a writ of habeas corpus. Relator ordered admitted to bail. Canales & Dancy, of Brownsville, and E. C. Gaines, of Austin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Relator was arrested under a charge of murder, and resorted to a writ of habeas corpus to obtain his release. It is not the purpose of this opinion to discuss the facts. After a careful review, however, of the evidence, we are of opinion the case is clearly bailable. The judgment will be reversed, and bail will be granted in the sum of \$5,000. Upon giving bond in the terms of the law for the above-stated amount, said bond to be approved by the sheriff of Cameron county, relator will be discharged from custody.

EL PASO & S. W. CO. v. SCOTT. (No. 530.) (Court of Civil Appeals of Texas. El Paso. Feb. 3, 1916. Rehearing Denied Feb. 17, 1916.) Appeal from District Court, El Paso County; P. R. Price, Judge. Action by the El Paso & Southwestern Company against L. C. Scott. From a judgment dissolving a temporary injunction, plaintiff appeals. Affirmed. Hawkins & Franklin and W. M. Petcolas, all of El Paso, for appellant. Geo. E. Wallace and P. E. Gardner, both of El Paso, for appellee.

HIGGINS, J. Scott filed a suit in the district court of El Paso county, Tex., against appellant, to recover damages resulting from personal injuries sustained by him in the state of Arizona while in the employment of appellant, which injuries it is alleged were caused by appellant's negligence. Citation was issued and served in El Paso county, Tex., upon H. J. Simmons, appellant's general manager. The present suit was instituted by appellant to enjoin the prosecution of the first-mentioned suit. In the court below a temporary injunction was issued, which was thereafter dissolved, and from the order of dissolution this appeal is prosecuted. This is a companion case to *El Paso & Southwestern Company v. Chisholm*, 180 S. W. 156, decided upon a former day of this term. The pleadings and evidence are the same as in that case, except as modified by the fact that Scott's injuries were sustained in Arizona. The same questions arise. We refer to that case for statement of the pleadings, evidence, and issues, and for our findings of fact and conclusions of law. Such statement, findings, and conclusions, as applied to this case, are to be considered in connection with the fact that Scott's injuries were sustained in Arizona, instead of in New Mexico. For the reasons stated in said companion case, the judgment herein is affirmed.

EL PASO & S. W. CO. v. TAYLOR. (No. 528.) (Court of Civil Appeals of Texas. El Paso. Feb. 3, 1916. Rehearing Denied Feb. 17, 1916.) Appeal from District Court, El Paso County; Ballard Coldwell, Judge. Action by the El Paso & Southwestern Company against Mrs. Allen Taylor. From a judgment dissolving a temporary injunction, plaintiff ap-

peals. Affirmed. Hawkins & Franklin and W. M. Peticolas, all of El Paso, for appellant. Geo. E. Wallace and P. E. Gardner, both of El Paso, for appellee.

HIGGINS, J. Appellee filed a suit in the district court of El Paso county, Tex., against appellant, to recover damages resulting to her on account of personal injuries sustained by her minor son, Claude J. Taylor, in the state of New Mexico, while in the employment of appellant, which injuries it is alleged were caused by appellant's negligence. Citation was issued and served in El Paso county, Tex., upon H. J. Simmons, appellant's general manager. The present suit was instituted by appellant to enjoin the prosecution of the first-mentioned suit. In the court below a temporary injunction was issued, which was thereafter dissolved, and from the order of dissolution this appeal is prosecuted. This is a companion case to El Paso & Southwestern Company v. Chisholm, 180 S. W. 156, decided upon a former day of this term. The pleadings and evidence are the same as in that case. The same questions arise. We refer to that case for statement of the pleadings, evidence, and issues, and for our findings of fact and conclusions of law. For the reasons therein stated, the judgment herein is affirmed.

EL PASO & S. W. CO. v. TAYLOR et al. (No. 529.) (Court of Civil Appeals of Texas. El Paso. Feb. 3, 1916. Rehearing Denied Feb. 17, 1916.) Appeal from District Court, El Paso County; Ballard Coldwell, Judge. Action by the El Paso & Southwestern Company against Claude J. Taylor and others. From a judgment dissolving a temporary injunction, plaintiff appeals. Affirmed. Hawkins & Franklin and W. M. Peticolas, all of El Paso, for appellant. Geo. E. Wallace and P. E. Gardner, both of El Paso, for appellees.

HIGGINS, J. Claude J. Taylor, a minor, by next friend, filed a suit in the district court of

El Paso county, Tex., against appellant, to recover damages resulting from personal injuries sustained by him in the state of New Mexico, while in the employment of appellant, which injuries it is alleged were caused by appellant's negligence. Citation was issued and served in El Paso county, Tex., upon H. J. Simmons, appellant's general manager. The present suit was instituted by appellant to enjoin the prosecution of the first-mentioned suit. In the court below a temporary injunction was issued, which was thereafter dissolved, and from the order of dissolution this appeal is prosecuted. This is a companion case to El Paso & Southwestern Company v. Chisholm, 180 S. W. 156, decided upon a former day of this term. The pleadings and evidence are the same as in that case. The same questions arise. We refer to that case for statement of the pleadings, evidence, and issues, and for our findings of fact and conclusions of law. For the reasons therein stated, the judgment herein is affirmed.

RIGGS v. JONES. (No. 146.) (Supreme Court of Arkansas. Jan. 31, 1916.) Appeal from Circuit Court, Garland County; Jeff T. Cowling, Judge. Action by Early Jones against John A. Riggs. Judgment for plaintiff, and defendant appeals. Affirmed. Calvin T. Cotham, of Hot Springs, for appellant. S. W. Leslie, of Hot Springs, for appellee.

KIRBY, J. This is the second appeal of this case, which is fully stated in the former opinion. Jones v. Burks, 110 Ark. 108, 161 S. W. 177. The first appeal came from a judgment on a directed verdict, and the case was reversed and remanded, to be submitted to a jury upon the questions of estoppel and delivery of the automobile. Upon the new trial the testimony was virtually the same as upon the first trial, and the majority of the court is of opinion that the case was submitted upon proper instructions and that the testimony is sufficient to support the verdict. Affirmed.

END OF CASES IN VOL. 182

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⚡45 (Tex.Civ.App.) An action brought by authority of the commissioner of banking in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs will not abate on change of commissioner.—McWhirter v. First State Bank of Amarillo, 182 S. W. 682.

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ACCOUNT.

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ACCOUNT, ACTION ON.

⚡7 (Ark.) In an action on account for meat sold and delivered defendant, who it was claimed was the owner of the business, and also guaranteed payment, evidence held to warrant finding that the sales were made to defendant.—Olson v. Swift & Co., 182 S. W. 903.

ACCOUNT STATED.

⚡8 (Ark.) Where the undisputed evidence showed that plaintiff had been overpaid, due to a mistake of defendant's bookkeeper in an account submitted, held, that plaintiff was not entitled to recover an alleged balance, even though it be conceded that the account became an account stated.—St. Louis Cooperage Co. v. Jackson, 182 S. W. 534.

ACKNOWLEDGMENT.

II. TAKING AND CERTIFICATE.

⚡25 (Tex.Civ.App.) While the statutes prior to 1879 did not require that a married woman's conveyance of her personal property should be in writing, yet, if such conveyance was in writing, it was required to be properly acknowledged, and otherwise was void.—Delay v. Truitt, 182 S. W. 732.

⚡36 (Tex.Civ.App.) An acknowledgment to an officer is sufficiently shown when the certificate shows that the person signing, "acknowledged" the instrument, though the words "to me" are omitted.—Delay v. Truitt, 182 S. W. 732.

The acknowledgment to a power of attorney to receive a land certificate and to transfer an interest therein, failing to recite that the maker "willingly" signed it, if the acknowledgment of a single woman, was sufficient.—Id.

⚡47 (Tex.Civ.App.) Act April 23, 1907 (Acts 30th Leg. c. 165), held to relate only to the admissibility in evidence of deeds not properly acknowledged, and not to the sufficiency of a married woman's conveyance, where a proper acknowledgment was necessary to convey the title.—Delay v. Truitt, 182 S. W. 732.

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ACTION.

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I. GROUNDS AND CONDITIONS PRECEDENT.

¶12 (Mo.App.) Employe, applying turpentine to anus of balky horse as directed by foreman, held not guilty of violation of Rev. St. 1909, § 4627, as to torturing animals, so as to be barred from recovering for injuries from being kicked.—Perlin v. Waters-Pierce Oil Co., 182 S. W. 1018.

II. NATURE AND FORM.

¶25 (Mo.App.) As courts of law recognize estoppel in pais, such defense does not convert an action at law on a note into one in equity.—Bank of Neelyville v. Lee, 182 S. W. 1016.

¶27 (Mo.App.) Petition in shipper's action for carrier's failure to deliver shipment, held to state causes of action ex contractu, and not ex delicto.—J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co., 182 S. W. 131.

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¶57 (Tex.Civ.App.) Where the several suits involved similar facts, but a judgment in one would not necessarily be conclusive in another, consolidation to avoid a multiplicity of suits will not be required.—Chicago, R. I. & G. Ry. Co. v. Liberal Elevator Co., 182 S. W. 355.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

¶64 (Mo.App.) Where there was no direction to the clerk to delay issuance of summons in an action, suit was commenced the moment the petition was filed.—First Nat. Bank of Appleton City v. Griffith, 182 S. W. 805.

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ADMISSIONS.

See Bills and Notes, ¶485; Evidence, ¶207-265; Pleading, ¶214.

ADOPTION.

See Robbery.

¶14 (Ky.) Judgment of adoption held conclusive that children were entitled to inherit from adopting parent notwithstanding subsequent judgment by which they were adopted by another, but which did not attempt to disturb the prior judgment of adoption.—Villier v. Watson, 182 S. W. 869.

Judgment of adoption held not abrogated so as to defeat right of inheritance by judgment bestowing parental control on person other than adoptive parent.—Id.

¶20 (Ky.) Under Ky. St. §§ 2071, 2072, held, that to make valid an adoption as an heir the parental control need not necessarily go with the adoption.—Villier v. Watson, 182 S. W. 869.

¶21 (Ky.) The right of one not the child of another to inherit from such other as a child must necessarily depend upon a compliance with the statute.—Villier v. Watson, 182 S. W. 869.

The right of an adopted child to inherit is based upon the statute, and not upon any common-law or civil law status.—Id.

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ADVANCES.

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ADVERSE POSSESSION.

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I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

¶8 (Ky.) Title to lands dedicated for public use may be acquired by adverse possession, but, under Ky. St. 1915, § 2546, written notice to city authorities is necessary in the case of streets, etc.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

(B) Actual Possession.

¶16 (Tex.Civ.App.) The building of logging railroad coupled with the cutting of timber, etc., from land available only for timbering purposes, held to show adverse possession within the five-year limitation statute (Rev. St. Art. 5674).—Billingsley v. Houston Oil Co. of Texas, 182 S. W. 373.

(E) Duration and Continuity of Possession.

¶57 (Tex.Civ.App.) Where defendant set up adverse possession under the five-year statute (Rev. St. art. 5674), evidence held insufficient to show that defendant or its predecessor had, for any continuous period of five years, held the land adversely.—Billingsley v. Houston Oil Co. of Texas, 182 S. W. 373.

(F) Hostile Character of Possession.

¶60 (Ky.) That one having easement of way occasionally locked the gate and would not permit others to use it, and often allowed his stock to pasture on the way, was not sufficient to apprise the owner of the land that owner of easement was asserting a hostile title to the land itself.—O'Banion v. Cunningham, 182 S. W. 185.

¶71 (Ky.) Deeds describing no lands and not acknowledged by anybody, held not deeds to land with definite boundary, but at most to constitute color of title.—Gilbert v. Parrott, 182 S. W. 859.

¶82 (Tex.Civ.App.) Under Rev. St. arts. 6786, 6789, 6790, 6791, a deed, duly deposited with the clerk for record, must be considered as recorded within article 5674, fixing a five-year limitation for recovery of land.—Billingsley v. Houston Oil Co. of Texas, 182 S. W. 373.

¶82 (Tex.Civ.App.) Under Rev. St. art. 6824, making unrecorded deeds void against subsequent purchasers, an unrecorded deed held color of title within the three-year limitation law (articles 5672, 5673).—Pheips v. Pecos Valley Southern Ry. Co., 182 S. W. 1156.

¶85 (Tex.Civ.App.) Adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination to the rightful owner.—Billingsley v. Houston Oil Co. of Texas, 182 S. W. 373.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

¶100 (Ark.) One who takes possession of a part of a tract of unoccupied land under a tax deed conveying the entire tract acquires title to the entire tract by limitation after two years, though the tax sale was void, in the absence of actual possession by the true owner of some portion of the land.—Earl v. Harris, 182 S. W. 273.

¶100 (Ky.) Where the calls in a deed did not close, and appellant, who went into possession,

occupied a parcel of land which apparently was excluded from the operation of the grant, *held*, that the clause of exclusion will be deemed to have been inserted through mistake.—*Shive v. Janes*, 182 S. W. 602.

⚡103 (Ky.) Constructive possession to well-defined and marked boundaries of tract arising from actual possession of part *held* not to extend to lands subsequently purchased from a different vendor and having a different chain of title.—*Gilbert v. Parrott*, 182 S. W. 859.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡112 (Tex.Civ.App.) One relying on adverse possession has the burden of proving it.—*Billingale v. Houston Oil Co. of Texas*, 182 S. W. 373.

⚡114 (Ark.) Evidence *held* insufficient to establish title by adverse possession in one who paid taxes and occupied only a portion of the land claimed.—*Earl v. Harris*, 182 S. W. 273.

⚡114 (Ky.) Evidence *held* to show that appellant had possessory title to a parcel of land which he occupied, though the deed under which he claimed was of no effect, except as a parol gift, the description being wholly insufficient.—*Shive v. Janes*, 182 S. W. 602.

AFFIDAVITS.

See Attachment, ⚡91, 122; Contempt, ⚡54; Criminal Law, ⚡957; Depositions; Divorce, ⚡111; Evidence, ⚡318; Extradition, ⚡35.

⚡2 (Tex.Cr.App.) The affidavit introduced by the state should not be considered, the oath thereto being taken by counsel for the state.—*Melton v. State*, 182 S. W. 289.

AGENCY.

See Principal and Agent.

AGREED CASE.

See Appeal and Error, ⚡945; Submission of Controversy.

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AMOUNT IN CONTROVERSY.

See Appeal and Error, ⚡45-61; Courts, ⚡189, 247; Justices of the Peace, ⚡44.

ANIMALS.

See Carriers, ⚡207-230; Railroads, ⚡360, 411-446.

⚡10 (Tex.Cr.App.) In a prosecution for cattle theft, where defendant claimed that he bought the black muley cow charged to have been stolen, testimony as to his taking and possession of a red cow was admissible.—*Sullenger v. State*, 182 S. W. 1140.

⚡10 (Tex.Civ.App.) In action to recover hides with sequestration by plaintiff and replevy by defendants, *held*, that plaintiff's brand, although not properly recorded, was admissible to identify animals from which hides were taken if ownership of animals with that brand was otherwise shown, and, if not recorded, was admissible to identify them.—*Herrera v. Marquez*, 182 S. W. 1148.

ANNULMENT.

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APPEAL AND ERROR.

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For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⚡5 (Tex.Civ.App.) The remedy against a judgment voidable because against a minor not represented by a guardian ad litem, the fact of infancy appearing on the face of the record, is by writ of error and not bill of review.—*Kidd v. Prince*, 182 S. W. 725.

III. DECISIONS REVIEWABLE.

(B) Nature of Subject-Matter and Character of Parties.

⚡41 (Ky.) The Court of Appeals has jurisdiction to review the judgment of the circuit court in an action to enjoin levy of execution for \$75, despite Ky. St. § 950, providing that an appeal may be taken to the Court of Appeals from the judgment of the circuit court, except from a judgment for the recovery of money or personality, where the amount in controversy is less than \$500.—*Kentucky River Hardwood Co. v. Noble*, 182 S. W. 941.

(C) Amount or Value in Controversy.

⚡45 (Ky.) From an order directing the payment at one time of alimony in the sum of \$200 or more, within the jurisdiction of the Court of Appeals, an appeal may be taken to that court, as such an order is a judgment for the recovery of money within Ky. St. § 950.—*Van Meter v. Van Meter*, 182 S. W. 950.

⚡61 (Ky.) Under Ky. St. § 950, prescribing the jurisdiction of the Court of Appeals, *held*, that appeal from order directing payment of alimony at \$4 per week, without showing that the amount paid had equaled the amount requisite to jurisdiction, would be dismissed.—*Van Meter v. Van Meter*, 182 S. W. 950.

(D) Finality of Determination.

⚡70 (Ky.) Where defendant, without entering its appearance, moved the court to quash the return on the summons, and the court made an order sustaining the motion, no appeal lies from such order, as it was not final.—*Edmonds v. David G. Evans & Co.*, 182 S. W. 207.

⚡78 (Ark.) Orders overruling demurrers to the complaint based on constitutionality of the law under which the complaint was drawn *held* not final orders and not appealable under Kir-

by's Dig. § 1188, declaring the judgments and orders which shall be appealable.—*State v. Greenville Stone & Gravel Co.*, 182 S. W. 555.

Where the court sustained demurrer to one count of a complaint, but made no final order dismissing that portion of the complaint, its order was not appealable, since it did not finally dispose of the cause.—*Id.*

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⇨169 (Tex.Civ.App.) An assignment, not presented in trial court, cannot be considered on appeal.—*Billingsley v. Houston Oil Co. of Texas*, 182 S. W. 373.

⇨171 (Ky.) Where the case for plaintiff was submitted to the jury under instructions presenting correctly his theory, he cannot complain because the court did not permit a recovery on some other theory.—*Clark v. Owensboro City R. Co.*, 182 S. W. 930.

⇨171 (Mo.App.) Where a case was tried below on a particular theory, held, that on appeal plaintiff could not contend that the pleadings did not raise such issue.—*Joblin v. Illinois Surety Co.*, 182 S. W. 143.

⇨171 (Mo.App.) Where a case is tried on one theory, questions arising from a different theory will not be considered on appeal.—*Delano v. Roberts*, 182 S. W. 771.

⇨171 (Mo.App.) The court on appeal will review a cause on the theory adopted by the parties and the trial court.—*Earls v. Earls*, 182 S. W. 1018.

⇨173 (Ark.) Where the adverse parties failed to deny the allegations of a defendant's cross-complaint, but depositions were taken on all sides of the issue raised and were read in evidence on trial without objection, defendant's insistence that the allegations of his cross-complaint should be taken as confessed, made for the first time on appeal, came too late.—*Reynolds v. Polk*, 182 S. W. 544.

⇨173 (Tex.Civ.App.) Where defendants failed to plead payment of water rent sued for, or to request submission of that issue to the jury, failure to submit it was not ground for reversal, in view of Rev. St. 1911, art. 1985.—*Bennett v. Rio Grande Canal Co.*, 182 S. W. 718.

(B) Objections and Motions, and Rulings Thereon.

⇨185 (Ky.) The contention that the court below had no jurisdiction will not be considered on appeal, where the objection was not properly made in the lower court.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

⇨200 (Ky.) A party, not objecting to an improperly selected jury panel, was not entitled to a reversal because thereof.—*Imperial Jellico Coal Co. v. Bryant*, 182 S. W. 205.

⇨204 (Mo.App.) Appellant cannot complain of the admission of evidence to which it failed to object below.—*Greenfield v. Roberts Cotton Oil Co.*, 182 S. W. 1052.

⇨206 (Ky.) Action of court in limiting number of witnesses to three on one point held not presented for review in absence of objection below.—*Bishop v. Newman's Ex'r*, 182 S. W. 165.

⇨212 (Mo.App.) Where plaintiff did not ask a directed verdict against one defendant, but voluntarily treated the testimony as raising an issue for the jury as to his liability, the court on appeal could not consider the issue of sufficiency of evidence, under Rev. St. 1909, § 2081; no express decision in such case having been made as required by statute.—*Swift & Co. v. Epps*, 182 S. W. 1024.

⇨216 (Ky.) Mine employé, appealing from judgment for defendant, held in no position to take advantage of employer's failure to furnish proper and sufficient caps and props, where instruction presenting this matter was not re-

quested.—*Imperial Jellico Coal Co. v. Bryant*, 182 S. W. 205.

⇨216 (Ky.) A party may not complain of a failure of the court to give instructions, unless he offers an instruction on the question.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

A party who fails to call the court's attention to an immaterial error in an instruction and to request that it be remedied will not be permitted to complain thereof on appeal.—*Id.*

⇨216 (Mo.App.) Where an instruction, general in character, authorizes a recovery for loss of probable support, defendant's failure to request an instruction limiting recovery to nominal damages is a waiver of its right to complain on appeal of the general character of the instruction.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

⇨230 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), defendant, who did not object to the court's charge before it was given or present appropriate charges, waived any errors, and must be considered as having adopted the charge.—*Gilbert v. Fuhrman*, 182 S. W. 51.

⇨230 (Tex.Civ.App.) Where appellant excepted and filed notice of appeal after the filing of findings of fact and conclusions of law, and after expiration of the term filed an objection to the same, but the matter was not brought to the attention of the trial court, appellant cannot complain of them on appeal.—*Broussard v. Le Blanc*, 182 S. W. 78.

⇨230 (Tex.Civ.App.) The refusal of a requested charge will not be reviewed where exceptions as required by Vernon's Sayles' Ann. Civ. St. 1914, art. 2061, were not taken at trial.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

⇨242 (Ark.) Under Kirby's Dig. §§ 5091, 5093, where the record shows no order passing upon defendant's motion to transfer the cause from the chancery to the circuit court, defendant will be deemed to have waived such motion.—*Sanders v. W. B. Worthen Co.*, 182 S. W. 549.

(C) Exceptions.

⇨254 (Tex.Civ.App.) Where petition clearly showed it stated a cause of action within jurisdiction of county court, held that, though plaintiff did not present exceptions in the court below to the sustaining of an exception to the petition and assessing of costs up to that time against him, the matter would be reviewed on appeal.—*Opiela v. Manka*, 182 S. W. 1166.

⇨260 (Ky.) Action of court in limiting number of witnesses to three on one point held not presented for review in absence of exception below.—*Bishop v. Newman's Ex'r*, 182 S. W. 165.

⇨263 (Tex.Civ.App.) An objection that an instruction was too broad because it failed to provide that no recovery could be had for injuries due to the plaintiff's own negligence subsequent to the injury could not be considered on appeal, when not presented by exceptions below.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

⇨263 (Tex.Civ.App.) Under Rev. St. 1911, art. 2061, as amended by Acts 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2061), providing that the ruling of the court in giving, refusing, or qualifying instructions shall be regarded as approved, unless excepted to, where no bill of exceptions is reserved to a charge attacked on appeal, the charge cannot be considered on appeal.—*Bennett v. Rio Grande Canal Co.*, 182 S. W. 713.

⇨264 (Tex.Civ.App.) Where no exception was directed to a special verdict, the appellate court need not refer to the statement of facts to determine whether the evidence was sufficient to support it.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

↪265 (Tex.Civ.App.) A finding unexcepted to in the trial court and not challenged on appeal must be taken as conclusive for purposes of the appeal.—*Texas Co. v. Charles Clarke & Co.*, 182 S. W. 351.

↪270 (Mo.App.) Where court, on motion to set aside order denying new trial, required entry of remittitur and rendered new judgment, defendants' failure to except thereto, or to move to set it aside, *held* not to prevent review on appeal.—*Ward v. Harvey*, 182 S. W. 105.

(D) Motions for New Trial.

↪293 (Ark.) Under Kirby's Dig. § 6215, providing that a new trial is a re-examination in the same court of an issue of fact after a verdict or a decision by the court, where there is no motion for new trial filed in the case the Supreme Court cannot inquire into the correctness of the trial court's decision on the issues of fact.—*Harry v. Williams*, 182 S. W. 546.

The rule that the Supreme Court cannot inquire into the correctness of the trial court's decision on issues of fact where no motion for new trial was filed in the case applies to all trials at law.—*Id.*

↪301 (Mo.) A party who takes exceptions to report of a referee, which exceptions the court overrules, must call the court's attention thereto in motion for new trial, or the rulings will not be reviewed.—*Mechanics-American Nat. Bank of St. Louis v. Rowell*, 182 S. W. 989.

↪301 (Mo.App.) Where a motion for a new trial contains no assignment that the verdict was excessive, an instruction authorizing a recovery for loss of probable support when there is no evidence of decedent's earnings will not be regarded as reversible error.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

↪301 (Tex.Civ.App.) Under Rev. St. 1911, art. 1612, constituting the motion for new trial the assignments of error, objection to submission of special issue not continued in motion for new trial *held* waived.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

↪387 (Tex.Civ.App.) Where an appeal bond was not shown to have been filed until more than 30 days after the order overruling the motion for a new trial, it was not filed in time, and the appeal will be dismissed.—*Spaulding Mfg. Co. v. Kuykendall*, 182 S. W. 371.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

↪501 (Ark.) Improper argument will not be reviewed where the record does not show the reservation of exceptions thereto.—*Shearer v. Farmers' & Merchants' Bank*, 182 S. W. 262.

↪502 (Mo.App.) Complaints embraced in motion for new trial *held* not reviewable, where the record did not show proper exceptions to denial of the motion, notwithstanding Court of Appeals rule 26 (169 S. W. xv).—*Starr v. Penfield*, 182 S. W. 113.

↪511 (Mo.App.) Where the abstract failed to state that the bill of exceptions, stated to have been filed at a date, which, in view of the time appeal was taken, was too late, was duly filed, as permitted by rule 32 of the Springfield Court of Appeals (169 S. W. xxiv), but the respondent, objecting, failed to state as a matter of fact that no order of court was made extending the time for filing as required by rule 15 (169 S. W. xxi), matters brought up by the bill will be considered.—*Greenfield v. Roberts Cotton Oil Co.*, 182 S. W. 1052.

(B) Scope and Contents of Record.

↪516 (Ark.) The recital of the transcript as to a discussion between the attorneys for the defendant and the court relative to its jurisdiction did not become a part of the record.—*Sanders v. W. B. Worthen Co.*, 182 S. W. 549.

↪520 (Ark.) Counsel for defendants, moving to transfer the cause from the chancery to the circuit court, to preserve their objections to the jurisdiction of the chancery court, should have caused entry of record of an order overruling the motion to transfer, which order would have become part of the record on appeal.—*Sanders v. W. B. Worthen Co.*, 182 S. W. 549.

↪523 (Ark.) It was proper for the parties to agree that the testimony should be transcribed and used as depositions, and such transcribed testimony became a part of the record on appeal.—*Sanders v. W. B. Worthen Co.*, 182 S. W. 549.

↪537 (Mo.App.) Under Rev. St. 1909, § 2029, as amended by Laws 1911, p. 139, where an appeal to the Springfield Court of Appeals was granted December 14, 1914, which was returnable to the March, 1915, term of the court, the bill of exceptions filed September 13, 1915, no order of the court having been made extending the time to file, was filed too late for consideration.—*Greenfield v. Roberts Cotton Oil Co.*, 182 S. W. 1052.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

↪544 (Tex.Civ.App.) Where improper argument was not preserved by bill of exceptions, and only the pleadings containing reflections on appellants were before the appellate court, the matter cannot be reviewed on appeal, as it could not be determined by the pleadings.—*Broussard v. Le Blanc*, 182 S. W. 78.

(B) Abstracts of Record.

↪581 (Mo.App.) Under Court of Civil Appeals rule 26 (169 S. W. xv), *held*, that an abstract stating that the "bill of exceptions was duly filed" was not defective, though it failed to state that it was filed at the term of trial or extension granted or when it was filed.—*Starr v. Penfield*, 182 S. W. 113.

↪581 (Mo.App.) Under Rev. St. 1909, § 2048, providing a short method of appeal, the abstract should show that a bill of exceptions was duly filed, and that it contained those matters which can be made part of the record in no other way.—*Greenfield v. Roberts Cotton Oil Co.*, 182 S. W. 1052.

↪592 (Mo.) Where defendant duly appealed, filing short-form transcript, but no abstract as required by court rules 11, 12, 13 (169 S. W. ix), the appeal will be dismissed.—*Pullar v. St. Louis & S. F. R. Co.*, 182 S. W. 740.

↪592 (Mo.App.) Failure to comply with Rule 15 (169 S. W. xxxi), requiring an abstract of the evidence on appeal, requires an affirmance.—*King v. King*, 182 S. W. 1047.

(I) Defects, Objections, Amendment, and Correction.

↪648 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1608, court cannot consider an exception to charge when the part of the transcript containing the purported bill of exceptions was inserted by the clerk after the transcript had been filed in the Court of Civil Appeals and more than 90 days after the appeal bond had been perfected.—*White v. Barrow*, 182 S. W. 1154.

↪656 (Ark.) Where the record showed the special judge was qualified and duly elected under Const. 1874, art. 7, § 21, submission on appeal will not be postponed to perfect the record, where the only ground of appeal was the invalidity of the election of the special judge.—*Stephens v. Universal Stenotype Co.*, 182 S. W. 278.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

⚖664 (Tex.Civ.App.) Where there is a conflict between a bill of exceptions and statement of facts as to proceedings at trial, the statement controls.—Southern Kansas Ry. Co. of Texas v. Hughey, 182 S. W. 361.

(K) Questions Presented for Review.

⚖671 (Ark.) Where appellant failed to abstract the evidence or the pleadings in a former case between the same parties, the appellate court will not determine whether the findings of the chancellor were warranted by the evidence or whether defendant's plea of res adjudicata was improperly denied.—Barr v. Weaver, 182 S. W. 267.

⚖677 (Ky.) Where bill of exceptions complaining of the overruling of motion to quash summons and return for fraud in obtaining service did not contain all the evidence, the ruling is not reviewable.—Stevens & Elkins v. Lewis-Wilson-Hicks Co., 182 S. W. 840.

⚖699 (Tex.Civ.App.) Where exceptions were reserved to an order overruling objections to a charge, but the order failed to show that the objections were made before the charge was given, the propriety of the charge could not be considered on appeal.—Bennett v. Rio Grande Canal Co., 182 S. W. 713.

⚖704 (Tex.Civ.App.) Without the evidence, a finding of the value of improvements put on land cannot be disturbed on appeal.—Bean v. Cook, 182 S. W. 1166.

(L) Matters Not Apparent of Record.

⚖713 (Tenn.) In the absence of an assignment of error and a bill of exceptions presenting the question of the refusal of an amendment, the matter cannot be reviewed, though the action of the judge appeared in the motion for new trial.—Richmond Type & Electrotype Foundry v. Carter, 182 S. W. 240.

XI. ASSIGNMENT OF ERRORS.

⚖719 (Tenn.) In the absence of an assignment of error and a bill of exceptions presenting the question of the refusal of an amendment, the matter cannot be reviewed, though the action of the judge appeared in the motion for new trial.—Richmond Type & Electrotype Foundry v. Carter, 182 S. W. 240.

⚖719 (Tex.Civ.App.) On appeal from an order declining to continue a temporary injunction, appellants are not required to file briefs containing formal assignments of error.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

⚖724 (Tex.Civ.App.) An assignment of error which is vague and uncertain and does not point out any distinct error, need not be considered.—West Texas Supply Co. v. Dunivan, 182 S. W. 425.

⚖730 (Tex.Civ.App.) An assignment of error, complaining that an instruction was uncertain, confusing, and misleading and calculated to mislead the jury and prejudicial to plaintiff, held too general to be considered.—McGraw v. Galveston, H. & S. A. Ry. Co., 182 S. W. 417.

⚖732 (Mo.App.) Assignments of error that the court erred in overruling defendant's motions for new trial and in arrest present nothing for review.—Collins v. Smith, 182 S. W. 1087.

⚖736 (Tex.Civ.App.) An assignment of error should not be multifarious.—West Texas Supply Co. v. Dunivan, 182 S. W. 425.

⚖742 (Tex.Civ.App.) An assignment of error in the admission of evidence cannot be considered, where the statement following it does not show what objection was made to the evidence.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

In action for libel, assignment of error in admission of evidence that plaintiff was not taken

before a magistrate before his arrest held not supported by the statement.—Id.

⚖742 (Tex.Civ.App.) An assignment that the trial court erred in setting aside a judgment rendered at a former term can be reviewed only upon a full statement, showing what issues were joined and what the evidence was on the former trial.—Shipp v. Cartwright, 182 S. W. 70.

An assignment, complaining that the court erred in not disregarding findings of the jury on special issues and in not rendering judgment for plaintiff despite them, cannot be considered where not accompanied by a statement showing the evidence and the proceedings.—Id.

An assignment of error, followed by a proposition not germane, will not be considered.—Id.

An assignment, complaining of the introduction of testimony given by plaintiff on a former trial, presents nothing for review, where the statement did not show the nature of the testimony, its materiality, or the objections urged.—Id.

⚖742 (Tex.Civ.App.) An assignment of error, which refers to no paragraph of the motion for new trial, is not a copy of any part thereof, and is not followed by any proposition or statement, as provided by the rules governing briefs before the Court of Civil Appeals, will not be considered.—Koch v. Noster, 182 S. W. 372.

⚖742 (Tex.Civ.App.) An assignment of error should be followed by a proposition germane thereto.—West Texas Supply Co. v. Dunivan, 182 S. W. 425.

An assignment of error should be followed by an appropriate statement.—Id.

⚖742 (Tex.Civ.App.) Assignments of error to the failure to give certain special issues, which are not followed by statements showing what the issues were, cannot be considered.—Bennett v. Rio Grande Canal Co., 182 S. W. 713.

⚖750 (Tex.Civ.App.) An assignment of error complaining of the refusal to direct a verdict for defendant, held limited to the question of variance between pleading and proof.—Gulf, C. & S. F. Ry. Co. v. Tips, 182 S. W. 1196.

XII. BRIEFS.

⚖758 (Tex.Civ.App.) Where the brief on appeal does not show whether objections interposed to the charges of the court complained of were before or after submission to the jury, the assignments of error thereon must be treated as waived.—Chicago, R. I. & G. Ry. Co. v. Cosio, 182 S. W. 83.

⚖759 (Tex.Civ.App.) Under rule 29 for Courts of Civil Appeals (142 S. W. xii), the brief of an appellant presents no matter for review when the assignments were not literally copied therein.—Shipp v. Cartwright, 182 S. W. 70.

⚖759 (Tex.Civ.App.) Under Rev. St. 1911, art. 1612, Court of Civil Appeals rule 29 (142 S. W. xii), and rule 101a (159 S. W. xi), assignments of error presented in the brief of plaintiff in error need not be considered, where they are not portions of or copied from the motion for new trial.—Tennegkeit v. Galveston Electric Co., 182 S. W. 72.

⚖759 (Tex.Civ.App.) Under the rule requiring assignments of error to be copied in the brief, an assignment in the brief complaining of the admission of part of the testimony of a witness will not be considered, where the assignment in the motion for new trial complains of the admission of all his testimony.—Dewees v. Nicholson, 182 S. W. 396.

⚖760 (Tex.Civ.App.) Under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making the grounds assigned in the motion for new trial constitute the assignments of error, the assignments of error in the brief must be true copies of the corresponding paragraphs of the motion for new trial, and not rewritten or reconstructed assignments.—Freeman v. Texas & P. Ry. Co., 182 S. W. 1158.

☞773 (Mo.) Where defendant duly appealed, filing short-form transcript, but no brief as required by court rule 15 (169 S. W. ix), the appeal will be dismissed.—Pullar v. St. Louis & S. F. R. Co., 182 S. W. 740.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

☞781 (Tex.Civ.App.) The appeal of a railroad for which, at the instance of its bondholder, a receiver has been appointed, from the order of appointment, will not be dismissed as moot because subsequently another receiver is appointed by a United States court, and the road does not appeal from, and apparently acquiesces in, the second appointment.—Houston & B. V. Ry. Co. v. Hughes, 182 S. W. 23.

☞803 (Mo.App.) Where, on appeal from an order dismissing an injunction against a city, the appeal was dismissed without remand, held, that the appellant plaintiff lost any rights he might thereafter have to apply for an order reinstating the injunction.—Bowser v. City of St. Louis, 182 S. W. 1066.

XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

☞811 (Tex.) A confession of error after the granting of a writ of error does not justify the advancement and hearing of the case in the Supreme Court out of its regular order upon the docket.—Galveston, H. & S. A. Ry. Co. v. Dickens, 182 S. W. 288.

Where, after defendant in error confessed error in the charge to secure an advancement on the docket, he filed, in good faith and with the sanction of the court, a written argument citing authorities in support of the charge to afford the court the benefit thereof, the action was not sufficient basis for granting of plaintiff in error's motion to vacate the advancement of the case.—Id.

XV. HEARING AND REHEARING.

☞833 (Tex.Civ.App.) A motion to vacate the opinion and judgment of a Court of Civil Appeals in a case of which it had jurisdiction, made in such court nine years after such judgment was rendered, must be overruled.—Kruegel v. Rawlins, 182 S. W. 705.

XVI. REVIEW.

(A) Scope and Extent in General.

☞843 (Ark.) Where a wife was riding in the tonneau of an automobile which her husband was driving, and the machine was struck by cars of the defendant which were making a flying switch, and the jury found for the husband, instructions on imputed negligence need not be considered.—Ft. Smith & W. R. Co. v. Pence, 182 S. W. 568.

☞845 (Mo.App.) Where the facts have been agreed upon, and a statement filed in the case, the court on appeal must regard the agreed facts as the true ones.—Hartman v. Chicago, B. & Q. R. Co., 182 S. W. 148.

☞854 (Tex.Civ.App.) The Court of Civil Appeals will affirm the correct judgment below on special exception to the petition, though the trial court assigned the wrong reason therefor.—Dublin Fruit Co. v. Neely, 182 S. W. 406.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

☞870 (Ky.) Where, after quashing of the return of the summons, plaintiff stated that he proposed taking no further steps, and the court entered judgment dismissing the action for want of jurisdiction of defendant, plaintiff could appeal upon the necessary exceptions, and thereby obtain a review of the order quashing the return.—Edmonds v. David G. Evans & Co., 182 S. W. 207.

(C) Parties Entitled to Allege Error.

☞877 (Tex.Civ.App.) The vendor of realty, who had no interest in the insurance money payable the purchaser for burning of the house, could not complain of the amount of recovery allowed the purchaser against the insurance company in the vendor's garnishment proceeding against it.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

☞882 (Mo.App.) On an issue as to the quantity of potatoes on sale by "carloads," where evidence of custom was heard and each side was granted instructions as to binding custom, defendants cannot complain.—Asbury v. Evans, 182 S. W. 785.

☞882 (Mo.App.) Objection that the evidence did not disclose a cause of action against some of the defendants made for the first time after verdict held too late.—Kelley v. Peeples, 182 S. W. 809.

☞882 (Mo.App.) Where defendant's own instructions repeatedly used the word "negligence" without definition, it cannot complain of plaintiff's instructions similarly using the word.—Anderson v. American Sash & Door Co., 182 S. W. 819.

☞882 (Mo.App.) Where plaintiff voluntarily treated testimony as raising an issue for the jury on liability as against one defendant by procuring an instruction thereon, the court cannot review a denial of new trial on the ground that the verdict is against the weight of evidence.—Swift & Co. v. Epps, 182 S. W. 1024.

☞882 (Tex.Civ.App.) In a passenger's action for injuries from falling on steps of the station, held that the defendant company could not complain that the court, in its general charge relative to actionable negligence, adopted the theory of a special instruction requested by defendant.—Galveston, H. & S. A. Ry. Co. v. Watts, 182 S. W. 412.

(M) Presumptions.

☞907 (Tenn.) Where complainant did not move for a new trial and preserve the evidence in a bill of exceptions, the finding of the jury against him on issues submitted in an equity case must be deemed by the appellate court as warranted by the evidence.—Minton v. Wilkerson, 182 S. W. 238.

☞917 (Tenn.) The allegations of a bill must be taken as true by the appellate court on hearing to review a decree dismissing the bill on demurrer.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

☞920 (Mo.App.) Where the court ordered an attachment to issue it will be presumed that it approved the attachment bond, though approval is not shown by the record.—First Nat. Bank of Appleton City v. Griffith, 182 S. W. 805.

☞920 (Tex.Civ.App.) Assignments of error that no grounds for the appointment of a receiver for defendant corporation were stated in the petition, and that it stated no cause of action, were equivalent to general demurrer, and required the appellate court to indulge all reasonable inferences in favor of the sufficiency of the petition to sustain the appointment.—Houston & B. V. Ry. Co. v. Hughes, 182 S. W. 23.

☞930 (Mo.App.) Where verdict was for plaintiff, the appellate court must accept her evidence as true.—Wiley v. Wiley, 182 S. W. 107.

☞930 (Mo.App.) Where verdict was for plaintiff, the appellate court must accept the evidence in his favor as wholly true.—McMurray v. Garnett, 182 S. W. 128.

☞930 (Tex.Civ.App.) In action for libel, refusal to strike part of petition setting up publication as libelous held not error, where the court told the jury they could not predicate libel thereon, since, without any showing to the contrary, it would be presumed that the jury

obeyed the instruction.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

⇨930 (Tex.Civ.App.) Where the verdict was general, and it appeared that, as to some of the claims of recovery, plaintiff was not entitled, it will be presumed on appeal that no part of the recovery was on account of such claim.—Southern Kansas Ry. Co. of Texas v. Hughey, 182 S. W. 361.

⇨931 (Tex.Civ.App.) Where the record does not show that findings of fact and conclusions of law were not requested, it will, such findings and conclusions having been filed, be presumed that they were requested.—Broussard v. Le Blanc, 182 S. W. 78.

Though, in an action tried to the court, incompetent evidence was received, it will be presumed that the trial judge was not affected by such evidence.—Id.

⇨931 (Tex.Civ.App.) All reasonable intentions will be indulged on appeal to support the findings.—Bean v. Cook, 182 S. W. 1166.

⇨934 (Mo.App.) The court on appeal from a judgment on a verdict for plaintiff must accept the evidence in the aspect most favorable to him.—McGrath v. Fogel, 182 S. W. 813.

⇨934 (Mo.App.) On verdict for plaintiff the court will accept as the facts, the evidence of plaintiff and all reasonable inferences therefrom.—Anderson v. American Sash & Door Co., 182 S. W. 819.

⇨934 (Tex.Civ.App.) Where the evidence is sufficient to warrant finding by the trial court of a fact justifying the judgment rendered, the Court of Civil Appeals will presume in support of the judgment below that the trial court so found.—Wilson v. Avery Co. of Texas, 182 S. W. 884.

⇨934 (Tex.Civ.App.) All reasonable intentions will be indulged on appeal to support the judgment.—Bean v. Cook, 182 S. W. 1166.

(F) Discretion of Lower Court.

⇨957 (Ky.) The discretion of the court as to setting aside default judgments will not be interfered with, unless abused.—Algee v. Algee, 182 S. W. 197.

⇨984 (Mo.) Rev. St. 1909, § 2266, gives the court discretion to divide the costs of cases falling within it, and the court on appeal will not disturb the discretion unless abused.—Mechanics-American Nat. Bank of St. Louis v. Rowell, 182 S. W. 989.

(G) Questions of Fact, Verdicts, and Findings.

⇨994 (Ark.) The jury being the judges of the credibility of the witnesses, their verdict will not be disturbed.—Shearer v. Farmers' & Merchants' Bank, 182 S. W. 262.

⇨997 (Mo.App.) The refusal of the court below to sustain defendant's demurrer is not reversible, if there is any substantial evidence to support the verdict, giving plaintiff the benefit of every reasonable inference the evidence will bear.—Dunn v. Missouri Pac. Ry. Co., 182 S. W. 109.

⇨1001. A verdict supported by substantial evidence will not be disturbed.

—(Ark.) Brown v. Norred, 182 S. W. 537;

(Mo. App.) F. Hattersley Brokerage & Commission Co. v. Humes, Id. 93; Warren v. New York Life Ins. Co., Id. 96; McMurray v. Garnett, Id. 128; Greenfield v. Roberts Cotton Oil Co., Id. 1052.

⇨1001 (Mo.App.) A verdict will not be set aside on appeal, where supported by any substantial evidence, giving plaintiff the benefit of every reasonable inference therefrom.—Dunn v. Missouri Pac. Ry. Co., 182 S. W. 109.

⇨1001 (Tex.Civ.App.) In suit upon an oral lease of pasture land for six months, where defendant denied the contract pleaded, the verdict for defendant will not be disturbed by reason of defendant's admission that he had put cattle in

the pasture, and that he owed pasturage for some cattle.—White v. Barrow, 182 S. W. 1154.

⇨1002 (Ky.) Where the only evidence is that of two witnesses, who flatly contradict each other, the verdict cannot be said to be flagrantly against the evidence.—Forestal v. National Surety Co., 182 S. W. 614.

⇨1002 (Mo.App.) A verdict resolves conflicts in the evidence in favor of the successful party.—Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.

⇨1002 (Tex.Civ.App.) A verdict on conflicting testimony justifying a verdict either way, according to which witnesses are believed, will not be disturbed on appeal.—Thomas v. Abbott, 182 S. W. 19.

⇨1002 (Tex.Civ.App.) A verdict on findings supported by evidence will not be disturbed though the evidence was conflicting.—Lucas v. Harrison, 182 S. W. 74.

⇨1002 (Tex.Civ.App.) It is not the province of the Court of Civil Appeals to disturb the jury's finding on conflicting evidence.—Texas & N. O. R. Co. v. Turner, 182 S. W. 357.

⇨1002 (Tex.Civ.App.) Where the conditions under which an architect was to receive compensation for drawing plans were in dispute, a verdict on conflicting evidence will not be disturbed on appeal.—Behles v. Blum, 182 S. W. 386.

⇨1003 (Tex.Civ.App.) The mere fact that more witnesses gave evidence on one side than on the other does not authorize the Court of Civil Appeals to disturb a jury's finding.—Koch v. Noster, 182 S. W. 372.

Unless the jury finding is clearly against the great weight of the testimony, showing that manifest injustice has been done, the Court of Civil Appeals cannot say whether it thinks conflicting evidence preponderates one way or the other.—Id.

⇨1004 (Tex.Civ.App.) In the absence of indicia of passion and prejudice a verdict of the jury based on evidence, cannot be disturbed by the court on appeal for excessiveness.—Galveston, H. & S. A. Ry. Co. v. Webb, 182 S. W. 424.

⇨1008 (Tex.Civ.App.) The appellate court will defer to findings of fact by the trial judge, who heard the evidence and saw the witnesses.—Broussard v. Le Blanc, 182 S. W. 78.

⇨1008 (Tex.Civ.App.) Findings not being attacked, the evidence will not be looked to, on appeal, to give them other than their apparent meaning.—Hamlin v. J. M. Radford Grocery Co., 182 S. W. 716.

⇨1009 (Ark.) Findings of fact made by the chancellor, when not clearly against the weight of the evidence, must be sustained on appeal.—Hockaday v. Warmack, 182 S. W. 263.

⇨1009 (Ark.) A finding of the chancellor with reference to a state of accounts between the parties, not against the preponderance of the evidence, must be upheld and his decree affirmed.—Streudle v. Leroy, 182 S. W. 898.

⇨1010 (Ark.) A finding of fact by the circuit judge sitting as a jury will not be disturbed, though the proof was by no means conclusive and satisfactory.—Loudermilk v. Midyett, 182 S. W. 262.

⇨1011 (Mo.App.) Where no error has been made in the application of the law, a finding of fact by the trial court on conflicting evidence is conclusive on appeal.—Joblin v. Illinois Surety Co., 182 S. W. 143.

⇨1011 (Tex.Civ.App.) Mere conclusions or inferences from facts which are not findings of fact upon conflicting evidence as contemplated by statute will not be approved.—Cattlemen's Trust Co. of Ft. Worth v. Turner, 182 S. W. 438.

⇨1022 (Ark.) Where an entire question was referred to a master, whose report was heard and approved by the court, and no specific objections to its correctness or the findings of the

court are pointed out, the findings will not be disturbed.—*Reynolds v. Polk*, 182 S. W. 544.

(H) Harmless Error.

⇒1029 (Ky.) Instruction incorrectly defining adverse possession *held* not prejudicial where plaintiffs in no view of the case showed title to the land in controversy.—*Gilbert v. Parrott*, 182 S. W. 859.

⇒1033 (Mo.) One suing for injuries by a street car cannot complain that the degree of care required of the defendant was "reasonable care," instead of "ordinary care."—*State ex rel. Grear v. Ellison*, 182 S. W. 961.

⇒1033 (Mo.App.) Instructions imposing a heavier burden on plaintiff than was required under the pleadings and evidence cannot be complained of by defendant.—*Penney & Penney Feed Co. v. Kramer*, 182 S. W. 755.

⇒1033 (Mo.App.) In a suit to enforce restrictive covenants, where plaintiff was denied injunction, an award of one cent damages for plaintiff and costs is harmless and no ground for reversal; defendant not objecting.—*Forsee v. Jackson*, 182 S. W. 783.

⇒1033 (Mo.App.) Plaintiff was not prejudiced by a decree giving defendant a lien on notes, which relief he did not seek in his pleadings; the facts justifying a decree declaring defendant the owner of the notes.—*King v. King*, 182 S. W. 1047.

⇒1033 (Tex.Civ.App.) In an action for damages for the death in transit of part of a shipment of hogs and injury to remainder, erroneous admission of evidence of the value of the hogs at the point where the dead were removed *held* harmless; the value at destination being greater.—*Southern Kansas Ry. Co. of Texas v. Hughes*, 182 S. W. 361.

⇒1033 (Tex.Civ.App.) In a brakeman's action for injuries in coupling cars, where the court instructed that if the injury resulted from plaintiff's negligence he could not recover, defendant could not complain of the refusal of his requested instruction that plaintiff could not recover, if he was negligent, whether defendant was negligent or not; the instruction given being more favorable than defendant was entitled to have.—*San Antonio, U. & G. R. Co. v. Green*, 182 S. W. 392.

In a brakeman's action for injuries in coupling cars, where the court charged that he could not recover if his negligence caused the injuries, defendant could not complain of the refusal of its requested charge on comparative negligence, which was less favorable than the charge given.—*Id.*

⇒1040 (Tex.Civ.App.) In an action for damage to a shipment of bananas, error in overruling a special exception to the petition which insufficiently described the property as to quantity was harmless, where defendant admitted receiving four carloads and in a cross-action its freight charges at a rate per hundred were allowed.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

⇒1040 (Tex.Civ.App.) Error in sustaining special exceptions to the petition is harmless, if the general demurrer was properly sustained.—*Kidd v. Prince*, 182 S. W. 725.

⇒1042 (Ark.) Dismissal of answer and cross-complaint in suit to enforce materialman's lien against owner under complaint fatally defective for failure to make the contractor a party defendant and hearing the cause and rendering judgment for plaintiff *held* necessarily prejudicial to defendant.—*Cruce v. Mitchell*, 182 S. W. 530.

⇒1048 (Ky.) Error in allowing a hypothetical question containing statements not supported by testimony, and so framed as to force an answer essential to establish a cause of action relied on, *held* prejudicial.—*Kentucky Traction & Terminal Co. v. Humphrey*, 182 S. W. 854.

⇒1048 (Ky.) In action for personal injury alleged to have produced tuberculosis, error in allowing a question put to a physician calling for his conclusion and not for his opinion, *held* prejudicial.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

⇒1050 (Tex.Civ.App.) Where a witness for defendant stated that defendant's track was rough, and that every day part of it would have to be raised, the error, if any, in admitting on cross-examination testimony that the track was not ballasted and was rough in some places was harmless; the cross-examination being covered by the direct.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

⇒1050 (Tex.Civ.App.) Where a wife claimed as her separate property an automobile sold by her husband to defendant, erroneous admission of evidence concerning the wife's suit for divorce was harmless, where the court's finding that the machine was the property of the wife was based on transactions occurring before the suit.—*Scruggs v. Gage*, 182 S. W. 696.

⇒1050 (Tex.Civ.App.) In an action to recover money paid for an alleged defective engine, the admission, without objection, of evidence for defendant that the engines manufactured and sold by it were successful, rendered harmless the admission of testimony of buyers of its engines that they were satisfactory.—*Wilson v. Avery Co. of Texas*, 182 S. W. 884.

Any error in the admission of evidence was harmless, where another witness, without objection, testified to substantially the same facts.—*Id.*

⇒1050 (Tex.Civ.App.) Admission of oral evidence of contents of time-tables *held* not ground for reversal, where another witness testified to same facts without objection.—*Mansell v. Western Union Telegraph Co.*, 182 S. W. 1178.

⇒1052 (Tex.Civ.App.) In an action for damage to a shipment of bananas from Galveston to Chicago, the improper admission of testimony as to their value in Galveston was harmless, where their market value in good condition in Chicago was shown, and that they were valueless when delivered there, and under proper instructions the jury based the verdict on the value at Chicago.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

⇒1052 (Tex.Civ.App.) Where a special verdict, finding plaintiff's purchase of property sued for, was ratified by defendant's directors, was not questioned, any error in allowing him to testify that he was the owner was harmless.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

⇒1053 (Mo.App.) Where, in action against a carrier for injuries to live stock during transportation, the court correctly charged on measure of damages, the carrier's objection to evidence as to what two or more of the animals were worth per day for work was not material.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S. W. 794.

⇒1053 (Tex.Civ.App.) In an action for damage to a shipment of bananas which the carrier contracted to protect against cold, where the charge rendered the fact that defendant's roundhouse could not accommodate the cars of fruit not a valid defense, the erroneous admission of testimony as to another roundhouse was harmless.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

⇒1056 (Tex.Civ.App.) The erroneous refusal of testimony tending to discredit plaintiff's claim of a contract *held* prejudicial, notwithstanding there were discrepancies.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

⇒1057 (Mo.App.) On a claim for services to deceased, exclusion of admission of plaintiff that deceased did not make her home with him after 1907 was harmless, where the testimony amply showed that the time for which plaintiff

charged was reasonable.—*Coates v. Dunnivant*, 182 S. W. 821.

—1057 (Mo.App.) In an action on contract to manufacture lumber for defendant, exclusion of his testimony as to whether he had continued to receive estimates and pay for lumber as the contract required *held* not injurious, where it was not denied that he did not accept lumber and pay therefor.—*Coombes v. Knowlson*, 182 S. W. 1040.

—1058 (Tex.Civ.App.) Exclusion of testimony of medical expert *held* harmless, where not only was the same witness permitted to testify to the same facts, but another expert medical witness testified to practically the same facts.—*McGraw v. Galveston, H. & S. A. Ry. Co.*, 182 S. W. 417.

—1058 (Tex.Civ.App.) A party cannot complain of the exclusion of testimony which was thereafter admitted.—*Galveston, H. & S. A. Ry. Co. v. Reinhart*, 182 S. W. 436.

—1060 (Tex.Civ.App.) Statement of counsel in argument, without evidence to support it, in effect that witness had testified contrary to his prior statement to counsel, was likely prejudicial; the court not having directed the jury to disregard it.—*Galveston, H. & H. R. Co. v. Hodnett*, 182 S. W. 7.

—1062 (Tex.Civ.App.) In an action for libel, error, if any, in submitting question of exemplary damages was harmless, where the jury found that no exemplary damages were recoverable.—*Houston Chronicle Pub. Co. v. Wegner*, 182 S. W. 45.

—1062 (Tex.Civ.App.) Submission of grounds of negligence not supported by evidence, in conjunction with those supported, *held* not to require a reversal, if the real issue is not thereby obscured and the jury is not induced thereby to believe that the court thinks there is evidence of many wrongful acts by defendant.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

—1062 (Tex.Civ.App.) Where two special issues submitted to the jury substantially the same question as was omitted in another, such erroneous omission was immaterial.—*Wilson v. Avery Co. of Texas*, 182 S. W. 884.

—1064 (Ky.) In a railroad employee's action for injuries, an instruction authorizing damages for lost time, and also for impairment of earning power since the accident, without qualifying the last element of recovery by directing that its allowance should begin when the allowance for time lost ended, was not prejudicial to defendant.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

—1064 (Ky.) Error in a charge submitting question of negligence of servants of a street railway company in charge of a car, instead of limiting the question to the negligence of the motorman, *held* not prejudicial.—*Kentucky Traction & Terminal Co. v. Humphrey*, 182 S. W. 854.

—1064 (Mo.App.) In action for alienation of affections instruction that, if defendant enticed, persuaded, induced, or influenced plaintiff's husband to separate from her "as alleged in the petition," the verdict should be for plaintiff, *held* not prejudicial error.—*McKay v. McKay*, 182 S. W. 124.

—1064 (Tex.Civ.App.) In suit to remove cloud from title to land instruction erroneously assuming that the lot contained more acres than it actually did *held* harmless, in view of uncontradicted testimony fixing the rights of the parties.—*Farmers' & Merchants' Nat. Bank of Abilene v. Ivey*, 182 S. W. 706.

—1066 (Ky.) In action against carrier for damage to shipment of tobacco, instruction on duty to promptly carry and deliver, merely prefatory and abstract, and not submitting the question itself, *held* not prejudicial to defendant.—*Louisville & N. R. Co. v. E. J. O'Brien & Co.*, 182 S. W. 227.

—1066 (Ky.) In action for injuries to a pedestrian on a defective sidewalk, error in submitting issue of contributory negligence *held* not prejudicial.—*Watkins v. City of Henderson*, 182 S. W. 887.

—1066 (Mo.App.) An instruction, general in character, authorizing a recovery for loss of probable support when there is no evidence of decedent's earnings is not reversible error, if enough appears to authorize a recovery of nominal damages.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

—1066 (Mo.App.) An instruction, which took from the jury the only defense made, *held* prejudicial.—*Collins v. Smith*, 182 S. W. 1087.

—1066 (Tex.Civ.App.) Under Court of Civil Appeals rule 62a (149 S. W. x), *held*, that the giving of an instruction, even if it were not authorized by the evidence in a street car passenger's action for injuries, would not require a reversal of a judgment for defendant, where plaintiff could not have been prejudiced thereby.—*Tennegkeit v. Galveston Electric Co.*, 182 S. W. 72.

—1066 (Tex.Civ.App.) The error, if any, in an instruction failing to follow the pleading precisely, *held* harmless.—*Galveston, H. & S. A. Ry. Co. v. Reinhart*, 182 S. W. 436.

—1067 (Tex.Civ.App.) In suit for cancellation of deed, refusal of instruction to find for plaintiff if promise of cash consideration was made without intention of performing, *held* prejudicial error, instruction given hypothesizing failure to perform as to all considerations.—*Wyatt v. Chambers*, 182 S. W. 16.

—1068 (Ark.) Where defendant's cutters by trespass cut plaintiff's logs, the question whether an instruction that plaintiff could recover the value of the finished product was erroneous was immaterial, where the amount awarded was less than the value of the raw product.—*Yelvington v. Polzin*, 182 S. W. 278.

—1068 (Ky.) Where plaintiff entered a remittitur of part of the verdict to cure possible tendency in instruction to allow double damages, the error was rendered harmless.—*Nashville, C. & St. L. Ry. Co. v. Henry*, 182 S. W. 651.

—1068 (Ky.) Error in an instruction which allowed recovery for impairment of earning power during the initial period of the disability for which the jury could have awarded damages for loss of time was cured by the remission of the entire sum which plaintiff could have possibly been awarded for loss of time.—*Nashville, C. & St. L. Ry. Co. v. Banks*, 182 S. W. 660.

—1068 (Tenn.) In action for price of goods sold, where the verdict was reached on ground that buyer had a right to rescind, charge of the trial court on the defense of set-off or recoupment, as to which no damages were shown upon which the verdict might have been reached, *held* not prejudicial.—*German-American Monogram Mfrs. v. Johnson*, 182 S. W. 595.

—1068 (Tex.Civ.App.) Where the jury found in favor of defendant, the erroneous refusal of a charge on defendant's right to compensation for improvements is harmless.—*Shipp v. Cartwright*, 182 S. W. 70.

Where the jury found that plaintiff and his predecessors had occupied the land for 10 consecutive years before institution of suit, the erroneous refusal of the court to so charge was immaterial.—*Id.*

—1069 (Tex.Civ.App.) In suit against railroad for killing of mules, error in refusing to allow jury to take to the jury room plaintiff's written statement as to his ownership as expressly authorized by *Vernon's Sayles' Ann. Civ. St. 1914, art. 1957*, *held* prejudicial error.—*Texas & N. O. R. Co. v. Turner*, 182 S. W. 357.

—1071 (Tex.Civ.App.) The finding of immaterial facts cannot be made ground for reversal if the judgment is not in conflict with the find-

ings upon material issues.—*J. M. Guffey Petroleum Co. v. Dinwiddie*, 182 S. W. 444.

⇒1071 (Tex.Civ.App.) In an action on a note, where judgment was rendered on a renewal note, the issue as to former owner's indorsement of the original subsequent to maturity was immaterial, and the trial court's failure to find thereon was not reversible error.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

The trial court's failure to file findings and conclusions is not cause for which the courts have reversed judgment where there is a statement of facts.—*Id.*

In an action on a note and to foreclose a deed of trust, where defendants claimed a homestead, the trial court's failure to make findings of fact, upon which its conclusion of defendant's abandonment could have been based, made a judgment in accordance with such conclusion erroneous, and it required reversal.—*Id.*

⇒1073 (Tex.Civ.App.) That a recovery was in the name of executrix, as authorized by federal Employers' Liability Act, instead of surviving wife, children, and parents, as required by state statutes, held not material, where verdict and judgment specify particular amounts to which wife, children, and surviving parent are entitled.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

(I) Error Waived in Appellate Court.

⇒1078 (Ark.) Grounds of a motion for a new trial not specifically argued in the brief may be treated as abandoned.—*Shawmut Lumber Co. v. Waites*, 182 S. W. 907.

⇒1078 (Mo.App.) A question not briefed by either party will not be determined on appeal.—*Stockwell Co. v. Union Pac. Ry. Co.*, 182 S. W. 829.

⇒1078 (Tex.Civ.App.) Where no attack is made in the brief upon a special verdict, it is conclusive as between the parties under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1886*, until set aside.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

(J) Decisions of Intermediate Courts.

⇒1095 (Tex.Civ.App.) An oversight of undisputed facts by the Court of Civil Appeals does not constitute prejudicial error, since the Supreme Court may consider such facts without a finding as to the same.—*Cattlemen's Trust Co. of Ft. Worth v. Turner*, 182 S. W. 438.

(K) Subsequent Appeals.

⇒1086 (Ky.) Where, on the second appeal of a case, the pleadings, evidence, and rulings are substantially the same, the first opinion is the law of the case, as to errors which might have been relied on whether or not brought to the attention of the court or noticed in the opinion.—*Nashville, C. & St. L. Ry. Co. v. Henry*, 182 S. W. 651.

⇒1096 (Ky.) Matters brought to the attention of the court on former appeal, but for which judgment was not reversed, they being unnoticed in the opinion, must be considered on second appeal as res adjudicata and as having been decided adversely to the appellant on former appeal.—*Nashville, C. & St. L. Ry. Co. v. Banks*, 182 S. W. 660.

⇒1099 (Ky.) Where, in the first appeal of a case, plaintiff's evidence was sufficient to take the case to the jury and sustain a verdict, and the evidence in the second trial is as favorable, the first opinion governs a second appeal.—*Nashville, C. & St. L. Ry. Co. v. Henry*, 182 S. W. 651.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

⇒1108 (Tex.) In an action on a life policy, where, after judgments for the beneficiary in

the district court and Court of Civil Appeals, the insured is discovered to be alive, plaintiff's and defendant's motion in the Supreme Court that the petition for writ of error be granted and the cause remanded for dismissal will be granted.—*Knights of the Maccabees of the World v. Parsons*, 182 S. W. 672.

(B) Affirmance.

⇒1140 (Mo.App.) In action against estate of plaintiff's mother for board, nursing, and services, failure to direct deduction of amount which will be directed to be paid for board, held curable by remittitur.—*Le Count v. Fountain's Estate*, 182 S. W. 102.

⇒1140 (Mo.App.) In an action for actual and punitive damages for wrongfully excluding plaintiff from its train and for procuring his arrest on a false charge, a remittitur waiving the award of actual damages cures any error in wrongfully admitting evidence of elements of damage not pleaded.—*Davis v. Chicago, R. I. & P. Ry. Co.*, 182 S. W. 826.

⇒1140 (Tex.Civ.App.) In an action for libel, error in submitting elements of special damages was harmless, where the appellate court required plaintiff to file a remittitur before affirmance.—*Houston Chronicle Pub. Co. v. Wegner*, 182 S. W. 45.

On error by the trial court, probably or possibly causing rendition of an excessive verdict, when it is impossible for appellate court to mathematically determine the excess erroneously found, *Rev. St. 1911, art. 1631*, does not apply, and the entire judgment will be reversed, and the cause remanded for another trial.—*Id.*

When it can be determined by the appellate court what excessive amount has been found by the jury by reason of an erroneous instruction, the court is authorized to cure such error by requiring a remittitur.—*Id.*

(C) Modification.

⇒1151 (Mo.App.) Error in authorizing interest on an insurance contract only from commencement of trial instead of date of denial of liability does not require another trial.—*Keeton v. National Union*, 182 S. W. 798.

(D) Reversal.

⇒1170 (Mo.App.) An instruction that assumes defendant's liability and its effort to escape because of an act of God, when the damages sued for may be attributed to defendant's negligence or an act of God, is not such material error as permits reversal in view of *Rev. St. 1909, § 2082*.—*Hoelscher v. Missouri, K. & T. Ry. Co.*, 182 S. W. 1078.

⇒1170 (Mo.App.) Under *Rev. St. 1909, § 2082*, the court cannot reverse a judgment for error in an instruction not actually misleading to the prejudice of the party complaining.—*Jeffries v. Chicago & A. R. Co.*, 182 S. W. 1082.

⇒1170 (Mo.App.) The giving of an erroneous instruction held one affecting the merits of the action, and so it could not be disregarded under *Rev. St. 1909, § 2082*.—*Collins v. Smith*, 182 S. W. 1087.

⇒1170 (Tex.Civ.App.) Where the charge as a whole fairly presented the case, judgment will not be reversed on account of technical defects.—*Panhandle & S. F. Ry. Co. v. Jones*, 182 S. W. 1.

⇒1170 (Tex.Civ.App.) In suit against railroad for killing mules, error in refusing to allow jury to take to the jury room plaintiff's written statement, as expressly permitted by *Vernon's Sayles' Ann. Civ. St. 1914, art. 1957*, held not harmless within rule 62a for Courts of Civil Appeals (149 S. W. x).—*Texas & N. O. R. Co. v. Turner*, 182 S. W. 357.

⇒1170 (Tex.Civ.App.) Under rule 62a of the Court of Civil Appeals (149 S. W. x), prohibiting reversal for harmless error, the Court of

Civil Appeals cannot reverse for error from which no substantial injury resulted.—Koch v. Noster, 182 S. W. 372.

⚡1171 (Ky.) In suit under the advancement statute, *held*, under the circumstances, that the disallowance of a fee to which the attorneys for plaintiff were entitled was not ground for reversal.—McCray v. Corn, 182 S. W. 640.

⚡1175 (Ark.) Where the case was fully developed, and it appeared plaintiff was not entitled to recover, and that defendants were entitled to a peremptory instruction, judgment for plaintiff should be reversed and dismissed.—Prescott & N. W. Ry. Co. v. Hopkins, 182 S. W. 551.

⚡1175 (Mo.App.) Where, after judgment for defendant on his counterclaim, he entered a remittitur, but no change was made in the judgment, in the absence of error in the record the court on appeal would enter proper judgment or reverse with directions to enter same.—Earls v. Earls, 182 S. W. 1018.

⚡1175 (Mo.App.) Where plaintiffs took a nonsuit, defendant, though successful on appeal from an order setting it aside and granting new trial, is not entitled to final judgment, but merely reversal of the order.—Crawford v. North American Union, 182 S. W. 1043.

⚡1175 (Tex.Civ.App.) Where the case was fully developed below, and the evidence showed defendant was not liable, judgment for plaintiff should be reversed on appeal without remand.—Kansas City, M. & O. Ry. Co. of Texas v. Adams, 182 S. W. 365.

⚡1176 (Mo.App.) Where, after judgment for defendant on his counterclaim, he entered a remittitur, but no change was made in the judgment, in the absence of error in the record, the court on appeal would enter proper judgment or reverse with directions to trial court to enter same.—Earls v. Earls, 182 S. W. 1018.

(F) **Mandate and Proceedings in Lower Court.**

⚡1195 (Mo.App.) Questions determined on writ of error to review a judgment are finally adjudicated between the parties, and cannot be raised again by the defeated party moving to quash an execution on the judgment.—Stegall v. American Pigment & Chemical Co., 182 S. W. 1086.

APPEARANCE.

⚡24 (Mo.App.) Where defendant's property was attached his appearance and filing of a plea to abate the attachment will not give the court jurisdiction over the attachment, where the affidavit was insufficient.—First Nat. Bank of Appleton City v. Griffith, 182 S. W. 805.

In view of Rev. St. 1909, § 2329, defendant's appearance and plea in abatement *held* a waiver of any failure to serve a writ of attachment upon him.—Id.

APPLIANCES.

See Master and Servant, ⚡103.

APPLICATION.

See Criminal Law, ⚡608, 957, 959; Payment.

APPOINTMENT.

See Guardian and Ward, ⚡10; Railroads, ⚡205.

APPROPRIATION.

See Counties, ⚡162; Schools and School Districts, ⚡93.

APPROVAL.

See Statutes, ⚡30.

ARBITRATION AND AWARD.

See Submission of Controversy.

ARGUMENT OF COUNSEL.

See Appeal and Error, ⚡1060; Criminal Law, ⚡713-730, 1171; Trial, ⚡114-133.

ARREST.

See Bail; Extradition, ⚡35; False Imprisonment.

ASPORTATION.

See Larceny, ⚡17.

ASSAULT AND BATTERY.

See Homicide, ⚡39, 86-90, 141, 310; Municipal Corporations, ⚡189.

II. CRIMINAL RESPONSIBILITY.

(A) **Offenses.**

⚡58 (Mo.) Under Rev. St. 1909, § 4483, punishing maiming, wounding, or disfiguring, *held* only necessary to show that the infliction of the wounds was not excusable or justifiable, and would constitute murder or manslaughter if death ensued.—State v. Webb, 182 S. W. 975.

⚡64 (Tex.Cr.App.) A guardian having emancipated his ward cannot justify an assault and battery on her because of the relationship.—Eitel v. State, 182 S. W. 318.

⚡66 (Mo.) That prosecutor feloniously assaulted by accused had, some hours before, as superintendent of schools, chastized accused's son *held* not to justify the offense punishable under Rev. St. 1909, § 4483.—State v. Webb, 182 S. W. 975.

⚡66 (Tex.Cr.App.) By express provision of Pen. Code 1911, art. 1016, verbal provocation does not justify assault and battery, but can be considered only in mitigation of punishment.—Eitel v. State, 182 S. W. 318.

⚡68 (Mo.App.) Where defendant's son was in an affray, *held* that defendant had the same right to act in his defense as the son had to act in his own defense.—State v. McNail, 182 S. W. 1081.

(B) **Prosecution and Punishment.**

⚡78 (Mo.) An information, charging felonious assault punishable under Rev. St. 1909, § 4483, need not allege the particular means by which the maiming and wounding were done.—State v. Webb, 182 S. W. 975.

⚡80 (Mo.) A felonious assault, punishable under Rev. St. 1909, § 4483, may be charged in the information to have been committed by different means, and proof of any will sustain the information.—State v. Webb, 182 S. W. 975.

⚡92 (Mo.) Evidence *held* to justify a conviction of felonious assault punishable under Rev. St. 1909, § 4483.—State v. Webb, 182 S. W. 975.

⚡96 (Mo.) On a trial for felonious assault, an instruction on the presumption that a person intends the probable consequences of his acts *held* warranted by the evidence.—State v. Webb, 182 S. W. 975.

⚡96 (Mo.App.) The defendant, in a prosecution for assault, is entitled to an instruction on self-defense, though his own testimony is the only evidence to support it.—State v. Robinson, 182 S. W. 113.

Where defendant's testimony conclusively showed that he was the aggressor and had no reasonable ground to believe himself in danger of bodily harm, the court properly refused to instruct on self-defense.—Id.

⚡96 (Mo.App.) Where a father contended that he interfered in a fight only to protect his son from grievous injury, and used no more force than was necessary, *held*, that the court should charge on that theory.—State v. McNail, 182 S. W. 1081.

ASSESSMENT.

See *Highways*, ¶122, 130; *Insurance*, ¶349, 750; *Municipal Corporations*, ¶450.

ASSETS.

See *Marshaling Assets and Securities*.

ASSIGNMENT OF ERRORS.

See *Appeal and Error*, ¶719-750.

ASSIGNMENTS.

See *Assignments for Benefit of Creditors*; *Chattel Mortgages*, ¶205; *Fraudulent Conveyances*; *Mortgages*, ¶249; *Vendor and Purchaser*, ¶261.

I. REQUISITES AND VALIDITY.

(A) *Property, Estates, and Rights Assignable.*

¶3 (Tex.Cr.App.) Acts 34th Leg. c. 28, regulating loan brokers, and providing by section 11 that each assignment of wages and bill of sale upon the household furniture of a married man should be void unless made with the consent of his wife, joining in the assignment, and signing and acknowledging it, *held* constitutional, as promoting the public welfare.—*Ex parte Hutsell*, 182 S. W. 458.

IV. ACTIONS.

¶129 (Tex.Civ.App.) An attorney to whom was assigned a contingent interest in the amount to be recovered was not such an interested party as to require that he be made a party to the action or to make the petition, which failed to make him a party subject to a plea in abatement for defect of parties.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.**I. REQUISITES AND VALIDITY.**

(A) *Nature and Essentials of Trust for Creditors.*

¶39 (Ark.) In the absence of statute, a provision in an assignment for the benefit of creditors that as a condition precedent to participation in the funds assigned, the creditors should release the debtor, would render the assignment void, even though all the debtor's property was included.—*Nelson v. Harper*, 182 S. W. 519.

Under the statute a creditor of a debtor who has assigned for the benefit of creditors cannot ignore the assignment and subject the property to the payment of his debt, though the assignment stipulates for the release from further payment.—*Id.*

(B) *Form and Requisites of Instruments.*

¶52 (Tex.Civ.App.) Where a tenant farmer orally agreed with his landlord that the latter should pay for completing and sell the tenant's cotton crop and apply the proceeds to the tenant's debt to the landlord for advances to make it, accounting for any excess, the transaction was within Rev. St. 1911, art. 91, requiring general assignments by insolvent debtors for the benefit of creditors to be in writing.—*Kimbrough v. Bevering*, 182 S. W. 408.

II. CONSTRUCTION AND OPERATION IN GENERAL.

¶193 (Ark.) Property of a debtor in possession of trustee under an assignment for the benefit of all his creditors could not be reached by garnishment issued at the instance of one of the creditors to have his claim satisfied in full, as the fund must go to all the creditors pro rata.—*Nelson v. Harper*, 182 S. W. 519.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.

¶208 (Ark.) An instrument under which the assignee took possession of the property and directed an inventory, which was made, was not affected as an assignment for the benefit of creditors, although the assignee did not comply with Kirby's Dig. § 336, in regard to filing his inventory and bond with the clerk of the chancery court.—*Nelson v. Harper*, 182 S. W. 519.

ASSOCIATIONS.

See *Insurance*, ¶687; *Partnership*, ¶41.

ASSUMPSIT, ACTION OF.

See *Account Stated*; *Work and Labor*.

ASSUMPTION.

See *Trial*, ¶352.

Of risk, see *Master and Servant*, ¶203-226, 280, 288, 295.

ATTACHMENT.

See *Execution*; *Exemptions*; *Garnishment*; *Justices of the Peace*, ¶86; *Homestead*; *Sequestration*.

I. NATURE AND GROUNDS.

(A) *Nature of Remedy, Causes of Action, and Parties.*

¶20 (Mo.App.) Where a writ of attachment issued on a void affidavit was not served, a second writ issued on a proper affidavit under Rev. St. 1909, §§ 2294, 2298, *held* valid, being considered as the first writ; it being the first one issued on a valid affidavit.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

III. PROCEEDINGS TO PROCURE.

(A) *Jurisdiction and Venue.*

¶73 (Mo.App.) Jurisdiction over the subject-matter of an attachment is obtained by levy thereon of a writ properly issued.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

(B) *Affidavits.*

¶91 (Mo.App.) An affidavit for attachment was valid, though the caption named the county of the principal case, and the jurat showed that it was taken in another county, where the notary was authorized to administer oaths.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

¶122 (Mo.App.) Where the original affidavit for an attachment was a nullity, it cannot be amended so as to justify the issuance of the attachment, though Rev. St. 1909, § 2341, authorizes the amendment of affidavits for attachment.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

(C) *Security.*

¶134 (Mo.App.) Where the court, after the filing of an affidavit and bond ordered a writ of attachment to issue, it impliedly approved the bond, though the record did not disclose a formal order of approval.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

¶138 (Mo.App.) By filing a plea in abatement to a writ of attachment, defendant waived any defect arising out of the court's failure to approve the bond.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

VIII. CLAIMS BY THIRD PERSONS.

¶314 (Tenn.) In attachment, where defendant intervened, replevying the property, under Shannon's Code, § 5269, and sections 5131-5144,

relating to actions of replevin, and providing for alternative judgments for monetary value of property or its return, are not applicable, and, judgment going against the intervener, there should be no provision for return.—*People's Nat. Bank v. Corse*, 182 S. W. 917.

XI. WRONGFUL ATTACHMENT.

§375 (Tex.Civ.App.) The general rule that one injured by a wrongful attachment cannot recover for loss of business or future profits applies only where the measure of damages is the value of property taken, and not where the recovery is for detention of property or interruption of its use.—*Hamlett v. Coates*, 182 S. W. 1144.

ATTORNEY AND CLIENT.

See Appeal and Error, §1060; Assignments, §129; Bills and Notes, §126, 534; Costs, §308; Criminal Law, §661½, 713-730, 1037, 1171; District and Prosecuting Attorneys; Divorce, §221, 227; Drains, §14; Garnishment, §191; Malicious Prosecution, §21; Partition, §114; Trial, §114-138.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§128 (Mo.App.) Assignee of contestant of will consenting to settlement by defendant, the attorney for the other contestant, and to defendant's agreement to pay him his share, held entitled to recover from the defendant.—*Young v. Miller*, 182 S. W. 822.

In a suit by assignee of contestant of will to recover his share of the proceeds of a settlement in the hands of the attorney and of another contestant, the attorney held a proper party defendant.—*Id.*

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§140 (Ark.) What is a reasonable attorney's fee for services performed is usually one of fact to be determined from the weight of evidence.—*Sain v. Bogle*, 182 S. W. 515.

Statement of elements to be considered in determining a reasonable attorney's fee.—*Id.*

§143 (Tex.Civ.App.) Where the attorney of an injured servant suing for damages was assigned one-half the amount which might be recovered, the transfer being made before the filing of the petition, the attorney's interest was contingent upon collection, and was a mere assignment of funds to be collected.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

§166 (Ark.) In action by attorneys to recover share of fee collected by other attorneys associated in the case, evidence held to support finding that plaintiffs were employed and were entitled to \$1,500 fee on quantum meruit.—*Stuckey v. Norwood*, 182 S. W. 528.

AUTHENTICATION.

See Evidence, §378, 380.

AUTHORITY.

See Principal and Agent, §103-111, 148-159, 178.

AUTOMOBILES.

See Bailment, §18, 31; Carriers, §2; Eminent Domain, §2; Highways, §176, 184; Licenses, §6, 7; Municipal Corporations, §703; Street Railroads, §110.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

§43 (Tex.Cr.App.) Where relator was charged with murder committed in perpetration of robbery and proof of his presence or connection with the homicide was not evident, relator held entitled to bail.—*Ex parte Lopez*, 182 S. W. 310.

§53 (Tex.Cr.App.) Bail in the sum of \$1,000 from one accused of murder and robbery, held not to be reduced pending action of grand jury, though offense was made out by accomplice testimony.—*Ex parte Castorena*, 182 S. W. 1119.

BAILMENT.

See Embezzlement; Pledges.

§18 (Mo.App.) Party constructing automobile body and attaching it to chassis owned by plaintiff held to have artisan's lien on the chassis.—*Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co.*, 182 S. W. 759.

§31 (Mo.App.) In action in which recovery was sought for constructing automobile body, jury held not bound to accept plaintiff's evidence as to manner in which work was done; there being evidence to the contrary.—*Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co.*, 182 S. W. 759.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Actions by or Against Trustee.

§296 (Tex.Civ.App.) Where a partner was a trustee in bankruptcy, and his copartners secured an injunction against his delivery to his successor of alleged partnership funds received by the trustee, the funds, having been received by the successor without notice, are no longer subject to the jurisdiction of the state court.—*Broussard v. Le Blanc*, 182 S. W. 78.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§395 (Tex.Civ.App.) A creditor not a party to the debtor's bankruptcy proceedings was not bound by the decree of the federal court setting aside to the bankrupt and his wife certain lands as a homestead.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

Exempt property is never really in bankruptcy court, as the bankruptcy court has no jurisdiction of it except to set it aside as exempt property, and as the rights of the lien creditors with reference to it must be determined in the state courts.—*Id.*

§407 (Tex.Civ.App.) A "false" statement in obtaining credit, which under Bankr. Act July 1, 1898, § 14b (3), as amended by Act June 23, 1910, § 6, will prevent discharge of bankrupt, must not only have been untrue, but knowingly made.—*Hamlin v. J. M. Radford Grocery Co.*, 182 S. W. 716.

§425 (Tex.Civ.App.) Where it did not appear that a bankrupt scheduled a debt, and the creditor had no actual notice of the bankruptcy proceedings, the bankrupt was not discharged from liability on such debt.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

§436 (Tex.Civ.App.) The burden of proving that a creditor's debt was duly scheduled in the debtor's bankruptcy proceeding, and that the creditor had either statutory or other actual notice of the proceeding, rested upon the bankrupt.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

BANKS AND BANKING.

See Abatement and Revival, ¶45; Evidence, ¶20; Principal and Surety, ¶75, 79.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(B) Capital, Stock, and Dividends.

¶39 (Tex.Civ.App.) Where, after a bank has become insolvent and is being wound up, one is sued on his subscription to its stock, the fact that his subscription was on agreement that it should be paid from dividends is not available as a defense.—*McWhirter v. First State Bank of Amarillo*, 182 S. W. 682.

(D) Officers and Agents.

¶58 (Tenn.) A bill was prematurely brought at the chancellor's direction by the receiver of an insolvent bank against its officers and directors to recover for loans negligently made by them, whereby the insolvency was brought about, where the debtors were not wholly insolvent when suit was brought, but collections might yet be made from them, but it would be otherwise where such insolvency existed.—*Green v. Officers and Directors of Knoxville Banking & Trust Co.*, 182 S. W. 244.

A bill filed by an insolvent bank's receiver at the direction of the chancellor to recover of officers and directors for loans negligently made was maintainable although the bank's assets were not first exhausted, the measure of damages being the amount of the negligent loans finally lost after due efforts to collect.—*Id.*

The right of action of an insolvent bank's receiver at the instance of the chancellor to recover of officers and directors for loans negligently made was not impaired by the fact that, if all the assets in the receiver's hands should be realized and the whole demand made against the directors be successfully prosecuted, there would not be enough assets produced to satisfy the bank's debts.—*Id.*

Allegations of negligence alone in a bill by the receiver of an insolvent bank at the instance of the chancellor against officers and directors to recover for fraud, willful mismanagement, and negligence, resulting in the insolvency, held sufficient to justify overruling of defendant's demurrer.—*Id.*

Under the common law a bank itself has the right to redress for injuries inflicted upon it by the acts denounced by Shannon's Code, §§ 2067, 2068, and 3242, giving persons injured, generally, by the misconduct of the officers or directors of a bank, a right of action.—*Id.*

A bill by the receiver of an insolvent bank filed at the instance of the chancellor to recover against its officers and directors for loans negligently made did not need to set out the particular circumstances of each loan, showing the situation and surroundings of the parties.—*Id.*

In suit by the receiver of an insolvent bank to recover of officers and directors for loans negligently made, that items catalogued in the bill as cash items and overdrafts were undated did not render it demurrable as to defendants who served five directorates, the period sued for; it being alleged that the items occurred during such period.—*Id.*

(E) Insolvency and Dissolution.

¶77 (Tex.Civ.App.) Under authority of the commissioner of banking, an action to realize on assets may be maintained in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs.—*McWhirter v. First State Bank of Amarillo*, 182 S. W. 682.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

¶127 (Ark.) Prima facie, in the absence of a contrary intention of the parties, express or implied, when a bank receives a check and places the amount to the credit of its customer, the title of the check is vested in the bank.—*Sanders v. W. B. Worthen Co.*, 182 S. W. 549.

In an action by a bank which received a check, payment of which was later stopped by the drawer, evidence held sufficient to justify the chancellor in finding that it was the intention of the parties that title to the check should pass to the bank when it received it and credited the amount to its customer's account.—*Id.*

In an action by a bank which credited to its customer's account the amount of a check, payment of which was afterwards stopped by the drawer, evidence held sufficient to warrant the chancellor in finding that the drawer signed the check.—*Id.*

¶138 (Mo.App.) The relation of a bank and a depositor is that of debtor and creditor, and as to checking accounts the contractual obligation assumed by the bank is to pay on presentation the checks drawn by the depositor.—*S. S. Allen Grocery Co. v. Bank of Buchanan County*, 182 S. W. 777.

¶148 (Mo.App.) The president of a corporation signing checks in blank held, under the facts, guilty of gross negligence estopping the corporation from recovering from the bank money paid when the checks were put in circulation by a thief.—*S. S. Allen Grocery Co. v. Bank of Buchanan County*, 182 S. W. 777.

A bank paying forged paper when there are no funds to the credit of the maker, who signed the check in blank, is to be treated as a bona fide purchaser, and not in the relation of bank to depositor.—*Id.*

The result of signing and keeping blank checks, whether the keeping be negligent or careful, is assumed by the maker, and not the bank who pays it.—*Id.*

A bank is bound to know the signature of a depositor, but is not bound to draw suspicious inferences from the discovery that the body of the check is in unfamiliar handwriting.—*Id.*

A bank is not put on guard in paying a check, genuinely signed by a depositor, by the fact that it is larger in amount than the maker had previously drawn, and that the depositor overdrew the account.—*Id.*

(E) Loans and Discounts.

¶180 (Mo.App.) While Rev. St. 1909, § 1086, prohibits a bank from taking its own stock as security for a loan, the statute applies only to a loan contemporaneously made, and permits the taking of such security to prevent loss upon a debt previously contracted.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

BAR.

See Equity, ¶72; Judgment, ¶565; Limitation of Actions, ¶175.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Insurance, ¶687.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, ¶400; Evidence, ¶178.

BETTERMENTS.

See Improvements.

BILL OF LADING.See Carriers, **83**.**BILL OF PARTICULARS.**See Pleading, **317**.**BILL OF REVIEW.**See Judgment, **335**; Limitation of Actions, **72**.**BILL OF SALE.**See Sales, **149**.**BILLS AND NOTES.**

See Action, **25**; Corporations, **414, 415**; Evidence, **419, 441**; Guaranty, **36**; Judgment, **691**; Limitation of Actions, **119**; Pleading, **8**; Principal and Agent, **111**; Principal and Surety, **104, 192, 193, 194**.

I. REQUISITES AND VALIDITY.**(C) Execution and Delivery.**

63 (Mo.App.) The delivery of an incomplete negotiable instrument by the maker, who signs it, is indispensable to the creation of a contractual obligation on the part of the maker.—S. S. Allen Grocery Co. v. Bank of Buchanan County, 182 S. W. 777.

(B) Consideration.

96 (Tex.Civ.App.) That defendants signed note without consideration at plaintiff payee's request upon his statement that he was hard pressed for money and their signature would enable him to sell the note, which was given by principal maker in payment of account due, held not to state defense.—Magill v. McCamley, 182 S. W. 22.

(F) Validity.

106 (Tenn.) A note executed in violation of a penal statute is absolutely void, not only between the parties, but even as against an innocent holder.—Cohn v. Lunn, 182 S. W. 584.

107 (Tenn.) Acts 1897, c. 77, requiring notes for patent right or interest therein to so show on their face, held not applicable to note given for patented articles with grant of exclusive license to sell.—Cohn v. Lunn, 182 S. W. 584.

Acts 1897, c. 77, as to notes for patent right showing facts on their face, held a penal act, and to be strictly construed.—Id.

II. CONSTRUCTION AND OPERATION.

121 (Ky.) One signing a note without anything appearing to indicate that he signed as surety is primarily liable thereon within Negotiable Instruments Act, § 191, and is only discharged in one of the ways provided in section 119.—Elsley v. People's Bank of Bardwell, 182 S. W. 873.

126 (Tenn.) An indorser of a note, stipulating for payment of attorney's fees in case of suit, though he be an accommodation indorser, is liable for such fees, especially where he waives demand, protest, and notice, conditions precedent to his liability.—Franklin v. The Duncan, 182 S. W. 230.

IV. NEGOTIABILITY AND TRANSFER.**(A) Instruments Negotiable.**

146 (Ky.) The negotiable instruments act, covers the subject of negotiable instruments and controls in all cases to which it is applicable.—Elsley v. People's Bank of Bardwell, 182 S. W. 873.

171 (Ark.) That the payee of a note indorsed it without recourse did not impair its negotiability.—Morehead v. Harris, 182 S. W. 521.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(B) Indorsement for Transfer.**

298 (Tenn.) Both at common law and under Negotiable Instruments Law, §§ 64, 68, defendant, who first indorsed a note for the accommodation of the maker, held liable at the suit of the subsequent indorser.—Cohn v. Hitt, 182 S. W. 235.

301 (Tenn.) The first indorser of a note is not discharged because the maker engaged a discount broker to secure discount and such broker also indorsed the instrument.—Cohn v. Hitt, 182 S. W. 235.

(D) Bona Fide Purchasers.

327 (Ark.) To constitute one a "bona fide holder" of a negotiable instrument it is essential that he take it bona fide for a valuable consideration in the usual course of business before maturity, without notice of any existing defense or of dishonor thereof.—Morehead v. Harris, 182 S. W. 521.

337 (Ark.) A recorded mortgage indicating that it was given to indemnify S. and three other indorsers, when, in fact, S. did not sign the note, held not to put a transferee of the note on notice that the three indorsed on condition that the note should not be delivered or become effective until also signed by S.—Morehead v. Harris, 182 S. W. 521.

340 (Tex.Civ.App.) The indorsee of a note executed by the president of a corporation and purporting to be secured by a lien on corporate land, and pledged to secure a debt partly owed by him, was charged with notice that the president was not authorized to give liens, and it was not an innocent purchaser.—El Fresnal Irrigated Land Co. v. Bank of Washington, 182 S. W. 701.

342 (Ark.) That the payee of a note indorsed it without recourse did not put the indorsee on notice of any infirmity or defenses.—Morehead v. Harris, 182 S. W. 521.

342 (Tex.Civ.App.) The indorser of notes purporting on their face to be secured by a lien in a recorded deed was charged with notice that no lien was reserved in the deed, and he was not an innocent purchaser.—El Fresnal Irrigated Land Co. v. Bank of Washington, 182 S. W. 701.

345 (Tex.Civ.App.) Where the president of a corporation executes notes without consideration to another corporation, and these notes are shortly pledged to a bank with other collateral to secure a debt partly owed by the said president, the circumstances were such as to put the bank on notice of a fraudulent conspiracy to defraud the corporation.—El Fresnal Irrigated Land Co. v. Bank of Washington, 182 S. W. 701.

375 (Tenn.) A note executed in violation of a penal statute is absolutely void, not only between the parties, but even as against an innocent holder.—Cohn v. Lunn, 182 S. W. 584.

377 (Mo.App.) Mere negligence in the keeping of a signed blank negotiable instrument which was afterwards stolen, filled out, and put in circulation by a thief should not be regarded as the proximate cause of the loss.—S. S. Allen Grocery Co. v. Bank of Buchanan County, 182 S. W. 777.

The maker or acceptor of negotiable paper may be guilty of conduct in the care of paper signed in blank which would estop him from disputing the title of an innocent holder, notwithstanding Negotiable Instruments Law.—Id.

VII. PAYMENT AND DISCHARGE.

430 (Mo.App.) Where a third party negotiated a loan on his own note and defendant's payable to a bank, a settlement of the third party's liability on the loan by payment of his own note did not divest the bank of its interest

in defendant's note.—Security Nat. Bank v. Field, 182 S. W. 815.

VIII. ACTIONS.

⚡485 (Mo.App.) The execution of a note, not denied under oath, stands admitted.—Davidson v. Spitscaufsky, 182 S. W. 106.

⚡497 (Tex.Civ.App.) Where notes were evidently without consideration and fraudulently put in circulation, the burden is upon an indorser to prove that he is a bona fide holder.—El Fresnal Irrigated Land Co. v. Bank of Washington, 182 S. W. 701.

⚡534 (Tenn.) Allowance of attorney's fees, stipulated for in a mortgage note, *held* proper, over objection that suit was unnecessary, where it appeared that the suit was necessitated by the filing of a creditors' bill, and by an injunction preventing the holder from foreclosing the mortgage except in that suit.—Franklin v. The Duncan, 182 S. W. 230.

⚡537 (Ark.) Where in a transferee's action on a note there was no evidence that plaintiff had notice of any equitable defenses, or of facts which would have put him on inquiry, or was not a bona fide holder, the court properly instructed a verdict for plaintiff.—Morehead v. Harris, 182 S. W. 521.

BLASTING.

See Nuisance, ⚡72.

BONA FIDE PURCHASERS.

See Bills and Notes, ⚡327-377; Vendor and Purchaser, ⚡228-242.

BONDS.

See Appeal and Error, ⚡387; Assignments for Benefit of Creditors, ⚡208; Attachment, ⚡134; Bail; Counties, ⚡178, 180; Highways, ⚡90; Justices of the Peace, ⚡191; Mechanics' Liens, ⚡315; Municipal Corporations, ⚡189, 917, 921; Principal and Surety; Schools and School Districts, ⚡81; Sheriffs and Constables; Subrogation; United States, ⚡67.

BOUNDARIES.

See Evidence, ⚡83; States, ⚡13.

I. DESCRIPTION.

⚡3 (Ky.) In construing deeds and in locating lines and corners in the description of the land conveyed, courses and distances surrender to natural objects.—Gilbert v. Parrott, 182 S. W. 859.

⚡7 (Ky.) Deed describing boundary as beginning at beech in upper corner of land of H., *held* to refer to beeches mentioned in H.'s deed to adjoining land, and not to another point claimed by H. as his corner.—Gilbert v. Parrott, 182 S. W. 859.

Where location of natural object mentioned in description of boundary is disputed, that object *held* to be accepted which apparently carries out intention and most nearly conforms to courses and distances as well as to quantity of land.—Id.

⚡20 (Tex.Civ.App.) Where plaintiff sold lot on platted unopened street to defendant railroad, after abandonment of street by city ordinance, title to middle of street passed under the deed.—Amerman v. Missouri, K. & T. Ry. Co. of Texas, 182 S. W. 54.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚡33 (Tex.Civ.App.) In trespass to try title, *held*, that the presumption was that bearing trees at points called for by field notes were

there once, and, even in their absence, the boundaries of the survey would be fixed in accordance with the notes.—Goodrich v. West Lumber Co., 182 S. W. 841.

⚡37 (Tex.Civ.App.) In trespass to try title, evidence *held* to show the location of the northwest corner of a certain survey, and that a boundary line should run north 43 degrees east from such corner to the northeast corner of the survey, unless arrested.—Goodrich v. West Lumber Co., 182 S. W. 841.

BRANDS.

See Animals, ⚡10.

BRIEFS.

See Appeal and Error, ⚡758-773.

BROKERS.

See Evidence, ⚡417, 441; Factors; Frauds, Statute of, ⚡115, 116; Licenses, ⚡7; Principal and Agent; Usury, ⚡5.

II. EMPLOYMENT AND AUTHORITY.

⚡10 (Ky.) A contract which makes one the agent of the owner of land for the sale thereof is simply a listing contract, revocable at any time by the owner.—Fields & Combs v. Vizard Inv. Co., 182 S. W. 934.

BUILDING CONTRACTS.

See Principal and Surety, ⚡100.

BURGLARY.

See Criminal Law, ⚡349, 351, 359, 368, 372, 511, 761, 792.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡16 (Tex.Cr.App.) One who stood out in front of a saloon, keeping watch, while others broke and entered it, was guilty of burglary as a principal.—McPherson v. State, 182 S. W. 1114.

The mere presence of defendant where and when a saloon was being broken and entered did not constitute him a principal in the crime of burglary, unless he aided by his acts, or encouraged by his gestures, those engaged in the offense.—Id.

Defendant, present when a saloon was burglarized, entering from the front at the criminals' invitation, while they entered from the rear, was not guilty as a principal, unless acting in concert with them.—Id.

II. PROSECUTION AND PUNISHMENT.

⚡28 (Tex.Cr.App.) Where the indictment alleged burglary in the nighttime by force, with intent to steal, and the defendant was identified by one witness, but he denied that he burglarized the house, consent to the entry was not an issue.—Wilson v. State, 182 S. W. 891.

⚡36 (Tex.Cr.App.) In a prosecution for burglary of a saloon, where defendant, its former employé, was shown to have opened the saloon in the morning and closed it at night while working there, evidence that he had been in possession of a key, though he no longer worked there, was admissible.—McPherson v. State, 182 S. W. 1114.

⚡41 (Tex.Cr.App.) In a prosecution for burglary, evidence *held* sufficient to authorize a verdict of guilty as principal, but not as accessory.—Hightower v. State, 182 S. W. 492.

⚡41 (Tex.Cr.App.) Evidence *held* sufficient to support conviction.—McPherson v. State, 182 S. W. 1114.

☞42 (Tex. Cr. App.) Defendant's explanation of possession of property from burglarized house, which would exonerate him, must be shown false in order to obtain a conviction.—*Lanier v. State*, 182 S. W. 451.

☞45 (Tex. Cr. App.) On trial for burglary, conflict as to whether defendant obtained pistol from burglarized house from a witness for the state held a matter for the jury.—*Lanier v. State*, 182 S. W. 451.

CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

II. PROCEEDINGS AND RELIEF.

☞43 (Tex. Civ. App.) In suit to set aside conveyance, petition held to make issue as to fraudulent promise to pay cash consideration without intent of doing so, as to two lots, though one was alleged to have been included fraudulently.—*Wyatt v. Chambers*, 182 S. W. 16.

☞59 (Ky.) A grantee, in a deed executed by a married woman alone, may, on the cancellation of the deed, recover only the amount the improvements made on property enhanced the vendible value not exceeding the reasonable value.—*Daniels v. France*, 182 S. W. 919.

A grantee in a deed, executed by a married woman alone, who failed to perform his contract to support the grantor in consideration of the deed, could not, on the cancellation of the deed, recover for improvements or past support.—*Id.*

A grantee, agreeing to support the grantor and her husband for life, who left the grantor and her husband on the land to take care of themselves, did not perform his agreement, and was entitled to no relief on the cancellation of the deed at the suit of the grantor.—*Id.*

CARRIERS.

See Action, ☞27; Commerce, ☞33; Constitutional Law, ☞297; False Imprisonment, ☞15; Pleading, ☞290; Railroads, ☞212; Street Railroads; Trial, ☞191, 194, 219, 296, 253.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

☞2 (Tex. Civ. App.) An ordinance regulating operation of jitneys and motor busses held not invalid.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

That operators of jitneys or motor busses are not able to comply with ordinance and will be required to abandon operation of their vehicles held not to establish unreasonableness or invalidity of ordinance.—*Id.*

That parties operating jitneys or motor busses will suffer a pecuniary injury from the enforcement of an ordinance regulating such vehicles does not tend to establish the invalidity of the ordinance.—*Id.*

II. CARRIAGE OF GOODS.

(C) Custody and Control of Goods.

☞71 (Tenn.) Railroad delivering carload of beans to defendant on his innocent presentation of false bill of lading held entitled to recover against defendant, on ground of misrepresentation of a material fact by mistake, upon which it had been induced to act.—*Louisville & N. R. Co. v. McKay & Morgan*, 182 S. W. 585.

Railroad which had delivered carload of goods to defendant on his innocent presentation of forged bill of lading held entitled to recover, on principle that, where one of two innocent parties must suffer, that one whose act occasioned the loss must bear it.—*Id.*

Where a carrier through mistake or fraud has been induced to deliver goods to the wrong person, it may maintain an action against such person for damages.—*Id.*

☞76 (Mo. App.) A suit on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S. W. 131.

☞76 (Mo. App.) Son, undertaking to bury mother's body and assuming responsibility for funeral expenses and transportation charges, held entitled to sue carrier for mishandling of the corpse and box containing it in his presence.—*Wall v. St. Louis & S. F. R. Co.*, 182 S. W. 1057.

(D) Transportation and Delivery by Carrier.

☞83 (Tenn.) A carrier is only authorized to deliver goods upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril and renders it liable to the holder of the genuine bill.—*Louisville & N. R. Co. v. McKay & Morgan*, 182 S. W. 585.

☞94 (Mo. App.) Party suing carrier for failure to deliver shipment, held entitled to sue either in tort or for breach of the contract of transportation.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S. W. 131.

(E) Delay in Transportation or Delivery.

☞102 (Tex. Civ. App.) At common law a shipper might rely either on an oral contract or recover for negligent delay where there was no contract.—*Panhandle & S. F. Ry. Co. v. Jones*, 182 S. W. 1.

(F) Loss of or Injury to Goods.

☞114 (Mo. App.) A railroad, whose relation to goods at the time of their destruction by fire is that of carrier, is liable as an insurer to safely carry and deliver.—*Dancinger Bros. v. Chicago, R. I. & P. Ry. Co.*, 182 S. W. 120.

Under bill of lading providing for notice to the consignee of arrival and for a return in ten days if not accepted, held, that where there was an unusual delay in the shipment and no notice to the consignee, the railroad, on their destruction by fire on the ninth day after arrival, was liable to the consignor as carrier.—*Id.*

☞114 (Tex. Civ. App.) A carrier of bananas, independent of the contract of shipment, owed the owner the duty to preserve the property after it reached destination until it was delivered.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

☞116 (Mo. App.) Where perishable goods could have been brought to destination in time for their marketing by transferring the shipment at an intermediate point to another train, failure to make such transfer is negligence rendering the carrier liable for the spoiling of the goods owing to the delay in shipment.—*Whitton v. Adams Express Co.*, 182 S. W. 137.

☞121 (Tex. Civ. App.) A carrier of bananas under contract whereby a messenger traveled with the shipment to advise concerning its protection en route, which carrier disregarded two requests of the messenger en route for protection against cold, could not escape liability because the messenger failed to ask that the fruit be protected at destination.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

☞129 (Mo. App.) Where defendant furnished an improper car for shipment of apples, the shipper's direction to connecting carrier to transport the car to its destination held not a waiver of damages.—*Smith v. Wabash R. Co.*, 182 S. W. 764.

☞131 (Tex. Civ. App.) In an action for damage to a shipment of bananas, where the petition described the property only as "four cars of bananas loaded in cars M. K. & T.," giving their numbers, such allegation was too indefinite as to the number of bunches or the value, and open to special exception.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

☞133 (Tex. Civ. App.) Testimony as to the condition of the bananas before they were de-

livered was admissible against the carrier.—*Illinois Cent. R. Co. v. Freeman*, 182 S. W. 369.

In an action for damage to a shipment of bananas which a carrier had agreed to place in its roundhouse on request of the messenger who traveled with them, testimony as to roundhouses on other roads than those of the contracting carriers was inadmissible.—*Id.*

—134 (Ky.) Evidence in action for damages to shipments of tobacco, held to sustain verdict for plaintiff for \$1,000.—*Louisville & N. R. Co. v. E. J. O'Brien & Co.*, 182 S. W. 227.

—134 (Mo.App.) In an action for damages for injuries to a shipment of apples, evidence held to show the injuries were caused by defendant's delivery of a beer car, instead of a refrigerator car, and not the shipper's delay in having the car forwarded by the connecting carrier.—*Smith v. Wabash R. Co.*, 182 S. W. 764.

—135 (Mo.App.) Verdict for \$500 punitive damages against carrier for mistreatment of corpse held not excessive, or so out of proportion to actual damages of \$5 as to show passion and prejudice.—*Wall v. St. Louis & S. F. R. Co.*, 182 S. W. 1057.

—136 (Tex.Civ.App.) Evidence, in an action for damages to household goods and wearing apparel, held to make defendant's negligence in not delivering the goods to plaintiff after their arrival at destination a question for the jury.—*Galveston, H. & S. A. Ry. Co. v. Wallraven*, 182 S. W. 21.

(G) Carrier as Warehouseman.

—140 (Mo.App.) A railroad, whose relation to goods at the time of their destruction by fire is that of warehouseman, is only liable for negligence.—*Dancinger Bros. v. Chicago, R. I. & P. Ry. Co.*, 182 S. W. 120.

(H) Limitation of Liability.

—159 (Mo.App.) A carrier of an intrastate shipment may incorporate in the contract of shipment a stipulation for written notice of damages.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S. W. 794.

A carrier of an intrastate shipment may waive the stipulation in the contract of shipment for written notice of damage.—*Id.*

—165 (Mo.App.) Evidence held to justify a finding that a carrier waived the stipulation in the contract for written notice of damage.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S. W. 794.

(I) Connecting Carriers.

—175 (Mo.App.) Carrier held liable to shipper for damages caused by connecting carrier's failure to deliver shipments at station of destination, resulting in consignee's refusal to accept.—*J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, 182 S. W. 131.

III. CARRIAGE OF LIVE STOCK.

—207 (Tex.Civ.App.) As the Carmack Amendment did not deprive shippers of remedies under the existing laws, a shipper of live stock may, where the written contract was not binding, recover under an oral contract.—*Panhandle & S. F. Ry. Co. v. Jones*, 182 S. W. 1.

Where the contract for an interstate shipment of cattle was oral, but just before the train started the shipper was required to sign a written bill of lading which he did not have time to read and could not have understood, the oral contract was not supplanted, the contract contained in the bill of lading not being mutual.—*Id.*

—207 (Tex.Civ.App.) Where a shipper of live stock, knowing that he would sign a written contract, orally contracted for cars for shipment, held, that the written contract, later executed, governs the carrier's liability.—*Kansas City, M.*

& O. Ry. Co. of Texas v. Adams, 182 S. W. 365.

—213 (Tex.Civ.App.) Though the market price was higher on the day the shipment reached the point of destination than on the day it should have reached there, the carrier is not entitled to a peremptory instruction, where the shipper sought recovery, not only for depreciation of the market, but for delay.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

—218 (Mo.App.) A stipulation of limited liability in a contract to transport live stock held not enforceable, where the carrier exacted a rate over that allowed by law.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S. W. 794.

—218 (Mo.App.) A bill of lading for an interstate shipment, providing that, in consideration of a reduced rate, a shipper of live stock should not recover more than \$100 for each horse or mule killed is valid.—*Jones v. Louisville & N. R. Co.*, 182 S. W. 1064.

Where a bill of lading fixed the recovery for loss of horses at \$100 in consideration of a reduced rate, the owner, though he receipted for the injured animal on representations by the local agent of the carrier that it was liable, cannot recover expenses in attempting to cure the horse.—*Id.*

—218 (Tex.Civ.App.) The agreement that a shipper should care for animals in transit is no defense to an action for damages to the same, unless the railroad company showed adequate facilities were provided and the agreement was reasonable.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

A stipulation in contract for shipment of live stock that the shipper would load the stock, care for and attend them while they were in the stockyards, and that the carrier should not be liable for any loss or damage while the stock were in the shipper's charge, is invalid.—*Id.*

An agreement requiring the shipper to inspect the cars, and accept them if in good condition, and declaring that in the event of failure it shall be conclusively presumed that the cars were suitable, is void.—*Id.*

Under Rev. St. arts. 708, 710, a stipulation freeing a railroad company from liability for injuries to animals because of heat, suffocation, or overcrowding, and declaring that injury should be presumed the result of overloading, is invalid.—*Id.*

Under Vernon's Sayles' Ann. Civ. 1914, art. 5713, an agreement in a contract for the shipment of live stock, requiring action, if brought, to be brought within six months, is void.—*Id.*

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, a stipulation, in a contract for the shipment of live stock, requiring presentation of claim to be made within 91 days, is no defense, and cannot be relied on, unless its reasonableness be pleaded.—*Id.*

—219 (Mo.App.) Where an initial carrier issued a through bill of lading for an interstate shipment over more than one railroad, proof that the animals were injured in transit, without proof of where the injury occurred, will support judgment against it.—*Jones v. Louisville & N. R. Co.*, 182 S. W. 1064.

—219 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 731, initial carrier may limit its liability for negligence to negligence occurring on its own line.—*Kansas City, M. & O. Ry. Co. of Texas v. Adams*, 182 S. W. 365.

—227 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, proof that a shipper did not file notice of claim within the time fixed by contract is inadmissible, where failure was not specially pleaded under oath; it being conclusively presumed that notice was given.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

In an action for injury to shipment of live

stock, a contract of shipment, part of the stipulations of which were void, and the other portion of which were not properly pleaded, is properly rejected.—Id.

—228 (Mo.App.) A shipper, accompanying a shipment of live stock, has the burden of proving that injury to the stock was occasioned by the carrier's negligence.—*Kolkmeier v. Chicago & A. R. Co.*, 182 S. W. 794.

—228 (Mo.App.) One claiming negligent delay in the shipment of live stock has the burden of proving that fact, negligence being a positive wrong.—*Cunningham v. Chicago & A. R. Co.*, 182 S. W. 1033; *Bailey v. Same*, Id. 1034.

Proof that plaintiff's shipment of cattle was delayed for some time at a division point and did not arrive at the destination until about ten hours later than the usual time will not, without anything else, establish negligent delay.—Id.

—228 (Mo.App.) Mere delay in the delivery of live stock at destination, unless very extraordinary, does not raise inference of negligence of carrier.—*Patterson v. Chicago & A. Ry. Co.*, 182 S. W. 1034.

No negligence can be imputed to a carrier because of a delay overnight at a division point in making connection with a train on the carrier's branch line.—Id.

Evidence that a carrier's stock pen was muddy, that cattle were compelled to drink muddy water, had difficulty in getting sufficient water, and could be fed only by throwing the hay upon the ground, without showing injury, does not sustain an action against the carrier.—Id.

—228 (Mo.App.) Where horses were transported over two different lines of railroad, proof that, when received, they were injured, and that one of them died from such injury, will not support a joint judgment against both railroad companies.—*Jones v. Louisville & N. R. Co.*, 182 S. W. 1064.

—228 (Tex.Civ.App.) In an action for injuries to an interstate shipment of cattle, where the carrier relied on a contract made under authority of the Carmack Amendment, claiming limitations of liability were in consideration of a reduced rate, the carrier has the burden of proving that the limitations were reasonable and supported by consideration, and were not a subterfuge to escape responsibility for negligence.—*Panhandle & S. F. Ry. Co. v. Jones*, 182 S. W. 1.

—228 (Tex.Civ.App.) In an action for the death of animals in transit, evidence of their weight, together with evidence of their value at a point where removed as compared with their value at the point of destination, which was greater, is admissible.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

—229 (Tex.Civ.App.) Where hogs died in transit, the measure of damages is their market value at point of destination, or, in case there was no market value, their intrinsic value at such point.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

—230 (Tex.Civ.App.) Where a shipper of live stock sought recovery for negligent delay, as well as mishandling, a charge that, if the shipment was forwarded on the first train, there could be no recovery, is erroneous, because disregarding other negligence.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

—238 (Ark.) Where a lumber company and a subsidiary railroad company had passed rules forbidding employees of the lumber company to use the trains for their own benefit, and an employee knew that fact, he was a trespasser when riding on a train.—*Prescott & N. W. Ry. Co. v. Hopkins*, 182 S. W. 551.

One riding on a work or logging train not pur-

porting to carry passengers, in violation of the rules of the company, is a trespasser.—Id.

—241 (Tenn.) Express messenger, who by his contract of employment released claims for injury and agreed to express company's contract to hold carriers harmless for personal injury to its employees, injured by wreck on defendant's line, held not to stand in the relation of a passenger.—*McKay v. Louisville & N. R. Co.*, 182 S. W. 874.

—243 (Ark.) It is the duty of one desiring to take passage on a work or logging train to inquire of proper persons if he may do so.—*Prescott & N. W. Ry. Co. v. Hopkins*, 182 S. W. 551.

—246 (Ark.) In an action for the death of one killed while riding on a work or logging train, where deceased was not a member of the crew, plaintiff had the burden of proving deceased was entitled to ride.—*Prescott & N. W. Ry. Co. v. Hopkins*, 182 S. W. 551.

—247 (Ky.) The relationship of carrier and passenger does not cease until the passenger has alighted from the train and left the premises by the means provided.—*Louisville & N. R. Co. v. Johnson*, 182 S. W. 214.

—247 (Mo.App.) A customer in a store, invited to use the elevator to visit the desired floor, is a passenger upon stepping forward to enter the cage.—*Anderson v. American Sash & Door Co.*, 182 S. W. 819.

(C) Performance of Contract of Transportation.

—277 (Mo.App.) Where the servants of a carrier excluded plaintiff from the train in good faith believing him to be intoxicated, though he was not, the carrier is not liable for punitive damages.—*Davis v. Chicago, R. I. & P. Ry. Co.*, 182 S. W. 828.

In an action for punitive damages for wrongfully excluding plaintiff from its train and in procuring his arrest on a false charge, "malice" means intentional doing of a wrongful act in a reckless manner.—Id.

Where the defendant railroad company wrongfully excluded plaintiff from its train and secured his arrest under a false charge of intoxication, so that he was incarcerated for almost a day, when the prosecution was dropped, an award of \$1,520 punitive damages is not excessive.—Id.

(D) Personal Injuries.

—280 (Ky.) A carrier owes its passengers the highest degree of care, and this duty exists until the relationship ceases.—*Louisville & N. R. Co. v. Johnson*, 182 S. W. 214.

—292 (Ky.) A street railway company held required to exercise the highest degree of care usually employed by prudent persons in that business to keep car steps free from ice and snow.—*South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850.

—296 (Tex.Civ.App.) The failure of a street car company to furnish a passenger with a seat in the car is not actionable negligence, where the fact that all the seats are occupied is apparent to the passenger when he takes his position on the running board, from which he thereafter falls.—*Tennegkeit v. Galveston Electric Co.*, 182 S. W. 72.

—298 (Mo.App.) Facts as to obstruction of aisle by grips and sudden stopping of train, causing passenger to trip over grip, and sudden starting as he was rising, held to show breach of carrier's duty.—*Abernathy v. Lusk*, 182 S. W. 1049.

—303 (Ky.) Though a passenger by reason of infirmities be entitled to aid when he presents himself to alight, the carrier need not specially notify him of a stop at his station.—*Louisville & N. R. Co. v. Johnson*, 182 S. W. 214.

—306 (Ky.) Where a railroad company leased its line to another carrier, which agreed to op-

erate trains thereon, the original carrier, as to passengers who used the line, was liable for the negligence of its lessee.—*Louisville & N. R. Co. v. Johnson*, 182 S. W. 214.

—307 (Tenn.) Contracts entered into by express company employé releasing claims for injuries, agreeing to express company's contract with defendant railroad to hold defendant harmless for injuries to its employés, *held* to create a new term of employment, so as to be a good consideration for the contract.—*McKay v. Louisville & N. R. Co.*, 182 S. W. 874.

In absence of fraud, plaintiff, an express messenger, *held* bound by his contract with express company in effect releasing defendant railroad from liability for injury, whether he did or did not read the contract when he signed it.—*Id.*

Plaintiff, who contracted with an express company for employment as messenger and thereby surrendered his claims against carriers for liability for personal injury, and who received the employment as a consideration, was bound by his contract.—*Id.*

Contract of express messenger, whereby he released claims for injury and agreed to contract of express company with defendant carrier to save it harmless for personal injury to company's employés, *held* not invalid as against public policy.—*Id.*

—314 (Mo.App.) A petition in an action by a customer of an establishment injured in entering an elevator *held* general in its averments so as to permit recovery on the doctrine of *res ipsa loquitur*.—*Anderson v. American Sash & Door Co.*, 182 S. W. 819.

—315 (Mo.App.) In street car passenger's action for injuries alleged to have been caused by suddenly starting car after slowing down at regular stopping place, such negligence *held* not proved.—*Ward v. Harvey*, 182 S. W. 106.

—315 (Mo.App.) Where a passenger suing for personal injuries alleged specific acts of negligence, the burden was on him to make out his case.—*Abernathy v. Lusk*, 182 S. W. 1049.

—315 (Tex.Civ.App.) Where a passenger, injured from falling on the steps while she was leaving the station, alleged conjunctively several grounds of negligence causing her injury, she was entitled to recover on proof of either, if shown to be the efficient sole cause, or concurring cause, of her injuries.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

—316 (Mo.App.) One invited to take passage in an elevator, injured by the falling of the door, cannot be deprived of the presumption of *res ipsa loquitur* in her favor by reason of evidence introduced by defendant.—*Anderson v. American Sash & Door Co.*, 182 S. W. 819.

—318 (Mo.App.) Passenger's testimony as to sudden slowing down and starting up of train, causing him to trip over a grip obstructing the aisle, *held* to justify finding that the slowing down and starting up was violent, extraordinary, and unusual.—*Abernathy v. Lusk*, 182 S. W. 1049.

—320 (Ky.) The court, in submitting to the jury the question whether a street railway company, during a storm of snow and sleet, exercised proper care in keeping the steps of its cars safe, should leave the question of due care to the jury, and not instruct as to duty to clean steps at end of every trip.—*South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850.

—320 (Tex.) In a passenger's action for injuries from a fellow passenger, *held* that, under the evidence, the conductor's negligence in not ejecting the offending passenger was for the jury.—*Ft. Worth & R. G. Ry. Co. v. Stewart*, 182 S. W. 893.

—321 (Ky.) In an action for injuries to a street car passenger slipping on slippery steps while alighting, an instruction *held* not to im-

pose unreasonable duty in keeping the steps free from ice and snow.—*South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850.

—321 (Tex.) In a passenger's action for injuries from an assault by a fellow passenger, *held*, that the pleadings and evidence justified an instruction charging that plaintiff could not recover if the assault was so sudden that it could not have been reasonably prevented by the conductor.—*Ft. Worth & R. G. Ry. Co. v. Stewart*, 182 S. W. 893.

—321 (Tex.Civ.App.) Refusal of instruction to find for defendant, if plaintiff remained in the waiting room of the station for her own purposes after all business with the railroad company connected with her journey had been entirely finished, *held* not error, in view of Rev. St. 1911, art. 6591, where there was no evidence that more than 30 minutes elapsed between the time she alighted from the train and the accident.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

(E) Contributory Negligence of Person Injured.

—333 (Ky.) A passenger attempting, at her own initiative, to alight from a moving car before it has stopped to discharge passengers, takes the risk of injury.—*Clark v. Owensboro City R. Co.*, 182 S. W. 930.

—344 (Mo.App.) In passenger's action for injuries, carrier *held* to have burden of proving its affirmative plea of contributory negligence.—*Abernathy v. Lusk*, 182 S. W. 1049.

—346 (Ky.) In an action for injuries received by a passenger in alighting, evidence *held* to show that he did not attempt to alight until after the train had started from his station, and that he was injured when alighting over the protest of the brakeman, who had signaled for the train to stop.—*Louisville & N. R. Co. v. Johnson*, 182 S. W. 214.

—347 (Mo.App.) Passenger stumbling over grip when speed of train was suddenly checked *held* not negligent as a matter of law in walking along the aisle for a necessary purpose, though aisle was obstructed by grips.—*Abernathy v. Lusk*, 182 S. W. 1049.

—348 (Tex.Civ.App.) Evidence in a street car passenger's action for injuries from falling from the running board of a car *held* to authorize an instruction on unavoidable accident.—*Tennegkeit v. Galveston Electric Co.*, 182 S. W. 72.

CATTLE.

See Animals; Railroads, —425.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

See Acknowledgment, —25-47; Corporations, —84, 96; Depositions.

CERTIFIED QUESTIONS.

See Courts, —247.

CERTIORARI.

I. NATURE AND GROUNDS.

—28 (Mo.App.) Failure of Court of Appeals to follow ruling of Supreme Court, as required by Const. Amend. 1884, § 6, *held* a jurisdictional excess which the Supreme Court on certiorari may remedy by quashing the judgment of the Court of Appeals.—*Iba v. Chicago, B. & Q. R. Co.*, 182 S. W. 135.

II. PROCEEDINGS AND DETERMINATION.

§66 (Mo.) The Supreme Court, on certiorari to quash a judgment of the Court of Appeals for refusal of the Court of Appeals to follow the last previous ruling of the Supreme Court, will presume that the Court of Appeals stated all the facts of record.—*State ex rel. Tiffany v. Ellison*, 182 S. W. 998.

§68 (Tenn.) Under Acts 1907, c. 82, on certiorari by defendant to review the judgment of the Court of Civil Appeals, which on some questions was against the plaintiff, the plaintiff, presenting no petition for certiorari and no assignment of errors, was concluded by the rulings adverse to him.—*McKay v. Louisville & N. R. Co.*, 182 S. W. 874.

§69 (Mo.App.) Power of Supreme Court to order up record on certiorari and quash judgment of Court of Appeals as in excess of jurisdiction *held* to include the power to require the Court of Appeals to proceed with the cause in the true course of lawful jurisdiction.—*Iba v. Chicago, B. & Q. R. Co.*, 182 S. W. 135.

A Court of Appeals *held* to have no power to inquire into the jurisdiction of the Supreme Court on certiorari to issue mandate, requiring that the Court of Appeals rehear a cause wherein it had rendered a judgment *held* to be in excess of jurisdiction.—*Id.*

CHALLENGE.

See Jury, §116.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Criminal Law, §123.

CHARACTER.

See Witnesses, §337, 344.

CHARGE.

By telephone company, see Telegraphs and Telephones, §33.

To jury, see Trial, §191-296.

CHattel MORTGAGES.

See Fraudulent Conveyances, §182; Justices of the Peace, §100.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§17 (Tex.Civ.App.) Stock subscribed for with a future promise to pay and held pending payment vests the subscriber with but a qualified right therein, not capable of being mortgaged.—*Cattlemen's Trust Co. of Ft. Worth v. Turner*, 182 S. W. 438.

(D) Validity.

§72 (Mo.App.) Where defendants knew there were only eight or nine beds in a rooming house and that they were rented at from 25 to 50 cents per night, they were not entitled to rely on the seller's representation that he made from \$15 to \$25 per day out of the establishment.—*Olds v. Aven*, 182 S. W. 1010.

§80 (Mo.App.) In an action to enforce a chattel mortgage given to secure a note for payment of the purchase price of a rooming house, question whether seller made fraudulent representations as to character of house on which defendants relied to their damage *held* under the evidence for the jury.—*Olds v. Aven*, 182 S. W. 1010.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§112 (Ark.) The owner of a business, who turned it over to another to manage, taking a chattel mortgage to secure the manager's performance of the contract, was entitled to the proceeds of the sale of the mortgaged property where the business was insolvent when he retaken possession, and the manager had withdrawn money as salary, while the contract entitled him to net profits only, which could not be ascertained.—*Myers v. Hines*, 182 S. W. 542.

(D) Lien and Priority.

§138 (Ark.) Where, on a transfer of corporate property, the holder of a trust deed having priority as to personally surrendered it so that a trust deed could be given plaintiffs, whose debt the purchaser agreed to assume, plaintiffs took a valid lien as against general creditors, regardless of whether plaintiffs were innocent holders for value.—*McIntosh Mining Co. v. Red Cloud Zinc Co. of Arkansas*, 182 S. W. 506.

§150 (Ky.) Under Ky. St. §§ 496, 501, 511, 519a, a chattel mortgage is not admissible of record, unless proved by the attesting witnesses, and where the certificate of the clerk who admitted it to record did not show that it was proved by such witnesses, it furnishes no notice, and a subsequent mortgagee takes priority.—*Starr Piano Co. v. Petrey*, 182 S. W. 624.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§205 (Tenn.) A transfer of notes secured by a chattel mortgage without assignment of the mortgage in his own name *held* merely to carry with it the equitable title to the mortgage.—*Richmond Type & Electrotype Foundry v. Carter*, 182 S. W. 240.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§243 (Tex.Civ.App.) A mortgage lien on a stock of goods is not released by the mortgagee joining in a bill of sale of the goods, it being agreed with the purchasers that it should not be delivered till the mortgagee was paid.—*Eagle Drug Co. v. White*, 182 S. W. 378.

IX. FORECLOSURE.

§278 (Ark.) In a proceeding to enforce a deed of trust on real and personal property given plaintiff after a deed of trust which was a prior lien on the personally had been released, evidence *held* to show that the deed of trust having priority was for the benefit only of the beneficiary named, so the release was valid.—*McIntosh Mining Co. v. Red Cloud Zinc Co. of Arkansas*, 182 S. W. 506.

CHEAT.

See Fraud.

CHECKS.

See Banks and Banking, §138.

CHILDREN.

See Adoption; Divorce, §298; Guardian and Ward; Infants; Parent and Child.

CHOSE IN ACTION.

See Assignments.

CHURCHES.

See Religious Societies.

CIRCUMSTANTIAL EVIDENCE.

See Evidence, §587.

CITIES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Attachment, ¶314; Counties, ¶204; Execution, ¶191; Executors and Administrators, ¶221, 245; Mechanics' Liens, ¶132-149; Receivers, ¶154.

CLASS LEGISLATION.

See Constitutional Law, ¶208.

COINSURANCE.

See Insurance, ¶494.

COLLATERAL AGREEMENT.

See Evidence, ¶441.

COLLATERAL ATTACK.

See Guardian and Ward, ¶107; Intoxicating Liquors, ¶32; Judgment, ¶470-518.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLECTION.

See Principal and Agent, ¶105.

COLLISION.

See Street Railroads, ¶90.

COLOR OF TITLE.

See Adverse Possession.

COMMERCE.**II. SUBJECTS OF REGULATION.**

¶27 (Ky.) A railroad baggagemaster, whose run was from Cincinnati, Ohio, to Maysville, Ky., and back, and who was injured at Maysville while assisting in side-tracking the train to permit the passage of another, pursuant to the usual custom regarding his train, was injured in interstate commerce.—Chesapeake & O. Ry. Co. v. Shaw, 182 S. W. 653.

¶27 (Mo.App.) Where an employe's service was between points in the state, but the train ran and carried shipments from without to within the state, the service was in interstate commerce.—Noel v. Quincy, O. & K. C. R. Co., 182 S. W. 787.

¶27 (Tex. Civ. App.) Before recovery can be had under the federal Employers' Liability Act, it must appear first that the defendant railroad was engaged at the time in interstate commerce, and that the employe was injured while actually so employed.—Chicago, R. I. & G. Ry. Co. v. Cosio, 182 S. W. 83.

¶33 (Ky.) Goods delivered to a common carrier at a point without the state consigned to a purchaser at his residence within the state are exempt from state regulations during the course of transportation.—City of Newport v. Wagner, 182 S. W. 834.

¶33 (Mo.App.) A shipment by one carrier between two points in a state, and by another carrier into another state, held, while transported by the first carrier, an intrastate shipment.—Kolkmeier v. Chicago & A. R. Co., 182 S. W. 794.

¶40 (Mo.App.) A sale of goods by a foreign corporation to a resident, through the corporation's nonresident broker, held interstate commerce, and the corporation could sue without first complying with the law of the state.—Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co., 182 S. W. 1086.

III. MEANS AND METHODS OF REGULATION.

¶63 (Ky.) State held authorized to levy tax on carrying on of business, if not discriminatory against persons residing in another state or the products or manufactures of another state.—City of Newport v. Wagner, 182 S. W. 834.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION MERCHANTS.

See Factors.

COMMON CARRIERS.

See Carriers.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶267-273.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶101.

COMPENSATION.

See Attorney and Client, ¶140-166; Contracts, ¶229; Counties, ¶74-77; Eminent Domain, ¶71-147; Executors and Administrators, ¶488, 490; Improvements, ¶4; Master and Servant, ¶78; Principal and Agent, ¶81, 85.

COMPETENCY.

See Jury, ¶85; Witnesses, ¶48-190.

COMPLAINT.

See Indictment and Information.

COMPROMISE AND SETTLEMENT.

See Payment; Principal and Agent, ¶111.

COMPUTATION.

See Limitation of Actions, ¶53-138.

CONCLUSION.

See Pleading, ¶8.

CONCLUSIVENESS.

See Account Stated, ¶8; Criminal Law, ¶1159; Divorce, ¶172; Evidence, ¶265; Judgment, ¶668-747.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL LIMITATIONS.

See Deeds, ¶134.

CONDITIONAL SALES.

See Sales, ¶481.

CONDITIONS.

See Action, ¶12; Evidence, ¶420; Sales, ¶85, 116, 392, 429; Tender.

CONDONATION.

See Divorce, ¶51.

CONFESSION.

See Criminal Law, ¶535.

CONFLICT OF LAWS.

See Husband and Wife, ¶208½.

CONFUSION OF GOODS.

See Accession.

CONNECTING CARRIERS.

See Carriers, ¶175, 219.

CONSIDERATION.

See Bills and Notes, ¶96; Corporations, ¶99; Deeds, ¶17; Evidence, ¶419; Fraudulent Conveyances, ¶177, 300; Mortgages, ¶25.

CONSOLIDATION.

See Action, ¶57; Corporations, ¶590.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, ¶30-64.

Special or local laws, see Statutes, ¶77, 95. Subjects and titles of statutes, see Statutes, ¶122, 123.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶13 (Tex. Civ. App.) The fundamental rule in the interpretation and construction of the Constitution is to give effect to the intent of the people who adopted it.—*Williams v. Carroll*, 182 S. W. 29.

¶14 (Tex. Civ. App.) It is a general rule of interpretation that words in a Constitution are to be understood in their usual and best-known signification.—*Williams v. Carroll*, 182 S. W. 29.

The court should endeavor to so interpret the Constitution as to leave none of its language meaningless and without effect, trying to enforce and sustain every sentence.—*Id.*

¶16 (Tex. Civ. App.) The court, in case of ambiguity in the language of the Constitution, may consider the prior state of the law, the subject-matter and purpose sought to be accomplished, and the proceedings of the constitutional convention and attending circumstances.—*Williams v. Carroll*, 182 S. W. 29.

When it is necessary to resort to extrinsic sources to aid in construing the Constitution, the courts will resort to the history of the time and the conditions leading to the enactment of the provision in question to ascertain its purpose, and thereafter it will be construed to further such purpose.—*Id.*

¶19 (Tex. Civ. App.) Contemporaneous and practical construction of constitutional provisions by the Legislature in the enactment of laws has great weight, and will be followed by the courts, if possible, without doing violence to the fair meaning of words used in the Constitution.—*Williams v. Carroll*, 182 S. W. 29.

¶26 (Mo.) The organic law of a state is not a grant of power, but a limitation on power.—

State ex rel. Moberly Special Road Dist. v. Burton, 182 S. W. 746; State ex rel. Columbia Special Road Dist. v. Johnson, Id. 750.

¶48 (Mo.) The court will hold a law valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt.—State ex rel. Moberly Special Road Dist. v. Burton, 182 S. W. 746; State ex rel. Columbia Special Road Dist. v. Johnson, Id. 750.

It must be presumed that in the creation of special road districts by Laws 1913, p. 669, the Legislature deemed them necessary.—*Id.*

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(B) Judicial Powers and Functions.**

¶70 (Tex. Cr. App.) The Court of Criminal Appeals, in determining whether the statute regulating loan brokers (Acts 34th Leg. c. 28), by requiring a bond, power of attorney, annual occupation tax, etc., is constitutional, has nothing to do with the wisdom of the law.—*Ex parte Hutsell*, 182 S. W. 458.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

¶89 (Tex. Cr. App.) Acts 34th Leg. c. 28, regulating loan brokers, and by section 13 making compromises for usury or unlawful interest collected and received void, held not unconstitutional as impairing the right to contract.—*Ex parte Hutsell*, 182 S. W. 458.

VI. VESTED RIGHTS.

¶92 (Ky.) Ky. St. § 4482, as amended by Acts 1914, c. 64, providing for an increase of the tax for operating expenses of common schools, is not invalid as violating federal Constitution and Const. Ky. § 19, on the ground that it impairs vested rights.—*Larue v. Redmon*, 182 S. W. 622.

VII. OBLIGATION OF CONTRACTS.**(B) Contracts of States and Municipalities.**

¶136 (Tex. Civ. App.) Ordinance imposing more burdensome conditions on operation of motor busses than prior ordinances which parties had complied with held not to impair obligations of contracts in violation of Const. art. 1, § 16.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

¶137 (Ky.) Ky. St. § 4482, as amended by Acts 1914, c. 64, providing for an increase of the tax for operating expenses of common schools, is not invalid as violating federal Constitution and Const. Ky. § 19, on the ground that it impairs the obligations of contracts.—*Larue v. Redmon*, 182 S. W. 622.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

¶205 (Tex. Civ. App.) Ordinance regulating jitneys or motor busses held not to violate Const. art. 1, § 3, as to grants of exclusive privileges.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

¶208 (Ark.) A municipal ordinance regulating jitney busses and requiring a license and bond from their operators is not invalid as discriminatory class legislation; the classification being a reasonable one resting on substantial differences.—*Willis v. City of Ft. Smith*, 182 S. W. 275.

A legislative classification of subjects must rest on a substantial difference between those included and those excluded, and must operate uniformly upon those to which it applies, and if it does so, it is not arbitrary or capricious.—*Id.*

X. EQUAL PROTECTION OF LAWS.

¶211 (Mo.) When the Legislature parens patriæ takes from a minor the power to dispose

of his property, and, through the instrumentality of the probate court and a curator, sells it for the purpose of his education and support, it does not deny to him the equal protection of the laws.—*Whittelsey v. Conniff*, 182 S. W. 161.

§230 (Ark.) A municipal ordinance regulating jitney busses and requiring a license and bond from their operators is not invalid as denying equal protection of the laws; the classification being a reasonable one resting on substantial differences.—*Willis v. City of Ft. Smith*, 182 S. W. 275.

§230 (Tex. Cr. App.) Acts 34th Leg. c. 28, regulating loan brokers and imposing an annual tax, which by section 1 defines "loan brokers," held not invalid as making a capricious or unreasonable classification, because of its exclusion of bankers or other money lenders not taking the same security of wages, household goods, etc.—*Ex parte Hutsell*, 182 S. W. 458.

XI. DUE PROCESS OF LAW.

§278 (Mo.) Where the Legislature takes from a minor the power to dispose of his property, and through the probate court and a curator, sells it for the purposes of his education and support, it does not take the property from him without due process of law, but uses it for his benefit.—*Whittelsey v. Conniff*, 182 S. W. 161.

§297 (Tex. Civ. App.) Ordinance regulating jitneys or motor busses held not to violate Const. art. 1, § 19, as depriving citizens of property except by due course of law.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

CONSTRUCTION.

See Constitutional Law, §13-19; Contracts, §147-169; Deeds, §95-134; Insurance, §146-179½; Pleading, §34; Principal and Surety, §59; Sales, §59, 85, 149; Statutes, §219-225; Stipulations, §14; Trial, §295, 296, 404; Trusts, §114; Vendor and Purchaser, §54; Wills, §682, 698.

CONTEMPT.

See Injunction, §229.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§2 (Tex. Cr. App.) Where language, contained in a brief for writ of error which was filed in the district court in vacation, was improper and intemperate, as applied to the judge of the district court, the contempt was constructive only.—*Ex parte Duncan*, 182 S. W. 813.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§54 (Tex. Cr. App.) Where the contemptuous language appeared in a brief for a writ of error, a copy of which was filed in the district court, held, that the district court could not summarily punish the attorney on order to show cause, where the petition of opposing counsel was unverified and no affidavit of charges was filed.—*Ex parte Duncan*, 182 S. W. 813.

CONTEST.

See Intoxicating Liquors, §87.

CONTINUANCE.

See Criminal Law, §590-608, 917.

§51 (Ky.) Under Civ. Code Prac. § 315, it was not an abuse of discretion to refuse defendant a second continuance for the absence of witnesses, allowing, with the consent of plaintiff, defendant's affidavit of the desired testimony of the witnesses to be read as their deposition.—*Connecticut Fire Ins. Co. v. Hardin*, 182 S. W. 204.

CONTRACTS.

See Account Stated; Action, §27; Assignments; Bailment; Bills and Notes; Cancellation of Instruments; Carriers, §207, 241, 277; Chattel Mortgages; Constitutional Law, §89; Corporations, §77, 456; Counties, §124; Covenants; Customs and Usages; Damages, §68, 120, 121; Estoppel, §92; Evidence, §397; Exchange of Property; Frauds, Statute of; Guaranty; Indemnity; Infants, §58; Injunction, §62; Insurance; Interest; Landlord and Tenant, §22; Limitation of Actions, §21; Logs and Logging; Master and Servant, §100; Mechanics' Liens; Mines and Minerals, §84; Novation; Partnership; Payment; Pledges; Principal and Agent; Principal and Surety, §59; Railroads, §138; Records; Reformation of Instruments; Sales; Schools and School Districts, §81; Stipulations; Subrogation; Subscriptions; Tenancy in Common, §33; United States, §67; Usury; Vendor and Purchaser; Venue; Witnesses, §144; Work and Labor.

I. REQUISITES AND VALIDITY.

(C) Formal Requisites.

§35 (Ky.) While ordinarily a written contract is not completed until signed by the parties, they may adopt a written instrument as their contract without signing it.—*Bowen v. Chenoa-Hignite Coal Co.*, 182 S. W. 635.

(D) Consideration.

§71 (Ky.) Promise by purchaser of interest in partnership to pay creditor if he would refrain from suing and obtaining attachment held supported by consideration, though firm's affairs so turned out that he received nothing from his purchase.—*Miller v. Davis*, 182 S. W. 839.

(E) Validity of Assent.

§93 (Ky.) If an offer is made by delivering a paper containing the terms of the proposed contract, and it is accepted, the acceptor is bound by its terms whether he reads the paper or not.—*Bowen v. Chenoa-Hignite Coal Co.*, 182 S. W. 635.

§93 (Tex. Civ. App.) Omission of part of the oral agreement from the written contract is not by mutual mistake, where one of the parties at the time of signing it knows that all the agreement is not embraced in it.—*Tom v. Roberson*, 182 S. W. 698.

(F) Legality of Object and of Consideration.

§105 (Ky.) Any agreement involving the doing of an act positively prohibited by common law or statute is illegal and void.—*Gordon v. Gordon's Adm'r*, 182 S. W. 220.

§106 (Ky.) Many things which the law does not prohibit in the sense of attaching penalties to punish their commission, cannot be admitted as the subject of a valid contract, as being so mischievous in their nature and tendency that to permit them to be the subject-matter of a contract, would be violative of public policy.—*Gordon v. Gordon's Adm'r*, 182 S. W. 220.

§108 (Ky.) A contract is against public policy if injurious to some established public interest, contravenes some public statute, is against good morals, or tends to interfere with the public welfare or safety.—*Gordon v. Gordon's Adm'r*, 182 S. W. 220.

§128 (Ark.) Where defendant gave notes to a bank under agreement, express or implied, that in consideration of the notes the bank would refrain from prosecuting its defaulting cashier, defendant's son-in-law, the notes were without consideration and void.—*Shearer v. Farmers' & Merchants' Bank*, 182 S. W. 262.

↪129 (Ky.) A contract whereby one agrees to use his personal influence with the pardoning authority to procure a pardon is void as against the public policy declared by Ky. St. § 1370, denouncing as unlawful contracts to procure a pardon from the Governor, only when the party whose pardon is sought has been convicted by the proper tribunal having constitutional power.—Gordon v. Gordon's Adm'r, 182 S. W. 220.

In view of Ky. St. § 3828, regulating the parole of prisoners, a son's contract with his father to prepare an application and do what was necessary to procure the parole of his brother, the father promising to reimburse for all expenses, was not void as being in contravention of the public policy declared by section 1370, denouncing as unlawful contracts to procure a pardon from the Governor.—Id.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

↪147 (Tenn.) The object in the construction of contracts is to ascertain the intention of the parties and what the contract means as a whole.—McKay v. Louisville & N. R. Co., 182 S. W. 874.

↪152 (Mo.App.) The contract made by the parties must stand, and the court cannot make contracts in opposition to their written terms by construing the words against their plain meaning.—Hartman v. Chicago, B. & Q. R. Co., 182 S. W. 148.

↪169 (Tenn.) In the construction of contracts, courts will look to the nature of the subject-matter, the relation of the parties to the contract, and the object to be accomplished.—McKay v. Louisville & N. R. Co., 182 S. W. 874.

(F) Compensation.

↪229 (Tex.Civ.App.) Defendants buying goods of B., merely agreeing to pay plaintiff out of such money as should be due B. from the purchase money, after other creditors of B. were paid, are liable for no more than was so due B.—Eagle Drug Co. v. White, 182 S. W. 378.

V. PERFORMANCE OR BREACH.

↪280 (Ark.) Where defendant, who had contracted to dig a drain, engaged plaintiff to clear part of the right of way for the drain, plaintiff, having cleared the land as other subcontractors had done, was entitled to recover; no directions having been given as to the manner of the work.—Brown v. Norred, 182 S. W. 537.

↪303 (Mo.App.) Where correspondence course was sold, to be paid for in installments, plaintiff's failure to deliver the lessons as agreed, held to excuse defendant from further payments.—International Text-Book Co. v. Brennan, 182 S. W. 770.

↪306 (Mo.App.) Where the owner took over the work and claimed recovery from the contractors and sureties for the expenses incurred, held, that he could not recover of the contractor's sureties any expenses not certified by the architect according to terms of the contract.—Joblin v. Illinois Surety Co., 182 S. W. 143.
Where, after first serving notice of the contractors' default, the architect agreed that the contractors might continue the work, held that the architect thereafter was not entitled to take over the work without a new notice.—Id.

↪318 (Mo.App.) Courts look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for, and will not enforce them, unless compelled by the plain letter of the contract.—Hartman v. Chicago, B. & Q. R. Co., 182 S. W. 148.

↪323 (Ky.) In action for breach of contract, the failure of defendant to saw the specified quantity of lumber held for the jury.—Stevens

& Elkins v. Lewis-Wilson-Hicks Co., 182 S. W. 840.

VI. ACTIONS FOR BREACH.

↪329 (Tex.Civ.App.) Where defendants wholly repudiated their agreement to pay plaintiff any profits to which he was entitled on a previous transaction, held that, despite their agreement that such profits should be invested in a second transaction, plaintiff, regardless of the maturity of the second transaction, might recover.—Burton v. Stayner, 182 S. W. 394.

↪330 (Mo.App.) A payee in possession of a note for the benefit of another may maintain action thereon in his own name as trustee of an express trust under Rev. St. 1899, § 541.—Security Nat. Bank v. Field, 182 S. W. 815.

↪346 (Tex.Civ.App.) Under a petition based on an alleged oral contract for the lease of pasture land, plaintiff cannot recover on a quantum meruit.—White v. Barrow, 182 S. W. 1154.

CONTRADICTION.

See Witnesses, ↪400.

CONTRIBUTION.

See Principal and Surety, ↪194; Subscriptions.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ↪75-101.

CONVEYANCES.

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Fraudulent Conveyances; Husband and Wife, ↪267; Mortgages; Partition.

CORPORATIONS.

See Banks and Banking; Bills and Notes, ↪340, 345; Carriers; Commerce, ↪40; Counties; Courts, ↪14; Evidence, ↪352; Insurance, ↪33; Municipal Corporations; Partnership, ↪41; Railroads; Religious Societies; Street Railroads; Telegraphs and Telephones.

I. INCORPORATION AND ORGANIZATION.

↪28 (Ark.) Where persons signed a subscription contract for the formation of a corporation, but no steps toward incorporation were thereafter taken, although some of the subscribers purchased machinery and established a canning factory, there was no de facto corporation.—Rainwater v. Childress, 182 S. W. 280.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

↪77 (Tex.Civ.App.) A stock subscription agreement, a note, and an agreement attached thereto to hypothecate the stock subscribed, all simultaneously delivered, constitute but a single subscription contract.—Cattlemen's Trust Co. of Ft. Worth v. Turner, 182 S. W. 438.

↪90 (Tex.Civ.App.) One who for years has gone along as a stockholder, being sued after the corporation is insolvent, is estopped to assert he is not a stockholder because, in violation of Const. art. 12, § 6, stock was issued for his note.—McWhirter v. First State Bank of Amarillo, 182 S. W. 682.

(C) Issue of Certificates.

↪94 (Tex.Civ.App.) A certificate of stock is not the stock itself, but evidence of its ownership.—Cattlemen's Trust Co. of Ft. Worth v. Turner, 182 S. W. 438.

↪99 (Tex.Civ.App.) A subscription for stock under an arrangement whereby the stock was

held until payment of the price *held* not an "issuance" of stock within Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, prohibiting issuing stock except for money paid, etc.—*Cattlemen's Trust Co. of Ft. Worth v. Turner*, 182 S. W. 438.

The purpose of Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, is to insure an equivalent in corporate property for such stocks or bonds as are in circulation and subject to purchase by the public.—*Id.*

(D) Transfer of Shares.

⇒123 (Tex.Civ.App.) Stock subscribed for with a future promise to pay and held pending payment vests the subscriber with but a qualified right therein, not capable of being pledged.—*Cattlemen's Trust Co. of Ft. Worth v. Turner*, 182 S. W. 438.

⇒136 (Ky.) Under Ky. St. § 545, a sale of pledged corporate stock, where there was no actual fraud, *held* valid as to the seller's creditors, though it was not transferred on the books of the company.—*First Nat. Bank of Lexington v. Bowman*, 182 S. W. 196.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

⇒244 (Ky.) The mistake of a solvent corporation in transferring only half of a block of its stock to a buyer from its stockholder, paying therefor one half in cash and the other half by giving the corporation her note in lieu of the stockholder's note, did not prevent the stockholder's release from liability, on his note, to the corporation's trustee in bankruptcy under Ky. St. § 547.—*Boulware-Allen Shoe Co.'s Trustee v. Morris*, 182 S. W. 225.

⇒252 (Ky.) Creditor of corporation which had distributed most of its assets among stockholders, but had property in another state, *held* not entitled to sue stockholder without procuring judgment and return of "no property found."—*Hanger v. Apperson*, 182 S. W. 831.

⇒268 (Tex.Civ.App.) A petition merely stating that defendants were the principal shareholders of a corporation, for which plaintiff rendered services, *held* not to state a cause of action against the defendant shareholders; the petition not coming within Vernon's Sayles' Ann. Civ. St. 1914, arts. 1198, 1206, 1208.—*Seaton v. Majors*, 182 S. W. 712.

VI. OFFICERS AND AGENTS.

(B) Authority and Functions.

⇒300 (Tex.Civ.App.) Unless authorized by the charter or directors, the president of a corporation has no greater control over its property than any director.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⇒370 (Tex.Civ.App.) Corporations exist by law for the purposes defined in their charters, and he who deals with them is charged with notice of those purposes.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

(B) Representation of Corporation by Officers and Agents.

⇒399 (Tex.Civ.App.) Corporations can be bound by their agents only within the scope of their authority.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

⇒410 (Tex.) Purchase, by president and general manager of wholesale grocery company, of retail stock of goods at wholesale prices to col-

lect debt, *held* within his authority, though he also intended to use stock to open retail business by the company.—*Crews v. Gulf Grocery Co.*, 182 S. W. 1096.

⇒414 (Tex.Civ.App.) The apparent authority of the president and manager of a corporation does not include the execution of notes.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

⇒415 (Tex.Civ.App.) An authorization to the president of a corporation to execute notes does not imply authority to execute liens to secure them.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

Where a corporation did not ordinarily give liens to secure loans, its president could not mortgage corporate land without authority from the directors.—*Id.*

⇒426 (Tex.Civ.App.) Where the directors ratify an unauthorized contract made by the manager of a corporation, such ratification relates back and validates the contract from the beginning.—*West Texas Supply Co. v. Dunivan*, 182 S. W. 425.

⇒428 (Ky.) Where an agent who had knowledge of a modification of the terms of a mining lease continued in the service of plaintiff, who succeeded to the rights under the lease, *held*, that plaintiff was charged with such knowledge.—*Blue Grass Coal Corp. v. Combs*, 182 S. W. 207.

⇒429 (Tex.Civ.App.) One cannot by relying upon its agent's assumption of authority charge a corporation for an unauthorized act of its agent.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

(D) Contracts and Indebtedness.

⇒456 (Ky.) The written minutes of the board of a corporation authorizing the president to engage a superintendent *held* insufficient to constitute a written contract for employment of a superintendent for a given period.—*Bowen v. Chenoa-Hignite Coal Co.*, 182 S. W. 635.

X. CONSOLIDATION.

⇒590 (Ky.) A purchaser of the assets of a corporation *held* to take the same subject to an equitable lien in favor of creditors of the corporation, unless a purchaser in good faith and for value.—*Justice's Adm'r v. Catlettsburg Timber Co.*, 182 S. W. 831.

XII. FOREIGN CORPORATIONS.

⇒642 (Tenn.) A foreign corporation, which consigned tires for sale to a company handling automobile accessories in the state, was not "doing business" within the state to render necessary compliance with the foreign corporation act as a condition precedent to its right to recover of the sureties on the bond of the consignee.—*I. J. Cooper Rubber Co. v. Johnson*, 182 S. W. 593.

The requirement of a contract between a foreign rubber company and a local company selling tires for the rubber company on commission, that the local company should keep the goods insured in the name of the rubber company, did not constitute the local company a business agency of the rubber company to render the latter subject to laws relating to doing business in the state.—*Id.*

The provision of the contract for the sale on commission of automobile tires consigned to an automobile accessories company in the state by a foreign rubber company that the former should make adjustments necessary under the selling guaranty out of the latter's stock in its hands did not render the rubber company subject to laws relating to engaging in business within the state.—*Id.*

⇒666 (Ky.) Civ. Code Prac. § 71, laying venue of actions against banks and insurance companies in certain cases, applies to foreign as

well as domestic corporations.—*Barnes v. Union Cent. Life Ins. Co.*, 182 S. W. 169.

In action by nonresident on foreign cause of action against foreign insurance company doing business in state, service on insurance commissioner, under defendant's implied consent thereto, as condition precedent to doing business in the state, as provided for by Ky. St. § 631, *held* sufficient to bring case within venue provisions of Civ. Code Prac. § 78.—*Id.*

CORPSE.

See Carriers, ¶76.

CORPUS DELICTI.

See Criminal Law; Homicide, ¶228; Larceny, ¶56.

CORRESPONDENCE SCHOOLS.

See Contracts, ¶303.

CORROBORATION.

See Criminal Law, ¶510, 511, 535; Witnesses, ¶318, 414.

COSTS.

See Appeal and Error, ¶984; Garnishment, ¶191.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

¶32 (Tex. Civ. App.) Where the only relief given plaintiffs in trespass to try title was not prayed for, defendant being unaware that it was demanded, and the only issue being decided for him by the jury, and plaintiffs not requesting the submission of others, the adjudging of costs against defendant was erroneous.—*Deweese v. Nicholson*, 182 S. W. 396.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

¶255 (Ky.) Under rule 5 of the Supreme Court (154 S. W. viii), a record of 206 pages, wholly without an index, will be condemned, and the clerk who made it out prohibited from collecting any fee therefor.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

¶255 (Ky.) Records for the Court of Appeals should be typewritten with black record ribbon and on good weight paper, and, where the transcript of the evidence was typewritten on very thin paper with a worn ribbon, the stenographer will only be allowed one-half the usual charge.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

IX. IN CRIMINAL PROSECUTIONS.

¶295 (Ark.) The liability of a county for costs in criminal cases rests solely on the statute.—*Lonoke County v. Reed*, 182 S. W. 563.

County *held* not liable for fees of prosecuting attorney in a misdemeanor case on conviction, under Kirby's Dig. §§ 2446, 2469-2471, providing for payment of fees and costs in criminal cases.—*Id.*

¶308 (Ark.) Fees of the attorney prosecuting a criminal case are a part of the "costs" of the case.—*Lonoke County v. Reed*, 182 S. W. 563.

COTENANCY.

See Tenancy in Common.

COUNTERFEITING.

See Forgery.

COUNTIES.

See Costs, ¶295; District and Prosecuting Attorneys, ¶3; Injunction, ¶76.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

¶52 (Tenn.) Under Pub. Acts 1913, c. 26, § 1, and Acts 1915, c. 23, the county courts may issue bonds at a meeting specially called under Shannon's Code, § 5997.—*Walsley v. Franklin County*, 182 S. W. 599.

¶54 (Tenn.) Under Pub. Acts 1913, c. 26, § 1, a resolution of the county court fixing the time of maturity of bonds at 40 years was valid, since it fixed a definite date of maturity as required by the act.—*Walsley v. Franklin County*, 182 S. W. 599.

(D) Officers and Agents.

¶74 (Ky.) Though the county clerk furnished the board of supervisors stamps to mail notices to taxpayers, the fiscal court cannot allow the claim; there being no authority therefor in law.—*Ray v. Woodruff*, 182 S. W. 662.

Though an auditor of the accounts of the fiscal court performed many of the services of a clerk, *held* that, where the county clerk and his deputy performed some of the services, an award of \$200 a year to the county clerk was justified under Ky. St. § 1835.—*Id.*

Though more than one deputy was necessary, the fiscal court cannot authorize compensation for another deputy, necessary to enable the county clerk to discharge the duties as clerk of the juvenile session of the county court; Ky. St. § 831e, subsec. 2, authorizing the appointment of only one deputy.—*Id.*

¶75 (Ky.) Though an allowance to the county clerk was to cover expenses of an election, the fiscal court having denominated the item as incidentals, it may, despite Ky. St. § 1540, be recovered from the clerk.—*Ray v. Woodruff*, 182 S. W. 662.

As the fiscal court has jurisdiction to allow the county clerk compensation for acting as clerk of such court, an order allowing compensation cannot be attacked in a collateral proceeding, whereby it was sought to recover from the clerk such sums so paid.—*Id.*

Despite the presumption that a public officer does his duty, and Ky. St. § 1761, requiring the county clerk to pay all money into the state treasury, a petition to recover an unauthorized appropriation by the fiscal court will be deemed to state a cause of action, though it did not negative such payment.—*Id.*

Under Ky. St. § 1761-4a, a county clerk who received unauthorized appropriations cannot escape liability on the ground that the moneys were paid into the state treasury; for 75 per cent. of such sums were used in payment of the clerk's salary and expenses.—*Id.*

¶77 (Ky.) Under the direct provisions of Ky. St. § 1749, officers of the county are forbidden to receive greater fees than allowed by law, or any fee when none has been fixed.—*Ray v. Woodruff*, 182 S. W. 662.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

¶124 (Ark.) The county may ratify an unauthorized contract made in its behalf, if it is one which the county could have made in the first instance.—*E. F. Leatham & Co. v. Jackson County*, 182 S. W. 570.

Under Const. art. 7, § 28, and Kirby's Dig. §§ 1162, 1163, 1375, 7162, 7167, 7171, 7174, it is within the power of the county court to ratify the appointment made by the county judge of an expert accountant to examine the accounts of the county; such appointment not being a delegation of the power to audit.—*Id.*

¶124 (Ark.) Payment of part of claim of attorneys for services in one suit *held* a ratification by the county court of contract by which county judge employed them to defend several suits arising from the same matter, so that the county was liable for the reasonable value of the

services in all suits.—*Spence & Dudley v. Clay County*, 182 S. W. 578.

(C) County Expenses and Charges and Statutory Liabilities.

⌚138 (Ark.) Where the county judge appoints attorneys to defend an action to test the validity of an act adding a township to the county, Kirby's Dig. § 7182, providing for reimbursement of county officers for counsel fees in cases arising from collection of revenue, has no application, although in such case the public revenue was indirectly affected by increasing the taxable land in the county.—*Spence & Dudley v. Clay County*, 182 S. W. 578.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

⌚162 (Ky.) The fiscal court of a county, while a court of record, is one of limited jurisdiction and can only make appropriations authorized by law.—*Ray v. Woodruff*, 182 S. W. 662.

⌚178 (Ky.) Under Const. § 157, and section 157a, adopted in 1909, and Ky. St. § 4307, held, that election authorizing issue of county bonds was not invalid because two-thirds of residents of county legally qualified to vote thereat did not vote to issue the bonds.—*Bowman v. Fayette County*, 182 S. W. 633.

An election on the question of issuing county bonds held on September 30, 1915, instead of on the day of the general election, did not invalidate the bond issue.—*Id.*

A vote to issue county bonds was not invalid because time of maturity was not fixed in the question submitted to the voters, except that they should not mature in less than 5 years nor after 30 years.—*Id.*

⌚180 (Tenn.) Pub. Acts 1913, c. 26, § 2, requiring adoption of resolution and publication before issuance of certain bonds, is mandatory, and may be enforced before action is taken, but after issuance of the bonds they are not invalid, in the absence of objection, for failure to comply with the section.—*Walmesley v. Franklin County*, 182 S. W. 599.

⌚190 (Tex.Civ.App.) Under Const. art. 8, § 9, specifying limits of county levies for various purposes, the expenditure in any fund, whether directly or indirectly as by transferring funds raised for one purpose into another fund, creating an excess over the constitutional limitation on such fund, is unconstitutional.—*Williams v. Carroll*, 182 S. W. 29.

Const. art. 8, § 9, authorizing counties to levy 30 cents on the \$100 for roads and bridges, and 25 cents on the \$100 for streets and other permanent improvements, does not authorize the levy of 55 cents on the \$100 for roads not within the corporate limits of a city or town.—*Id.*

Const. art. 8, § 9, authorizing a levy for roads and bridges and a levy for county purposes, does not permit the use of county purpose funds for roads and bridges of the county.—*Id.*

In view of Const. art. 8, § 9, setting the limits of levies for various county purposes, Vernon's Sayles' Ann. Civ. St. 1914, art. 1440, does not authorize the commissioners' court to transfer into the road and bridge fund such amounts as to make possible an expenditure for roads and bridges in excess of the constitutional limit.—*Id.*

Vernon's Sayles' Ann. Civ. St. 1914, art. 1440, permitting transfer by the commissioners' court of funds from one fund to another, permits such transfer so long as the augmented fund is not thereby rendered in excess of the maximum expenditure and levy for the various county purposes under Const. art. 8, § 9.—*Id.*

⌚196 (Ky.) If the fiscal court pays a claim of an officer or other person without authority, or appropriates money without authority, such sum may be recovered in a suit against the person or officer receiving it.—*Ray v. Woodruff*, 182 S. W. 662.

⌚196 (Tex.Civ.App.) In a taxpayer's action to restrain the commissioners' court from transferring funds raised for county purposes to the road and bridge fund, holders of outstanding warrants against the road and bridge fund, issued before service of the temporary restraining order, were not necessary parties.—*Williams v. Carroll*, 182 S. W. 29.

The burden of proof to show that the action would result in road and bridge expenditure beyond the constitutional limitation of 30 cents on the \$100 valuation, held on plaintiff.—*Id.*

In a taxpayer's action to restrain the commissioners' court from transferring from the county purpose fund into the road and bridge fund sums which would make possible from the latter an expenditure in excess of the constitutional limit, where plaintiff showed an excess in the road and bridge fund for several years, the burden was on defendants to prove that such excess was only seeming, on account of authorized expenditures for streets in municipalities.—*Id.*

In a taxpayer's action against the commissioners' court to prevent its expending from the road and bridge fund amounts in excess of the constitutional limit upon taxation for road and bridge purposes, plaintiff must be limited to the relief sought, and unlawful amounts levied and expended for road and bridge purposes in previous years are beyond reach of the injunction.—*Id.*

V. CLAIMS AGAINST COUNTY.

⌚204 (Ark.) Const. art. 7, § 28, and Kirby's Dig. §§ 1162, 1163, 1375, 7162, 7167, 7171, 7174, empowering the county court to audit the accounts of the county, are not affected by the grant of powers to the circuit court by Kirby's Dig. §§ 625-640, subsequently enacted; the latter statute being designed to aid the circuit court in the enforcement of the criminal laws.—*E. F. Leatham & Co. v. Jackson County*, 182 S. W. 570.

COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

COUNTY BOARDS.

See Counties, ⌚52, 54.

COURTS.

See Appeal and Error, ⌚185; Bankruptcy, ⌚296; Certiorari, ⌚28; Contempt, Counties, ⌚162; Criminal Law, ⌚730, 1020; Habeas Corpus, ⌚102; Judges; Judgment, ⌚842, 475, 489; Jury, ⌚11; Justices of the Peace; Mandamus, ⌚31; Railroads, ⌚22; Religious Societies, ⌚24; Removal of Causes; States, ⌚13; Submission of Controversy; Trial, ⌚133, 386-404.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

⌚1 (Tex.Civ.App.) The "jurisdiction" of a court is the power to consider and decide one way or the other as the law may require.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

⌚14 (Ky.) A nonresident may bring an action in Kentucky against a foreign insurance corporation doing business in the state.—*Barnes v. Union Cent. Life Ins. Co.*, 182 S. W. 169.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

⚡91 (Mo.) Where the holding of the Court of Appeals entrenches upon the decisions of the Supreme Court, its judgment will be quashed.—State ex rel. Schmohl v. Ellison, 182 S. W. 740.

⚡91 (Mo.) Holding that street railroad was not liable where motorman turned off power and applied hand brake but did not reverse power, *held* not in conflict with a holding that where there was evidence that motorman did not see the danger when he should, and that he could have stopped the car if he saw the danger, the case was properly submitted to the jury on the humanitarian theory.—State ex rel. Grear v. Ellison, 182 S. W. 961.

Holding that plaintiff was negligent in driving over a sleet-covered street on down grade at a trot to within 35 feet of a street car track is not in conflict with a holding that one is not required to look for danger when he has no cause to anticipate it.—Id.

⚡95 (Mo.App.) Where a decision is to be based on the common law of a sister state, in a case where the statute law of that state is not shown, the courts will follow the local precedents in declaring the rules applicable.—Coombes v. Knowlson, 182 S. W. 1040.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(B) Courts of Particular States.

⚡155 (Tex.Civ.App.) A suit to divest title out of defendants *held* one to try title to land, within the jurisdiction of the district court, under Rev. St. 1911, art. 1705.—Kidd v. Prince, 182 S. W. 725.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

⚡169 (Tex.Civ.App.) Under express provision of Act Thirty-Third Legislature increasing the civil jurisdiction of the county court of Stone-wall county, such court had jurisdiction of an action for \$150, alleged to be due upon an oral lease of land with claim of a pasturer's lien.—White v. Barrow, 182 S. W. 1154.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

⚡207 (Mo.) The Supreme Court has authority to quash a judgment of the Court of Appeals where the judgment is the result of refusal by the Court of Appeals to follow the last previous rulings of the Supreme Court.—State ex rel. Tiffany v. Ellison, 182 S. W. 996.

⚡207 (Tex.Civ.App.) Where property rights are involved in attempted enforcement of criminal ordinances, Court of Civil Appeals *held* authorized to inquire into validity of ordinances and grant relief by injunction if they are invalid.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

(B) Courts of Particular States.

⚡231 (Mo.App.) Action to cancel notes and deed of trust for procuring loan which was never procured involves title to real estate, and appellate jurisdiction vests exclusively in the Supreme Court.—Craws v. Lombard, 182 S. W. 825.

⚡247 (Tex.Civ.App.) Where, on appeal to county court, actions were consolidated by agreement and carried on in appellee's name, *held*, that a third person, interested as plaintiff in one of them, would be presumed to have assigned his interest, and the amount involved in the two will be considered as determinative of the jurisdiction of the Court of Civil Appeals.—Kansas City, M. & O. Ry. Co. of Texas v. Adams, 182 S. W. 365.

⚡247 (Tex.Civ.App.) Under Rev. St. 1911, arts. 1521, 1522, as amended by Acts 33d Leg. c. 55, in view of article 1591, a cause originating in the county court cannot, on disagreement in the Court of Civil Appeals, be certified to the Supreme Court.—Lindsay v. Collings, 182 S. W. 879.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⚡480 (Ky.) Where the execution, levy of which is sought to be enjoined, issued on a judgment regularly entered in justice court, the injunction action should be brought in such court, under Civ. Code Prac. § 285, providing that an injunction to stay proceedings on a judgment shall not be granted in any other court than that in which the judgment was rendered.—Kentucky River Hardwood Co. v. Noble, 182 S. W. 941.

Where the judgment is void, or there is no judgment, so that the execution has no foundation on which to rest, Civ. Code Prac. § 285, has no application.—Id.

⚡480 (Tex.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4653, the district court has no jurisdiction to try a suit to enjoin execution on a judgment of the county court; it not affirmatively appearing that the judgment is void or that the property is exempt.—Baker v. Crosbyton Southplains R. Co., 182 S. W. 287.

(B) State Courts and United States Courts.

⚡489 (Ky.) Under a petition properly drawn under the federal Employers' Liability Act, the state court has jurisdiction to try the merits of the case, including the question as to whether plaintiff was injured in interstate commerce.—Chesapeake & O. Ry. Co. v. Shaw, 182 S. W. 653.

⚡493 (Tex.Civ.App.) After discharge of a receiver appointed by the federal court, and during the pendency of the receivership suit, a state court may appoint a receiver who can hold the property to the exclusion of the power of the federal court to appoint a second receiver for it.—Kansas City, M. & O. Ry. Co. of Texas v. Latham, 182 S. W. 717.

⚡500 (Tex.Civ.App.) Pending a receivership in the federal court, a state court may determine a claim against the railroad company whose property was so impounded, if it does not interfere with the receiver's custody of the property.—Kansas City, M. & O. Ry. Co. of Texas v. Latham, 182 S. W. 717.

⚡501 (Tex.Civ.App.) Under Act Cong. Aug. 13, 1888, claimants against receivers of a railroad company appointed by the federal court may bring suit in the state court without consent of the appointing court, and it cannot, sitting as a court of equity, deprive claimants of that right.—Kansas City, M. & O. Ry. Co. of Texas v. Latham, 182 S. W. 717.

COVENANTS.

See Equity, ⚡84; Injunction, ⚡62; Landlord and Tenant, ⚡152.

III. PERFORMANCE OR BREACH.

⚡103 (Mo.App.) Covenants prohibiting building nearer than two feet to edge of the lot and restricting the length of the building are not violated because the space between building and edge of the lot was concreted and used for an areaway, or because a retaining wall was constructed from the building to the rear of the lot.—Forsee v. Jackson, 182 S. W. 783.

Restrictive covenants as to length and location of a building *held* not to include a front porch on the building erected on the granted premises; back and sleeping porches only being mentioned.—Id.

Where a deed established a building line, the

erection of a dwelling with bay windows extending eight or nine inches over the line is a violation of the covenant; the windows being a part of the building.—Id.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Witnesses, ¶818-414.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Marshaling Assets and Securities.

CRIMINAL LAW.

See Assault and Battery; Bail; Burglary; Contempt; Costs, ¶295, 308; Embezzlement; Extradition, ¶32; Forgery; Fraud, ¶68; Grand Jury; Husband and Wife, ¶304; Indictment and Information; Intoxicating Liquors, ¶139, 239; Larceny; Libel and Slander, ¶7; Malicious Prosecution; Robbery; Seduction; Weapons, ¶17; Witnesses.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

¶50 (Tex.Cr.App.) The doctrine that one, not otherwise insane, who commits crime from an irresistible impulse, cannot be held accountable therefor is not the rule in Texas.—Mikeska v. State, 182 S. W. 1127.

¶53 (Tex.Cr.App.) By direct provision of Pen. Code 1911, art. 41, intoxication is not a defense to a charge of crime.—Mikeska v. State, 182 S. W. 1127.

¶57 (Tex.Cr.App.) By direct provision of Pen. Code 1911, art. 41, temporary insanity, produced by the voluntary use of intoxicants, is eliminated as a defense to a charge of crime.—Mikeska v. State, 182 S. W. 1127.

III. PARTIES TO OFFENSES.

¶59 (Tex.Cr.App.) Defendant was a principal, even if H., and not he, telephoned B. that I. wanted four sacks of sugar, and that a wagon would be sent therefor, whereupon defendant hired an expressman, who got it and took it to H., who paid defendant for aiding in working the scheme.—Jones v. State, 182 S. W. 306.

¶59 (Tex.Cr.App.) To make one a principal offender he must be shown to have been guilty of some overt act or conduct prior to or at the time of a homicide.—Villareal v. State, 182 S. W. 322.

¶59 (Tex.Cr.App.) Under Pen. Code 1911, art. 86, providing that an accessory is one who knowingly conceals or gives aid to the principal, the accessory becomes criminally connected with the principal, and not with the offense.—Hightower v. State, 182 S. W. 492.

¶69 (Tex.Cr.App.) Concealment of knowledge that a crime is to be committed does not make a party an accessory before the fact.—Hightower v. State, 182 S. W. 492.

¶76 (Tex.Cr.App.) Concealment of knowledge that a crime is to be committed does not make a party an accessory after the fact.—Hightower v. State, 182 S. W. 492.

Failure to inform on a person known to have committed a crime will not make one an accessory.—Id.

V. VENUE.

(B) Change of Venue.

¶126 (Ky.) Under Const. § 11, and Ky. St. § 1109, defendant, charged with murder, held entitled to a change of venue on the ground

that in the county where the prosecution was pending he could not have a fair and impartial trial.—Allen v. Commonwealth, 182 S. W. 176.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

¶260 (Ark.) Where defendant appealed from a justice after entering a plea of guilty to an information sufficiently charging him with abandonment of his wife and child in violation of Acts 1909, p. 184, the appeal should have been dismissed.—Stokes v. State, 182 S. W. 521.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

¶273 (Ark.) A "plea of guilty," being a formal confession of guilt before the court, leaves the court with power only to pass sentence as upon a verdict.—Stokes v. State, 182 S. W. 521.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

¶304 (Mo.) The court may take judicial notice that a pistol is a dangerous and deadly weapon.—State v. Taylor, 182 S. W. 159.

¶308 (Ark.) An "indictment" is merely an accusation against a defendant, and does not even raise a presumption of guilt.—State v. Fox, 182 S. W. 906.

(B) Facts in Issue and Relevant to Issue, and Res Gestæ.

¶349 (Tex.Cr.App.) In a prosecution for burglary of a saloon, a detective's testimony that he searched defendant's house and found none of the missing property, defendant claiming that others, who had previously pleaded guilty to the burglary, and in whose possession stolen property had been found, were alone guilty, was admissible.—McPherson v. State, 182 S. W. 1114.

In a prosecution for burglary of a saloon, where defendant had admittedly been at the scene of the crime, but, as he claimed, with an innocent purpose, testimony that from the appearance of his clothing shortly after he had none of the stolen property on his person, was admissible.—Id.

¶351 (Tex.Cr.App.) In a prosecution for burglary, evidence that the defendant had been in several states since the alleged burglary was admissible as a circumstance tending to show guilt.—Williams v. State, 182 S. W. 327.

¶351 (Tex.Cr.App.) In prosecution for forgery, evidence of accused's visit to courthouse in effort to destroy forged check on which prosecution was based and other similar checks, held properly admitted in evidence.—Fry v. State, 182 S. W. 331.

¶359 (Tex.Cr.App.) In a prosecution for burglary of a saloon, the judgment showing that two persons, other than defendant, also charged with the crime, had pleaded guilty to burglarizing the saloon on the particular occasion, was admissible.—McPherson v. State, 182 S. W. 1114.

In a prosecution for burglary of a saloon, any testimony tending to show that parties other than defendant broke and entered the saloon was admissible.—Id.

¶364 (Tex.Cr.App.) What defendant said immediately after his assault was res gestæ thereof, and admissible as original testimony.—Eitel v. State, 182 S. W. 318.

¶368 (Tex.Cr.App.) What the wife of defendant said in the presence of defendant immediately after an assault by him was admissible as res gestæ.—Eitel v. State, 182 S. W. 318.

¶368 (Tex.Cr.App.) In a prosecution for burglary, testimony of defendant as to what another

er, also charged with the crime, with whom defendant denied acting in concert, had told defendant while the other was in the very commission of the act, as to how such other had gained entrance, was competent, though such other was not competent as a witness.—*McPherson v. State*, 182 S. W. 1114.

(C) Other Offenses, and Character of Accused.

⇒372 (Tex.Cr.App.) Evidence that accused had for two years pursued system of cashing checks issued to fictitious payees, held admissible in prosecution for forgery of one of such checks.—*Fry v. State*, 182 S. W. 331.

⇒372 (Tex.Cr.App.) On the issue of whether defendant gave away whisky, as he claimed, or sold it, as claimed by those receiving it, testimony that an hour later he sold liquor to others is admissible.—*Graham v. State*, 182 S. W. 453.

⇒372 (Tex.Cr.App.) In a prosecution for burglary of a saloon, evidence that a drug store in the same building was burglarized on the same night, the two transactions being so interwoven as to be but one in effect, was admissible.—*McPherson v. State*, 182 S. W. 1114.

(D) Materiality and Competency in General.

⇒393 (Tex.Cr.App.) Testimony of a qualified expert that defendant appeared in court to be playing the part of one afflicted with melancholia, that he was not suffering from such disease, and that he had not so acted while in jail was not improper, as causing the defendant, in effect, to testify against himself.—*Mikeska v. State*, 182 S. W. 1127.

⇒396 (Tex.Cr.App.) Where defendant set up insanity and attempted to prove the defense by evidence of his entire life history, the state could show in rebuttal by similar evidence, that at no period of his life was defendant's mind so unbalanced as to render him irresponsible for his acts.—*Mikeska v. State*, 182 S. W. 1127.

⇒396 (Tex.Cr.App.) In a prosecution of a hackman for manslaughter of another whom he had reported to an officer for violating the law in crossing a line at the railroad depot, testimony that decedent had in fact violated no ordinance held admissible.—*Mansell v. State*, 182 S. W. 1137.

(E) Best and Secondary and Demonstrative Evidence.

⇒400 (Tex.Cr.App.) In an incest case, where the woman testified accused never had intercourse with her, held, that a copy of a letter in which she charged accused with being father of her child was not admissible as original evidence.—*Hollingsworth v. State*, 182 S. W. 465.

⇒404 (Tex.Cr.App.) Clothes worn by decedent at the time he was shot by accused are admissible to show where the wounds took effect in the body of decedent.—*Hiles v. State*, 182 S. W. 1121.

(F) Admissions, Declarations, and Hearsay.

⇒417 (Tex.Cr.App.) That defendant was not present when the complaining witness identified property found on defendant's premises as being the stolen property did not render inadmissible such witness' testimony as to his identification of the property.—*Williams v. State*, 182 S. W. 335.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

⇒433 (Tex.Cr.App.) In a prosecution for embezzling money sent defendant for a particular purpose, defendant's replies to letters written for the sender by a bank cashier were properly admitted in evidence, where they related to a transaction in connection with which the money was sent, and there was evidence authenticating

defendant's signature to them.—*Messner v. State*, 182 S. W. 829.

(I) Opinion Evidence.

⇒448 (Tex.Cr.App.) Under Pen. Code 1911, art. 1143, as to showing character of deceased, when defendant shows threats of deceased, witness may, over objection of opinion, state whether or not deceased was a person who would likely execute a threat made.—*Melton v. State*, 182 S. W. 289.

⇒448 (Tex.Cr.App.) A witness' testimony that he saw some wagon and mule tracks near where the peas were stolen, and that he followed them for some distance and found peas spilled on the ground and walked on and saw similar tracks, held admissible over objection that it was a statement of a conclusion.—*Williams v. State*, 182 S. W. 335.

⇒452 (Tex.Cr.App.) Witnesses held sufficiently qualified to testify that during their acquaintance with defendant they observed nothing in him leading them to believe he was mentally afflicted.—*Mikeska v. State*, 182 S. W. 1127.

⇒474 (Tex.Cr.App.) Expert testimony that a person laboring under a sudden attack of insanity and having a slipp of the mind would not, upon recovering normal consciousness, know anything that he did or what took place during the time, was admissible.—*Mikeska v. State*, 182 S. W. 1127.

Testimony of medical experts that one insane to the extent of not knowing right from wrong would not and could not detail the incidents attendant upon a homicide by him, and the events just before and subsequent, was admissible.—Id.

(J) Testimony of Accomplices and Codefendants.

⇒508 (Tex.Cr.App.) That a witness is a codefendant of accused and under indictment for the same offense does not make him incompetent.—*Smith v. State*, 182 S. W. 311.

That such witness has been promised immunity, does not make him incompetent as a witness for the state.—Id.

⇒510 (Tex.Cr.App.) In a trial for murder the state need not show that deceased was unlawfully killed, independently of accomplice testimony.—*Ingram v. State*, 182 S. W. 290.

In a trial for murder the testimony of an accomplice alone cannot establish the fact of an unlawful killing, or that defendant was the guilty party, but must be corroborated by other facts and circumstances tending to show such facts.—Id.

⇒510 (Tex.Cr.App.) In a prosecution for cattle theft, it was essential to a conviction that the testimony of a witness, who was a codefendant of accused and under indictment for the same offense, should be corroborated by testimony tending to connect accused with the original taking.—*Smith v. State*, 182 S. W. 311.

⇒510½ (Tex.Cr.App.) Evidence to corroborate the widow of deceased, an accomplice, who would testify to adulterous relations with defendant, put in before defendant himself testified to such relations, held admissible.—*Ingram v. State*, 182 S. W. 290.

⇒511 (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. art. 801, evidence corroborating an accomplice is sufficient if it tends to connect defendant with the crime, though it is not sufficient to convict and does not corroborate in detail.—*Ingram v. State*, 182 S. W. 290.

Where the testimony of the wife of deceased placed her in the position of an accomplice, independent corroborating evidence held sufficient to sustain a conviction.—Id.

⇒511 (Tex.Cr.App.) Corroboration of accomplices in burglary held sufficient, within the requirement that it tend to connect defendant with commission of the crime.—*Whetstone v. State*, 182 S. W. 1117.

(K) Confessions.

—535 (Tex.Cr.App.) The fact that deceased was unlawfully killed and the further fact of defendant's connection with the crime may be shown by confessions in connection with the other facts and circumstances in evidence.—Ingram v. State, 182 S. W. 290.

—535 (Tex.Cr.App.) An extrajudicial verbal confession by defendant is not enough for conviction, being insufficient to establish the corpus delicti.—Daugherty v. State, 182 S. W. 306.

(L) Evidence at Preliminary Examination or at Former Trial.

—543 (Tex.Cr.App.) In a prosecution for assault to murder, where a witness on examining trial, whose testimony was reduced to writing, went to Mexico, on trial defendant could reproduce so much of his testimony as showed that the party assaulted was armed with a pistol and had secured cartridges from the witness.—Hernandez v. State, 182 S. W. 494.

XI. TIME OF TRIAL AND CONTINUANCE.

—590 (Ky.) On facts alleged, *held*, that motion for continuance on the ground that defendant, charged with murder, did not have sufficient opportunity or time to prepare for trial, should have been granted.—Allen v. Commonwealth, 182 S. W. 176.

What is a reasonable opportunity to prepare for trial, and what time should be given, necessarily depend on the facts and circumstances of each case, and must be left largely to the discretion of the trial court, subject to review.—*Id.*

—594 (Tex.Cr.App.) A showing of absence, sick, of the only person other than defendant, present the night before the homicide, when deceased was alleged to have made threats, *held* sufficient for continuance.—Melton v. State, 182 S. W. 289.

—594 (Tex. Cr. App.) Defendant is not entitled to continuance as a matter of right for the absence of a witness, but his application is addressed to the sound discretion of the trial court.—Furnace v. State, 182 S. W. 454.

Where defendant was immediately arrested upon killing deceased, and indicted in 12 days, but for 3 weeks made no application for process for a witness, who had left for California, not showing in his application for continuance any reason for delay, when the witness left, or that defendant did not know he was going, defendant was not entitled to continuance for absence of the witness.—*Id.*

—594 (Tex.Cr.App.) Refusal of continuance for absence of a witness, for a long time a fugitive from justice, is proper.—Jordan v. State, 182 S. W. 890.

There was no error in denying a continuance based on absence of a witness, where he makes affidavit that he did not know and would not testify what defendant in his application alleged he would.—*Id.*

—594 (Tex.Cr.App.) Defendant is entitled to a continuance for the absence of a witness, whose testimony, material to the defense, he has used due diligence to secure.—Mansell v. State, 182 S. W. 1137.

—595 (Tex.Cr.App.) Where it was a contested issue whether deceased was armed with a knife during the quarrel in which he was killed, the refusal of continuance for absence of a witness who would have testified that he was so armed was reversible error.—Mansell v. State, 182 S. W. 1137.

—597 (Tex.Cr.App.) The appellate court will not reverse a conviction for a refusal of continuance for absence of a witness, unless in connection with the evidence adduced on trial it is impressed that if the absent testimony, relevant,

material, and probably true, had been before the jury, a verdict more favorable to defendant would have resulted.—Furnace v. State, 182 S. W. 454.

—597 (Tex.Cr.App.) Showing by accused *held* insufficient to show error in denying continuance on the ground of absence of material witnesses.—Wood v. State, 182 S. W. 1122.

—608 (Tex.Cr.App.) Overruling of application for continuance because of defendant's claimed illness *held* not error, where there was no evidence to contradict physician appointed by the court, who swore he could find nothing wrong with defendant.—Smith v. State, 182 S. W. 451.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

—633 (Tex.Cr.App.) That among the names of witnesses called before a jury was impaneled or announcement of ready made was that of defendant's wife shows no error.—Jordan v. State, 182 S. W. 890.

—636 (Tex.Cr.App.) Where accused in forgery case having given statutory bond for remaining in court until verdict voluntarily absented himself during jury's deliberation, it was not error for the court in his absence, on sending a jury back for further deliberation, to remark that trials were expensive, that the cause was for the jury and not court to decide, and that court was not again retiring jury as punishment, or to extort verdict.—Fry v. State, 182 S. W. 331.

—656 (Tex.Cr.App.) In a prosecution for burglary of a saloon, where a detective testified that the morning after the burglary they searched the defendant's house and found none of the stolen property, the court's remark that all the testimony could have been eliminated by objection by the state, because immaterial, was improper.—McPherson v. State, 182 S. W. 1114.

(C) Reception of Evidence.

—666½ (Tex.Cr.App.) Permitting a witness under indictment for the same offense to talk with his attorney after being placed on the witness stand and before testifying *held* not error.—Smith v. State, 182 S. W. 311.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

—695 (Tex.Cr.App.) Where evidence for defendant to meet and explain evidence offered by the state was inadmissible on any phase of the case, it was immaterial as to what objection to it was made, or as to what reason the court gave for excluding it.—Ingram v. State, 182 S. W. 290.

(E) Arguments and Conduct of Counsel.

—713 (Tex.Cr.App.) In a prosecution for wife murder, defended on the ground of insanity, argument of state's counsel that when there is no other defense they always resort to the "low-down, cowardly stinking defense of insanity" did not authorize reversal.—Mikeska v. State, 182 S. W. 1127.

—721½ (Tex.Cr.App.) The prosecuting attorney may comment on the failure of defendant to produce his wife as a witness.—Jordan v. State, 182 S. W. 890.

—722 (Tex.Cr.App.) In a prosecution for wife murder, the argument of state's counsel that while defendant was in a saloon drinking good whisky, his wife was out in the field picking cotton to support her children, which had support in evidence, was not improper.—Mikeska v. State, 182 S. W. 1127.

—724 (Tex.Cr.App.) In trial for murder, argument of defendant denouncing the widow of deceased, whose adulterous relations with defend-

ant were relied upon as a motive, and argument of counsel for state as to the record showing of defendant's guilt, *held* legitimate.—*Ingram v. State*, 182 S. W. 290.

☞730 (Tex.Cr.App.) In trial for murder, remarks of district attorney in closing argument as to attitude of widow of deceased, whose adulterous relations with defendant were relied upon as motive, withdrawn by the attorney, with instructions to disregard it, *held* not error.—*Ingram v. State*, 182 S. W. 290.

(F) Province of Court and Jury in General.

☞761 (Mo.) On trial for theft, an instruction which assumes that the property alleged to have been stolen was stolen *held* erroneous, where that question was in issue.—*State v. Lee*, 182 S. W. 972.

(G) Necessity, Requisites, and Sufficiency of Instructions.

☞792 (Tex.Cr.App.) In a prosecution for burglary of a saloon, where defendant testified that he was called into the place to have a drink by parties engaged in committing the crime, and that he left as soon as he understood the true condition of affairs, he had the right to have presented to the jury the law, applicable to his defense, that he was not guilty as a principal, unless he aided in the commission of the crime.—*McPherson v. State*, 182 S. W. 1114.

☞814 (Tex.Cr.App.) Where, in a prosecution for embezzlement, there was no evidence that defendant returned the money, the court properly refused to instruct on that issue.—*Messner v. State*, 182 S. W. 329.

☞814 (Tex. Cr. App.) Where the defendant was identified by a witness, who stated that she recognized him as the man who made the entry into the house, that a light was burning, and that she recognized him, it was not error to fail to charge on circumstantial evidence.—*Wilson v. State*, 182 S. W. 891.

☞814 (Tex.Cr.App.) Refusal of an instruction that prosecutrix traded her virtue for a promise of marriage, the only promise being to marry if she became pregnant from the intercourse, was not error, where the testimony of the prosecutrix showed the reverse to be true.—*Wood v. State*, 182 S. W. 1122.

☞814 (Tex.Cr.App.) In the absence of evidence that defendant was suffering from disease when he killed his wife, or at the trial, the charge that the jury should acquit if they believed defendant was temporarily insane from disease and the use of liquor was properly refused.—*Mikeska v. State*, 182 S. W. 1127.

In the absence of evidence that defendant was suffering from delirium tremens at the time of the homicide, the refusal of a charge, as to his being permanently insane at the time from the long-continued use of intoxicants, was not erroneous.—*Id.*

☞814 (Tex.Cr.App.) Where defendant admits that he did the act which constitutes the *factum probandum*, whatever be the offense charged, it is unnecessary to charge on circumstantial evidence.—*Sullenger v. State*, 182 S. W. 1140.

In a prosecution for cattle theft, where the taking of a cow by defendant was shown directly, but circumstantial evidence was introduced to show the intent with which the taking was committed, a charge on circumstantial evidence was not required.—*Id.*

(H) Requests for Instructions.

☞828 (Tex.Cr.App.) Where defendant did not think the court's instruction given on sustaining his objection to the prosecutor's argument was sufficient, but did not request further instruction in writing, no error was presented.—*Ingram v. State*, 182 S. W. 290.

☞829 (Tex.Cr.App.) In a criminal trial the refusal of defendant's special charge was not erroneous, where it was fully covered by the court in its charge.—*Williams v. State*, 182 S. W. 327.

☞829 (Tex.Cr.App.) Where the court gave an adequate instruction on self-defense, the refusal of requested charges on that issue is not error.—*Atkinson v. State*, 182 S. W. 1069.

☞829 (Tex.Cr.App.) The refusal of a special charge, on an issue, as to which the court fully instructs, is not erroneous.—*Mikeska v. State*, 182 S. W. 1127.

Where the court's charge and a special charge of defendant fully and completely presented the issue of insanity as made by the testimony, the refusal of other special charges on the issue was proper.—*Id.*

☞829 (Tex.Cr.App.) In a prosecution for cattle theft, where the court properly submitted the defense of defendant's claimed purchase of the cow from a third party, the refusal of the specific charge that, if defendant bought the cow, to acquit him was proper.—*Sullenger v. State*, 182 S. W. 1140.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

☞841 (Tex.Cr.App.) Complaint of the charge must be made before it is read to the jury.—*McPherson v. State*, 182 S. W. 1114.

(J) Custody, Conduct, and Deliberations of Jury.

☞855 (Tex.Cr.App.) The drinking of a glass of beer by a jurymen while eating his supper during trial does not constitute error, as the drinking of intoxicants by jurors constitutes reversible error only where some of them become intoxicated.—*Mikeska v. State*, 182 S. W. 1127.

☞857 (Tex.Cr.App.) Discussion by jury, in deliberating, of accused's failure to testify, *held* ground for reversal of judgment of conviction.—*Fry v. State*, 182 S. W. 331.

☞863 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 754, touching the matter of instructions after retirement, where the judge verbally answered the foreman's verbal question, having directed that both question and answer be taken down by the stenographer, which was done, the judge signing his answer and delivering it to the jury, there was no error.—*Mikeska v. State*, 182 S. W. 1127.

☞866 (Tex.Cr.App.) Verdict *held* not invalid as verdict by lot, where the time of imprisonment was indicated by part of jurors and divided by 12, but was afterwards changed by agreement of all the jurors.—*Ingram v. State*, 182 S. W. 290.

(K) Verdict.

☞889 (Tex.Cr.App.) Where a verdict of guilty of theft—a misdemeanor—assessed a fine only, the court properly directed the jury to retire to their room, and if they found defendant guilty, assess a jail penalty.—*Williams v. State*, 182 S. W. 335.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

☞917 (Tex.Cr.App.) There was no error in denying a new trial based on absence of a witness, where he makes affidavit that he did not know and would not testify what defendant in his application alleged he would.—*Jordan v. State*, 182 S. W. 890.

☞957 (Tex.Cr.App.) Verdict *held* not subject to impeachment by juror's affidavit that he and others believing defendants not guilty voted to convict, thinking this would force defendants to tell what they knew about the crime.—*Villareal v. State*, 182 S. W. 322.

☞959 (Tex.Cr.App.) Court's refusal to postpone hearing on motion for new trial to allow

counsel to procure affidavits concerning statements of state's witness *held* not error; diligence not being shown, and the evidence being only impeaching and apparently hearsay.—*Lanier v. State*, 182 S. W. 451.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

⇒1020 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 87, if the punishment imposed in the county court on appeal be a fine not exceeding \$100, its judgment was final, and further appeal will not lie.—*Smith v. State*, 182 S. W. 310.

⇒1023 (Tex.Cr.App.) Notice of appeal should not be permitted where the court in its judgment suspended sentence, as, under the suspended sentence law, accused can appeal from the conviction only when, if ever, proper sentence is later pronounced against him.—*Gallier v. State*, 182 S. W. 306.

⇒1026 (Ark.) Accused does not lose his right of appeal by entering a plea of guilty where the accusation states no offense, but may attack the accusation on appeal for the first time.—*Stokes v. State*, 182 S. W. 521.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇒1037 (Tex.Cr.App.) For defendant to complain of statement of prosecuting attorney in argument, *held*, that he should have asked an instruction that the jury disregard it.—*Jordan v. State*, 182 S. W. 890.

⇒1043 (Tex.Cr.App.) Objections, other than those made below, to the court's refusal to receive a verdict of guilty until it had been corrected by the jury could not be considered.—*Williams v. State*, 182 S. W. 335.

(D) Record and Proceedings Not in Record.

⇒1086 (Tex.Cr.App.) The record must show a sentence, the final judgment, to give the appellate court jurisdiction.—*Gilliard v. State*, 182 S. W. 1136.

⇒1090 (Tex.Cr.App.) Where accused pleaded guilty to violating the local option law and received the lowest punishment, his appeal presents nothing for review, there being no statement of facts or bill of exceptions showing the proceedings at trial.—*Looper v. State*, 182 S. W. 308.

⇒1090 (Tex.Cr.App.) Where the indictment charges an offense under the law, no questions are reviewable without a statement of facts or a bill of exceptions.—*Warren v. State*, 182 S. W. 327.

⇒1090 (Tex.Cr.App.) On appeal from conviction, where there is no bill of exceptions, and no complaint is made of the charge, the only question presented is whether or not the evidence sustains the conviction.—*Crockett v. State*, 182 S. W. 1119.

⇒1092 (Tex.Cr.App.) Bills of exception filed several days after the time allowed by the court cannot be considered on appeal.—*Jones v. State*, 182 S. W. 306.

⇒1092 (Tex.Cr.App.) Where accused was tried by a judge other than the regular judge, the regular judge could not approve the bill of exceptions.—*McGee v. State*, 182 S. W. 309.

⇒1092 (Tex.Cr.App.) The court cannot consider a bill of exceptions from which the judge's signature is omitted.—*Morgan v. State*, 182 S. W. 461.

⇒1092 (Tex.Cr.App.) Bills of exceptions, approved and filed after the time fixed by orders allowing the filing of bills after adjournment of court, cannot be considered.—*Noe v. State*, 182 S. W. 1122.

⇒1092 (Tex.Cr.App.) During the term in which conviction is had, upon proper motion and service thereof, the court, having the proceedings and judgment still in his control can, if through mistake or otherwise a bill of exceptions is untruthful, or certifies to matters which did not occur, upon proper notice to the interested parties, make the matter appear of record as it occurred in fact.—*Sullenger v. State*, 182 S. W. 1140.

Under Code Cr. Proc. 1911, art. 916, the trial court could not, pending rehearing on appeal on motion of the state, amend defendant's bill of exceptions to overruling of his objection to a juror.—*Id.*

Where bills of exceptions and statements of facts have been properly agreed to and approved and filed in the lower court, after term has expired they cannot be amended or attacked without showing fraud.—*Id.*

⇒1095 (Tex.Cr.App.) A bill of exceptions not filed until more than 90 days after denial of new trial and sentencing of accused, notice of appeal being given at time of sentence, will be stricken on motion.—*McGee v. State*, 182 S. W. 309.

An affidavit filed by appellant in opposition to a motion to strike out bills of exceptions which was not filed until more than 90 days *held* to show such lack of diligence as required that the motion be sustained.—*Id.*

⇒1099 (Tex.Cr.App.) Defendant, having prepared, and on the last day of the term presented, a statement of facts in time for its disposition on that day, was sufficiently diligent, so that he could have it considered on appeal, though under ruling, concurred in by county attorney, it was not approved and filed till next day.—*Daugherty v. State*, 182 S. W. 306.

⇒1099 (Tex.Cr.App.) Where accused was tried by a judge other than the regular judge, the regular judge could not approve the statement of facts.—*McGee v. State*, 182 S. W. 309.

⇒1099 (Tex.Cr.App.) Where within the 20 days allowed the judge, on the parties failing to agree, undertook to prepare and file a statement of facts, and one was filed, it will be considered, though not specifically certified or approved by him till later.—*Eitel v. State*, 182 S. W. 318.

⇒1099 (Tex.Cr.App.) A statement of facts filed on October 23d on appeal from a conviction at a term adjourned September 25th cannot be considered; more than 20 days having elapsed.—*Morgan v. State*, 182 S. W. 451.

A statement of facts not approved by the trial judge or signed by the prosecuting attorney cannot be considered.—*Id.*

⇒1099 (Tex.Cr.App.) The statement of facts, with reference to the denial of new trial for newly discovered evidence having been filed after adjournment, cannot be considered.—*Whetstone v. State*, 182 S. W. 1117.

⇒1102 (Tex.Cr.App.) A statement of facts not filed until more than 90 days after denial of new trial and sentencing of accused, notice of appeal being given at time of sentence, will be stricken on motion.—*McGee v. State*, 182 S. W. 309.

An affidavit filed by appellant on opposition to a motion to strike out statement of facts which was not filed until more than 90 days *held* to show such lack of diligence as required that the motion be sustained.—*Id.*

⇒1119 (Tex.Cr.App.) In a prosecution for burglary, a bill of exception *held* sufficient to present for review the propriety of a remark of the court that cross-examination of a witness could have been eliminated upon objection by the state, because the testimony was immaterial.—*McPherson v. State*, 182 S. W. 1114.

⇒1120 (Tex.Cr.App.) On bill of exception not showing the object of the testimony sought to be introduced by defendant, or the testimony which

the witness would have given, *held*, that the court could not determine whether there was error in its exclusion.—*Solan v. State*, 182 S. W. 317.

⚡1120 (Tex.Cr.App.) Bills of exception complaining of the exclusion of questions asked witnesses should show what the witnesses' answers would have been.—*Villareal v. State*, 182 S. W. 322.

⚡1120 (Tex.Cr.App.) On exception to exclusion of evidence not disclosing what the testimony alleged to have been erroneously excluded would have been, the Court of Criminal Appeals is unable to judge whether it would be material, if admissible.—*Williams v. State*, 182 S. W. 327.

⚡1124 (Tex.Cr.App.) Where the term of court at which defendant was convicted adjourned, and the evidence heard on the motion for a new trial on the ground of newly discovered evidence was not filed in the trial court until 7 weeks thereafter, such ground would not be considered on appeal.—*Ingram v. State*, 182 S. W. 290.

⚡1124 (Tex.Cr.App.) Where no statement of the evidence on the trial accompanies the record, and no bill of exceptions as contained therein, there is nothing in the motion for a new trial which the Court of Criminal Appeals can review.—*Holt v. State*, 182 S. W. 1119.

⚡1124 (Tex.Cr.App.) Error cannot be predicated on the refusal of a new trial prayed on account of the absence of witnesses, where the record shows that the court in hearing the motion, heard evidence, but the evidence heard is not disclosed by statement of facts, bill of exceptions, or other proper method.—*Wood v. State*, 182 S. W. 1122.

(G) Review.

⚡1137 (Tex.Cr.App.) Accused could not predicate error on the admission of testimony that there was much drinking and drunkenness at the time and place of the alleged sale in violation of the local option law, where he had adduced testimony as to the same matter.—*Venn v. State*, 182 S. W. 315.

Where accused elicited testimony that the prosecuting witness had run off and forfeited his attachment bond as a witness, it was not error to permit the county attorney to prove by the witness why he had forfeited such bond.—*Id.*

Permitting the sheriff to testify that, when he arrested defendant, he had had in his possession for about two years a warrant for defendant's arrest in a felony case, and that he had been unable to arrest defendant because he was constantly on the dodge, was not error, where evidence as to such matter was first introduced by defendant.—*Id.*

⚡1144 (Tex.Cr.App.) Where the testimony heard by the court in acting on a contested motion for new trial is not in the record, the appellate court must conclude that the trial judge was justified in refusing new trial on the grounds assigned.—*Furnace v. State*, 182 S. W. 454.

⚡1144 (Tex.Cr.App.) Denial of continuance and new trial must be presumed correct; there being no statement of facts or bills of exceptions filed in term showing the testimony heard.—*Jordan v. State*, 182 S. W. 890.

⚡1150 (Ky.) The discretion of the trial judge in granting or refusing an application for a change of venue on the ground of local prejudice will not be interfered with, unless it affirmatively appears that it was abused, or that the ruling was prejudicial to the constitutional rights of the complaining party.—*Allen v. Commonwealth*, 182 S. W. 176.

⚡1152 (Tex.Cr.App.) Where a bill of exceptions clearly shows that a juror was disqualified, and that appellant properly objected and preserved the question by proper bill, the Court

of Criminal Appeals cannot hold that the trial judge properly exercised his discretion in holding the juror qualified.—*Sullenger v. State*, 182 S. W. 1140.

⚡1159 (Mo.) A conviction, sustained by sufficient evidence, if believed, will not be disturbed on appeal.—*State v. Webb*, 182 S. W. 975.

⚡1159 (Tex.Cr.App.) That it appeared on cross-examination of state's witness that he was once convicted of lunacy *held* not ground for reversal as for insufficiency of the evidence from the incompetency of the witness.—*Lanier v. State*, 182 S. W. 451.

⚡1159 (Tex.Cr.App.) Where the state's evidence, which was apparently believed, sustained a conviction, and defendant's evidence, if believed, would have justified his acquittal, the sufficiency of the evidence was for the jury.—*Martin v. State*, 182 S. W. 1119.

⚡1159 (Tex.Cr.App.) In a criminal case credibility of witnesses, weight of testimony, and facts established, are questions for the jury, and the court on appeal cannot disturb its finding thereon.—*Wood v. State*, 182 S. W. 1122.

⚡1169 (Tex.Cr.App.) Error, if any, in admitting corroborating evidence of defendant's adulterous relations with widow of deceased to show motive, *held* harmless, where defendant himself testified to such relations.—*Ingram v. State*, 182 S. W. 290.

Error in asking defendant when he had been expelled from the Odd Fellows *held* harmless, where the court at once sustained objection thereto and instructed the jury not to consider the answer.—*Id.*

⚡1169 (Tex.Cr.App.) In a prosecution for embezzling money sent defendant to use in getting a patent to school land, the admission of evidence that a third person had written defendant to get certain school land patented, if error, was harmless, where defendant's letters introduced in evidence showed that he had agreed to get the land patented.—*Messner v. State*, 182 S. W. 329.

⚡1170 (Mo.) Accused cannot complain of the exclusion or withdrawal of evidence where the ruling is in his favor, because the evidence, excluded or withdrawn, tended to show an unlawful motive for the crime.—*State v. Webb*, 182 S. W. 975.

⚡1171 (Tex.Cr.App.) In a prosecution for homicide committed in attempting to arrest deceased, argument by the prosecutor referring to the exclusion of deceased's dying declaration on accused's objection *held* harmless, if erroneous; the jury having been present when the declaration was excluded.—*Marshall v. State*, 182 S. W. 1106.

⚡1172 (Mo.) An instruction, pertinent to the first count of an information, *held* not prejudicial to accused, convicted under the second count.—*State v. Webb*, 182 S. W. 975.

CROSS-EXAMINATION.

See Witnesses, ⚡269.

CROSSINGS.

See Railroads, ⚡312-350.

CURTESY.

See Dower.

CUSTODY.

See Divorce, ⚡298.

CUSTOMS AND USAGES.

⚡12 (Tex.Civ.App.) Where a principal, with knowledge, actual or constructive, of a rule of the Cotton Exchange, consigns cotton to a factor to sell, he is estopped to deny the binding effect of such rule.—*Wm. D. Cleveland & Sons v. Jamison*, 182 S. W. 1175.

§13 (Ky.) Where a contract of employment was wholly indefinite, it cannot be extended by custom that such employment should last for the term of a year.—*Bowen v. Chenoa-Hignite Coal Co.*, 182 S. W. 635.

§19 (Mo.App.) Evidence that there was not a custom of "minimum car shipments" was competent on an issue as to quantity of potatoes ordered where the term used in negotiation was "carloads."—*Asbury v. Evans*, 182 S. W. 785.

DAMAGES.

See Attachment, §875; Carriers, §185, 229, 277; Eminent Domain, §271, 298, 303; Execution, §461; False Imprisonment, §36; Infants, §72; Insurance, §602; Libel and Slander, §33, 121; Malicious Prosecution, §69; Sales, §377, 387, 442; Sequestration, §16, 21; Trial, §256.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§40 (Ark.) Where plaintiff agreed to perform certain work for defendant and was prevented from doing so by defendant's failure, he was entitled to recover the profits which the evidence made it reasonably certain that he would have made if the defendant had carried out his contract.—*Streudle v. Leroy*, 182 S. W. 898.

§50 (Tex.Civ.App.) Mental suffering will be implied from illness, or injuries accompanied by physical pain, and may arise from a sense of discomfort or inconvenience.—*Turner v. McKinney*, 182 S. W. 481.

(B) Aggravation, Mitigation, and Reduction of Loss.

§62 (Tex.Civ.App.) A boarding house keeper against whom a writ of sequestration was wrongfully sued out, destroying her business, was under duty to use all reasonable means to secure another place in which to conduct a boarding house and thereby mitigate her loss.—*Hamlett v. Coates*, 182 S. W. 1144.

(C) Interest, Costs, and Expenses of Litigation.

§68 (Ky.) Where a contract did not provide a penalty nor stipulate for liquidated damages for a breach, interest was not allowable by way of damages for a breach until after the damages were ascertained by verdict or judgment.—*Stevens & Elkins v. Lewis-Wilson-Hicks Co.*, 182 S. W. 840.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§77 (Ark.) While the use of the word "penal," in a contract stipulating the damages to be paid on its breach, is not controlling, it must be considered in determining whether the parties intended to treat it as liquidated damages or penalty.—*Montague v. Robinson*, 182 S. W. 558.

§79 (Ark.) Where a logging contract stipulated for a bond conditioned on performance, by which the principal and surety were "held and firmly bound in the penal sum of \$600," the condition was a penalty, and not liquidated damages, since it provided the same damages for any breach, though the actual damages were easily ascertainable.—*Montague v. Robinson*, 182 S. W. 558.

V. EXEMPLARY DAMAGES.

§87 (Mo.App.) In an action for actual and punitive damages, judgment for punitive damages may be upheld, though plaintiff was, as a condition to denial of a new trial, required to

remit all actual damages but a nominal sum, because of receipt of evidence not pleaded.—*Davis v. Chicago, R. I. & P. Ry. Co.*, 182 S. W. 826.

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

§95 (Ky.) Measure of recovery of one suing for a personal injury is such a sum as the jury may believe from the evidence will reasonably compensate him for any suffering, and for any impairment of his earning capacity.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

(C) Breach of Contract.

§120 (Ky.) Where a contract is made under special circumstances communicated to one of the parties by the other, the damages resulting from a breach are the amount of the injury which would ordinarily flow from a breach under the special circumstances.—*Stevens & Elkins v. Lewis-Wilson-Hicks Co.*, 182 S. W. 840.

Where lumber which defendant undertook to manufacture for plaintiff would be for sale on the market as of the time the contract required delivery at a specified place, the market price as of the time of delivery fixed in the contract was the market value in determining damages for defendant's breach.—*Id.*

Damages recoverable by plaintiff for defendant's breach of contract to manufacture a specified quantity of lumber annually are the profits that would have accrued to plaintiff from defendant's performance of the contract.—*Id.*

§121 (Ky.) Necessary compensation paid by a party to a contract to third persons in the part performance of the contract by the other party to the contract held not recoverable as damages for the latter's breach of contract.—*Stevens & Elkins v. Lewis-Wilson-Hicks Co.*, 182 S. W. 840.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§130 (Ky.) An award of \$10,000 damages for fractures to one arm is so flagrantly excessive as to furnish ground for reversal.—*Indian Creek Coal Co. v. Walcott*, 182 S. W. 631.

§132 (Ky.) Damages of \$16,500 for the loss of both hands, awarded a healthy young man earning from \$75 to \$85 a month at the time of his injury, were not excessive.—*Nashville, C. & St. L. Ry. Co. v. Banks*, 182 S. W. 660.

§132 (Mo.App.) An award of \$2,000 for injuries to a school teacher, which caused her to suffer from headaches and necessitated her having assistance, held not excessive.—*Anderson v. American Sash & Door Co.*, 182 S. W. 819.

§132 (Tex.Civ.App.) \$20,000 verdict against railroad held not excessive, where employee's injury would probably cause permanent inability to work, and suffering, with momentary danger of death.—*Texas & P. Ry. Co. v. Conway*, 182 S. W. 52.

§132 (Tex.Civ.App.) A verdict of \$18,000 damages for loss of a brakeman's leg while coupling cars is not excessive merely on the ground of comparative negligence, where intense suffering is shown and plaintiff is a young man.—*San Antonio, U. & G. R. Co. v. Green*, 182 S. W. 392.

§132 (Tex.Civ.App.) A recovery of \$18,000 for injuries to a trained nurse, 39 years old, earning \$25 a week, besides board, was not excessive, where it appeared that she was partially paralyzed, that one eye was rendered useless, and that she was but a wreck of her former self and almost in a helpless condition.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

§132 (Tex.Civ.App.) Where the injuries of a railroad switchman were a bad heart, an erratic pulse, a wrecked nervous system, an injured spine, and a disordered stomach, bowels, kid-

neys, and bladder, and the troubles were progressive, a verdict of \$15,000 was not excessive.—Galveston, H. & S. A. Ry. Co. v. Webb, 182 S. W. 424.

☞132 (Tex.Civ.App.) Verdict for \$10,000 for injuries by falling from a scaffolding due to negligence of fellow servants, *held* not excessive.—Galveston, H. & S. A. Ry. Co. v. Reinhart, 182 S. W. 436.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

☞157 (Mo.App.) Elements of damage not pleaded in an action for damages for excluding plaintiff from its train and procuring his arrest under a false charge of intoxication may not be shown.—Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.

(B) Evidence.

☞166 (Tex.Civ.App.) In a brakeman's suit for injuries in coupling cars, evidence as to what was done to his injured leg after the accident was admissible to show his pain and anguish.—San Antonio, U. & G. R. Co. v. Green, 182 S. W. 392.

☞173 (Tex.Civ.App.) A brakeman suing for injuries in coupling cars could show the amount he was capable of earning, and had earned with other companies in the past.—San Antonio, U. & G. R. Co. v. Green, 182 S. W. 392.

☞186 (Tex.Civ.App.) In father's action for loss of minor son's services, due to injuries, evidence *held* to sustain finding that minor son's capacity to perform manual labor had been destroyed or greatly impaired.—Acme Laundry v. Weinstein, 182 S. W. 408.

(C) Proceedings for Assessment.

☞208 (Tex.Civ.App.) Evidence, in a railroad employe's action for permanent injury to his collar bone and abdomen, *held* sufficient to justify a submission of the question of his future mental anguish and physical pain.—Turner v. McKinney, 182 S. W. 431.

☞208 (Tex.Civ.App.) In a servant's action for personal injury by falling from a ladder attached to defendant's oil derrick, striking upon his back with his head on some iron tubing, evidence *held* to warrant a submission of his impaired ability to earn money in the future.—J. M. Guffey Petroleum Co. v. Dinwiddie, 182 S. W. 444.

☞216 (Ky.) In action for personal injury, the judge must direct the jury not to allow anything for diminished earning capacity caused by a disease of which plaintiff suffered, unless the disease was directly attributable to the injury.—Taylor Coal Co. v. Miller, 182 S. W. 920.

(D) Computation and Amount, Double and Treble Damages, and Remission.

☞228 (Ky.) It is good practice to remit in the trial court so much of the recovery as may be fairly attributable to erroneous instructions.—Nashville, C. & St. L. Ry. Co. v. Henry, 182 S. W. 651.

DAMS.

See Waters and Water Courses, ☞172, 179.

DEAD BODIES.

See Carriers, ☞76, 185.

DEADLY WEAPONS.

See Homicide, ☞90.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Principal and Surety, ☞142, 162; Subrogation; United States, ☞76.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law, ☞417; Evidence, ☞271; Homicide, ☞202-215.

DEDICATION.

I. NATURE AND REQUISITES.

☞5 (Mo.) The conveyance of land for an avenue adjacent to a park and to be a part thereof, to be maintained as a "carriage avenue" subject to the rules of the park commissioners, indicated a purpose to dedicate for a public use.—Kennard v. Eyermann, 182 S. W. 737.

☞20 (Mo.) The knowledge and acquiescence of the grantor of title to a strip of land adjacent to a park for use as a carriage avenue, in the city's permanent improvements by paving, lighting, etc., was proof of his intention to dedicate it for a public use in all that the term implies.—Kennard v. Eyermann, 182 S. W. 737.

☞31 (Ky.) A dedication is an offer, and must be accepted before it is complete.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

☞35 (Ky.) Constructing a sewer along and otherwise exercising control over a street is sufficient as an acceptance by the city of its dedication.—Koop v. Henry Bickel Co., 182 S. W. 617.

☞36 (Ky.) The acceptance of a dedication in violation of the conditions of the grant is a nullity, if objection is seasonably made.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

Dedicator may require acceptance to be made according to terms of offer, but, if it is accepted without some of the imposed conditions, and he assents and waives the conditions, he cannot afterwards complain.—Id.

II. OPERATION AND EFFECT.

☞55 (Ky.) The dedicators of a public way may impose any condition as to its use which they may desire, and may limit a street to the use of pedestrians.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

☞57 (Ky.) In view of Act March 24, 1851 (Laws 1850-51, c. 692), denying general council right to accept dedication of street less than 60 feet in width, strip 16 feet wide *held* not dedicated or accepted as ordinary street.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

☞57 (Mo.) A city's acceptance of dedicated land and its course in uniformly regarding it as a highway fixed its status, so far as municipal affairs are concerned.—Kennard v. Eyermann, 182 S. W. 737.

☞58 (Ky.) Property dedicated for specific, limited, and defined purpose cannot be used for another purpose if reasonable objection to the misuser is made.—Home Laundry Co. v. City of Louisville, 182 S. W. 645.

☞58 (Mo.) Land dedicated for street purposes cannot thereafter be diverted for park purposes.—Kennard v. Eyermann, 182 S. W. 737.

☞65 (Tex.Civ.App.) Where heirs received in partition lots abutting on unplatted street, which was afterwards abandoned, fee in street did not revert to them in common.—Amerman v. Missouri, K. & T. Ry. Co. of Texas, 182 S. W. 54.

DEEDS.

See Covenants; Evidence, ☞461; Fraud, ☞68; Husband and Wife, ☞207; Mortgages; Vendor and Purchaser, ☞239.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances in General.**

⚡17 (Tex.Civ.App.) Where the grantee of realty paid the grantor \$10 provided an annuity of \$600 for her, and agreed to render her personal services in caring for her as a daughter would her mother, which she did until the grantor's death, there was consideration for the conveyance.—*Feebles v. Slaughter*, 182 S. W. 10.

(B) Form and Contents of Instruments.

⚡38 (Tex.Civ.App.) Where the ambiguity in a deed as to the land conveyed is patent, and so inconsistent and contradictory that the deed is inoperative, no land passes by it, unless the deed is corrected to conform to the actual agreement of the parties.—*Standefor v. Miller*, 182 S. W. 1149.

(D) Delivery.

⚡56 (Ky.) Delivery of a deed may be actual or constructive, but in either case there must be an intent on the part of the grantor to transfer title, coupled with some act by which he parts with power and control over the deed.—*Justice v. Peters*, 182 S. W. 611.

⚡59 (Ky.) The recording by the grantor of a deed of gift to his children is a sufficient delivery.—*Combs v. Ison*, 182 S. W. 953.

(E) Validity.

⚡70 (Tex.Civ.App.) Grantee's fraudulent promise to pay \$700, upon delivery of deed with intent not to make such payment, held such fraud as authorized cancellation of deed.—*Wyatt v. Chambers*, 182 S. W. 16.

Where grantee's promise to make cash payment was fraudulent and without intent of performing deed held to be set aside though other promises constituting considerations were performed.—Id.

III. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⚡95 (Tex.Civ.App.) Where the language of a deed cannot be harmonized, from which an ambiguity arises, so that the instrument is susceptible of two constructions, the interpretation most favorable to the grantee will be adopted.—*Standefor v. Miller*, 182 S. W. 1149.

(B) Property Conveyed.

⚡114 (Tex.Civ.App.) Mention of the acreage conveyed by a deed describing the land specifically by metes and bounds does not control as to the property conveyed.—*Standefor v. Miller*, 182 S. W. 1149.

Where a deed, following the field notes, calling for the length of the lines east and west and for the north and south lines of the section, recited that the intention of the parties was "to convey said amount of land," such recital did not refer alone to the quantity of the land conveyed, first mentioned in the deed.—Id.

Where a general description in a deed of the acreage intended to be conveyed is inconsistent with the particular locative calls identifying the land, such deed should be construed most favorably to the grantee.—Id.

⚡115 (Tex.Civ.App.) Where the description of the property in a deed contains false matter, without which the description would be sufficient to identify the property conveyed, such false matter will be rejected and effect given to what remains.—*Standefor v. Miller*, 182 S. W. 1149.

Where there was an inconsistency in a deed, in that the boundaries of the land included a greater acreage than the deed recited was intended to be conveyed, the trial court, having

found the fact, could treat the statement of the quantity as false; the description being sufficient without it.—Id.

⚡118 (Mo.) In ejectment for part of a lot claimed under deeds from defendant executed when the lot was divided by a 60-foot avenue, evidence held to show that the minds of the parties never met upon a sale of the entire lot, but only upon that part of it lying west of the avenue.—*McIntyre v. Casey*, 182 S. W. 966.

(C) Estates and Interests Created.

⚡120 (Tex.Civ.App.) Every part of a deed must be given effect, if possible, and, when all of the parts are harmonized, the largest estate that its terms will permit will be conferred upon the grantee.—*Standefor v. Miller*, 182 S. W. 1149.

⚡124 (Ky.) Deed conveying to husband and wife with right of survivorship so long as the survivor remained unmarried, in which case the decedent's interest should vest in his or her heirs, provided that no sale had taken place before death, held to give grantees a fee-simple title.—*Schupp v. Mueller*, 182 S. W. 187.

⚡134 (Ky.) Under deed to husband and wife, with right of survivorship until remarriage, when property was to vest in the decedent's heirs provided that no sale took place before death, held that a sale by the grantees released the property from such limitation.—*Schupp v. Mueller*, 182 S. W. 187.

IV. PLEADING AND EVIDENCE.

⚡194 (Ky.) When a parent makes a voluntary deed for the benefit of his infant child, the law presumes an acceptance by the infant.—*Justice v. Peters*, 182 S. W. 611.

If one executes a deed to an infant and causes it to be recorded, delivery and acceptance is presumed; but the mere execution by a parent of a deed does not raise a presumption of delivery and acceptance, where the parent retains it.—Id.

⚡194 (Ky.) An acceptance of a beneficial deed to infants recorded by the grantor will be presumed.—*Combs v. Ison*, 182 S. W. 953.

⚡208 (Ky.) Evidence held insufficient to show a delivery of a deed by a father to his infant sons, or acceptance by them.—*Justice v. Peters*, 182 S. W. 611.

DE FACTO CORPORATIONS.

See Corporations, ⚡28.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Appeal and Error, ⚡957; Judgment, ⚡106-153.

DELAY.

See Carriers, ⚡102, 116, 213.

DELEGATION OF POWER.

See Licenses, ⚡6.

DELIVERY.

See Bills and Notes, ⚡63; Carriers, ⚡83, 94, 175; Deeds, ⚡56, 59, 194, 208; Sales, ⚡168½, 181.

DEMAND.

See Limitation of Actions, ⚡66.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, ⚡404.

DEMURRER.

See Appeal and Error, ¶917; Pleading, ¶205.

DEPOSITARIES.

See Subrogation, ¶28.

DEPOSITIONS.

See Appeal and Error, ¶523: Discovery. ¶79 (Ky.) Civ. Code Prac. § 585, does not prevent a party from proving any fact shown in a deposition not filed by any method permitted by law.—*Ohio Valley Mills v. Louisville Ry. Co.*, 182 S. W. 955.

DEPOSITS.

See Banks and Banking, ¶127-148.

DESCENT AND DISTRIBUTION.

See Adoption, ¶21; Dower; Executors and Administrators; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

¶91 (Ky.) The donee of personal property is a necessary party to an action to set aside the gift after the death of the donor, without whom no judgment setting the gift aside can be rendered.—*Norman v. Norman*, 182 S. W. 224.

(B) Advancements.

¶95 (Ky.) On facts appearing in an action to charge plaintiff's brothers with land conveyed to them by their mother as advancements, *held*, that the defendants were not charged with reasonable rent of land from date of its conveyance until the mother's death.—*McCray v. Corn*, 182 S. W. 640.

Rents may be charged as an advancement, so that a child who has the use of land may be charged with the value of such use as an advancement.—*Id.*

¶110 (Ky.) Attorneys for plaintiff in suit to charge defendants with advances *held* not entitled to an attorney's fee payable out of the estate on the ground that suit was brought to settle the estate of the defendants' mother and grantor.—*McCray v. Corn*, 182 S. W. 640.

¶115 (Ky.) Under Ky. St. § 1407, relating to advancements, the party seeking to charge property conveyed by a deed reciting a money consideration as an advancement has the burden of showing that it was, in fact, an advancement, and not made for a valuable consideration.—*McCray v. Corn*, 182 S. W. 640.

¶116 (Ky.) In a suit under the advancement statute (Ky. St. § 1407) to charge land devised to defendants as an advancement, evidence that the defendants' mother and grantor had stated before the conveyance was made that she intended to convey such land in consideration of defendants' services was admissible.—*McCray v. Corn*, 182 S. W. 640.

¶117 (Ky.) Under Ky. St. § 1407, the recited consideration in the conveyance sought to be charged as an advancement was not conclusive, nor was it essential that it should be averred or shown that it was made either by fraud or mistake.—*McCray v. Corn*, 182 S. W. 640.

In an action under the advancement statute (Ky. St. § 1407) to charge property conveyed by plaintiff's mother to her brothers as an advancement, evidence *held* to show that the conveyance was not made for a valuable consideration, but was to be charged as an advancement.—*Id.*

DESCRIPTION.

See Boundaries, ¶8-20; Deeds, ¶38, 114, 115.

DILIGENCE.

See New Trial, ¶96.

DIRECTING VERDICT.

See Appeal and Error, ¶212; Trial, ¶178.

DISCHARGE.

See Bankruptcy, ¶407-486; Principal and Surety, ¶100-129; Railroads, ¶212; Receivers, ¶204.

DISCOVERY.**I. IN EQUITY.**

¶3 (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3679-3686, giving a party the right to examine the opposite parties as witnesses to secure information for maintaining an action or defense, superseded the bill of discovery as known to equity practice.—*Farmers' & Merchants' Nat. Bank of Abilene v. Ivey*, 182 S. W. 706.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

¶70 (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3663 et seq. and 3680, 3682, 3683, relating to taking the deposition of a party, contemplates written interrogatories, and oral interrogatories would not be taken as confessed because of a failure to answer.—*Farmers' & Merchants' Nat. Bank of Abilene v. Ivey*, 182 S. W. 706.

DISCRETION OF COURT.

See Appeal and Error, ¶957-984; Criminal Law, ¶594; Judgment, ¶139, 143; Jury, ¶85.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶781, 803.

DISORDERLY HOUSE.

See Injunction, ¶229; Landlord and Tenant, ¶170.

DISQUALIFICATION.

See New Trial, ¶42.

DISTRICT AND PROSECUTING ATTORNEYS.

See Affidavits, ¶2.

¶3 (Ark.) Where action is brought by one county against another of the same judicial district, the county court may appoint counsel for the county, since the prosecuting attorney obviously cannot act for both counties, in spite of Kirby's Dig. § 6393, requiring the prosecuting attorney to defend suits brought against the county.—*Spence & Dudley v. Clay County*, 182 S. W. 573.

Attorneys appointed by county judge to defend suit testing validity of act adding township to county were concluded as to the value of their services by accepting a sum, as recited by the order of allowance, "for services in" the case.—*Id.*

The county court, which ratifies the appointment of counsel to defend an action against the county, cannot agree to pay a stipulated sum for the legal services, but the amount of compensation must be reasonable, and determined from all facts and surrounding circumstances.—*Id.*

DITCHES.

See Drains.

DIVORCE.

See Appeal and Error, **45**; Evidence, **318**.

II. GROUNDS.

29 (Mo.App.) Husband *held* entitled to divorce if wife called him objectionable names, struck him, threatened him with a butcher knife, told one of the children to stab him, and without cause had him arrested for assault.—Kennedy v. Kennedy, 182 S. W. 100.

III. DEFENSES.

51 (Mo.App.) A husband did not, by living and sleeping with his wife after alleged indignities for which he sought a divorce, condone the offenses where, after such cohabitation, other unhappy occurrences took place.—Kennedy v. Kennedy, 182 S. W. 100.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(C) Pleading.

108 (Ark.) The statements of a complaint for a divorce are not taken as true because of the defendant's failure to answer or his admission of their truth, but must be proved.—Johnson v. Johnson, 182 S. W. 897.

(D) Evidence.

111 (Ark.) There is no warrant in law for the introduction of an affidavit in evidence to establish ground for divorce.—Johnson v. Johnson, 182 S. W. 897.

127 (Ark.) Divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor.—Johnson v. Johnson, 182 S. W. 897.

132 (Mo.App.) In a husband's suit for divorce upon the ground of indignities, in which the wife filed a cross-bill on similar grounds, evidence *held* to support a decree in favor of the husband.—Kennedy v. Kennedy, 182 S. W. 100.

(F) Judgment or Decree.

172 (Ky.) Action against plaintiff's father-in-law for alienation of wife's affections *held* not concluded by action in which wife obtained divorce from plaintiff, as the parties were not the same, although the evidence was much the same.—Willey v. Howell, 182 S. W. 619.

(G) Appeal.

184 (Ark.) Where the evidence in action for divorce for wife's desertion in another state was not sufficient to establish the facts of such alleged ground, the Supreme Court could not determine whether chancellor erred in construing Kirby's Dig. § 2678, relative to proof of a cause of divorce occurring outside of the state.—Johnson v. Johnson, 182 S. W. 897.

It was immaterial that the chancellor refused to grant a divorce for a different reason where the plaintiff was not entitled to a divorce on the case made.—Id.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

221 (Tenn.) In Tennessee, a wife is entitled to recover both alimony and attorneys' fees upon successful termination of her suit for divorce, as well as an allowance for such purposes pendent lite; attorneys' fees being treated as part of the expenses of the case and allowed the wife whether she be complainant or defendant.—Winslow v. Winslow, 182 S. W. 241.

227 (Tenn.) Attorneys for the wife in her successful suit for absolute divorce against her husband were entitled to a fee of \$5,000 from the husband, though they could have procured

a divorce upon the ground of abandonment alone, with very little trouble, but in fact charged cruel and inhuman treatment and infidelity as well.—Winslow v. Winslow, 182 S. W. 241.

241 (Tenn.) A wife, granted absolute divorce for abandonment, from her husband, worth some \$170,000, he having been the more blamable party in their difficulties, will be awarded \$50,000 alimony in solido, instead of monthly payments of \$200.—Winslow v. Winslow, 182 S. W. 241.

249 (Ky.) Under Ky. St. § 2121, and Civ. Code Prac. § 425, relative to restoration of property upon granting of divorce, divorced wife named as beneficiary in policy *held* divested of interest, though premiums were paid by her.—Schauberger v. Morel's Adm'r, 182 S. W. 198.

Where upon granting of divorce wife loses interest in policy naming her as beneficiary, *held*, that she is entitled to reimbursement from the proceeds for the premiums paid by her.—Id.

Divorce *held* to restore property obtained by either party from the other, whether ordered by judgment or in subsequent proceeding, and when not ordered, or when order is formal, questions as to such restoration may be settled in subsequent proceeding.—Id.

254 (Ky.) Where a wife making no claim for alimony obtained a default judgment granting a divorce and adjudging her the owner of certain property described in her petition, but which belonged to her husband under Civ. Code § 425, an order setting aside the judgment on condition that she might amend her pleadings and present her claim for alimony was not prejudicial to her.—Algee v. Algee, 182 S. W. 197.

VI. CUSTODY AND SUPPORT OF CHILDREN.

298 (Mo.App.) Decree of divorce to husband, which gave custody of girls 16 and 14 years old to wife, *held* not erroneous in giving custody of boy in his twelfth year to the husband.—Kennedy v. Kennedy, 182 S. W. 100.

DOCKETS.

See Appeal and Error, **811**.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Criminal Law, **483**; Evidence, **352-380**.

DOMICILE.

See Husband and Wife, **3**.

DONATIONS.

See Gifts.

DOWER.

III. RIGHTS AND REMEDIES OF WIDOW.

79 (Ark.) In a widow's action against her children and their grantees for assignment of dower, evidence *held* sufficient to justify a finding that plaintiff, after the death of her husband, authorized proceedings in the chancery court of the county where the land was situated whereby title to them was vested in her son.—Owen v. Cox, 182 S. W. 559.

DRAINS.

See Exchange of Property, ¶7.

I. ESTABLISHMENT AND MAINTENANCE.

¶1 (Tenn.) In the absence of restriction the Legislature has plenary power over the establishment of drainage districts.—In re Forked Deer Drainage Dist., 182 S. W. 237.

¶14 (Ark.) Under Acts 1911, p. 196, § 4, a drainage district *held* not liable for fees of attorneys in drawing up petition for its formation.—Sain v. Bogle, 182 S. W. 515.

The drainage statute contemplating the employment of only one firm of attorneys for a district, that others may recover fees of it, they must show additional counsel were necessary, and employed under authority from the county court.—Id.

The civil engineers for a drainage district are entitled to only such fees as are expressly or by necessary implication allowed by statute.—Id.

Engineers *held*, in view of language of bond required by drainage law, not entitled to compensation from a district which was abandoned as impracticable.—Id.

¶14 (Tenn.) Const. art. 2, § 29, applies only to ordinary taxes; consequently Laws 1909, c. 185, as amended by laws 1915, c. 61, authorizing, where lands desired to be drained lie in several counties, a county court of any one of the counties to take complete jurisdiction over organization of the district, is not invalid.—In re Forked Deer Drainage Dist., 182 S. W. 237.

¶19 (Ark.) Where a drainage district is dissolved before its engineers have performed any work in the construction of the improvement, such work is not considered in fixing their compensation.—Sain v. Bogle, 182 S. W. 515.

II. ASSESSMENTS AND SPECIAL TAXES.

¶66 (Tenn.) A drainage district is a governmental agency to which power to levy special assessments may be properly delegated.—In re Forked Deer Drainage Dist., 182 S. W. 237.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Criminal Law, ¶53, 57.

DUE PROCESS OF LAW.

See Constitutional Law, ¶278, 297.

DYING DECLARATIONS.

See Homicide, ¶202-215.

DYNAMITE.

See Explosives, ¶8.

EASEMENTS.

See Dedication; Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

¶24 (Ky.) Defendant, owning lands to which a passway over land to which plaintiff had legal title was appurtenant, and who also acquired, by quitclaim deed the right to use the passway, acquired a mere easement over plaintiff's land.—O'Banion v. Cunningham, 182 S. W. 185.

¶31 (Ky.) A right of way is not forfeited by a use not contemplated by the grant, unless such use cannot be separated from that allowed by the grant; so that an obstruction thereof by the dominant owner, which could be easily

separated from its lawful use, did not work a forfeiture, but would be enjoined.—O'Banion v. Cunningham, 182 S. W. 185.

ECCLESIASTICAL TRIBUNALS.

See Religious Societies, ¶12.

EJECTMENT.

See Trespass to Try Title.

ELECTION OF REMEDIES.

See Indictment and Information, ¶132.

ELECTIONS.

See Intoxicating Liquors, ¶31-37; Judges; Schools and School Districts, ¶27.

ELEVATORS.

See Carriers, ¶247, 314, 316.

EMBEZZLEMENT.

See Criminal Law, ¶433, 814, 1169; Indictment and Information, ¶132.

¶32 (Tex. Cr. App.) An indictment for embezzlement of money, the property of trustees of a church as special owners, *held* insufficient in not alleging its receipt from them by defendant in some fiduciary relation, and its subsequent embezzlement by him.—Gilliard v. State, 182 S. W. 1136.

¶47 (Tex. Cr. App.) In a prosecution for embezzlement, *held*, that the court properly refused peremptory instructions for defendant.—Messner v. State, 182 S. W. 329.

EMINENT DOMAIN.

See Stipulations, ¶14.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

¶2 (Tex. Civ. App.) Ordinance regulating jitneys or motor busses *held* not to violate Const. art. 1, § 17, as to taking property without compensation.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

¶47 (Tenn.) Under the state laws, a telegraph company may condemn a way for telegraph purposes over a railroad right of way; act of Congress of July 24, 1863, Rev. St. U. S. § 5263 (U. S. Comp. St. § 10072), merely prohibiting the states from denying such right.—Western Union Telegraph Co. v. Nashville, C. & St. L. Ry. Co., 182 S. W. 254.

Where a telegraph company condemns the right to build a line on a railroad right of way the telegraph company, and not the railroad, is entitled to select the site for the telegraph line, so long as it does not interfere with operation of the railroad.—Id.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

¶71 (Tenn.) Shannon's Code, §§ 1844-1859, relating to condemnation under which a telegraph company condemning a right of way over a railroad line is bound to make compensation in money, provides a sufficient method for assessment and allowance of compensation.—Western Union Telegraph Co. v. Nashville, C. & St. L. Ry. Co., 182 S. W. 254.

(B) Taking or Injuring Property as Ground for Compensation.

¶96 (Tenn.) A wife, when a railroad condemned a way through land owned by herself and husband as tenants by the entirety, could not recover damages to a tract of land owned by her individually lying across a turnpike from the other tract and used in connection with it.—Tillman v. Lewisburg & N. R. Co., 182 S. W. 597.

§120 (Tenn.) Where a telegraph company condemns the right to run its line over a railroad right of way, *held* that, though it may not run its line if it amounts to an obstruction, yet, as its line may amount to an interference, the railroad company cannot be denied substantial damages.—*Western Union Telegraph Co. v. Nashville, C. & St. L. Ry. Co.*, 182 S. W. 254.

(C) Measure and Amount.

§147 (Mo.) A lessee of land condemned *held* not entitled to recover for loss of profits in business during removal of stock of goods, nor expense of removal thereof, nor depreciation in value caused by removal, but is entitled to market value of trade fixtures taken.—*City of St. Louis v. St. Louis, I. M. & S. Ry. Co.*, 182 S. W. 750, 755.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§191 (Tenn.) Under Acts 1885, c. 66, § 1, a petition for condemnation of a way for a telegraph line over a railroad right of way is not bad because averring that it would not interfere with the railroad and offering to move the telegraph line in case of obstruction.—*Western Union Telegraph Co. v. Nashville, C. & St. L. Ry. Co.*, 182 S. W. 254.

IV. REMEDIES OF OWNERS OF PROPERTY.

§271 (Ky.) Under Const. § 242, providing for just compensation for property taken or injured, an abutting owner whose property has been injured by the regrading of a street may maintain an action against the city for damages.—*City of Dayton v. Rewald*, 182 S. W. 931.

§293 (Ky.) In abutting owner's action for damages to property by regrading of street, answer alleging that plaintiff's contributory negligence was the producing cause of the damage, if any, *held* bad on demurrer.—*City of Dayton v. Rewald*, 182 S. W. 931.

§298 (Ky.) In abutting owner's action for damages to property by regrading of street, she might show the condition of the building as it was left after the regrading, what would be necessary to arrange it so that it could be used at all, and its condition after such arrangement.—*City of Dayton v. Rewald*, 182 S. W. 931.

§303 (Ky.) In abutting owner's action against city for damages from regrading of street, the measure was the difference between the market value of the property just before it became known that the regrading was to be done and its market value after the work had been done.—*City of Dayton v. Rewald*, 182 S. W. 931.

In an abutting owner's action for damages to property from lowering the grade of a street, evidence *held* to sustain a verdict for plaintiff for \$800.—*Id.*

§307 (Ky.) In an abutting owner's action against a city for damages to property by regrading of street, where the evidence as to the cause of a settling of the house so as to break a window sill was conflicting, the issue was for the jury.—*City of Dayton v. Rewald*, 182 S. W. 931.

§307 (Tenn.) Under Shannon's Code, § 1866, providing for the assessment of damages in an ordinary action for the taking of property by eminent domain, no jury of view is necessary where the amount of land taken is agreed upon and the sole issue is its value.—*Tennessee Power Co. v. Lay*, 182 S. W. 253.

V. TITLE OR RIGHTS ACQUIRED.

§317 (Tex. Civ. App.) Railroad, condemning lot abutting on platted street described by lot and block number only, *held* to acquire title to

middle of street.—*Amerman v. Missouri, K. & T. Ry. Co. of Texas*, 182 S. W. 54.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Commerce, §27.

ENCROACHMENT.

See Constitutional Law, §70, 71.

ENGINEERS.

See Drains, §14.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §211, 230.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITABLE TITLE.

See Replevin, §8.

EQUITY.

See Appeal and Error, §917, 1009; Cancellation of Instruments; Discovery, §3; Fraudulent Conveyances; Injunction; Judgment, §435-460; Limitation of Actions, §37; Marshaling Assets and Securities; Partition; Receivers; Reformation of Instruments; Subrogation; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§32 (Tenn.) In an action to reform insurance policy containing assignment to insured's mother to conform to assignment, agreement that the policy should revert to him on his mother's death, where the company and other resident defendants were served and appeared, the jurisdiction of the court was not defeated by the fact that nonresident distributees of the mother were served only by publication; the action being quasi in rem, and the court having jurisdiction of the res or the policy.—*Perry v. Young*, 182 S. W. 577.

§34 (Mo.App.) Violations of a building line covenant by an inch or two are too trivial for aid in equity.—*Forsee v. Jackson*, 182 S. W. 788.

(C) Principles and Maxims of Equity.

§65 (Tex. Civ. App.) He who comes into equity must come with clean hands.—*Hardee v. Alexander*, 182 S. W. 57.

II. LACHES AND STALE DEMANDS.

§72 (Ark.) "Laches" is not mere delay, but delay that works disadvantage to another, which disadvantage may arise from loss of evidence, change of title or intervention of equities and other causes.—*Nobles v. Poe*, 182 S. W. 270.

IV. PLEADING.

(A) Original Bill.

§129 (Tenn.) Where a bill set out the facts showing complainant to be entitled to relief, and concluded with a general prayer, it is sufficient, though not in so many words stating the theory upon which complainant was entitled to relief.—*Elledge v. Anderson*, 182 S. W. 234.

§147 (Tenn.) Whether a bill should be declared multifarious is largely a matter of discretion controlled by considerations of the inconvenience to the parties and the court of per-

mitting the examination of disconnected controversies in the same litigation.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

⚡149 (Tenn.) A bill by the receiver of an insolvent bank at the instance of the chancellor to recover of officers and directors for loans negligently made was not bad for misjoinder of parties complainant on the ground that it was substantially one by creditors and stockholders to enforce their respective rights against the directors.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

A bill by the receiver of an insolvent bank filed at the instance of the chancellor against its officers and directors to recover for loans negligently made, which joined directors who served five full terms and those who served only a part of such five terms, was multifarious as to the short-term defendants.—Id.

⚡153 (Tenn.) Every reasonable presumption must be indulged in favor of a bill when opposed by a demurrer.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

(E) Demurrer, Exceptions, and Motions.

⚡219 (Tenn.) Defenses not appearing on the face of complainant's bill cannot be taken advantage of by defendant on its demurrer.—Johnson City v. Tennessee Eastern Electric Co., 182 S. W. 587.

⚡232 (Tenn.) Demurrer to the bill as a whole which is not good to the whole must be *held* bad in toto.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

⚡239 (Tenn.) Foreign matter contained in a pleading must be disregarded on demurrer.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

⚡381 (Tenn.) Generally, when in equity there are several issues of fact submitted to a jury, they must find on all or none, and a verdict on one or more is not valid.—Minton v. Wilkerson, 182 S. W. 238.

In a suit to recover an interest in his wife's estate, attacking his release thereof, the failure of the jury to find on other issues presented by defendants will not deprive defendants of a verdict, where the jury found in favor of the validity of the release.—Id.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Deeds, ⚡120-134; Descent and Distribution; Dower; Executors and Administrators; Fraudulent Conveyances; Life Estates; Tenancy in Common; Wills.

ESTOPPEL

See Appeal and Error, ⚡882; Corporations, ⚡90; Criminal Law, ⚡1137; Mechanics' Liens, ⚡76.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

⚡52 (Mo.App.) Estoppels are odious, and will not be lightly invoked.—S. S. Allen Grocery Co. v. Bank of Buchanan County, 182 S. W. 777.

⚡52 (Tex.Civ.App.) Where the president of a corporation without authority executed two notes without consideration, and later the notes were produced to secure a debt partly owed by him, there was no element of estoppel against the corporation.—El Fresnal Irrigated Land Co. v. Bank of Washington, 182 S. W. 701.

(B) Grounds of Estoppel.

⚡70 (Tex.Civ.App.) Plaintiff's failure to assert his claim by intervention in the receivership proceedings coupled with slight delay thereafter, *held* not to prevent subsequent assertion against the railroad company after discharge of the receiver.—Kansas City, M. & O. Ry. Co. of Texas v. Latham, 182 S. W. 717.

⚡92 (Mo.App.) A party to a contract cannot accept its benefits and reject its burdens.—Hartman v. Chicago, B. & Q. R. Co., 182 S. W. 148.

⚡92 (Mo.App.) Where defendant, the owner of a mill operated by others, received indemnity under a policy for plaintiff's grain which was burned with the mill, *held*, that defendant was estopped to deny liability.—Penney & Penney Feed Co. v. Kramer, 182 S. W. 755.

(E) Pleading, Evidence, Trial, and Review.

⚡110 (Tex.) In action for breach of contract, estoppel of plaintiff, to be available as defense, must be pleaded.—Crews v. Gulf Grocery Co., 182 S. W. 1096.

EVIDENCE.

See Criminal Law, ⚡304-543; Depositions; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚡666½; Trial, ⚡86-96.

I. JUDICIAL NOTICE.

⚡20 (Tenn.) The court will judicially know that in Tennessee the duty to make loans does not ordinarily devolve on the directors of a bank.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S. W. 244.

II. PRESUMPTIONS.

⚡58 (Tex.Civ.App.) In ascertaining when children of a class not otherwise determined shall be ascertained, it is presumed, under the common law, that a man or woman is capable of having issue until death.—Reeves v. Simpson, 182 S. W. 68.

⚡83 (Tex.Civ.App.) It will be presumed that a surveyor marked a corner which his notes state he established on a tree locating it.—Goodrich v. West Lumber Co., 182 S. W. 341.

⚡87 (Tex.Civ.App.) The failure of a defendant to produce evidence particularly within his knowledge raises a presumption against him only when a plaintiff, having the burden of proof on the point, has produced evidence sufficient to raise an issue as to the truth of his claim.—Texas Co. v. Charles Clarke & Co., 182 S. W. 351.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestæ.

⚡121 (Mo.App.) In an action for price of goods, letters and telegrams passing between the plaintiff and a milling company, relating to the goods sold the deceased defendant, were admissible as part of the *res gestæ* to show to whom the plaintiff extended credit, where they had been submitted to the deceased and he had suggested answers to be made to them.—F. Hatterley Brokerage & Commission Co. v. Humes, 182 S. W. 93.

⚡123 (Mo.App.) Insured's reply to a question by his wife, that he slipped and fell in the bathroom, *held* admissible as *res gestæ* in an action on an accident policy.—Greenlee v. Kansas City Casualty Co., 182 S. W. 138.

V. BEST AND SECONDARY EVIDENCE.

☞178 (Mo.App.) Where plaintiff demanded insurance money received by defendant under a policy which covered plaintiff's grain, and a mill that was destroyed, a copy of the policy is admissible in evidence, the original having been destroyed after payment of the loss.—*Penney & Penney Feed Co. v. Kramer*, 182 S. W. 755.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

☞207 (Mo.App.) It is not error to exclude, when offered by defendant, the opening statement of plaintiff's counsel on a former trial of the case.—*Dubray v. Chicago & A. Ry. Co.*, 182 S. W. 1092.

☞207 (Tex.Civ.App.) In an action for the rent of grazing lands, the admissions of defendant as to the pasturage of his cattle thereon, made in another suit between him and another party, were admissible in evidence.—*Warburton v. Wilkinson*, 182 S. W. 711.

☞220 (Mo.) That a defendant remained silent when a clerk of codefendant made a statement not pertinent to a question asked of the clerk by defendant while the clerk was on another floor, so that the conversation was carried on either through a speaking tube or up the stairway, while codefendant was absent, *held* not admissible as an admission against defendant.—*State ex rel. Tiffany v. Ellison*, 182 S. W. 996.

☞220 (Mo.App.) In an action for negligently blinding plaintiff, testimony by the process server that defendant's office assistant stated in defendant's presence that plaintiff was the teacher whose eye he put out with iodine *held* admissible as an admission, not being denied.—*Coffey v. Tiffany*, 182 S. W. 495.

(B) By Parties or Others Interested in Event.

☞222 (Ky.) In an action on the bond of a police officer, who shot the plaintiff and claimed self-defense, testimony of a conversation with the officer after the shooting was admissible as an admission against interest.—*Forestal v. National Surety Co.*, 182 S. W. 614.

(E) Proof and Effect.

☞265 (Mo.App.) The contention that there was no proof of the number of bushels shipped by plaintiff is not sustained where it was admitted by counsel in stating the case that there were over 1,200 bushels to the car.—*Asbury v. Evans*, 182 S. W. 785.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

☞271 (Tex.Civ.App.) Statements between plaintiff and his attorney in defendants' absence are inadmissible on the question of the agreement of the parties.—*Eagle Drug Co. v. White*, 182 S. W. 878.

IX. HEARSAY.

☞317 (Mo.App.) In an action for damages for negligent delay in shipments of live stock, witnesses cannot testify to matters of which they have no knowledge, save from written statements made by others.—*Stockwell Co. v. Union Pac. Ry. Co.*, 182 S. W. 829.

☞317 (Tex.Civ.App.) In explaining the absence of a material witness, testimony of defendant's agent that his subagent telephoned that he had located the witness, who refused to attend, was inadmissible because hearsay.—*Galveston, H. & S. A. Ry. Co. v. Reinhart*, 182 S. W. 436.

☞318 (Ark.) An affidavit attached as an exhibit to a deposition in an action for divorce stating that affiant at plaintiff's request had

gone to see his wife and asked her to return and live with plaintiff, and that she had refused, was but written hearsay testimony and incompetent.—*Johnson v. Johnson*, 182 S. W. 897.

☞318 (Tex.Civ.App.) Where a material witness is absent and his absence is not satisfactorily explained, it is not error to exclude his sworn statement made before the trial.—*Galveston, H. & S. A. Ry. Co. v. Reinhart*, 182 S. W. 436.

☞320 (Tex.Civ.App.) In an action by contractor for materials used in school building, testimony of value thereof by expert, admitting that information was given him by a traveling man to whom he had submitted specifications one week before trial, *held* erroneously admitted.—*Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County*, 182 S. W. 386.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

☞352 (Tex.Civ.App.) In action for delay in delivering telegram, preventing addressee from attending funeral, the admission of a timetable of a railroad in force at the time was not error.—*Mansell v. Western Union Telegraph Co.*, 182 S. W. 1178.

(D) Production, Authentication, and Effect.

☞378 (Ky.) Letter written by railroad freight claim adjuster in reply to and referring to claim made by shipper, *held* prima facie genuine, and admissible without proof of the handwriting or other proof of its authenticity.—*Louisville & N. R. Co. v. E. J. O'Brien & Co.*, 182 S. W. 227.

☞380 (Ky.) In a personal injury action X-ray photographs not properly accredited should not be received.—*Indian Creek Coal Co. v. Walcott*, 182 S. W. 631.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

☞387 (Mo.App.) In an action on tax bills to cover the cost of a sidewalk, the recorded ordinance under which the work was done cannot be supplanted by parol evidence of a lost ordinance.—*City of Huntsville v. Eatherton*, 182 S. W. 767.

☞397 (Mo.App.) Evidence as to agreement with real estate broker *held* admissible because option given the broker was not a contract within the parol evidence rule.—*Bowers v. Bell*, 182 S. W. 1068.

☞417 (Mo.App.) Evidence as to agreement with real estate broker *held* admissible under exceptions to the parol evidence rule, admitting parol evidence where part only of real agreement is reduced to writing, and also admissible because option given the broker was not a contract within that rule.—*Bowers v. Bell*, 182 S. W. 1068.

☞419 (Ark.) Where a contract for the sale of a hotel recited a consideration of \$15,000 and acknowledged receipt thereof, parol evidence was admissible to show that other sums and goods also formed a part of the consideration.—*Hockaday v. Warmack*, 182 S. W. 263.

☞419 (Mo.App.) In view of the statute permitting plea of failure or partial failure of consideration for note, parol evidence that no consideration was received, or that the consideration wholly or partly failed, is admissible.—*Davidson v. Spitscafsky*, 182 S. W. 106.

☞420 (Tex.Civ.App.) In an action for goods sold and delivered on the buyer's order to the seller's salesman, parol evidence was admissible to show that the written order was not to be delivered to the seller to be filled within

30 days.—National Novelty Import Co. v. Duncan, 182 S. W. 888.

(C) *Separate or Subsequent Oral Agreement.*

—441 (Mo.App.) Parol evidence that a note payable on a certain day was to be extended was inadmissible.—Davidson v. Spitscaufsky, 182 S. W. 106.

—441 (Mo.App.) In an action for breach of warranty of a rope, evidence of conversation with agent of seller to show that a certain time was a reasonable time *held* properly excluded, where written contract did not fix the time.—Metropolitan St. Ry. Co. v. Broderick Rope Co., 182 S. W. 765.

—441 (Mo.App.) Evidence as to agreement with real estate broker *held* admissible to prove prior or contemporaneous collateral parol agreement within that rule.—Bowers v. Bell, 182 S. W. 1068.

—441 (Tex.Civ.App.) Where architect ordered school building roof changed from tile to metal, at no difference in cost, testimony of parol agreement to pay for difference *held* improperly admitted to vary written order in absence of participation by contractor in alleged fraud of architect.—Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County, 182 S. W. 386.

(D) *Construction or Application of Language of Written Instrument.*

—448 (Ky.) Where the meaning of a written contract is ambiguous parol evidence is admissible to explain the writing, that its meaning may be submitted to the jury.—Nolin Milling Co. v. White Grocery Co., 182 S. W. 191.

—450 (Ky.) Under Ky. St. § 4051a, *held*, that parol evidence might be received to explain that an order of the fiscal court making payment to the county clerk for note clerk and extra clerk was in payment for certifying to the county auditor the amount of liens due as shown by conveyances on record.—Ray v. Woodruff, 182 S. W. 662.

—450 (Tex.Civ.App.) An ambiguous contract is one obscure in meaning through indefiniteness of expression or having a double meaning.—Tom v. Roberson, 182 S. W. 698.

—457 (Ky.) Where the meaning of a written contract is to be interpreted in the light of a trade usage giving its words a peculiar meaning, parol evidence is admissible to explain the writing that its meaning may be submitted to the jury.—Nolin Milling Co. v. White Grocery Co., 182 S. W. 191.

—457 (Mo.App.) Trade terms in a written contract may be defined by parol.—Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co., 182 S. W. 1036.

—460 (Tex.Civ.App.) Where a call in field notes of a survey does not refer to objects on the ground indicating the surveyor's footsteps, such call cannot be controlled by parol evidence of such objects, except in actions to correct mistake; but evidence of facts extraneous to the call is admissible, in aid of a call found in field notes, to remove an ambiguity, and determine which of two or more conflicting calls shall prevail.—Goodrich v. West Lumber Co., 182 S. W. 341.

—461 (Tex.Civ.App.) In action on policy on stock of lumber which insurer claimed to be void for want of inventory required by policy, evidence that before its issuance insurer's agent told insured what inventory should contain, that he followed such instruction, and that his inventory was approved by agent *held* admissible.—Camden Fire Ins. Co. v. Yarbrough, 182 S. W. 66.

—461 (Tex.Civ.App.) Where the general description of a deed recited an amount of land intended to be conveyed less than the specific boundaries given therein included, parol evidence was not admissible to alter the calls given

in the description of the land to include only the recited amount, although it is admissible to explain a latent ambiguity.—Standefer v. Miller, 182 S. W. 1149.

Where the calls of a deed were made by mistake, correction of the instrument under the rules of pleading in such cases is the proper remedy, and not the introduction of parol evidence as to the correct calls in an action to recover part of the land conveyed.—Id.

XII. OPINION EVIDENCE.

(A) *Conclusions and Opinions of Witnesses in General.*

—474 (Tex.Civ.App.) Plaintiff, who had shipped hogs a number of times, may testify as to the normal shrinkage of hogs resulting from shipment.—Southern Kansas Ry. Co. of Texas v. Hughey, 182 S. W. 361.

(B) *Subjects of Expert Testimony.*

—505 (Ky.) A question put to an expert testifying from information gained by personal observation must call for an opinion, and not for a conclusion on his opinion.—Taylor Coal Co. v. Miller, 182 S. W. 920.

—507 (Mo.App.) In action for injuries to operator of a truck, it is improper to permit experts to testify as to the effect of its use in certain ways.—White v. Ennis Coffee Co., 182 S. W. 775.

(C) *Competency of Experts.*

—543 (Tex.Civ.App.) A practicing physician was improperly allowed to testify as to the market value of bananas at the shipping point, where he could not say he had ever seen the bananas and did not know how many were in a car or their grade.—Illinois Cent. R. Co. v. Freeman, 182 S. W. 369.

(D) *Examination of Experts.*

—553 (Ky.) Hypothetical question must incorporate the facts conclusively proven, and facts which the testimony tends to establish, and such as the jury may find.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S. W. 854.

A hypothetical question put to a physician *held* objectionable because incorporating statements not justified by the evidence.—Id.

(F) *Effect of Opinion Evidence.*

—570 (Ky.) Expert testimony is regarded by law as the weakest character of testimony.—Kentucky Traction & Terminal Co. v. Humphrey, 182 S. W. 854.

—571 (Ark.) Expert opinion is admissible, but not conclusive, on the question of value of an attorney's services.—Sain v. Bogle, 182 S. W. 515.

—571 (Mo.App.) In an action for negligently blinding one of plaintiff's eyes, where the claim was merely that defendant administered the wrong kind of medicine, and not that he erred in judgment, expert testimony as to the cause of the accident is merely advisory.—Coffey v. Tiffany, 182 S. W. 495.

XIV. WEIGHT AND SUFFICIENCY.

—587 (Tex.Civ.App.) A material fact or issue may be established as well by circumstantial as by direct evidence.—J. M. Guffey Petroleum Co. v. Dinwiddie, 182 S. W. 444.

—588 (Ky.) In an action against a water company for flooding plaintiff's house, *held*, that a theory inherently impossible could not supply the required scintilla of evidence, so that defendant's motion for a directed verdict should have been given.—Louisville Water Co. v. Lally, 182 S. W. 186.

—589 (Tex.Civ.App.) In trespass to try title, the unsupported testimony of a defendant was legally sufficient to sustain a verdict that the tract of land involved, part of a larger tract

conveyed to defendant and by him, with the exception of the tract in litigation conveyed to plaintiffs, did not belong, by way of a trust agreement, to plaintiffs under their agreement with defendant.—*Deweese v. Nicholson*, 182 S. W. 398.

⚡589 (Tex.Civ.App.) In an action on a note and to foreclose a deed of trust, where the defendant claimed a homestead in part of the land, the trial judge was not bound to believe their statements.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

⚡597 (Tex.Civ.App.) To support a verdict there must be more than a scintilla of evidence; there must be evidence sufficient to warrant a reasonable belief of the existence of the fact sought to be inferred.—*Canode v. Sewell*, 182 S. W. 421.

EXAMINATION.

See Witnesses, ⚡244-287.

EXCEPTIONS.

See Appeal and Error, ⚡254-270, 501, 1040; Pleading, ⚡228.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡511, 544; Criminal Law, ⚡1090-1095.

EXCESSIVE DAMAGES.

See Damages, ⚡130, 182, 228.

EXCHANGE OF PROPERTY.

⚡7 (Ark.) Agreement in exchanging lands that each party should pay taxes on the land acquired by the exchange held to contemplate payment of special levee district assessments.—*Hockaday v. Warmack*, 182 S. W. 263.

⚡8 (Ark.) In an action to cancel and set aside a deed and bill of sale given in exchange for personal property, evidence held sufficient to support the chancellor's finding that there was a total want of consideration to plaintiffs for the transfer of the land and personality.—*Lindsey v. Ritchey*, 182 S. W. 901.

⚡13 (Tex.Civ.App.) Where plaintiff relied on a contract whereby he was to exchange a certificate of stock for a set of tools, and it appeared that he offered to deliver the stock, but was told by defendant's agent to wait until demand was made, plaintiff was entitled to recover, though there had been no delivery.—*West Texas Supply Co. v. Duniavan*, 182 S. W. 425.

Where plaintiff claimed a set of tools under a contract with defendant corporation, testimony by one who was subsequently manager that plaintiff entered into a different contract with him for the acquisition of the tools is admissible.—*Id.*

EXECUTED TRUSTS.

See Trusts, ⚡114.

EXECUTION.

See Attachment; Exemptions; Garnishment; Principal and Agent, ⚡71, 79.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

⚡163 (Ark.) In proceeding to quash execution on ground that judgment was rendered without service on petitioner or notice on his part, preponderance of evidence held to show that attorney for another party defendant did not enter the appearance of the petitioner.—*Hall v. Huff*, 182 S. W. 535.

⚡172 (Tex.Civ.App.) In suit to restrain sale by constable under execution to satisfy judg-

ment, judgment creditor held necessary party defendant.—*Allen v. Carpenter*, 182 S. W. 430.

VI. CLAIMS BY THIRD PERSONS.

⚡191 (Tex.Civ.App.) By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 3740, levying on and sale under execution of property in which the debtor has merely an interest, without right to exclusive possession, is made by giving notice to the person entitled to the possession, and a levy made by taking actual possession cannot stand as legal on the ground that the debtor had an interest in the property, though not exclusive.—*Kimbrough v. Bevering*, 182 S. W. 403.

VII. SALE.

(B) Title and Rights of Purchaser.

⚡268 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3744, where a tenant pledged his cotton crop to his landlord to secure advances, a judgment creditor of the tenant was not entitled to possession of the cotton or to any interest therein by levy and sale to himself under execution, unless he complied with the conditions of the pledge.—*Kimbrough v. Bevering*, 182 S. W. 403.

XII. WRONGFUL EXECUTION.

⚡461 (Tex.Civ.App.) For an unauthorized levy of execution against a tenant farmer on cotton which the latter had sold to the landlord, the landlord was entitled to recover the value of all cotton appropriated by virtue of the execution and levy, whenever and by whomsoever the appropriation was made.—*Kimbrough v. Bevering*, 182 S. W. 403.

⚡466 (Ky.) An execution defendant cannot have judgment for damages against the sheriff and the judgment plaintiff, where at the direction of the latter's attorney the sale on execution was abandoned, and the property left in possession of the debtor, and though he gave a purchase bond, he was never required to pay it.—*Heard v. Higginbotham*, 182 S. W. 846.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Trusts; Wills; Witnesses, ⚡138-178.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

⚡221 (Mo.App.) On a claim for services to deceased, evidence held to sustain plaintiff's burden of showing that deceased intended to pay, and plaintiff intended to charge, for the services.—*Coates v. Dunnivant*, 182 S. W. 821.

(C) Disputed Claims.

⚡245 (Mo.App.) Where administrator went to trial on the merits without objection for want of notice of the filing of amended statement of claim, this objection was waived.—*Coates v. Dunnivant*, 182 S. W. 821.

An administrator, by going to trial on the merits, waived the objection that the original claim was not sufficient on which to base an amendment.—*Id.*

VII. DISTRIBUTION OF ESTATE.

⚡296 (Ky.) In suit under Civ. Code Prac. § 428, by heir against administratrix for a settlement of the estate, order of distribution to such heir, made more than nine months after the qualification of the administratrix, and when there were no unsettled claims against the estate, was proper.—*Stratton v. Wilson*, 182 S. W. 858.

⚡315 (Mo.App.) A final settlement and order of distribution in the probate court has the force of a judgment as to all matters necessarily involved in the settlement.—*Einstein v. Strother*, 182 S. W. 122.

X. ACTIONS.

⚡449 (Ky.) That testatrix lived with defendant, who nursed and attended her, under testatrix's agreement to pay a reasonable compensation therefor, *held* allegation of an express contract not supported by evidence of implied contract arising from acceptance and rendition of such services.—*Bishop v. Newman's Ex'r*, 182 S. W. 165.

⚡450 (Ky.) Where defendant's answer to executor's petition seeking recovery of money belonging to estate was that defendant had expended the money under direction and for benefit of testatrix, the burden was on defendant to show expenditure as alleged.—*Bishop v. Newman's Ex'r*, 182 S. W. 165.

⚡451 (Mo.App.) In action for board, nursing, and services furnished plaintiff's deceased mother, evidence *held* to make question for jury as to whether there was an agreement to pay therefor.—*Le Count v. Fountain's Estate*, 182 S. W. 102.

In suit against estate for services, though defendant did not plead payment, *held*, that instruction should have directed deduction from value of services of amount which will directed to be paid for such services.—*Id.*

⚡453 (Mo.App.) Where the plaintiff sued certain persons as administrators of the estate, the judgment could not run against them individually with an award of execution, but should have run against them in their representative capacity.—*Powers v. Conran*, 182 S. W. 1012.

XI. ACCOUNTING AND SETTLEMENT.

(D) Compensation.

⚡488 (Ark.) At common law an executor was not allowed compensation, a rule changed in Arkansas by statute.—*Gordon v. Greening*, 182 S. W. 272.

⚡490 (Ark.) Under Kirby's Dig. § 184, providing the maximum compensation for executors, where testator's will provided that his executor should receive \$150 per month for carrying on testator's business for three years and winding up the estate, an additional allowance to the executor of a 2 per cent. commission on funds distributed to legatees was erroneous.—*Gordon v. Greening*, 182 S. W. 272.

(E) Stating, Settling, Opening, and Review.

⚡516 (Mo.App.) Where allowance of commission to an administrator on approval of his final settlement was induced by negligence of plaintiff, there was no mistake or fraud entitling him to equitable relief.—*Einstein v. Strother*, 182 S. W. 122.

Mistake in administrator's right to commission on note collected for the estate, though belonging to another, *held* a mistake of law, for the correction of which no action would lie after the term in which administrator's final account was approved.—*Id.*

Allegations of petition, in suit in equity to set aside probate judgment approving defendant's final settlement as administrator, *held* not to show that plaintiff availed himself of adequate remedies at law.—*Id.*

Any fraud in allowance of commission to an administrator on his final settlement *held* not fraud in procuring the settlement so as to afford ground for setting it aside.—*Id.*

EXEMPLARY DAMAGES.

See Damages, ⚡87.

EXEMPTIONS.

See Bankruptcy, ⚡395; Homestead.

I. NATURE AND EXTENT.

(C) Property and Rights Exempt.

⚡57 (Tex.Civ.App.) Insurance money on a homestead, occupied as such, when insured by the purchaser, under express reservation of a vendor's lien, without agreement to insure for the benefit of the vendor, was not subject to payment of the vendor's foreclosure judgment against the purchaser.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

EXPERT TESTIMONY.

See Criminal Law, ⚡474; Evidence, ⚡505-571.

EXPLOSIVES.

See Nuisance, ⚡72; Steam, ⚡6.

⚡8 (Ky.) Owner of building storing dynamite and caps on a loft therein *held* negligent and liable for injuries to son of a person permitted to use the building where he knew the boy frequently went on the loft.—*Miller v. Chandler*, 182 S. W. 833.

EXPRESS MESSENGERS.

See Carriers, ⚡241, 307.

EXTENSION.

See Landlord and Tenant, ⚡90; Principal and Surety, ⚡104.

EXTRADITION.

II. INTERSTATE.

⚡21 (Tex.Cr.App.) The laws of Texas (Vernon's Ann. Code Cr. Proc. art. 1088) touching the return of criminals to other states are governed by the federal act touching the matter.—*Ex parte Goodman*, 182 S. W. 1120.

⚡32 (Tex.Cr.App.) A complaint filed in Louisiana charging violation of its criminal law, based only upon belief or information, is insufficient as authority for a requisition demand on the Governor of Texas for the return of the offender.—*Ex Parte Goodman*, 182 S. W. 1120.

⚡35 (Tex.Cr.App.) Under the act of Congress and the laws of Texas (Vernon's Ann. Code Cr. Proc. 1916, art. 1088), an affidavit that affiant had good reason to and did believe that a party was a fugitive from justice from Louisiana, where he had committed a criminal offense under the laws of Louisiana, and that he fled into Texas, where he might be found, was insufficient to justify the alleged criminal's arrest as a fugitive from justice.—*Ex Parte Goodman*, 182 S. W. 1120.

FACTORS.

See Brokers; Customs and Usages, ⚡12; Principal and Agent.

⚡25 (Tex.Civ.App.) Where an uninstructed factor endeavors to secure the fair market value, he is not liable in damages, though he sells for less than the market value.—*Wm. D. Cleveland & Sons v. Jamison*, 182 S. W. 1175.

⚡47 (Tex.Civ.App.) In the absence of an agreement or direction to the contrary before advancements made, a factor who has made advancements may, over his principal's objection, sell enough of the goods to reimburse himself.—*Wm. D. Cleveland & Sons v. Jamison*, 182 S. W. 1175.

Factors, who had advanced approximately the value of cotton consigned to them for sale, *held* authorized to sell the cotton at what seemed to them the market price, where the principal had authorized them to use their best judgment and

failed to comply with their demand to remit the difference between the amount advanced and the market price when the demand was made.—*Id.*

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⚡4 (Mo.App.) In an action for punitive damages for wrongfully excluding plaintiff from its train and in procuring his arrest on a false charge, "malice" means intentional doing of a wrongful act in a reckless manner.—*Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.*

⚡7 (Mo.App.) Where the servants of a railroad company wrongfully excluded plaintiff from a train and had him arrested, the fact that he was arrested on a warrant is no defense to an action for false imprisonment; the charge being unfounded.—*Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.*

Where the servants of a railroad company wrongfully excluded plaintiff from a train and secured his arrest on the false charge that he was intoxicated, plaintiff may recover for the false imprisonment without showing an acquittal where the prosecution was abandoned.—*Id.*

⚡15 (Mo.App.) It being the duty of a railway station agent to protect the property at the station and persons rightfully assembled there, the railroad company is liable where he wrongfully procured the arrest of a prospective passenger on the false claim that he was intoxicated.—*Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.*

(B) Actions.

⚡31 (Mo.App.) In an action against a railroad company for damages for securing his imprisonment on a false charge of intoxication, evidence held to show an abandonment of the prosecution.—*Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.*

⚡36 (Mo.App.) Where the defendant railroad company wrongfully excluded plaintiff from its train and secured his arrest under a false charge of intoxication, so that he was incarcerated for almost a day, when the prosecution was dropped, an award of \$1,520 punitive damages is not excessive.—*Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.*

Plaintiff, wrongfully arrested and imprisoned, though no actual damages were pleaded, other than the wrongful and malicious arrest, etc., is entitled to nominal damages.—*Id.*

FALSE STATEMENT.

See Bankruptcy, ⚡407.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ⚡27; Courts, ⚡489; Jury, ⚡11; Limitation of Actions, ⚡127; Master and Servant, ⚡228, 256, 276, 281, 284, 286; Removal of Causes, ⚡3; Statutes, ⚡279.

FEDERAL SAFETY APPLIANCE ACT.

See Master and Servant, ⚡111, 228, 278.

FEES.

See Attorney and Client, ⚡140-166; Counties, ⚡77.

FEE SIMPLE.

See Deeds, ⚡124; Wills, ⚡600, 608.

FELLOW SERVANTS.

See Master and Servant, ⚡177-201, 216, 279, 287, 294.

FENCES.

See Railroads, ⚡411.

FILING.

See Assignments for Benefit of Creditors, ⚡208; Depositions, ⚡79; Indictment and Information, ⚡43.

FINDINGS.

See Appeal and Error, ⚡1008-1022, 1071; Trial, ⚡351, 352, 395-404.

FIXTURES.

⚡15 (Mo.App.) Articles necessary to fix up a store building as a post office, put in it at the time of its lease as a post office, and leased therewith, held not fixtures, so as to pass by execution sale of the realty.—*Cunningham v. Von Mayes, 182 S. W. 1069.*

⚡18 (Mo.App.) Where machinery is permanently attached to a building and the soil by the purchaser and mortgagor of the realty in effecting the purpose of his purchase to install a mill in the building, it becomes a part of the freehold and passes to the mortgagee on foreclosure.—*Citizens' State Bank of Birch Tree v. Martin, 182 S. W. 1022.*

⚡35 (Mo.App.) In an action to determine the rights of a mortgagee of land and the mortgagee of machinery permanently attached thereto by the owner and mortgagor of the land for mill purposes, evidence held insufficient to support a finding in favor of the chattel mortgagee.—*Citizens' State Bank of Birch Tree v. Martin, 182 S. W. 1022.*

FLOWAGE.

See Waters and Water Courses, ⚡171.

FORECLOSURE.

See Chattel Mortgages, ⚡278; Mortgages, ⚡560.

FOREIGN CORPORATIONS.

See Corporations, ⚡642, 666.

FORFEITURES.

See Contracts, ⚡318; Easements, ⚡81; Insurance, ⚡835, 349, 378-396, 750-756.

FORGERY.

See Banks and Banking, ⚡148; Bills and Notes, ⚡377; Criminal Law, ⚡351, 372.

⚡12 (Tex.Cr.App.) To constitute forgery of an order to deliver goods, the party to whom it is directed need not accept or comply with it, or be able to do so.—*Townser v. State, 182 S. W. 1104.*

⚡16 (Tex.Cr.App.) Where evidence showed that accused forged payee's name to a check issued by county treasurer for a road warrant, and in order to cash it at depository bank indorsed his own name thereon under bank's custom requiring persons cashing checks to indorse their names thereon, and accused's name was last indorsement appearing on check, it was not error to submit the count for passing forged check to jury.—*Fry v. State, 182 S. W. 331.*

⚡29 (Tex.Cr.App.) Indictment charging accused with forging payee's name to road work warrant issued by county treasurer, held not insufficient for failure to allege facts showing drawer's authority to act as treasurer and to

issue checks against county funds.—Fry v. State, 182 S. W. 331.

§29 (Tex.Cr.App.) An indictment for forgery of an order to deliver goods and charge them to the purported maker, need not allege that the order, if genuine, could have created any pecuniary obligation.—Townser v. State, 182 S. W. 1104.

The indictment for forgery of an order to a salesman in a store to deliver goods need not allege that he himself had goods for sale, or was empowered to furnish them.—Id.

The indictment for forgery of an order on a company for goods need not allege whether it was a firm or a corporation, its name not being alleged to have been forged.—Id.

§34 (Tex.Cr.App.) Under an indictment for forgery of an instrument purporting to be the act of "Mariah Thorn," held, that there was no fatal variance where the copy of the instrument showed that the name signed to it was "Marth Thorn."—Lofton v. State, 182 S. W. 310.

§37 (Tex.Cr.App.) In a prosecution for forgery of an instrument purporting to be the act of "Mariah Thorn," the forged check which had been copied in the indictment and appeared to be signed by "Marth Thorn" was admissible.—Lofton v. State, 182 S. W. 310.

In prosecution for forgery of check for \$16, purporting to be the act of "Mariah Thorn," evidence that defendant presented to witness at a bank a check on such bank purporting to be signed by Mariah Thorn, and also presented a check for such amount to another witness, held material and admissible.—Id.

FORNICATION.

See Seduction.

FRAUD.

See Chattel Mortgages, §72; Deeds, §70; Frauds, Statute of; Judgment, §443, 511; Insurance, §291, 668; Limitation of Actions, §21, 100; Principal and Agent, §71.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§9 (Mo.App.) A broker having an option on land falsely representing the acreage held guilty of actionable fraud, where the purchaser relied thereon, without knowledge of falsity.—Kelley v. Peeples, 182 S. W. 806.

§9 (Tenn.) A representation amounting to a mere expression of intention, though false, is not a fraud at law, but a representation amounting to an engagement binds the party making it to make it good.—German-American Monogram Mfrs. v. Johnson, 182 S. W. 595.

§11 (Tex.Civ.App.) A representation as to the amount that would be due another, appearing under the evidence to have been only an opinion, the parties understanding that it was doubtful how much would be due, will not support an action of deceit.—Eagle Drug Co. v. White, 182 S. W. 378.

§20 (Tex.Civ.App.) Where the buyer of an engine, in purchasing, did not rely upon the seller's fraudulent representations made to induce the purchase, the buyer had no cause of action based upon such fraudulent representations.—Wilson v. Avery Co. of Texas, 182 S. W. 884.

§22 (Mo.App.) A vendor making false representations peculiarly within his knowledge held not relieved from liability on the theory that the purchaser could have discovered the falsity.—Kelley v. Peeples, 182 S. W. 809.

§24 (Mo.App.) A fraudulent representation to be treated as the proximate cause of a loss must have been acted on by the party to whom addressed, and he must have exercised the care to be expected from an ordinarily prudent person.—Kelley v. Peeples, 182 S. W. 809.

III. CRIMINAL RESPONSIBILITY.

§68 (Mo.App.) Offense of executing second deed fraudulently, within Rev. St. 1909, § 4569, consists not merely in making second deed without reciting therein former outstanding and defective deed, but so doing with intent to defraud some person.—Bowers v. Walker, 182 S. W. 116.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARriage OF ANOTHER.

§16 (Tex.Civ.App.) Where a seller of apples acted as one of the principals in the transaction, his promise, made before acceptance to the buyer, to save the latter harmless from any defects in the fruit, was not within the statute of frauds.—Dublin Fruit Co. v. Neely, 182 S. W. 406.

§23 (Ky.) Promise by purchaser of interest in partnership to pay firm's creditor, if he would refrain from suing and attaching the firm's property, held an original promise not within the statute of frauds.—Miller v. Davis, 182 S. W. 839.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§58 (Tex.Civ.App.) Where land was rented verbally, and, after entry by the tenant, the landlord stated that as long as the tenant paid her rent she could have the place, the contract was not obnoxious to the statute of frauds.—Hamlett v. Coates, 182 S. W. 1144.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§113 (Ky.) As a parol contract for employment for a year or more is unenforceable under the statute of frauds (Ky. St. § 470, subsec. 7), all its terms must be expressed in writing, and cannot be supplemented by parol.—Rowen v. Chenoa-Hignite Coal Co., 182 S. W. 635.

§115 (Mo.App.) Signature of a party to be charged under the statute of frauds is not confined to the actual subscription of his name, but the name may be in writing, or print, or by stamp, and may be in the body of the writing, or at the beginning or at the end.—Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co., 182 S. W. 1036.

A memorandum of sale, executed by a broker, held sufficient under the statute of frauds, though the name of the buyer appears at the beginning of the memorandum.—Id.

§116 (Mo.App.) A broker effecting a sale is the agent of both the buyer and the seller, when executing a memorandum of sale, and may bind the party to be charged within the statute of frauds.—Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co., 182 S. W. 1036.

Signature to a memorandum within the statute of frauds may be made by an agent, though he writes his own name.—Id.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(I) Retention of Possession or Apparent Title by Grantor.

§135 (Ky.) Where corporate stock was pledged, a sale by the pledgor is not, under Ky. St. § 1908, void as to the creditors of the seller, there being no actual fraud, though possession of the certificates was not delivered; they being in the hands of the pledgee.—First Nat. Bank of Lexington v. Bowman, 182 S. W. 195.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

⚡177 (Tenn.) Where complainant, who had purchased a one-half interest in a stock of goods in violation of the Bulk Sales Law, acquired the other half after the death of the seller, *held*, that money paid for such half was subject to a trust in favor of complainant; debts on the property not having been paid, despite incompetency of seller's widow.—*Blledge v. Anderson*, 182 S. W. 234.

⚡182 (Tex.Civ.App.) Rev. Civ. St. art. 8972, places no personal liability for the debts of the seller on the purchaser of a stock of goods in bulk.—*Eagle Drug Co. v. White*, 182 S. W. 878. Though the purchaser of a stock of goods in bulk does not assume a mortgage debt thereon, the mortgagee, not having waived his lien, may foreclose.—*Id.*

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

⚡300 (Ky.) Evidence *held* to justify a finding that a corporation sold its assets for full value, and the purchaser did not take the property subject to equitable liens of creditors.—*Justice's Adm'r v. Catlettsburg Timber Co.*, 182 S. W. 831.

FRIGHTENING ANIMALS.

See Railroads, ⚡360.

GARNISHMENT.

See Assignments for Benefit of Creditors, ⚡193; Attachment.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

⚡61 (Tex.Civ.App.) One who would garnish assets derived from or through an executor or administrator must show that the original title by which the executor or administrator holds has changed, and that he now holds the property in some capacity other than as a representative of the decedent.—*Gulf Nat. Bank v. Shelton*, 182 S. W. 337.

Under Rev. St. 1911, arts. 8447, 3452, 3458, 3459, 3464, 3466, 3467, 3470, an order allowing and classifying a claim of the second class *held* not to subject the executor to garnishment during the 12 months allowed for payment, though it be alleged the estate is solvent.—*Id.*

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

⚡112 (Ark.) A garnishee must retain possession of all property and effects of the principal debtor in his hands, otherwise he is liable to the plaintiff in the principal action for the full value of goods, or for all moneys due.—*Hockaday v. Warmack*, 182 S. W. 263.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

⚡191 (Tex.Civ.App.) In a vendor's garnishment proceeding against the insurer of realty, where the answer of the garnishee was not denied, and it was discharged from the garnishment upon its answer, although judgment went against it for the purchaser, such garnishee was entitled to recover of the vendor its costs, including a reasonable attorney's fee, under Rev. St. 1911, art. 307.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

⚡233 (Ark.) A garnishee must retain possession of all property and effects of the prin-

cipal debtor in his hands, otherwise he is liable to the plaintiff in the principal action for the full value of goods, or for all moneys due.—*Hockaday v. Warmack*, 182 S. W. 263.

⚡235 (Mo.App.) Where land of the principal debtor which was attached was sold under deed of trust, and the surplus in the hands of the trustee was garnished, it was the duty of one claiming the surplus as grantee of the principal debtor to appear and set up her claim, and, if not done, judgment disposing of it is conclusive.—*First Nat. Bank of Appleton City v. Griffith*, 182 S. W. 805.

Under Rev. St. 1909, §§ 2439, 2440, authorizing a garnishee to answer that there are rival claimants and have them interplead, where claimants to the fund garnished did not appear and interplead, the judgment is conclusive as against any rights they might have.—*Id.*

GATES.

See Railroads, ⚡413.

GIFTS.

I. INTER VIVOS.

⚡49 (Ky.) Evidence *held* insufficient to show fraud and undue influence, inducing a conveyance by decedent of personalty to defendant as trustee for a grandson of decedent by way of gift.—*Norman v. Norman*, 182 S. W. 224.

⚡49 (Tex.Civ.App.) Evidence *held* to sustain finding that notes sued on had not been given to maker by the payee thereof since deceased.—*Baker v. Bledsoe*, 182 S. W. 1184.

GOOD FAITH.

See Bills and Notes, ⚡837.

GRAND JURY.

See Indictment and Information.

⚡41 (Ark.) The grand jury is an inquisitorial body, whose proceedings are intended to be kept secret.—*State v. Fox*, 182 S. W. 906.

GRANTS.

See Navigable Waters, ⚡87; Public Lands.

GUARANTY.

See Indemnity; Principal and Surety.

I. REQUISITES AND VALIDITY.

⚡24 (Ark.) Where the contract of guaranty provided that it could not be canceled except after ten days' notice in writing, a verbal revocation of it, if accepted and acted upon, will relieve the guarantor.—*Olson v. Swift & Co.*, 182 S. W. 903.

II. CONSTRUCTION AND OPERATION.

⚡32 (Mo.) A guaranty of a stockholder of a corporation *held* for the benefit of the bank mentioned in the contract of guaranty, and did not inure to the benefit of another bank obtaining a large part of its assets.—*Mechanics-American Nat. Bank of St. Louis v. Rowell*, 182 S. W. 989.

A guaranty executed to one bank by a stockholder of a corporation *held*, under the facts, not to inure to the benefit of a new bank acquiring a large part of the assets of the old bank.—*Id.*

⚡36 (Mo.) Liability of a guarantor on a contract of guaranty cannot be extended beyond the language of the contract.—*Mechanics-American Nat. Bank of St. Louis v. Rowell*, 182 S. W. 989.

⚡36 (Tenn.) A guarantor of payment of a note, stipulating for payment of attorney's

fees, *held* subject to the maker's liability for such fees.—*Franklin v. The Duncan*, 182 S. W. 280.

GUARDIAN AND WARD.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§10 (Mo.) Under Gen. St. 1865, c. 116, §§ 3, 11-13, *held*, that there was no choice of a curator given to a nonresident minor either under or over 14 years.—*Whittelsey v. Conniff*, 182 S. W. 161.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§87 (Mo.) Notice of a curator's application for an order to sell the land of his minor ward is unnecessary, because the curator represents the ward.—*Whittelsey v. Conniff*, 182 S. W. 161.

§107 (Mo.) Where no express formal order discharging a curator was ever made, a sale by a curator thereafter duly appointed, valid in all other respects, could not be collaterally assailed in a suit to quiet title as against defendant claiming under such sale.—*Whittelsey v. Conniff*, 182 S. W. 161.

V. ACTIONS.

§117 (Tex.Civ.App.) The general guardian of minors may maintain suit against them, a guardian ad litem being appointed for them.—*Kidd v. Prince*, 182 S. W. 725.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§102 (Tex.Cr.App.) An application for discharge from an order binding accused over to await action of grand jury, *held* properly refused under the showing.—*Ex parte Castorena*, 182 S. W. 1119.

HARMLESS ERROR.

See Appeal and Error, §1029-1073; Criminal Law, §1169-1172; Homicide, §340.

HAWKERS AND PEDDLERS.

See Indictment and Information, §111.

§7 (Tex.Cr.App.) Under Rev. Civ. St. art. 7355, imposing occupation tax on traveling persons selling medicines, etc., and Pen. Code 1911, art. 130, making the pursuit of any occupation without paying the license tax an offense, *held*, on facts shown, that a conviction for selling medicines without a license was authorized.—*Collins v. State*, 182 S. W. 327.

HAZARD.

See Usury, §37.

HEAD LIGHTS.

See Railroads, §312.

HEALTH.

See Evidence, §58.

HEARSAY EVIDENCE.

See Evidence, §317-320.

HEAT OF PASSION.

See Homicide, §39.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Boundaries, §20; Counties, §190; Dedication, §5; Municipal Corporations, §648-703; Statutes, §123; Taxation, §44.

II. HIGHWAY DISTRICTS AND OFFICERS.

§90 (Mo.) The Legislature having power to create special road districts, as it did by Laws 1913, p. 669 et seq. it has the necessary further authority to provide means for the perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best.—*State ex rel. Moberly Special Road Dist. v. Burton*, 182 S. W. 746; *State ex rel. Columbia Special Road Dist. v. Johnson*, Id. 750.

§90 (Tex.Civ.App.) Under Rev. St. art. 627, providing for the issuing of bonds by road districts, *held* that a claim for breach of a contract for the construction of a road cannot be paid out of proceeds of bonds issued by the district.—*Matagorda County v. Horn*, 182 S. W. 76.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§122 (Mo.) Rev. St. 1909, § 10482, as amended by Laws 1913, p. 669, providing for the apportionment by county courts of taxes collected for road purposes within special road districts within the county, is not violative of Const. art. 10, § 22, empowering the county court, in its discretion, to levy and collect a road tax, in that the county court is given exclusive power to disburse such tax over the whole county, in view of article 10, and notwithstanding article 6, § 36.—*State ex rel. Moberly Special Road Dist. v. Burton*, 182 S. W. 746; *State ex rel. Columbia Special Road Dist. v. Johnson*, Id. 750.

Rev. St. 1909, §§ 10482, 10591, 10594, as amended and re-enacted by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, does not violate Const. art. 10, § 10, forbidding use of taxes collected in city outside of such city.—Id.

Rev. St. 1909, §§ 10482, 10591, 10594, as amended and re-enacted by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, are not violative of Const. art. 10, §§ 11, 12, fixing the tax rates for county, city, town, and school purposes, as road districts are not included therein.—Id.

§130 (Ark.) Under Const. art. 7, § 28, Const. Amend. No. 5, adopted January 13, 1899, Const. art. 16, § 9, and Acts 1913, p. 998, §§ 1, 2, *held*, that city was not entitled to one-half of optional road tax levied under Kirby's Digest, § 7280.—*City of El Dorado v. Union County*, 182 S. W. 899.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§176 (Ark.) Act March 24, 1911 (Laws 1911, p. 102) § 12, requiring an automobilist to stop in certain case, has no application to an automobilist, who, approaching from the rear a horse-drawn vehicle going in the same direction, observes that the team appears to be frightened.—*Fleming v. Oates*, 182 S. W. 509.

§184 (Ark.) In an action for injuries in a runaway caused by frightening of horses by defendant's automobile, evidence *held* to warrant a finding that defendant failed to exercise proper care to avoid frightening the team.—*Fleming v. Oates*, 182 S. W. 509.

Where the driver of an automobile approached

from the rear a horse-drawn vehicle going in the same direction, the team of which appeared to be frightened, the question whether the automobile driver, who failed to stop, exercised ordinary care to avoid frightening the team, was for the jury.—Id.

HOLDING OVER.

See Landlord and Tenant, ¶90.

HOLIDAYS.

See Sunday.

HOMESTEAD.

I. NATURE, ACQUISITION, AND EXTENT.

(D) Property Constituting Homestead.

¶79 (Tex.Civ.App.) Money paid upon an insurance policy upon a house not the insured's homestead is not exempt from garnishment for payment of his debts.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

¶88 (Tex.Civ.App.) An equitable title founded upon a conveyance in which an express lien is retained to secure unpaid purchase money may be the subject of a homestead, and exempt from the payment of ordinary debts.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

(E) Liabilities Enforceable Against Homestead.

¶96 (Tex.Civ.App.) A purchaser of land holding under a deed expressly retaining a lien for part of the purchase money cannot hold the land as a homestead against the vendor holding vendor's lien purchase-money notes.—Stratton v. Westchester Fire Ins. Co. of New York, 182 S. W. 4.

II. TRANSFER OR INCUMBRANCE.

¶115 (Tex.Civ.App.) Whether land claimed as a homestead is exempt from the operation of a trust deed must be determined by the conditions existing when the deed was given.—Bogart v. Cowboy State Bank & Trust Co., 182 S. W. 678.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

¶162 (Tex.Civ.App.) A farm occupied as a homestead does not lose that character when abandoned by the owner partly on account of ill health, with the intention of returning at a later date.—Bogart v. Cowboy State Bank & Trust Co., 182 S. W. 678.

¶168 (Tex.Civ.App.) Lease of land, including part which had been used for homestead for five years, when no other homestead had been acquired, held a temporary renting, which, under the express provisions of Const. art. 16, § 51, did not change the character of the homestead.—Bogart v. Cowboy State Bank & Trust Co., 182 S. W. 678.

¶181 (Tex.Civ.App.) When property has been impressed with a homestead character it will be presumed to so continue until its use as such has been discontinued with the intention not to use it as a home, and the burden of proof rests upon the one asserting the abandonment.—Bogart v. Cowboy State Bank & Trust Co., 182 S. W. 678.

Certain and conclusive evidence of abandonment with no intention to return and claim the exemption is required before a homestead once occupied as such can be subjected to a forced sale.—Id.

¶181 (Tex.Civ.App.) In the absence of any evidence from the husband as to their purpose in leaving and their intention to again occupy a homestead, the wife's statement as to such

purpose and intent was competent.—Farmers' & Merchants' Nat. Bank of Abilene v. Ivey, 182 S. W. 706.

HOMICIDE.

See Bail, ¶43, 53; Criminal Law, ¶126, 404, 474, 510, 543, 595, 713, 722, 724, 730, 829.

II. MURDER.

¶30 (Tex.Cr.App.) Under Pen. Code 1911, arts. 75, 87, person present when his son committed a homicide and who concealed the fact of his son's guilt, held not guilty as a principal.—Villareal v. State, 182 S. W. 322.

III. MANSLAUGHTER.

¶39 (Tex.Cr.App.) Where defendant committed an assault with a specific intent to kill, but, at the time of the killing, was laboring under such a degree of anger, rage, resentment, or terror as to render his mind incapable of cool reflection, he was guilty of manslaughter, and not aggravated assault.—Mansell v. State, 182 S. W. 1137.

IV. ASSAULT WITH INTENT TO KILL.

¶86 (Tex.Cr.App.) The specific intent to kill is an essential element of the crime of assault to murder, unless the attack is made with such a reckless disregard of human life that the law will impute malice.—Hernandez v. State, 182 S. W. 484.

¶90 (Tex.Cr.App.) A gun used as a firearm within carrying distance, and at such range that it shot off a hand of the prosecuting witness and put out one of his eyes, was a "deadly weapon."—Schultz v. State, 182 S. W. 316.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

¶101 (Tex.Cr.App.) Communication by deceased to defendant of the fact that he had had intercourse with defendant's wife did not justify the killing.—Jordan v. State, 182 S. W. 890.

¶109 (Tex.Cr.App.) In considering the plea of self-defense of a defendant charged with manslaughter, the circumstances must be viewed as they appeared to defendant at the time of the killing.—Mansell v. State, 182 S. W. 1137.

¶112 (Tex.Cr.App.) Where accused provoked the difficulty intentionally, he could not rely on self-defense, though deceased attacked him with a knife, but, if the difficulty was not provoked, he might rely on such defense.—Atkison v. State, 182 S. W. 1099.

VI. INDICTMENT AND INFORMATION.

¶141 (Mo.) An information held broad enough to support a conviction for assault with malice aforethought with intent to kill, under Rev. St. 1909, § 4481, or with intent to kill or do great bodily harm without malice or a felonious wounding, under sections 4482 and 4483.—State v. Taylor, 182 S. W. 159.

In view of Rev. St. 1909, § 4004, accused cannot, though the information charged assaults with intent to kill with malice and without malice and a felonious wounding, object to a conviction of the higher offenses on the ground that only the lowest was charged.—Id.

VII. EVIDENCE.

(B) Admissibility in General.

¶164 (Tex.Cr.App.) In a prosecution for manslaughter committed in a quarrel, where defendant made the physical condition of deceased an issue, the state was properly allowed to show that he had suffered from rheumatism since a child.—Mansell v. State, 182 S. W. 1137.

¶166 (Tex.Cr.App.) Where the state proved defendant's statement that the widow of deceased, an accomplice, was accused, but that he

did not believe it, testimony for defendant *held* to furnish no basis for such statement by defendant and was properly excluded.—*Ingram v. State*, 182 S. W. 290.

Where the state relied on adulterous relations of defendant and the wife of deceased as affording motive, testimony that defendant had given money to her in decedent's lifetime *held* admissible.—*Id.*

Where the state relied on the adultery of defendant and wife of deceased as motive, testimony that defendant frequently used witness' phone to talk with her, and that witness objected to its frequent use, *held* admissible.—*Id.*

¶174 (Tex.Cr.App.) In a prosecution for manslaughter, testimony of the officer who arrested defendant, that at the latter's instance he searched him and found no knife or weapon of any character, was admissible.—*Mansell v. State*, 182 S. W. 1137.

Where defendant introduced evidence that deceased refused to make a dying declaration, the county attorney was properly allowed to testify that deceased did not refuse, but said that he felt too weak, and asked the attorney to come back later.—*Id.*

In a prosecution for manslaughter, testimony that when the body of deceased was being shipped by railroad, defendant was at the depot, talking and laughing to his relatives, standing within a few feet of the corpse, was inadmissible.—*Id.*

¶179 (Tex.Cr.App.) The jailer's testimony of his conversation with defendant in custody tending to show sanity, but having bearing on the question of defendant's guilt or innocence, was inadmissible.—*Mikeska v. State*, 182 S. W. 1127.

The jailer's testimony as to defendant's demeanor in custody, relating a conversation with defendant which had no bearing on the issue of guilt or innocence, but merely had a tendency to aid the jury in passing upon the question of insanity, was admissible.—*Id.*

It was proper for the jailer to testify, without giving an opinion as to defendant's sanity, that defendant did not conduct himself in jail like he did on trial, and that he had never noticed anything peculiar about defendant outside of the courtroom.—*Id.*

¶187 (Tex.Cr.App.) In a prosecution for manslaughter, where defendant killed deceased in a quarrel over a standing difficulty, testimony of defendant's wife, that when she was made aware of the quarrel she said it was nothing more than she expected, was inadmissible.—*Mansell v. State*, 182 S. W. 1137.

¶191 (Tex.Cr.App.) Where deceased permitted himself to be disarmed shortly before the killing, a witness cannot testify as to the impression he received when deceased again armed himself; the fact not having been communicated to accused.—*Atkison v. State*, 182 S. W. 1099.

(C) Dying Declarations.

¶202 (Tex.Cr.App.) Testimony of deceased's sister as to his dying statement, voluntarily made when he had no hope of recovery and was sane, was admissible.—*Mansell v. State*, 182 S. W. 1137.

¶203 (Ky.) Where deceased was shot about 11 in the morning and died at about 6 in the evening, and it appeared that he was fully convinced that his wounds were fatal, *held*, that his dying declaration was admissible.—*Allen v. Commonwealth*, 182 S. W. 176.

¶215 (Ky.) The statement in a dying declaration that the accused had "shot me for nothing" was inadmissible and prejudicial, as it was not the relation of any fact or circumstance connected with the homicide, but merely an expression of the deceased's opinion.—*Allen v. Commonwealth*, 182 S. W. 176.

(E) Weight and Sufficiency.

¶228 (Tex.Cr.App.) In a trial for murder, where the state relied upon the adultery of the

wife of the deceased and defendant as a motive, evidence *held* sufficient to establish the corpus delicti.—*Ingram v. State*, 182 S. W. 290.

¶230 (Tex.Cr.App.) Evidence *held* to show that defendant, when he shot and injured another, had a specific intent to kill.—*Schultz v. State*, 182 S. W. 316.

¶234 (Tex.Cr.App.) In a trial for murder, it was necessary for the state to prove that deceased was unlawfully killed, and that defendant had killed him or was a party to the crime, which requisites may be shown by circumstantial evidence.—*Ingram v. State*, 182 S. W. 290.

¶237 (Tex.Cr.App.) The state need not prove defendant sane beyond a reasonable doubt.—*Mikeska v. State*, 182 S. W. 1127.

¶250 (Tex.Cr.App.) On trial for murder, evidence *held* sufficient to support a conviction, though the reputation of the state's principal witness for truth and veracity was severely assailed and he was strongly contradicted.—*Villareal v. State*, 182 S. W. 322.

¶250 (Tex.Cr.App.) In a prosecution for manslaughter, evidence *held* sufficient to support verdict of guilty.—*Mansell v. State*, 182 S. W. 1137.

VIII. TRIAL.

(A) Conduct in General.

¶262 (Tex. Cr. App.) Decedent's clothing should not be displayed in front of the jury unless virtually in the same condition as at the time of the killing.—*Mansell v. State*, 182 S. W. 1137.

(B) Questions for Jury.

¶268 (Mo.) In a prosecution for assault with intent to kill, evidence of accused's identity *held* sufficient to go to the jury.—*State v. Taylor*, 182 S. W. 159.

(C) Instructions.

¶300 (Tex.Cr.App.) In a prosecution for homicide, evidence *held* to raise the issue as to whether accused provoked the difficulty so that a charge on self-defense properly submitted the question whether accused provoked the difficulty.—*Atkison v. State*, 182 S. W. 1099.

¶310 (Mo.) In a prosecution for assault with intent to kill with malice, an instruction *held* not erroneous, as precluding the jury from convicting of lesser degrees of assault; the court being entitled to charge the jury that, from accused's act in shooting at the prosecuting witness, they could infer a malicious intent to kill.—*State v. Taylor*, 182 S. W. 159.

¶310 (Tex.Cr.App.) On evidence in a trial resulting in conviction of assault to murder, *held*, that there was no error in refusing to submit the issue of aggravated assault.—*Schultz v. State*, 182 S. W. 316.

¶310 (Tex.Cr.App.) In a prosecution for assault to murder, the refusal of special charges presenting the issue, raised by defendant's evidence, that if he fired without intent to kill he was guilty of no higher offense than aggravated assault, *held* error.—*Hernandez v. State*, 182 S. W. 494.

X. APPEAL AND ERROR.

¶338 (Ky.) The statement in a dying declaration that the accused had "shot me for nothing" was inadmissible and prejudicial, as it was not the relation of any fact or circumstance connected with the homicide, but merely an expression of the deceased's opinion.—*Allen v. Commonwealth*, 182 S. W. 176.

¶340 (Tex. Cr. App.) Where accused was only convicted of manslaughter, the propriety of a charge on murder, which issue was raised by the evidence, need not be determined.—*Atkison v. State*, 182 S. W. 1099.

Where accused was convicted only of manslaughter, the refusal of charges directing that under given circumstances accused could not

be convicted of murder as well as charges submitting more than one theory of manslaughter was harmless.—Id.

HORSES.

See Railroads, ¶441.

HOSTILE WITNESS.

See Witnesses, ¶244, 323.

HOTCHPOT.

See Descent and Distribution, ¶110.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Acknowledgment, ¶25; Appeal and Error, ¶1064; Assignments, ¶8; Divorce, ¶172; Dower; Insurance, ¶115; Landlord and Tenant, ¶170; Marriage; Trial, ¶251, 267; Witnesses, ¶52, 58, 144, 188, 190.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

¶3 (Mo.App.) Rule as to husband's right to select domicile held not to render wife helpless if husband keeps her in a place where he has withdrawn all care and protection from her and allows her to suffer gross indignities.—*McKay v. McKay*, 182 S. W. 124.

¶19 (Mo.App.) The authority of the wife to purchase actual necessities for minor children suitable to their station in life need not be based on any theory of agency, since the wife and minor children are entitled by law to support from the husband, and, if he fails therein, a tradesman may supply them at his charge without his consent.—*Gately Outfitting Co. v. Vinson*, 182 S. W. 133.

Although the husband has the right to control his family's style of living, provided he selects that which is reasonably suitable to his means, the wife has implied authority to purchase on the husband's credit those things which his family's mode of life classifies as necessities, though they are not strict necessities.—Id.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

¶119 (Tex.Civ.App.) Transaction of husband and wife, after their purchase of land partly with the wife's separate property and partly with the proceeds of community property, held to vest title of the remaining part of the land in the wife.—*Farmers' & Merchants' Nat. Bank of Abilene v. Ivey*, 182 S. W. 706.

(B) Rights and Liabilities of Husband.

¶137 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4621 and 4622, declaring that the husband shall have sole control over his separate property and the wife over her separate property, and that the husband shall have power of disposition of the community, a husband has no authority to sell an automobile belonging to his wife.—*Scruggs v. Gage*, 182 S. W. 696.

¶141 (Ky.) Where a husband before his death ordered materials and labor for repairs on his wife's separate property to be charged to him, his property, as against other heirs, will be charged with the repairs.—*Rau v. Rowe's Adm'r*, 182 S. W. 846.

(C) Liabilities and Charges.

¶151 (Mo.App.) Under *Rev. St. 1909, § 8309*, making the property of a wife liable for debts for necessities contracted by the husband, there can be no personal judgment against the wife,

the right to levy upon her property being one in rem.—*Dougherty v. McClelland*, 182 S. W. 766.

While a debt for rent for a suitable residence is a necessary for which the wife's property is liable under *Rev. St. 1909, § 8309*, the wife's property is not liable for damages for breach of a contract of lease by the husband.—Id.

(D) Conveyances and Contracts to Convey.

¶202 (Tex.Civ.App.) Defendant, who purchased an automobile from plaintiff's husband, is not charged with constructive notice of plaintiff's suit for divorce, where at the time of the purchase citation had not been served.—*Scruggs v. Gage*, 182 S. W. 696.

A purchaser of an automobile, the separate property of the seller's wife, who believed the seller to be unmarried, held not a bona fide purchaser on the theory that a purchaser from the husband alone may presume that the property was community.—Id.

VI. ACTIONS.

¶203½ (Mo.App.) Under *Rev. St. 1909, § 8304*, a married woman can maintain in this state a suit at law in her own name on a contract made in a foreign state, though the common law applies as to the construction and effect of the contract.—*Coombes v. Knowlson*, 182 S. W. 1040.

¶230 (Tex.Civ.App.) In trespass to try title against a married woman sued as a feme sole, where her plea in reconvention did not disclose her coverture, plaintiff's objection, that defendant, on account of coverture, could not recover the damages set up in the plea of reconvention, came too late when first made in the motion for new trial.—*Hamlett v. Coates*, 182 S. W. 1144.

¶232 (Ky.) Where a surviving wife asserted that it was agreed that her husband should pay taxes on her separate property, evidence that he had the property listed in his own name and usually paid the taxes is not sufficient to establish the agreement.—*Rau v. Rowe's Adm'r*, 182 S. W. 846.

¶235 (Mo.App.) In the absence of an express revocation of a wife's authority to bind her husband for necessities supplied his children, an instruction that the mother was a proper person to determine what necessities were needed by her children is not error.—*Gately Outfitting Co. v. Vinson*, 182 S. W. 133.

¶239 (Tex.Civ.App.) Judgment in trespass to try title, taken against a wife, sued as a feme sole, who did not plead her coverture, in its operation and effect was the same as if rendered against a feme sole.—*Hamlett v. Coates*, 182 S. W. 1144.

VII. COMMUNITY PROPERTY.

¶267 (Tex.Civ.App.) A deed of a husband, properly acknowledged and recorded, conveyed the community interest in the property.—*Delay v. Truitt*, 182 S. W. 782.

¶270 (Tex.Civ.App.) A married woman cannot sue in her own name without joining her husband to recover community property, unless she has been abandoned by the husband.—*Hamlett v. Coates*, 182 S. W. 1144.

¶273 (Tex.Civ.App.) Right of surviving husband to appropriate community property to reimburse him for paying community debts, not being a claim against minor children, may be exercised by suit to divest title out of them, though administration of their estate be pending.—*Kidd v. Prince*, 182 S. W. 725.

That a surviving husband, as guardian of his children, inventoried an interest in the community property as their property, does not estop him to appropriate it to reimburse himself for payment of community debts.—Id.

Expenditure by surviving husband for sup-

port of his children is not a "community debt" for which he can appropriate the community property to reimburse himself.—*Id.*

VIII. SEPARATION AND SEPARATE MAINTENANCE.

⚡285½ (Ky.) A wife may bring a suit for alimony alone.—*Van Meter v. Van Meter*, 182 S. W. 950.

⚡299 (Ky.) Orders directing a husband to pay alimony are under the control of the court and may at any time in its reasonable discretion be set aside, or the amount directed to be paid may be increased or diminished.—*Van Meter v. Van Meter*, 182 S. W. 950.

IX. ABANDONMENT.

⚡304 (Tex.Cr.App.) A husband cannot be convicted under Vernon's Ann. Pen. Code 1916, art. 640a, of willfully deserting or failing to provide for his wife in destitute or necessitous circumstances, where she has means when he leaves her, and he does not know of her afterwards becoming destitute.—*Furlow v. State*, 182 S. W. 308.

X. ENTICING AND ALIENATING.

⚡333 (Ky.) In an action against plaintiff's father-in-law for alienation of wife's affections, exclusion of testimony as to a conversation witness had with plaintiff's former wife before the separation held erroneous.—*Wiley v. Howell*, 182 S. W. 619.

HYPOTHETICAL QUESTIONS.

See Evidence, ⚡553.

IMMUNITY.

See Criminal Law, ⚡508.

IMPEACHMENT.

See Witnesses, ⚡318-414.

IMPLIED CONTRACTS.

See Indemnity, ⚡13.

IMPRISONMENT.

See Bail; False Imprisonment; Habeas Corpus.

IMPROVEMENTS.

See Cancellation of Instruments, ⚡59; Husband and Wife, ⚡141; Mechanics' Liens; Municipal Corporations, ⚡266-450.

⚡4 (Tex.Civ.App.) That one in possession knew of plaintiff's adverse claim to the land will not deprive him of the right to compensation for improvements; for he might, in good faith, have believed himself the true owner, and have been ignorant of plaintiff's superior rights.—*Shipp v. Cartwright*, 182 S. W. 70.

INCEST.

See Criminal Law, ⚡400.

INCOMPETENT PERSONS.

See Insane Persons.

INCRIMINATION.

See Criminal Law, ⚡393.

INCUMBRANCES.

See Homestead, ⚡115.

INDEMNITY.

See Guaranty; Mechanics' Liens, ⚡815; Principal and Surety.

⚡13 (Ky.) A city, having paid a judgment recovered against it on account of injuries received by a traveler due to a defective metal pipe laid in the sidewalk, the city might recover from the abutting owner, it being primarily bound to keep the pipe in repair.—*City of Louisville v. Metropolitan Realty Co.*, 182 S. W. 172.

INDEPENDENT CONTRACTORS.

See Master and Servant, ⚡321.

INDICTMENT AND INFORMATION.

See Assault and Battery, ⚡78, 80; Burglary, ⚡28; Criminal Law, ⚡308; Embezzlement, ⚡32; Extradition, ⚡32; Forgery, ⚡29, 34; Grand Jury; Homicide, ⚡141.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

⚡5 (Tex.Cr.App.) A conviction in the county court upon a complaint only, where the defendant did not waive the filing of an information but objected to trial on the complaint, cannot be sustained.—*Beakes v. State*, 182 S. W. 461.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

⚡43 (Tex.Cr.App.) A nunc pro tunc placing by the clerk of file mark on complaint and information, as of the date they were filed with him, may be permitted by the court.—*Milstead v. State*, 182 S. W. 305.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⚡111 (Mo.App.) In prosecution for practicing medicine without a license, contrary to Rev. St. 1909, § 8315, an information need not charge that accused did not come within the exception allowing physicians registered before March 12, 1901, to practice; that being matter of defense.—*State v. Saak*, 182 S. W. 1074.

⚡111 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 453, 460, 474, relating to sufficiency of indictments, indictment under Rev. Civ. St. art. 7355, imposing license tax on itinerant sellers of medicines, and, by subdivision 2, exempting salesmen for merchants "engaged in the sale" of medicines, etc., alleging that defendant was not selling for merchants "selling medicines," etc., held to sufficiently negative proviso.—*Collins v. State*, 182 S. W. 327.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

⚡132 (Tex.Cr.App.) Where an indictment contained two counts, one charging embezzlement of a check and the other embezzlement of the money represented by the check, both counts being based on the same transaction, the court properly refused to require the prosecution to elect on which count to ask for a conviction, and did not err in submitting both counts to the jury.—*Messner v. State*, 182 S. W. 329.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⚡137 (Ark.) Under Kirby's Dig. §§ 2203, 2204, 2279, it was an error to quash an indictment on the ground that there was no legal and sufficient evidence before the grand jury to warrant the finding thereof.—*State v. Fox*, 182 S. W. 906.

IX. ISSUES, PROOF, AND VARIANCE.

⚡180 (Tex.Cr.App.) There is no fatal variance between an indictment charging sale to "Chandoin" and proof that his name was spelled "Chaudoin," he being generally known and called by the former name.—*Graham v. State*, 182 S. W. 458.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

⚡202 (Ark.) Any irregularity in the finding and the return of an indictment by the grand jury does not deprive the accused of any substantial right, since the trial before a jury on the plea of not guilty affords an opportunity to establish his innocence, or the truth of the charge.—State v. Fox, 182 S. W. 908.

⚡202 (Mo.App.) If an information in the language of Rev. St. 1909, § 8315, charging a physician with practicing without a license, was subject to attack for duplicity, a judgment of conviction cured the defect.—State v. Saak, 182 S. W. 1074.

INDIGNITIES.

See Divorce, ⚡29.

INDORSEMENT.

See Bills and Notes, ⚡171-801.

INFANTS.

See Adoption; Divorce, ⚡298; Guardian and Ward; Limitation of Actions, ⚡72; Master and Servant, ⚡153, 230; Parent and Child.

II. CUSTODY AND PROTECTION.

⚡16 (Tex.Cr.App.) Juvenile and delinquent acts apply only to boys, and do not require or authorize trial of a girl as a delinquent child or juvenile.—Townser v. State, 182 S. W. 1104.

IV. CONTRACTS.

⚡58 (Ark.) A minor who knowing that valuable improvements were being placed on property conveyed by her, waited 43 years before seeking to disaffirm her contract, during which time several conveyances of the property were made, was guilty of such laches that she could not disaffirm her conveyance.—Nobles v. Poe, 182 S. W. 270.

VII. ACTIONS.

⚡72 (Mo.App.) An infant suing for a personal injury may not recover for the loss of earning capacity during his minority.—White v. Ennis Coffee Co., 182 S. W. 775.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Appeal and Error, ⚡719; Courts, ⚡207, 480; Execution, ⚡172; Nuisance, ⚡26, 75.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

⚡7 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, owner of property levied on under execution against another held entitled to sue for injunction, and not limited to statutory remedy.—Allen v. Carpenter, 182 S. W. 430.

II. SUBJECTS OF PROTECTION AND RELIEF.

(C) Contracts.

⚡62 (Mo.App.) While a grantor is entitled to the aid of equity to prevent his grantee from violating restrictive covenants, yet, after completion of the building a mandatory injunction will not be issued to compel removal of bay windows extending less than a foot beyond a building line.—Forsee v. Jackson, 182 S. W. 788.

(E) Public Officers and Boards and Municipalities.

⚡76 (Tex.Civ.App.) The court has no power to interfere with the commissioners' court in the exercise of a statutory judgment or discretion to transfer the excess of a fund raised for one county purpose to the fund of another, so long as the exercise of such discretion does not exceed constitutional limitations.—Williams v. Carroll, 182 S. W. 29.

⚡85 (Tex.Civ.App.) Injunction held to lie to restrain enforcement of criminal ordinance, the validity of which is involved, where repeated prosecutions would seriously impair or destroy property rights.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

VII. VIOLATION AND PUNISHMENT.

⚡229 (Mo.App.) As the court is without jurisdiction to enjoin the keeping of a bawdy-house, one violating an order enjoining the maintenance of such a place, though she consented to the injunction, cannot be punished for contempt.—State ex rel. Prosecuting Attorney of Jackson County v. Chambers, 182 S. W. 775.

INQUISITION.

See Insane Persons, ⚡8, 29.

INSANE PERSONS.

See Criminal Law, ⚡50; Homicide, ⚡179, 237.

II. INQUISITIONS.

⚡8 (Ark.) Kirby's Dig. §§ 4204, 4206, 4207, held not invalid as violating constitutional provisions vesting jurisdiction in matters relating to insane persons in probate courts, since the statutes named relate to criminal prosecutions only, and the determination of the circuit judge therein provided for is not final.—Baker v. Young, 182 S. W. 279.

⚡29 (Ark.) One committed by the circuit judge to the insane asylum under Kirby's Dig. §§ 4204, 4206, 4207, providing for commitment of persons acquitted of offenses because insane, or who cannot be tried because insane, may, after commitment, apply to the probate court for an adjudication on the question of his sanity.—Baker v. Young, 182 S. W. 279.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, ⚡77.

INSPECTION.

See Master and Servant, ⚡124.

INSTRUCTIONS.

By master to servant, see Master and Servant, ⚡153.

To jury, see Criminal Law, ⚡792-841, 863; Homicide, ⚡800, 810; Trial, ⚡191-290.

INSURANCE.

See Appeal and Error, ⚡1108, 1151; Corporations, ⚡666; Courts, ⚡14; Divorce, ⚡249; Evidence, ⚡178, 461; Exemptions, ⚡84; Homestead, ⚡79; Witnesses, ⚡190.

II. INSURANCE COMPANIES.

(A) Stock Companies.

⚡33 (Mo.App.) Where a note was given in payment of an insurance stock subscription and the proceeds paid into the treasury before incorporation was effected, held that it was not given in violation of Rev. St. 1909, § 7083, prohibiting notes from being considered as payment for capital stock of insurance companies.—Security Nat. Bank v. Field, 182 S. W. 815.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§93 (Ark.) One applying to a soliciting insurance agent for a policy cannot assume that his authority is unlimited to bind his principal on the agent's statement, but is presumed to have known the extent of the agent's authority.—*National Union Fire Ins. Co. v. School Dist. No. 55*, 182 S. W. 547.

IV. INSURABLE INTEREST.

§115 (Mo.App.) A husband who had conveyed to his wife an undivided half interest in his property may not thereafter insure the entire property in his own name and collect insurance thereon.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§129 (Ark.) A soliciting insurance agent, authorized only to secure applications, accept premiums, and forward to the insurer for approval, could not bind the insurer by stating that a certain policy of insurance would be issued.—*National Union Fire Ins. Co. v. School Dist. No. 55*, 182 S. W. 547.

§130 (Ark.) Where an insurance agent accepted an application and the premium, but failed to forward them to the insurer and the application provided that no liability should attach until approval and issuance of a policy by the insurer, there was no contract of insurance.—*National Union Fire Ins. Co. v. School Dist. No. 55*, 182 S. W. 547.

Mere delay in passing on an application for a policy of insurance cannot be construed as an acceptance of the application and consent to be bound by it, nor can a cause of action for negligence be based on such delay.—*Id.*

(B) Construction and Operation.

§146 (Ky.) The construction of a policy of insurance requires a reasonable interpretation of all the parts so as to give effect to the apparent intention of the parties not at variance with the clear meaning of the language employed.—*Boyle v. Maryland Casualty Co.*, 182 S. W. 946.

§146 (Mo.App.) A defense to an insurance policy in the nature of a forfeiture is not a favorite of the insurance law.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

§146 (Mo.App.) An accident policy should be construed favorably to the insured and against the insurer.—*Greenlee v. Kansas City Casualty Co.*, 182 S. W. 138.

§179 (Mo.) Principal contract of accident insurance against injury to son in favor of mother, and separate supplemental contract against injury to mother in favor of son, covered by same premium, held not to constitute one contract to be construed as a whole.—*State ex rel. Schmohl v. Ellison*, 182 S. W. 740.

§179 (Mo.App.) A fire policy insuring a dwelling at a specified sum, household furniture and furnishings at another sum, and other specific property at other sums, held a divisible contract as to each group.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

§179½ (Mo.App.) An agreement, whereby a loan was made by an insurance company on a life policy, held to impose a personal obligation to repay.—*Equitable Life Assur. Society of United States v. De Lisle*, 182 S. W. 1026.

There was no payment of a loan by a life insurance company on a pledge of a policy, because of its attempted application thereon of the policy's surrender value, it having, before the pledge, vested in insured's trustee in bankruptcy.—*Id.*

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§245 (Mo.App.) Abandonment of insurance is not a defense, unless insured failed to pay or offered to pay subsequent assessments.—*Keeton v. National Union*, 182 S. W. 798.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

§291 (Ark.) Although, after applying for life insurance in one company, the insured was told by another examining physician of certain diseases which he had, he was not bound to so inform the first company unless he believed the second examiner.—*United States Annuity & Life Ins. Co. v. Peak*, 182 S. W. 565.

Failure of insured to acquaint first insurer of physical condition, as disclosed to him by another examining physician whom he believed and upon whose advice he acted, held an intentional concealment of a material fact sufficient to avoid the policy.—*Id.*

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§335 (Tex.Civ.App.) Provision of fire insurance policy that insured should take a complete inventory of stock held met by inventory showing number of pieces of lumber and dimensions of each piece of different kinds and total number of each kind separately, without showing the class or value.—*Camden Fire Ins. Co. v. Yarbrough*, 182 S. W. 66.

(E) Nonpayment of Premiums or Assessments.

§349 (Ark.) Where the insurance agent discounted the insured's note given for the first premium and remitted to the insurer the money due it out of such premium, the failure of the insured to pay an installment on the note did not forfeit the policy for nonpayment of premium for the first year.—*United States Annuity & Life Ins. Co. v. Peak*, 182 S. W. 565.

§349 (Mo.App.) Where insurance contract contains no provision for forfeiture for nonpayment of assessments, insurance held to continue in force notwithstanding such nonpayment.—*Keeton v. National Union*, 182 S. W. 798.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§378 (Mo.App.) Where agent of insurer, with knowledge, incorrectly fills out an application for a fire policy, and the applicant signs the application without reading it, insurer held estopped from showing any breach of warranty as to the incorrectly filled in matter.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

§396 (Mo.App.) Where a beneficiary is encouraged by the insurer to go to substantial expense in furnishing proofs of loss, the insurer is estopped to assert the time for such proofs had expired.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

Where an insurance company, on application of plaintiff under the policy on her deceased husband's life, required her to make proofs of loss on forms furnished by them, which she did at a considerable expense, the company could not escape the estoppel worked against it thereby, by asserting that it did not compel her to fill the blanks, since failure to file them would have been an abandonment of her claim.—*Id.*

Where plaintiff made claim for loss of her

husband under a life policy 17 years after his death, whereupon defendant required proofs of loss to be submitted, defendant was estopped to assert the defense of failure to file proofs of loss in time, although in requiring proofs it specifically asserted that it waived no defense it had, since such a statement, without specific reference to the particular defense, was valueless.—Id.

XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

§455 (Tenn.) An injury is not produced by accidental means, within the terms of a policy, where it is the natural result of an act or acts in which the insured intentionally engages and is caused by a voluntary, natural, ordinary movement, executed as was intended.—*Stone v. Fidelity & Casualty Co. of New York*, 182 S. W. 252.

Under policy insuring against injury from "accidental means," insured, whose sudden raising of his hand above his head while lying in bed debilitated from medical treatment caused a blood pressure rupturing the retina and resulting in blindness in one eye, could not recover.—Id.

§455 (Tex.) In an accident policy insuring against death through accidental means, which included death resulting from sunstroke independently of other causes "sunstroke" is to be deemed a form of personal injury rather than a disease.—*Bryant v. Continental Casualty Co.*, 182 S. W. 673.

Death of one by sunstroke, caused by exposure to the sun while pursuing his ordinary vocation, held due to accidental means, within a policy insuring against sunstroke due to accidental means.—Id.

§457 (Ky.) Provision in policy of accident insurance construed as if written "likewise subject to its terms, limits and conditions, this policy covers the assured in event of death * * * from * * * blood poisoning. * * *"—*Doyle v. Maryland Casualty Co.*, 182 S. W. 946.

Insertion of clause in accident policy that, subject to its terms, the policy would cover death from blood poisoning due directly to a bodily injury held justifiable, and not a fraud or evidence of bad faith on the part of the insurer.—Id.

In policy of accident insurance classing benefits as "accident benefits," "illness benefits" etc., by section 1, clause in section 6, relating to death, etc., from blood poisoning, held subject to terms and conditions of policy in reference to accident benefits.—Id.

§466 (Mo.App.) A policy insuring against bodily injuries and death through accidental means, independent of any disease, held to cover death resulting from a fall which produced cerebro-spinal meningitis.—*Greenlee v. Kansas City Casualty Co.*, 182 S. W. 138.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

§494 (Ky.) Despite a coinsurance clause in a tornado policy requiring the insured to insure the property to fifty per cent. of its value or bear a proportion of the loss, held that, under Ky. St. § 700, where the loss was less than the amount of the policy, the insurer is liable for the full amount.—*Hartford Fire Ins. Co. v. Henderson Brewing Co.*, 182 S. W. 852.

§500 (Mo.App.) Rev. St. 1909, § 7020, providing for valued policies, applies to a policy insuring an undivided interest in property, and insurer is estopped from denying that the property insured was worth the amount of the policy at the time of its issuance.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

(E) Accident and Health Insurance.

§528 (Ky.) The disability of one insured in accident policy held continuous from the time of the infliction of the wound until time blood poisoning developed.—*Doyle v. New Jersey Fidelity & Plate Glass Ins. Co.*, 182 S. W. 944.

One insured in an accident policy held not disabled by an injury continuously up to the time of his death; it conclusively appearing that he discharged the duties of his profession for some months after partial recovery from the injury.—Id.

XIV. NOTICE AND PROOF OF LOSS.

§539 (Mo.App.) Where plaintiff's husband died in 1897, and she sued on the policy in 1915, the cause was barred, in the absence of waiver or estoppel of the company, since she had at most only a reasonable time after her husband's death in which to make proof of death.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

§555 (Mo.App.) Though a statute required proofs of loss to be submitted to the insurer within 90 days of the insured's death, that condition might be waived by the insurer.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

§559 (Mo.App.) An insurer's denial of liability dispenses with proofs of loss or surrender of the certificate.—*Keeton v. National Union*, 182 S. W. 798.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§598 (Mo.App.) Under Rev. St. 1909, § 7179, interest is recoverable on contract of insurance from denial of liability, notwithstanding failure to make proofs of death and surrender of certificate.—*Keeton v. National Union*, 182 S. W. 798.

§602 (Mo.App.) Rev. St. 1909, § 7068, as amended by Laws 1911, p. 282, held not to penalize insurer for resisting a claim, a material part of which it has good reason to believe is not due insured.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

XVIII. ACTIONS ON POLICIES.

§615 (Mo.App.) The statute of limitations and failure to submit proofs of death within 90 days, as required by Rev. St. 1879, § 5985, are special defenses, a matter of privilege to the defendant insurance company, but do not extinguish the cause of action, operating merely to bar the remedy.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

§634 (Mo.App.) Plaintiff's failure to plead waiver by the insurer of delay in filing proof of loss would not defeat her action, which was tried on an agreed statement of facts which showed the waiver.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

§640 (Mo.App.) Abandonment of a contract of insurance is an affirmative defense which is waived if not pleaded.—*Keeton v. National Union*, 182 S. W. 798.

§646 (Mo.App.) In a suit on a policy of life insurance, the burden was on the insurer to establish its affirmative defense that insured made misrepresentations as to his previous health and having consulted a physician, in his application for the insurance.—*Warren v. New York Life Ins. Co.*, 182 S. W. 96.

§655 (Ark.) Where evidence was introduced showing circumstantially that the insured obtained a policy of life insurance by fraud, it was error to admit testimony as to his good character.—*United States Annuity & Life Ins. Co. v. Peak*, 182 S. W. 565.

§668 (Mo.App.) In a suit on a life policy, whether the insured, in his application, mis-

represented his previous health, or whether he had consulted a physician, *held* for the jury under the evidence.—*Warren v. New York Life Ins. Co.*, 182 S. W. 96.

⚡668 (Mo.App.) In an action on an accident policy, evidence *held* sufficient to carry the case to the jury.—*Greenlee v. Kansas City Casualty Co.*, 182 S. W. 138.

Where scientific opinions differed as to the cause of death of one insured against accident, the court will not determine it as a matter of law, but the question must be left to the jury.—*Id.*

⚡669 (Mo.App.) Under the "valued policy" provisions of Rev. St. 1909, §§ 7020, 7021, 7030, an instruction in an action on a fire policy *held* erroneous because not permitting the jury to assess the damages by determining the depreciation, if any, in the property insured.—*La Font v. Home Ins. Co.*, 182 S. W. 1029.

A fire policy insuring a dwelling at a specified sum, household furniture and furnishings at another sum, and other specific property at other sums, *held* a divisible contract as to each group, and the court must submit to the jury separately the questions of loss and depreciation as applied to each group.—*Id.*

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

⚡687 (Mo.App.) In action on insurance contract, defendant, to avail itself of laws applicable to beneficiary contracts of fraternal associations, has burden of showing nature of contract and that it was such association authorized to do business in state, and these facts cannot be proved by the form of the contract.—*Keeton v. National Union*, 182 S. W. 798.

In an action on an insurance contract, defendant's articles of incorporation, showing that it was incorporated in another state as a fraternal association, but not showing that it was licensed to do business in the state, *held* properly excluded.—*Id.*

A certificate expressing absolute undertaking to pay a certain sum out of benefit fund without regard to assessments on persons holding similar contracts, *held* not assessment insurance.—*Id.*

(D) Forfeiture or Suspension.

⚡750 (Mo.App.) A provision in the by-laws of a fraternal insurer for forfeiture in case of nonpayment of monthly assessments on or before a fixed day is valid.—*Crawford v. North American Union*, 182 S. W. 1043.

⚡755 (Mo.App.) That a fraternal insurer accepted checks in payment of assessments mailed on the last day of the month in which they could be paid shows no waiver of the provision for payment within the month under penalty of forfeiture, but merely of the right to demand payment in cash.—*Crawford v. North American Union*, 182 S. W. 1043.

Where there was no collector at member's residence, a fraternal insurer which received assessments mailed on the last day of the month *held* not to have waived the requirement that assessments be paid during the month; members, where there was a collector, being allowed the whole month to pay.—*Id.*

Where a certificate issued by a fraternal insurer provided for reinstatement after forfeiture for nonpayment of assessment, upon furnishing health certificate, reinstatement of a member on those conditions was not a waiver of the right to insist on forfeiture for nonpayment of future assessments.—*Id.*

Where defendant took over the business of another fraternal insurer, notifying members of its by-laws with respect to payment of assessments, and the beneficiaries of a member relied on such by-laws, a waiver by the old company was unavailing.—*Id.*

Where through misunderstanding monthly assessments were not paid within time, the insurer being so notified, a waiver of the by-law

requiring payments to be made during the month under penalty of forfeiture is unavailing.—*Id.*

⚡756 (Mo.App.) Where a fraternal insurer led a member to believe that it would not insist on payment of assessments within the stipulated month, it could not, without notice of intention to require strict compliance, enforce the provision for forfeiture in case of nonpayment.—*Crawford v. North American Union*, 182 S. W. 1043.

INTENT.

See Constitutional Law, ⚡18; Contracts, ⚡147; Damages, ⚡77; Evidence, ⚡461; Homicide, ⚡86, 230; Wills, ⚡439, 487.

INTEREST.

See Damages, ⚡68; Eminent Domain, ⚡147; Insurance, ⚡115, 598; Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

⚡1 (Mo.App.) Interest is a purely statutory right.—*Coombes v. Knowlson*, 182 S. W. 1040.

II. RATE.

⚡34 (Mo.App.) Under Rev. St. 1909, § 7179, interest in excess of 6 per cent. is not allowable when the agreement to pay is verbal.—*Coombes v. Knowlson*, 182 S. W. 1040.

⚡36 (Mo.App.) Under Rev. St. 1909, § 7179, one verbally agreeing to pay 7 per cent. promised to pay interest, and might be charged with the statutory rate of 6 per cent.—*Coombes v. Knowlson*, 182 S. W. 1040.

III. TIME AND COMPUTATION.

⚡51 (Ark.) Garnishee *held* liable to defendant for interest which would have accrued on notes and mortgage which he had agreed to deliver to defendant, but which he refused to deliver on account of the service of the writ.—*Hockaday v. Warmack*, 182 S. W. 263.

That the garnishee in such case deposited a part of the money which was to be included in the notes in a bank to be paid to defendant on his compliance with certain conditions not made in the original contract did not relieve him from payment of interest on such sum prior to its delivery to defendant.—*Id.*

IV. RECOVERY.

⚡67 (Mo.App.) In an action on contract to manufacture lumber for the defendant, testimony that some of the lumber had been ready for delivery a considerable time before the defendant accepted it was competent to reduce the amount of interest.—*Coombes v. Knowlson*, 182 S. W. 1040.

INTERLOCUTORY JUDGMENT.

See Appeal and Error, ⚡870.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

⚡10 (Mo.App.) Defendant, an attorney receiving money in a settlement of his clients' claims, *held* not entitled to interplead the clients, where defendant was claiming an interest in the funds in his hands.—*Young v. Miller*, 182 S. W. 822.

Defendant *held* not entitled to interplead contestants, where he had assumed inconsistent obligations.—*Id.*

II. PROCEEDINGS AND RELIEF.

⚡33 (Mo.App.) An order in interpleader by a bank against administrator de bonis non and administrator of wife of decedent, dying pending settlement as administratrix, *held* not to justify a payment by bank to wife's administrator.—*Luther v. Granger Exch. Bank*, 182 S. W. 1073.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

See Criminal Law, ¶372; Indictment and Information, ¶180.

III. LOCAL OPTION.

¶31 (Mo.App.) Under Rev. St. 1909, § 7244, the county court on presentation of a petition for a local option election within four years from a valid election should decline to call an election, but its jurisdiction over the subject-matter was not destroyed, and hence its action in calling the election was only voidable in case the former election was valid.—State v. Edwards, 182 S. W. 816.

¶32 (Mo.App.) The acts of the county court in entertaining a petition for a local option election, in determining the qualification of the petitioners and the sufficiency thereof, and in calling a local option election are judicial in their nature, and the court's record therein partakes of the nature of a judgment.—State v. Edwards, 182 S. W. 816.

Such orders or judgment are not open to collateral attack.—Id.

Under Rev. St. 1909, § 7283, providing an election to determine whether liquors shall be sold in a county, and the procedure thereon, the presentation of a petition properly signed calls the court's jurisdiction in the particular case into exercise.—Id.

¶37 (Mo.App.) Rev. St. 1909, § 7242, held to afford the exclusive statutory remedy by action to contest a local option election.—State v. Edwards, 182 S. W. 816.

¶39 (Mo.App.) County court, acting upon petition for local option election presumed to have acted in accordance with law, and that since former election something had happened allowing it to grant second petition, without violating Rev. St. 1909, § 7244.—State v. Edwards, 182 S. W. 816.

VI. OFFENSES.

¶139 (Mo.App.) Rev. St. 1909, § 7227, does not prohibit a manufacturer of intoxicating liquor from maintaining a branch house in a local option county for the storage of liquor, and the delivery thereof to consumers in a sister state.—State v. Richardson, 182 S. W. 782.

VIII. CRIMINAL PROSECUTIONS.

¶239 (Tex.Cr.App.) Where the evidence in a prosecution for violation of the local option law tended to show alibi, held, that it was error to refuse requested instructions on alibi.—Venn v. State, 182 S. W. 315.

IRRIGATION.

See Waters and Water Courses, ¶254.

ISSUES.

See Wills, ¶545.

JITNEYS.

See Carriers, ¶2; Constitutional Law, ¶186, 206, 297; Eminent Domain, ¶2; Licenses, ¶6, 7; Monopolies, ¶4; Municipal Corporations, ¶703.

JOINDER.

See Parties.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Criminal Law, ¶1092, 1099; Justices of the Peace; Trial, ¶23.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

¶3 (Ark.) Acts 1915, p. 402, changing the existing statute only by postponing date of biennial election for 1916 and thereafter, held not to require election in 1916 of successors of circuit judges whose terms would expire in 1918, but to merely incidentally postpone commencement of terms of office. Const. art. 5, §§ 3, 15; article 19, § 5; Kirby's Dig. §§ 647, 2850.—Hendricks v. Hodges, 182 S. W. 538.

JUDGMENT.

See Execution; Justices of the Peace, ¶86; Limitation of Actions, ¶72.

For judgments in particular actions or proceedings, see also the various specific topics. For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

¶17 (Tenn.) No personal judgment can be rendered against a nonresident served with notice only by publication.—Perry v. Young, 182 S. W. 577.

IV. BY DEFAULT.

(A) Requisites and Validity.

¶106 (Tex.Civ.App.) On substitution of new plaintiffs and adoption by them of petition of original plaintiffs, entry of judgment by default without permitting opportunity to answer was error.—Cooney v. Van Deren, 182 S. W. 1190.

(B) Opening or Setting Aside Default.

¶138 (Ark.) Under Kirby's Dig. §§ 4431-4433, facts in suit to set aside default judgment held to show plaintiff's own lack of diligence, so that the court was not warranted in granting the relief sought.—Kohn v. Smith, 182 S. W. 538.

¶139 (Ky.) In the matter of setting aside default judgments, trial courts have a wide discretion.—Algee v. Algee, 182 S. W. 197.

¶143 (Tex.Civ.App.) Refusal to set aside a default judgment on the ground of the absence of defendant's attorney held within the court's discretion.—Commonwealth Bonding & Casualty Ins. Co. v. Stearns, 182 S. W. 1197.

¶144 (Ark.) In view of docket entry of case pending in circuit court, held, that there was no misprision of the clerk which would justify setting aside a default judgment therein.—Kohn v. Smith, 182 S. W. 538.

¶153 (Ky.) Where a judgment was rendered by default, a motion to set it aside made at any time during the term at which it was rendered, suspended the judgment, and the court, after the term, had power to sustain the motion and set the judgment aside.—Algee v. Algee, 182 S. W. 197.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

¶199 (Ky.) Where defendant moved for a peremptory instruction on the ground that plaintiff had not traversed a defense pleaded, it is not, verdict having gone for plaintiff, entitled to judgment notwithstanding the verdict, but only to a new trial.—Louisville & N. R. Co. v. Johnson, 182 S. W. 214.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

¶250 (Tex.Civ.App.) A judgment cannot be upheld, where the petition did not state a cause

of action against the parties, regardless of what the evidence showed.—*Seaton v. Majors*, 182 S. W. 712.

⇒251 (Ky.) Where, in action by executor to recover money of estate, defendant counter-claimed for care and nursing, to which plaintiff's reply set up devise in will as compensation for nursing, it was error for court to adjudge that a gift by testatrix to defendant of part of the money in question was ademption of devise.—*Bishop v. Newman's Ex'r*, 182 S. W. 165.

⇒256 (Tex.Civ.App.) When the alternative finding of the trial court in a suit for negligence, that either of two acts or omissions of the defendant was negligent, is conditioned upon the insufficiency of the evidence to sustain the first finding, and such first finding is supported by the evidence, the alternative finding cannot be considered in support of the judgment.—*Texas Co. v. Charles Clarke & Co.*, 182 S. W. 351.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⇒335 (Tex.Civ.App.) Function of bill of review is to review cases in the trial court when judgment is the result of fraud, accident, or mistake.—*Kidd v. Prince*, 182 S. W. 725.

The function of a bill of review, where judgment is rendered against a minor legally served and represented by guardian ad litem regularly appointed, is no greater than in the case of a person sui juris.—Id.

The remedy against a judgment voidable because against a minor not represented by a guardian ad litem, the fact of infancy appearing on the face of the record, is by writ of error, and not bill of review.—Id.

A bill of review based on fraud must allege facts sufficient to show that, if true, complainant would have had judgment in the original action but for fraud of his adversary.—Id.

A bill of review based on fraud must allege facts supporting the charge of fraud.—Id.

A bill of review based on fraud must make explanation of failure to urge at the trial the falsity of allegations or testimony.—Id.

On bill of review it will be presumed the judgment was based on the one of two facts alleged which would support it, and that it was established by evidence.—Id.

IX. OPENING OR VACATING.

⇒342 (Ky.) Where judgment is rendered after trial and upon the merits, the court, after expiration of the term, loses control of it except in actions brought pursuant to Civ. Code Prac. §§ 344, 518, unless the motion for a new trial or to set it aside is made within the statutory time.—*Algee v. Algee*, 182 S. W. 197.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⇒435 (Mo.App.) The mistakes for which equity will afford relief from a judgment must be mutual and unmixed with the negligence of the injured party in failing to avail himself of the legal remedies open to him.—*Einstein v. Strother*, 182 S. W. 122.

⇒443 (Mo.App.) The fraud for which equity will relieve from a judgment must be in the very procurement of the judgment, and fraud relating only to the cause of action, and which should be interposed as a defense thereto, is not a good ground for setting aside the judgment.—*Einstein v. Strother*, 182 S. W. 122.

(B) Jurisdiction and Proceedings.

⇒460 (Tex.Civ.App.) Petition to set aside judgment for fraud in procuring its entry in the absence of plaintiff's attorneys held not bad on general demurrer.—*Evans v. San Antonio Machine & Supply Co.*, 182 S. W. 604.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

⇒470 (Ky.) Judgment of court having jurisdiction unless reversed or annulled held not open to contradiction or impeachment in collateral action or proceeding.—*Villier v. Watson*, 182 S. W. 869.

⇒475 (Mo.App.) The judgments of probate courts are as impregnable to collateral attack as the judgments of other courts of record.—*Einstein v. Strother*, 182 S. W. 122.

(B) Grounds.

⇒489 (Mo.App.) There is a distinction between jurisdiction over the subject-matter and the exercise of jurisdiction in a particular proceeding, turning upon the difference between a wrongful execution of power to hear and determine, which renders the judgment merely voidable, and a lack of power to hear the matter at all, which renders it void.—*State v. Edwards*, 182 S. W. 816.

⇒511 (Mo.App.) A judgment of a court of record may be impeached collaterally, in equity, after the lapse of the term at which it was rendered, when by mistake or fraud it gives an unfair advantage to the prevailing party.—*Einstein v. Strother*, 182 S. W. 122.

(C) Proceedings.

⇒518 (Ark.) Motion under Kirby's Dig. § 4431, to vacate or set aside judgment rendered at former term, held a direct attack on the judgment.—*Hall v. Huff*, 182 S. W. 535.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

⇒565 (Tenn.) Where the evidence was insufficient to show that the parties to a suit in ejectment involving the question of a state boundary were the parties to a prior suit in a federal court in another state, dismissed on the ground of want of jurisdiction, and the order of dismissal specifically provided that it should be without prejudice, the judgment was not res adjudicata, and did not estop the parties in ejectment.—*McCarty v. Carolina Lumber Co.*, 182 S. W. 909.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

⇒668 (Ark.) A widow, a party to a proceeding to settle her dower rights in land sought to be vested solely in her son under Kirby's Dig. §§ 5770-5772, joining in the prayer that title be vested in the son, was bound by the decree and could not thereafter assert dower against purchasers from the son.—*Owen v. Cox*, 182 S. W. 559.

⇒691 (Mo.App.) Judgment for a payee in possession of a note precludes recovery thereon by the party for whose benefit it was made.—*Security Nat. Bank v. Field*, 182 S. W. 815.

(C) Matters Concluded.

⇒715 (Mo.) A former judgment, which was affirmed on appeal, held conclusive adjudication that all interests in parcel of land devised to son for life, remainder to the heirs of his body, were subject to charges in favor of other beneficiaries, and so on judicial sale the son might buy in the property.—*Dudgeon v. Hackley*, 182 S. W. 1004.

⇒735 (Ark.) A judgment in prior action denying plaintiff attachment on the ground that the note was not then due held no bar to a subsequent action on the note.—*Sauls v. Sherrick*, 182 S. W. 269.

(D) Judgments in Particular Classes of Actions and Proceedings.

⇒747 (Ky.) Judgment ordering partition of land, and judgment overruling exceptions to re-

port of commissioners for partition, both affirmed on appeal, conclude the defendant who cannot thereafter recover damages for plaintiff's cutting timber on the portion allotted to him.—*Heard v. Higginbotham*, 182 S. W. 846.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

—883 (Ark.) Under Kirby's Dig. § 6238, relating to the setting off against each other of money judgments, defendant could set off his judgment for the recovery of money against plaintiff's judgment against him for the recovery of a larger sum where defendant's judgment was based on a liability growing out of the transaction on which plaintiff's cause of action was based.—*Harry v. Williams*, 182 S. W. 546.

JUDICIAL NOTICE.

See Criminal Law, —304; Evidence, —20.

JUDICIAL SALES.

See Guardian and Ward, —87, 107.

JURISDICTION.

See Appeal and Error, —185; Appearance; Attachment, —73; Bankruptcy, —296; Certiorari, —28; Courts; Criminal Law, —1020; Equity, —32, 34; Habeas Corpus, —102; Insane Persons, —8; Judgment, —475, 489.

JURY.

See Appeal and Error, —200, 1069; Criminal Law, —855-889; Grand Jury; New Trial, —42, 77; Trial, —307.

II. RIGHT TO TRIAL BY JURY.

—11 (Ky.) In a railroad employee's action under the federal Employers' Liability Act nine or more jurors, under the state practice, can return a verdict.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

—25 (Tenn.) A demand for jury trial entered in the clerk's trial docket before the first day of the term held to entitle defendant to jury trial under Shannon's Code, § 4611 (Acts 1875, c. 4, as amended by Acts 1889, c. 220), and in view of sections 4616 and 4673.—*National Life & Acc. Ins. Co. v. Jordan*, 182 S. W. 250.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

—43 (Tex.Cr.App.) A juror, who had lived in America only five years, could read, write, and understand English only a little, and did not understand all that was asked him touching his qualifications as a juror, and who would have to guess at what was said on trial, was not qualified.—*Sullenger v. State*, 182 S. W. 1140.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

—85 (Tex.Cr.App.) A large discretion is vested in the trial judge in passing upon the qualifications of a juror.—*Sullenger v. State*, 182 S. W. 1140.

—116 (Ky.) Under Ky. St. 1909, § 2247, held that challenge to panel should have been sustained, where more than three bystanders had been summoned at the same time by the sheriff.—*Imperial Jellico Coal Co. v. Bryant*, 182 S. W. 205.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

—36 (Mo.App.) Rev. St. 1909, § 7397, depriving justices of the peace of jurisdiction to try actions where title to realty is in issue, did not deprive a justice of jurisdiction to try an action

by the seller of a cigar stand against his agent to sell for the latter's disloyalty in aiding the purchaser to defraud the seller by paying with a note secured by a mortgage on worthless land.—*McMurray v. Garnett*, 182 S. W. 128.

—44 (Tex.Civ.App.) In a suit wherein plaintiff filed no written pleadings and the citation showed that the suit was on an account for \$188.68, held, that the justice had jurisdiction though his docket, after statement that the suit was for \$188.68 with interest, contained the entry "attorney's fees —%."—*Lucas v. Harrison*, 182 S. W. 74.

IV. PROCEDURE IN CIVIL CASES.

—86 (Ark.) On an affidavit filed in justice's court asking for judgment in the sum named for labor performed and for an order of attachment, the justice had jurisdiction to render a personal judgment against the defendant.—*Shawmut Lumber Co. v. Waites*, 182 S. W. 907.

—100 (Mo.App.) In an action begun in justice court to enforce a chattel mortgage to secure a note for the purchase price of a rooming house, held that, under Rev. St. 1909, § 7456, defendants might show false representations on which they relied to their damage to establish want of consideration.—*Olds v. Aven*, 182 S. W. 1010.

—127 (Tex.Civ.App.) A justice's judgment being void, he can set it aside at any time; the statutes prescribing the conditions on which a justice may set aside a judgment and grant a new trial having no application.—*Barton v. Jackson*, 182 S. W. 365.

A justice having rightfully set aside a judgment by default, the case is properly before him for further proceedings.—*Id.*

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

—141 (Ark.) On appeal to the circuit court and trial de novo in an action in which the justice court had jurisdiction to render personal judgment, the circuit court had the same jurisdiction to render personal judgment.—*Shawmut Lumber Co. v. Waites*, 182 S. W. 907.

—174 (Tex.Civ.App.) The county court held not ousted of jurisdiction to render judgment for less than \$200 because after appeal from a justice the petition was amended to ask more because of accrual of interest pending the action.—*Klabunde v. Vogt Hardware Co.*, 182 S. W. 715.

—191 (Ark.) Where appellant from a judgment in a justice's court and his sureties, by the express terms of the appeal bond became liable for any judgment rendered by the circuit court, that court properly entered judgment against the sureties, as well as against the appellant.—*Shawmut Lumber Co. v. Waites*, 182 S. W. 907.

JUSTIFICATION.

See Homicide, —101-112; Libel and Slander, —55, 56.

JUVENILE DELINQUENTS.

See Infants, —16.

LACHES.

See Equity, —72; Trusts, —365.

LANDLORD AND TENANT.

See Eminent Domain, —147; Execution, —268; Fixtures, —15; Frauds, Statute of, —58; Homestead, —168; Life Estates.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

⚡22 (Tex.Civ.App.) Where land was rented verbally, and, after entry by the tenant, the landlord stated that as long as the tenant paid her rent she could have the place, the contract was not unilateral.—Hamlett v. Coates, 182 S. W. 1144.

IV. TERMS FOR YEARS.

(A) Nature and Extent.

⚡72 (Tex.Civ.App.) A contract that R., having land leased for a year, leases it to T. at the same price R. paid N. for it, is not ambiguous as to term, which is said year.—Tom v. Roberson, 182 S. W. 698.

(C) Extensions, Renewals, and Options to Purchase or Sell.

⚡90 (Ky.) Where a lease confers on lessee the privilege of extending his term, a mere holding over for a part of extended term held an election to hold for extended term.—Miller v. Albany Lodge No. 206, F. & A. M., 182 S. W. 936.

A lease for a year at an annual rental; "with option at same rate for five years," provides for a mere extension of term, and lessee holding over elects to hold for extended term.—Id.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

⚡152 (Ark.) The lessor covenanting but failing to repair fences, the lessee is not required to repair them to save himself from liability for injury to the orchard because of cattle getting in through the want of repairs.—Bowling v. Carroll, 182 S. W. 514.

The lessee cannot recover damages for breach of the lessor's covenant to make needed repairs of fences, unless he gives the lessor notice and reasonable time to make repairs.—Id.

⚡154 (Ark.) The measure of damages for breach of a lessor's covenant to repair fences is what it would have cost the lessee to make them.—Bowling v. Carroll, 182 S. W. 514.

(E) Injuries from Dangerous or Defective Condition.

⚡164 (Mo.App.) The owner of an office building or apartment house, retaining control over the common entrance, stairways, etc., held liable for personal injuries to tenants caused by defects in the premises.—Wilson v. Jones, 182 S. W. 756.

⚡167 (Mo.App.) The owner of an office building or apartment house, retaining control over the common entrance, stairways, etc., held liable for personal injuries to invitees caused by defects in the premises.—Wilson v. Jones, 182 S. W. 756.

The owner of an apartment house held liable for injuries to an expressman, falling into an unguarded and unlighted areaway while delivering a trunk.—Id.

⚡169 (Mo.App.) An expressman, falling into an unguarded and unlighted areaway while delivering a trunk at the rear entrance of an apartment house, held not guilty of contributory negligence as a matter of law.—Wilson v. Jones, 182 S. W. 756.

⚡170 (Mo.App.) The lessor of an assignment house held not liable in damages to a husband for the debauchery of his wife therein.—Payton v. Woolfolk, 182 S. W. 801.

VIII. RENT AND ADVANCES.

(C) Lien.

⚡254 (Mo.App.) Where a landlord gave his tenant the right to sell a portion of the crop and collect the price, he waived his lien for rent, though the purchaser knew nothing of the

arrangement.—Norrid v. Garner, 182 S. W. 1025.

⚡262 (Mo.App.) In action to enforce lien for rent, evidence held to present question for jury, whether landlord authorized tenant to sell crop free from lien.—Norrid v. Garner, 182 S. W. 1025.

LANDS.

See Public Lands.

LARCENY.

See Animals, ⚡10; Criminal Law, ⚡510, 829; Embezzlement; Robbery.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡17 (Tex.Or.App.) Under Pen. Code 1911, art. 1831, the branding by one of the animals of another for purpose of appropriation, but without removal from the range, held to support a conviction for theft.—Davis v. State, 182 S. W. 1126.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

⚡45 (Tex.Cr.App.) Under Rev. St. 1911, art. 7160, as amended by Acts 33d Leg. c. 69 (Ver-non's Sayles' Ann. Civ. St. 1914, art. 7160), providing that unrecorded brands shall not be recognized as evidence of the ownership of live stock, except in criminal cases, in a prosecution for larceny of a cow, testimony as to the brand on the stolen cow in defendant's possession was admissible.—Sullenger v. State, 182 S. W. 1140.

⚡51 (Tex.Cr.App.) Permitting the complaining witness to testify that, when he went to defendant's house and identified peas found there as being the ones stolen, the sheriff was with him held not error.—Williams v. State, 182 S. W. 335.

⚡55 (Mo.) Evidence held not to sustain a conviction of theft.—State v. Lee, 182 S. W. 972.

⚡55 (Tex.Cr.App.) Evidence held to support a conviction of theft.—Davis v. State, 182 S. W. 1126.

⚡56 (Mo.) That accused was found in possession of a hog which belonged to prosecutor, and which prior to that time had been running on the range, held not to show corpus delicti.—State v. Lee, 182 S. W. 972.

(C) Trial and Review.

⚡77 (Mo.) On trial for theft, an instruction on presumption of guilt from recent unexplained possession of stolen property held improper.—State v. Lee, 182 S. W. 972.

LAW OF THE CASE.

See Appeal and Error, ⚡1096-1099, 1195.

LAW OF THE ROAD.

See Highways, ⚡176-184.

LEADING QUESTIONS.

See Witnesses, ⚡244.

LEASE.

See Landlord and Tenant; Mines and Minerals, ⚡62, 64.

LEGISLATURE.

See States, ⚡28.

LETTERS.

See Criminal Law, ⚡433; Evidence, ⚡378.

LIBEL AND SLANDER.

See Appeal and Error, ¶1062, 1140; Trial, ¶184, 260.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

¶4 (Tex.Civ.App.) "Malice," in an action for libel, means an act done with a bad or wicked intent and the specific intention to injure, or an act done with such wanton or gross indifference as to indicate an utter disregard of consequences.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

¶5 (Tex.Civ.App.) Malice might be inferred from the publication of a libelous article received from defendant's correspondent, without any reasonable inquiry as to its truth, when inquiry would have disclosed its falsity.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

¶5 (Tex.Civ.App.) Plaintiff libeled by the publication of an article libelous per se was entitled to recover actual damages, and was not required to prove malice, except as a basis for the recovery of exemplary damages.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

In an action of libel it is not necessary that malice be shown by proof of ill will, animosity, or hatred, etc., but it may be inferred from the fact that the publication was made with such utter recklessness as to indicate a disregard of the consequences.—Id.

¶7 (Tex.Civ.App.) Publication of account of plaintiff's unauthorized arrest and imprisonment on mere suspicion that he might be guilty of murder under investigation in another state, with picture of plaintiff and of the girl whose murder was being investigated, held libelous per se.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

¶10 (Tex.Civ.App.) The publication of a false charge that plaintiff, the chief of police of another city, had put his son on the pay roll of the city as his confidential clerk, contrary to law, held libelous per se.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

¶33 (Tex.Civ.App.) In an action for publication of false and libelous charge of plaintiff's misconduct in his office as chief of police, plaintiff was entitled to recover general damages without proof other than the fact of the libel.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

¶42 (Tex.Civ.App.) Publication of plaintiff's unwarranted arrest and imprisonment on suspicion of his connection with a murder committed in another state held not privileged as the publication of a proceeding in the administration of the law.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

III. JUSTIFICATION AND MITIGATION.

¶55 (Tex.Civ.App.) The publication and circulation of matter libelous per se as to the plaintiff entitled him to actual damages, even though a part of the publication was privileged.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

¶56 (Tex.Civ.App.) Fact that defendant's publication of false charge or statements against plaintiff purported to be only a repetition of a charge made by another held not to relieve such publication of its libelous character.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

¶100 (Ark.) Where the complaint alleged that defendant stated that there was a shortage in plaintiff's accounts as treasurer with the county, and his bondsmen had to make it good, proof that defendant stated plaintiff had been short in some public office, and that his official bondsmen had to make good the shortage, did not constitute a substantial variance.—Waters v. Moore, 182 S. W. 904.

Testimony of the witness as to the slanderous utterance that he was not positive whether the office stated was that of county clerk or treasurer held not to constitute a substantial variance.—Id.

(C) Evidence.

¶103 (Tex.Civ.App.) In an action for libel by publication including what took place in plaintiff's room when he was arrested on suspicion that he might be guilty of murder in another state, it was permissible for plaintiff to show untruth of the publication by testimony as to what actually occurred then.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

¶112 (Tex.Civ.App.) Evidence, in an action for libel in publishing plaintiff's unwarranted arrest and imprisonment on mere suspicion of connection with a murder committed in another state, held sufficient to show actual malice, justifying an award of exemplary damages.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

(D) Damages.

¶121 (Tex.Civ.App.) Verdict of \$2,500 special and \$10,000 general damages for libelous publication that plaintiff, when chief of police of another city, had carried his son on the city pay roll in violation of law, was excessive, and would be reversed unless plaintiff filed a remittitur of \$5,000.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

(E) Trial, Judgment, and Review.

¶124 (Tex.Civ.App.) In an action for libel, an instruction submitting as special damages items which would properly come under the head of general damages was technical error.—Houston Chronicle Pub. Co. v. Wegner, 182 S. W. 45.

In an action for libel in charging on report that plaintiff, chief of police of another city, was to be investigated for carrying his son on the city pay roll as confidential clerk in violation of law, instruction that publication did not charge that the son was on the city pay roll held properly refused.—Id.

In an action for damages for publication libelous per se, an instruction that the jury might find for plaintiff such damages as from the evidence they believed he suffered was proper.—Id.

LICENSES.

See Constitutional Law, ¶186, 230; Railroads, ¶358.

I. FOR OCCUPATIONS AND PRIVILEGES.

¶6 (Ark.) Under Kirby's Dig. § 5454, and Acts 1911, p. 102, § 13, authorizing cities to regulate carriages kept for hire, cities may require all jitney busses to be licensed; the regulation of jitney busses being a proper exercise of police power.—Willis v. City of Ft. Smith, 182 S. W. 275.

¶7 (Tex.Cr.App.) Acts 34th Leg. c. 28, regulating loan brokers and imposing an annual tax, held not invalid.—Ex parte Hutsell, 182 S. W. 458.

Acts 34th Leg. c. 28, levying an annual tax of \$150 on loan brokers taking certain security,

held not invalid, as imposing a prohibitive tax.—Id.

Acts 34th Leg. c. 28, regulating loan brokers, and by sections 2 and 5 requiring them to give bond in the sum of \$5,000 conditioned to comply with requirements of law, and judgments against them, etc., and to keep books recording their transactions, held not to impose unreasonable requirements.—Id.

Acts 34th Leg. c. 28, § 7, requiring loan brokers before engaging in such business to file with the county clerk an irrevocable power of attorney, constituting the county judge an agent to accept service, held not unconstitutional.—Id.

Acts 34th Leg. c. 28, regulating loan brokers, and by section 8 providing that, if any judgment obtained upon a broker's bond should not be paid within 60 days, the license to engage in such business should be suspended until the judgment was paid, held within the legislative authority.—Id.

Acts 34th Leg. c. 28, § 9, making judgments against a loan broker collectible out of the bond required to be filed under the act, held valid.—Id.

Acts 34th Leg. c. 28, regulating loan brokers, held not void for not levying a penalty for its violation, when construed with section 10 thereof, assessing a specific penalty, and with the usury laws.—Id.

Under Acts 34th Leg. c. 28, regulating loan brokers, imposing an annual tax, etc., it is the occupation that one pursues that is licensed and taxed, and not the mere loaning of money on security, and, though one making an occasional loan is not within its provisions, the act is not thereby rendered discriminatory.—Id.

Acts 34th Leg. c. 28, regulating loan brokers, section 13 of which forbids compromises of usury or unlawful interest, held not contrary to public policy.—Id.

§7 (Tex.Civ.App.) Ordinance regulating jitneys or motor busses and imposing license fee held not to violate Const. art. 8, § 2, as to equality and uniformity of occupation taxes.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

§15 (Ky.) Persons manufacturing soft drinks in Ohio and making some sales to retail dealers in Newport from their delivery wagons held liable to license tax imposed by that city on wholesale dealers in such goods.—City of Newport v. Wagner, 182 S. W. 834.

§39 (Tenn.) One pursuing an occupation defined as a privilege by statute cannot recover on a contract made in pursuance of the business, if he has not paid his privilege tax.—Morton v. Imperial Realty Co., 182 S. W. 230.

Where, in suit on a contract made in pursuance of a business defined as a privilege by statute, the defendant pleads that the plaintiff has not paid his privilege tax, the burden to prove the fact so pleaded is on defendant.—Id.

One suing on a contract made in pursuance of a business defined by statute as a privilege cannot be defeated by failure to pay his privilege tax, in the absence of some proof in the record showing his default.—Id.

LIENS.

See Bailment, §18; Corporations, §415; Execution, §268; Factors, §47; Homestead, §96; Landlord and Tenant, §254, 262; Marshaling Assets and Securities; Mechanics' Liens, §199, 315; Pledges; Telegraphs and Telephones, §17; Vendor and Purchaser, §261-295.

LIFE ESTATES.

See Dower; Wills, §616.

§10 (Mo.) Where land devised to one for life remainder to his bodily heirs, was sold to pay charges imposed by the testator, held, that the life tenant's purchase was not a purchase of a paramount outstanding title, which inured to

the benefit of reversioners, who would take in the absence of his bodily heirs.—Dudgeon v. Hackley, 182 S. W. 1004.

Where land devised to one for life, remainder to his bodily heirs, was sold to pay charges imposed by the testator, life tenant, by purchasing the property at such sale, did not become trustee for the benefit of reversioners, who would take in default of his bodily heirs.—Id.

LIFE INSURANCE.

See Insurance, §291.

LIGHTS.

See Railroads, §312.

LIMITATION OF ACTIONS.

See Adverse Possession; Carriers, §218; Trusts, §365.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§21 (Tex.Civ.App.) Action of deceit, based on oral representations made to induce plaintiff to purchase land, held one for deceit, and not on contract, governed by the two-year statute of limitations; the four-year statute not applying.—Sowell v. Hoffman, 182 S. W. 1152.

§37 (Ky.) Action for relief from mistake must, by express provision of Ky. St. §§ 2515, 2519, be brought within 5 years after the accrual of the cause of action, the discovery of the mistake, and never more than 10 years after its commission.—Combs v. Ison, 182 S. W. 933.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§53 (Mo.App.) Where parties have dealings with each other consisting of transactions of different character, there must be evidence of an intention to make the transactions part of a running account before they will be so treated in determining limitations.—Earls v. Earls, 182 S. W. 1018.

Parties held not to intend to carry various business transactions in an open account within the statute of limitations.—Id.

(B) Performance of Condition, Demand, and Notice.

§66 (Mo.App.) While a debt accrues as soon as incurred, the cause of action upon it does not accrue until a right to demand payment arises.—Givens v. Rogers, 182 S. W. 115.

(C) Personal Disabilities and Privileges.

§72 (Tex.Civ.App.) Under Rev. St. 1911, art. 5684, the two years in which to institute a bill of review does not in the case of minor commence to run until he attains majority.—Kidd v. Prince, 182 S. W. 725.

(E) Absence, Nonresidence, and Concealment of Person or Property.

§84 (Mo.App.) Where defendant, after executing notes, removed from the state before maturity, his removal did not, under Rev. St. 1909, § 1897, stop the running of limitations in his favor.—Givens v. Rogers, 182 S. W. 115.

Though defendant, at the time of executing notes, intended to leave the state, and did so shortly, no attachment having been issued, under Rev. St. 1909, § 2295, the running of limitations against action on the note was not tolled by section 1897.—Id.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§100 (Tex.Civ.App.) In case of fraud the cause of action accrues when the fraud was, or

by the use of reasonable diligence might have been, discovered, and the limitation begins then, and the right of relief is barred when the statutory period has expired.—*Sowell v. Hoffman*, 182 S. W. 1152.

Plaintiff, in action for fraudulent representations inducing his purchase of land, held as matter of law wanting in reasonable diligence to discover the alleged fraud, so that his cause of action accrued and limitation was to be computed from the time he received his deed.—*Id.*

(H) Commencement of Action or Other Proceeding.

⚡119 (Tex.Civ.App.) Where plaintiff, suing on a note, suppressed citation, and took no steps to procure issuance and service until four years from the maturity of the note, merely instructing the clerk after such date to issue in time for the next June Term, plaintiff's suit did not interrupt the running of limitations.—*Estes v. McWhorter*, 182 S. W. 887.

Where suit on a note was barred because plaintiff failed to procure citation before the elapse of four years from maturity of the note, so that the running of the statute was not interrupted, the subsequent filing by defendant of a waiver of citation did not remove the bar of the statute.—*Id.*

Plaintiff's suit on a note was barred where he suppressed citation and failed to procure its issuance and service before the elapse of four years from maturity of the note, so that the suit failed to interrupt limitations, though defendant in his original answer did not plead limitation.—*Id.*

⚡127 (Tex.Civ.App.) Amendment of complaint by intervention of administratrix and allegation of cause of action under federal Employers' Liability Act held not to state new cause of action barred by the two-year limitation in section 6.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

Amendment of complaint under Rev. St. 1911, arts. 4694, 4695, by alleging as ground for recovery negligence of fellow servant based on article 6640, held not to state new cause of action so as to bar recovery thereon under two-year statute of limitations (Rev. St. 1911, art. 5687, par. 7).—*Id.*

⚡138 (Tex.Civ.App.) Where plaintiffs resorted to action in the state court, instead of the federal court, in a cause of action arising out of bankruptcy proceedings, they could not complain, having been defeated in the state court, that limitations against an action in the federal courts had run.—*Broussard v. Le Blanc*, 182 S. W. 78.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⚡155 (Mo.App.) Where plaintiff, indebted to defendant for merchandise, asked defendant to sell goods to a third person and charge the same to plaintiff, payment by the third person did not stop the running of limitations on the account against plaintiff.—*Earls v. Earls*, 182 S. W. 1018.

⚡157 (Mo.App.) Where a debtor for merchandise was a surety on a note executed by the merchant, a payment on the note made by the debtor was not a payment on the account and did not stop running of limitations.—*Earls v. Earls*, 182 S. W. 1018.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

⚡175 (Mo.App.) The statute of limitations, being for the protection of the defendant, may be waived by defendant insurance company, so that action may be brought after such waiver be-

yond the statutory period.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

Waiver of the statute of limitations may occur after, as well as before, the time limit has expired; but, if made after such expiration, the waiver must contain the element of estoppel.—*Id.*

Where plaintiff made claim for loss of her husband under a life policy 17 years after his death, whereupon defendant required proofs of loss to be submitted, defendant was estopped to assert the defense of the statute of limitations, although in requiring proofs it specifically asserted that it waived no defense it had, since such a statement, without specific reference to the particular defense, was valueless.—*Id.*

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡177 (Mo.App.) Plaintiff's failure to plead waiver by the insurer of statute of limitations would not defeat her action, which was tried on an agreed statement of facts which showed the waiver.—*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89.

⚡185 (Tex.Civ.App.) Under Rev. St. 1911, art. 1829, plaintiff, whose petition fixed the accrual of her cause of action within two years from the filing of her suit, was not required to specially deny defendant's plea of the two-year statute of limitations.—*Galveston, H. & S. A. Ry. Co. v. Wallraven*, 182 S. W. 21.

⚡195 (Mo.App.) The party asserting that the transaction forms a part of a running account within the statute of limitations has the burden of proving it.—*Earls v. Earls*, 182 S. W. 1018.

LIMITATION OF LIABILITY.

See Carriers, ⚡159, 185, 218, 307.

LIQUIDATED DAMAGES.

See Damages, ⚡77, 79.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Carriers, ⚡207-230.

LOAN BROKERS.

See Constitutional Law, ⚡89, 230; Licenses, ⚡7; Statutes, ⚡64; Usury, ⚡6.

LOANS.

See Banks and Banking, ⚡180.

LOCAL OPTION.

See Intoxicating Liquors, ⚡31-39.

LOCOMOTIVES.

See Steam, ⚡6.

LOGS AND LOGGING.

See Damages, ⚡79.

⚡8 (Ark.) Defendant, who agreed to cut timber for a part thereof, under mistake as to the amount he was to have could not escape liability for a breach of his contract on the ground of mistake, where the error was pointed out to him before he commenced cutting and he refused an offered release from the contract.—*Montague v. Robinson*, 182 S. W. 558.

LOOKOUTS.

See Railroads, ⚡415.

LOT.

See Criminal Law, ¶866.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

See Fixtures, ¶18; Master and Servant, ¶234; Steam.

MAIMING.

See Assault and Battery, ¶58.

MALICE.

See False Imprisonment, ¶4; Libel and Slander, ¶4, 5; Malicious Prosecution.

MALICIOUS PROSECUTION.

See False Imprisonment.

II. WANT OF PROBABLE CAUSE.

¶18 (Mo.App.) Institution of prosecution against grantor for fraudulent execution of second deed, penalized by Rev. St. 1909, § 4569, where omission of prior deed is with grantee's knowledge, under design by both to defraud third person, is not without probable cause because grantee is not defrauded.—*Bowers v. Walker*, 182 S. W. 116.

¶21 (Mo.App.) Where defendant took a prosecuting attorney's advice in instituting prosecution, but acted in bad faith, withholding facts, he was not, by acting on such advice, legally exonerated from imputation of malice in subsequent action for malicious prosecution.—*Bowers v. Walker*, 182 S. W. 116.

¶24 (Mo.App.) A prima facie case of malicious prosecution, made by failure of prosecution or by accused's discharge, is rebuttable by proof of defendants' probable cause.—*Bowers v. Walker*, 182 S. W. 116.

III. MALICE.

¶32 (Mo.App.) Proof of want of probable cause in malicious prosecution does not raise legal inference of malice, though malice as matter of fact may be inferred therefrom.—*Bowers v. Walker*, 182 S. W. 116.

V. ACTIONS.

¶56 (Mo.App.) Burden is on plaintiff, in malicious prosecution, to prove want of probable cause and malice, both being essential elements of case.—*Bowers v. Walker*, 182 S. W. 116.

¶69 (Mo.App.) Five thousand dollars verdict in malicious prosecution held not excessive as compensatory damages for false arrest, half-hour imprisonment, and malicious prosecution of practicing lawyer in good standing.—*Bowers v. Walker*, 182 S. W. 116.

¶71 (Mo.App.) Where evidence in malicious prosecution is conflicting, question whether facts alleged as probable cause are true is for jury; determination whether such facts constitute probable cause in law being for court.—*Bowers v. Walker*, 182 S. W. 116.

¶72 (Mo.App.) Instruction, in malicious prosecution, held not objectionable as allowing jury to determine law as to what constitutes probable cause.—*Bowers v. Walker*, 182 S. W. 116.

MALPRACTICE.

See Physicians and Surgeons.

MANDAMUS.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

¶31 (Mo.) The alternative writ of mandamus, issued to a circuit judge to compel a special assignment of a cause for trial in violation of rules of court en banc, requiring assignments to be made in certain order, will be quashed and peremptory writ denied.—*State ex rel. Odell v. Johnson*, 182 S. W. 969.

MANSLAUGHTER.

See Homicide.

MANUFACTURES.

See Licenses, ¶15.

MARRIAGE.

See Divorce; Husband and Wife.

¶58 (Tex.Civ.App.) A marriage taking place through fear of, or to stop, a prosecution for seduction, will not be set aside for duress.—*Gass v. Gass*, 182 S. W. 1195.

¶59 (Tex.Civ.App.) A marriage induced by fear of physical violence will not be set aside where the parties lived together as husband and wife after the threatening influences were removed.—*Gass v. Gass*, 182 S. W. 1195.

¶60 (Tex.Civ.App.) In an action to annul a marriage evidence held sufficient to support either the theory that plaintiff married to escape prosecution, or that he recognized defendant as his wife for a considerable time.—*Gass v. Gass*, 182 S. W. 1195.

MARRIED WOMEN.

See Husband and Wife.

MARSHALING ASSETS AND SECURITIES.

¶5 (Tex.Civ.App.) Where it is inequitable that the earliest grantee's land should primarily bear the burden of a common charge, either in whole or in part, equity will presume an intention of the parties to the conveyance that the part conveyed shall be free from such burden until the grantor's land was first exhausted.—*Biswell v. Gladney*, 182 S. W. 1168.

MASTER AND SERVANT.

See Appeal and Error, ¶216; Assignments, ¶3; Commerce, ¶27; Courts, ¶489; False Imprisonment, ¶15; Frauds, Statute of, ¶113; Jury, ¶11; Limitation of Actions, ¶127; Negligence, ¶101; Removal of Causes, ¶3; Statutes, ¶279; Trial, ¶253, 260, 351, 352; Work and Labor.

I. THE RELATION.

(C) Termination and Discharge.

¶20 (Ky.) Where the term of employment was indefinite, it may be terminated by the master at any time.—*Bowen v. Chenoa-Hignite Coal Co.*, 182 S. W. 635.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

¶78 (Mo.App.) Although the rules of an employers' benefit association require claim to be made within a certain time and in a certain manner, failure to make such a claim is waived by the association when it acknowledges the claim and tenders monthly benefits thereunder.—*Hartman v. Chicago, B. & Q. R. Co.*, 182 S. W. 148.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

☞89 (Ark.) Where a lumber company and a subsidiary railroad company had passed rules forbidding employes of the lumber company to use the trains for their own benefit, and an employe knew that fact, he was a trespasser when riding on a train.—Prescott & N. W. Ry. Co. v. Hopkins, 182 S. W. 551.

A master may reinstate rules which have been abrogated by noninsistence at any time it sees fit, and, on reinstating rules forbidding servants to ride on a logging railroad, servants riding in violation are trespassers.—Id.

☞100 (Mo.App.) An employer cannot make a valid contract with his employe for relief against his own negligence; such a contract being opposed to common morality and humanity.—Hartman v. Chicago, B. & Q. R. Co., 182 S. W. 148.

Contract of membership in relief department of defendant railroad held void so far as it sought to provide in advance for the release of defendant from the legal consequences of his future wrongs, regardless of whether there was a consideration for the contract.—Id.

Where an employe is injured through the master's negligence, he may recover both for negligence and under a contract of membership in the relief department maintained by the master, under which he paid a premium; for such recovery is not a double indemnity.—Id.

A contract by which the employe agrees to pay a certain premium for certain benefits in case of sickness or injury, and which provides that acceptance of such benefits shall waive any right of action against the master, or that suit against the master shall waive any right under the contract, is void as to the forfeiture provisions, since it requires him to forfeit one of two rights which he has at law.—Id.

A contract of a railroad employer with its employe to pay him certain benefits in return for a small premium paid, but providing that suit against the railway shall waive the benefits to be paid, and that acceptance of such benefits shall waive the right of action against the company, is void under Federal Employers' Liability Act, § 5.—Id.

(B) Tools, Machinery, Appliances, and Places for Work.

☞101, 102 (Ky.) A coal company furnishing means by which employes are carried to and from their work, must exercise ordinary care to provide reasonably safe methods.—Taylor Coal Co. v. Miller, 182 S. W. 920.

☞101, 102 (Tex.Civ.App.) It is the master's duty to exercise ordinary care to render the place for work reasonably safe for his servants.—San Antonio Brewing Ass'n v. Sievert, 182 S. W. 389.

☞101, 102 (Tex.Civ.App.) A master is bound to exercise ordinary care to furnish a safe place for his servants to work.—Turner v. McKinney, 182 S. W. 431.

☞103 (Mo.App.) The duty of furnishing an employe a safe place and appliances rests on the employer, and he cannot delegate it to another.—McGrath v. Fogel, 182 S. W. 813.

☞107 (Tex.Civ.App.) The master is not liable for failure to provide a safe place to work when such failure results from a risk of operation, but that liability attaches only on failure properly to construct or provide a safe place to work.—San Antonio Brewing Ass'n v. Sievert, 182 S. W. 389.

☞111 (Mo.App.) Under the federal Safety Appliance Acts, failure of a coupler to work sustains a charge of negligence, though the couplers provided are proper in material and con-

struction, of standard make, and constructed so as to be capable of coupling by impact.—Noel v. Quincy, O. & K. C. R. Co., 182 S. W. 787.

☞111 (Tex.Civ.App.) The rigidity in trucks of a freight car which caused the wheels to mount the rails and the car to be derailed is a defect, for failure to discover which, on inspection, the master is liable for injury to a servant.—Galveston, H. & S. A. Ry. Co. v. Webb, 182 S. W. 424.

☞112 (Ark.) Though primarily intended for benefit of stockowners, noncompliance with a statute requiring a railroad to fence its right of way so as to keep out stock may be considered on the question of negligence, in case of its employe injured by its motor car running into sheep on the track.—Sands v. Lynch, 182 S. W. 561.

☞124 (Tex.Civ.App.) Where the danger of a place to work arises from the work itself, and there is no evidence that the master had knowledge of the danger, or was, by the length of time it had existed, charged with knowledge of it, the mere failure to inspect does not determine his liability.—San Antonio Brewing Ass'n v. Sievert, 182 S. W. 389.

The duty of the master to inspect the place provided for his servants to work in is not a continuing duty requiring inspection from time to time.—Id.

☞124 (Tex.Civ.App.) Where a switchman was injured by jumping from a freight car when it was derailed because of a defect in the trucks, the master was liable, where the defect was such that inspection must have discovered it.—Galveston, H. & S. A. Ry. Co. v. Webb, 182 S. W. 424.

Where a switchman was injured by jumping from a car derailed because of rigid trucks, the fact that the car did not belong to the employer did not relieve him of the duty of inspection, where the car had been in his possession long enough to give opportunity for an inspection, and some inspection was made.—Id.

☞125 (Ky.) If telephone cable suspended above railroad track and sagging so as to injure brakeman had been down sufficiently long for railroad company in exercise of ordinary care to discover it, such company held liable for brakeman's injuries.—Louisville & N. R. Co. v. Mink, 182 S. W. 188.

(C) Methods of Work, Rules, and Orders.

☞137 (Ark.) In action for death of freight brakeman, thrown from car in taking up slack when spotting the tender at the tank, held, that such taking up of the slack was not a movement, within rule requiring signal thereof, so that there was no negligence in that respect.—Scullin v. Thomason, 182 S. W. 285.

☞137 (Mo.App.) Where defendant's switch engine, with lookout on footboard, was approaching plaintiff, who was in a dangerous position, it was the lookout's duty to warn plaintiff upon sufficient notice of danger to put a reasonably prudent man on the alert.—Dunn v. Missouri Pac. Ry. Co., 182 S. W. 109.

Plaintiff employe, working at riveting pipe and told to fix working place for himself, who walked to track to pick up piece of pipe for riveting base, where he was struck by engine, held licensee by invitation, entitled to notice of train movements.—Id.

☞148 (Mo.App.) Forman's direction to driver to apply turpentine to anus of horse if it balked held not outside the scope of his authority.—Perlin v. Waters-Pierce Oil Co., 182 S. W. 1013.

(D) Warning and Instructing Servant.

☞153 (Mo.App.) A truck held not a simple appliance so as to relieve the employer from the duty of instructing an infant employe as

to how to use it safely.—*White v. Ennis Coffee Co.*, 182 S. W. 775.

(E) Fellow Servants.

⇒177 (Ky.) Negligence, if any, of fellow servants in failing to inform their foreman of the defective condition of the appliances used by servant could not be imputed to the master or render him liable in damages for the servant's death.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

⇒177 (Mo.App.) A city which made an excavation to expose a sewer pipe to be cut, affording ample room for the work, was not liable for the injury of its servant holding a chisel, struck by his fellow servant when the latter's hammer was deflected through being used in such a manner as to strike a timber above supporting street railway ties.—*Hendrickson v. Kansas City*, 182 S. W. 108.

⇒177 (Tex.Civ.App.) Although the master's duty to furnish a safe place to work is nondelegable, he is not liable to an injured servant when the place of work is made temporarily dangerous by the act of a fellow servant.—*San Antonio Brewing Ass'n v. Sievert*, 182 S. W. 389.

⇒196 (Mo.App.) An employé directed by the foreman to erect a scaffold for use by a plasterer held not a fellow servant of the plasterer.—*McGrath v. Fogel*, 182 S. W. 813.

⇒201 (Tex.Civ.App.) Injuries to a servant caused by a barrel falling from a stack carelessly piled by fellow servants held the result of negligence of the fellow servants, in the absence of a showing that the master knew, or by the utmost diligence could have known, of the danger.—*San Antonio Brewing Ass'n v. Sievert*, 182 S. W. 389.

(F) Risks Assumed by Servant.

⇒203 (Ky.) An employé riding to his place of work on a car furnished by employer to take employes to and from their work, does not assume any risk of danger growing out of the conduct of the animal drawing the car.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

⇒203 (Tex.Civ.App.) Assumption of the risk causing his injury will defeat an injured brakeman's action for damages for the injury.—*San Antonio, U. & G. R. Co. v. Green*, 182 S. W. 392.

⇒205 (Ky.) A servant not charged with the duty of inspection need not inspect his place of work or the appliances for work, or take notice of any defect not obvious, but may rely on the master's duty to use ordinary care to make the place and appliances reasonably safe.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

⇒205 (Mo.App.) Where boards in a pile had been selected and used as scaffolding boards, an employé could assume that any of them were proper for that purpose in the absence of anything to show him that a particular board was not fit.—*McGrath v. Fogel*, 182 S. W. 813.

⇒205 (Tex.Civ.App.) A servant is not required to inspect the place where his master has put him to work, but has the right to assume that the place furnished by the master is safe.—*Turner v. McKinney*, 182 S. W. 431.

⇒208 (Ky.) An employé riding to his place of work on a car furnished by employer to take employes to and from their places of work, held not to assume the risk of defect in the track.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

⇒211 (Ark.) Where a self-dumping cage was a standard apparatus in general use in coal mines, and in all cases some coal escaped and fell down the shaft, a coal miner assumed the risk of injury from falling coal as one of the incidents of his employment.—*Western Coal & Mining Co. v. Harrison*, 182 S. W. 525.

⇒216 (Mo.App.) While an employé did not assume a risk caused by the negligence of a

vice principal, the vice principal's negligence did not relieve him of the consequence of his own negligence.—*Perlin v. Waters-Pierce Oil Co.*, 182 S. W. 1013.

⇒219 (Ky.) A servant may recover for an injury caused by a defect in his place of work or the appliances for work making them dangerous to use, unless the defect or the danger is so obvious that one in his situation ought, with reasonable care, to discover it.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

Where the defect in machinery and the danger to be apprehended from its continued use were obvious, risk attending its use in such condition, though greater than the ordinary risks incident to the employment, was assumed by the servant.—*Id.*

⇒222 (Mo.App.) Employé held not to assume risk of injury from obedience to foreman's negligent direction that he apply turpentine to anus of horse if it balked.—*Perlin v. Waters-Pierce Oil Co.*, 182 S. W. 1013.

⇒226 (Ky.) A servant does not assume the risk of accident and danger, due to the master's failure to exercise ordinary care in furnishing him with a reasonably safe place to work.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

⇒226 (Tex.Civ.App.) While the master is not liable for failure to provide a reasonably safe place for his servants to work where the very progress of the work renders it impossible to supply a safe place, he must exercise ordinary care, since the servant working in such a place does not assume the risk of the master's negligence.—*San Antonio Brewing Ass'n v. Sievert*, 182 S. W. 389.

(G) Contributory Negligence of Servant.

⇒227 (Mo.App.) Where plaintiff employé, when struck by defendant's switch engine, was negligent, he could not recover for defendant's negligence in running in excess of speed permitted by ordinance; the only issue open being defendant's negligence under the last chance doctrine.—*Dunn v. Missouri Pac. Ry. Co.*, 182 S. W. 109.

⇒228 (Mo.App.) In an action under the federal Employers' Liability Act, contributory negligence, to be a bar to recovery, must be the sole cause of injury.—*Delano v. Roberts*, 182 S. W. 771.

⇒228 (Mo.App.) Rules of an interstate carrier, of which the injured servant had notice, but which practically nullified the federal Safety Appliance Acts, held not to affect an employé's recovery for personal injuries.—*Noel v. Quincy, O. & K. C. R. Co.*, 182 S. W. 787.

⇒230 (Ky.) Want of care on part of deceased servant could not be excused on ground of youth, when it appeared that he was an intelligent young man of normal physical and mental development, capable of properly operating his machine, and fully instructed as to its operation.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

⇒234 (Ky.) A master, ignorant of a defect in machinery because of the deceased servant's negligence in failing to inform of the defect, which had been caused by his further negligence in striking and niching a pulley a few days before his death, was not liable for the death.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

⇒235 (Mo.App.) Employé, struck by engine on switch track, held negligent in not looking for approaching trains.—*Dunn v. Missouri Pac. Ry. Co.*, 182 S. W. 109.

⇒235 (Tex.Civ.App.) A servant is not required to inspect the place provided him to work in for the purpose of discovering concealed dangers, though they might be disclosed by superficial observation, but he can assume that the master has provided a safe place and

safe appliances.—*San Antonio Brewing Ass'n v. Slevert*, 182 S. W. 389.

—235 (Tex.Civ.App.) Employee directed by foreman to use running board held entitled to assume that it was secure, and not required to inspect to see whether it was fastened to its supports.—*Decatur Cotton Seed Oil Co. v. Taylor*, 182 S. W. 401.

—248 (Mo.App.) Though plaintiff employee was negligent in not observing approaching engine, which struck him, defendant railroad will be liable if thereafter it might have avoided the accident in the exercise of due care.—*Dunn v. Missouri Pac. Ry. Co.*, 182 S. W. 109.

(H) Actions.

—256 (Tex.Civ.App.) Allegations of petition held sufficient to entitle plaintiff to recover under the federal Employers' Liability Act, although he failed to state that his action was brought thereunder.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

—264 (Mo.App.) In an engine fireman's action for injuries by being jarred from the engine through the engineer's violent coupling to the train, evidence held not to raise a mere presumption of negligence from the happening of the accident, but to be responsive to the particular acts of negligence alleged in the petition.—*Delano v. Roberts*, 182 S. W. 771.

—264 (Mo.App.) Where contributory negligence was not pleaded, the question whether it would be a defense under the federal Safety Appliance Acts was not involved.—*Noel v. Quincy, O. & K. C. R. Co.*, 182 S. W. 787.

—265 (Ky.) Where telephone cable above railroad track sagged so as to strike brakeman, doctrine of *res ipsa loquitur* held not to apply as against railroad company not shown to have control or management of the cable.—*Louisville & N. R. Co. v. Mink*, 182 S. W. 188.

—265 (Tex.Civ.App.) Where a servant alleged injuries due to rigidity in the trucks of a freight car on which he was working, which caused the car to leave the rails twice within a few minutes it was unnecessary for him to show the cause of the defect.—*Galveston, H. & S. A. Ry. Co. v. Webb*, 182 S. W. 424.

—270 (Tex.Civ.App.) Though employee merely alleged that board was furnished for particular use, without charging negligence of foreman in directing its use, evidence of such direction held admissible; the direction to use it constituting a furnishing.—*Decatur Cotton Seed Oil Co. v. Taylor*, 182 S. W. 401.

—276 (Ky.) Plaintiff, suing for injuries under the federal Employers' Liability Act, must show that he was injured in interstate commerce.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

—276 (Mo.App.) In an action for injuries by a cotton gin employee when his hand, by the falling of a roll board, was knocked into the gin saws, evidence held sufficient to support verdict for plaintiff.—*Greenfield v. Roberts Cotton Oil Co.*, 182 S. W. 1052.

—276 (Tex.Civ.App.) Evidence in servant's action for injury from falling from ladder on side of oil derrick, held to sustain jury's finding that defendant's negligence in affixing a step to the ladder and in allowing it to remain loose and unsafe, was the proximate cause of plaintiff's injury.—*J. M. Guffey Petroleum Co. v. Dinwiddie*, 182 S. W. 444.

—276 (Tex.Civ.App.) Evidence, held insufficient to show that negligence, if any, of railroad employing deceased in permitting excavations near track or failing to keep watchman was proximate cause of injury.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

—278 (Ky.) In brakeman's action for injuries caused by sagging telephone cable, held, that there was a failure of proof in the absence of

evidence as to how long it had been in this condition.—*Louisville & N. R. Co. v. Mink*, 182 S. W. 188.

—278 (Ky.) In an action for a master's negligence in allowing machinery and appliances to remain in a defective and dangerous condition, as known to it, but unknown to a servant, evidence held insufficient to show the master's negligence.—*Jarboe's Adm'r v. Coleman*, 182 S. W. 922.

—278 (Mo.App.) In an engine fireman's action for injuries by being jarred from the engine while it was being coupled to the train, evidence held sufficient to support a finding of actionable negligence.—*Delano v. Roberts*, 182 S. W. 771.

—278 (Mo.App.) In action under federal Safety Appliance Acts, evidence that failure to couple was not due to fault in construction, but to hole in crossbeam of cars, held to make a case against the carrier.—*Noel v. Quincy, O. & K. C. R. Co.*, 182 S. W. 787.

—278 (Tex.Civ.App.) Evidence in a railroad servant's action for injuries held sufficient to show defendant's negligence.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

—278 (Tex.Civ.App.) In an action for death of a servant found with his skull crushed on the master's descending elevator, which he had been repairing, evidence held insufficient to establish negligence of the master as the producing cause of the death.—*Canode v. Sewell*, 182 S. W. 421.

—278 (Tex.Civ.App.) In railroad employee's action for injury from cave-in of sides of a ditch in which he was working, evidence held to justify finding that the dangers incident to the work were known to defendant and its foreman, and not known to plaintiff.—*Turner v. McKinney*, 182 S. W. 431.

—278 (Tex.Civ.App.) Evidence held insufficient to show liability of a railway company for injuries to a car inspector received when inspecting a locomotive on a turntable when the turntable was moved without warning.—*Galveston, H. & S. A. Ry. Co. v. Muhlemann*, 182 S. W. 448.

—278 (Tex.Civ.App.) Evidence held insufficient to show negligence of railroad employing deceased in permitting excavations near track or failing to keep watchman.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

—279 (Tex.Civ.App.) Evidence of plaintiff held to show that his injuries proximately resulted from the negligent act of his fellow servants, so as to support recovery from the master.—*Galveston, H. & S. A. Ry. Co. v. Reinhart*, 182 S. W. 486.

—279 (Tex.Civ.App.) Evidence held to authorize jury to find that stop signal, which resulted in the fall of deceased, was given by a fellow servant, and not by deceased himself.—*Ft. Worth Belt Ry. Co. v. Jones*, 182 S. W. 1184.

—280 (Tex.Civ.App.) Evidence in a railroad servant's action for injuries by falling from a gasoline motor car which he had attempted to start by pushing it held to support a verdict that he did not assume the risk in attempting to board the moving car.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

—281 (Ark.) Where an employee of a lumber company was killed while riding on the train of a subsidiary railroad company, evidence that he stated he was going to ride on the train, but that he might have to fight his superior to ride on the train, is admissible, to show that he knew the rules prohibiting riding on such train.—*Prescott & N. W. Ry. Co. v. Hopkins*, 182 S. W. 551.

—281 (Ky.) In a servant's personal injury action, evidence held to show that he was in

charge of the gang of men who fired the shot of dynamite which resulted in the injury, relieving the master from liability.—Indian Creek Coal Co. v. Walcott, 182 S. W. 631.

—281 (Mo.App.) In a servant's action under the federal Employers' Liability Act for injuries by being jarred from an engine while it was being coupled to a train, evidence *held* not to present an issue of contributory negligence.—Delano v. Roberts, 182 S. W. 771.

—284 (Ky.) In an action against a railroad under the federal Employers' Liability Act for injuries to its baggagemaster, whether the accident occurred at a switch or about 35 feet south therefrom *held* for the jury.—Chesapeake & O. Ry. Co. v. Shaw, 182 S. W. 653.

—284 (Ky.) Under Ky. St. § 331a, subsec. 1, and subsection 2 as amended by Act March 23, 1910 (Acts 1910, c. 85), and subsection 11, where child of 15, for whom a certificate of school superintendent had been procured, but none of county physician or city health officer, as required in his employment as messenger, was required to use an elevator not reasonably safe, the question of violation of the statute was properly submitted to the jury.—Stewart Dry Goods Co. v. Miller, 182 S. W. 866.

—284 (Tex.Civ.App.) In a servant's action for injuries in operating a tool car on an interstate railway, it is a question for the court whether the servant's injuries were received while employed in interstate or intrastate commerce, thereby determining whether state or federal statutes shall control.—Chicago, R. I. & G. Ry. Co. v. Cosio, 182 S. W. 83.

—285 (Ky.) In an action for a servant's death, where the evidence left the cause of death purely a matter of conjecture, a peremptory instruction for defendant was authorized.—Jarboe's Adm'r v. Coleman, 182 S. W. 922.

—285 (Mo.App.) In an engine fireman's action for injuries by being jarred from the tender while the engine was being coupled to the train, *held* that, under the evidence, whether the fireman was jarred from the tender and his injuries resulted therefrom was for the jury.—Delano v. Roberts, 182 S. W. 771.

—286 (Ark.) Under the facts, finding of which is warranted by the evidence, *held*, the question of negligence of the foreman in charge of a railroad motorcar, which ran into sheep, injuring a servant on the car, was for the jury.—Sands v. Lynch, 182 S. W. 561.

—286 (Ky.) In an action against a railroad under the federal Employers' Liability Act for injuries to its baggagemaster, question whether the road was negligent in leaving an open space between two ties for a switch rod to work in *held* for the jury.—Chesapeake & O. Ry. Co. v. Shaw, 182 S. W. 653.

—286 (Tex.Civ.App.) It is the duty of the employer to furnish a reasonably safe implement for the work required, and whether it was the duty of a railroad company to furnish a tool car with a motor starting apparatus was a question for the jury in a servant's action for injuries in attempting to start the car by pushing it.—Chicago, R. I. & G. Ry. Co. v. Cosio, 182 S. W. 83.

—286 (Tex.Civ.App.) Where a switchman was injured by jumping from a car derailed for the second time in a few minutes because of rigid trucks, it was a question for the jury whether the inspection of the car was properly made.—Galveston, H. & S. A. Ry. Co. v. Webb, 182 S. W. 424.

—286 (Tex.Civ.App.) In a railroad employe's action for injuries when the sides of a narrow ditch on which he was working caved in, *held*, that there was no error in overruling defendant's motion for an instructed verdict.—Turner v. McKinney, 182 S. W. 431.

—287 (Mo.App.) In an engine fireman's action for injuries by being jarred from the tend-

er while the engine was being coupled to the train, *held* that, under the evidence, the engineer's negligence in making the coupling was for the jury.—Delano v. Roberts, 182 S. W. 771.

—288 (Mo.App.) Positive testimony and inferences that employe, applying turpentine to anus of balky horse, did not know danger *held* not overcome, so as to justify sustaining of demurrer to evidence.—Perlin v. Waters-Pierce Oil Co., 182 S. W. 1018.

—289 (Mo.App.) Where defendant's switch engine, approaching plaintiff, who was in position of danger, sounded no signals, and lookout on footboard did not warn plaintiff, question of defendant's negligence under last chance doctrine was for jury.—Dunn v. Missouri Pac. Ry. Co., 182 S. W. 109.

—289 (Mo.App.) Evidence *held* to make question for jury as to contributory negligence of employe, who applied turpentine to anus of balky horse, as directed by his foreman.—Perlin v. Waters-Pierce Oil Co., 182 S. W. 1013.

—289 (Tex.Civ.App.) The violation of a rule by a servant is not negligence per se.—San Antonio, U. & G. R. Co. v. Green, 182 S. W. 392.

—293 (Tex.Civ.App.) Where a car inspector was injured while inspecting a locomotive on a turntable which was moved without warning in spite of custom to give warning if any one could be seen about the engine, it was error to refuse to instruct that the employe could not recover if, had the turntable operator looked, he could not have seen the employe.—Galveston, H. & S. A. Ry. Co. v. Muhlemann, 182 S. W. 448.

—294 (Tex.Civ.App.) Where there was no evidence of negligence of any fellow servants except two Mexicans, an instruction authorizing recovery if the injury resulted from negligence of fellow servants, without limiting it to negligence of the Mexicans, was not erroneous.—Galveston, H. & S. A. Ry. Co. v. Reinhart, 182 S. W. 436.

—295 (Ark.) An instruction concerning the miner's assumption of risk of injury from falling coal in the mine shaft, *held* erroneous as tending to mislead.—Western Coal & Mining Co. v. Harrison, 182 S. W. 525.

—297 (Tex.Civ.App.) Findings, in action by employe against railroad, that plaintiff's duties required use of footboard on tender, and that proper attention to duties would not inform him of defective condition, *held* not necessarily contradictory.—Texas & P. Ry. Co. v. Conway, 182 S. W. 52.

—297 (Tex.Civ.App.) In a servant's action for injury, findings that defendant's negligence in the construction of a ladder was the proximate cause of plaintiff's injury, would support a judgment for plaintiff.—J. M. Guffey Petroleum Co. v. Dinwiddie, 182 S. W. 444.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

—302 (Tex.Civ.App.) Principal's liability for acts of agent or servant *held* not limited to those expressly authorized, the question being whether it was done in the course of the agent's employment and while he was engaged in the principal's business.—Acme Laundry v. Weinstein, 182 S. W. 408.

Acts specifically directed and acts which can fairly be deemed an ordinary and natural incident or attribute of such acts, or their natural, direct, and logical result, *held* acts in course of servant's employment.—Id.

Where it was employe's duty to go to room where supplies were kept for supplies, removal of rubbish therefrom so that he might more conveniently or efficiently perform this duty *held* within the scope of his employment.—Id.

To render master liable for servant's act, it must be done within scope of his general au-

thority, in furtherance of master's business and for accomplishment of object for which servant is employed.—Id.

⚡305 (Ark.) Defendant held liable for the value of logs cut from plaintiff's land, though the fault was that of his cutters who trespassed thereon.—Yelvington v. Polzin, 182 S. W. 278.

⚡305 (Tex.Civ.App.) That a negligent act of a servant resulting in an injury may not have been authorized by the principal, or may have been forbidden, will not necessarily relieve the master or principal from liability.—Acme Laundry v. Weinstein, 182 S. W. 408.

(B) Work of Independent Contractor.

⚡321 (Mo.App.) Defendant could not escape responsibility for damage caused by threshing machine which he knew to be in a dangerous and defective condition by engaging an independent contractor to take it over the highway.—Johnson v. J. I. Case Threshing Mach. Co., 182 S. W. 1089.

(C) Actions.

⚡329 (Mo.) A petition, in action against an express company based on its agent shooting plaintiff, held to state a cause of action as against a demurrer.—Maniaci v. Interurban Express Co., 182 S. W. 981.

⚡330 (Tex.Civ.App.) In the owner's suit for destruction of his oil barge by fire, evidence held insufficient to sustain a finding that one who carried a lantern near the oil flowing from a hose into the barge was in defendant's employ and in the performance of his duties at the time.—Texas Co. v. Charles Clarke & Co., 182 S. W. 351.

In a suit by the owner of an oil barge for its destruction by fire while loading, evidence held sufficient to support a finding that the fire was started by one claimed to be a servant of defendant carrying a lighted lantern near the oil that was flowing from a hose into the barge.—Id.

In an owner's suit for destruction of his oil barge by fire, where the person was shown whose negligence in carrying a lighted lantern near the oil caused the fire, the burden was on plaintiff to show that such person was defendant's servant acting within the scope of his employment in going upon the barge with the lighted lantern.—Id.

⚡330 (Tex.Civ.App.) When a recovery is sought of a master for an injury inflicted by a servant, plaintiff must show that the servant did the wrong while acting within the scope of his employment.—Acme Laundry v. Weinstein, 182 S. W. 408.

In action for injuries to person struck by barrel thrown from window of employer's laundry, jury finding that employes, in clearing rubbish out of room, were acting within scope of their employment held sustained by evidence.—Id.

MAXIMS.

See Equity, ⚡65.

MEASURE OF DAMAGES.

See Damages, ⚡95-121, 216.

MECHANICS' LIENS.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

⚡57 (Tex.Civ.App.) Where the title to farm lands stood in the name of one other than the trustee for the farms who managed them and contracted for the cleaning and drilling of wells thereon, it became the duty of the contractors for the work to ascertain what rights had been acquired by such trustee.—Eardley Bros. v. Burt, 182 S. W. 721.

⚡59 (Tex.Civ.App.) One who has only a contract to purchase land is not the owner thereof within the meaning of the mechanics' lien statutes.—Eardley Bros. v. Burt, 182 S. W. 721.

⚡76 (Tex.Civ.App.) The record owner of farm lands, who did not know that a well was being drilled thereon, pursuant to contract with another to whom he later conveyed, until the work was in progress, and did not know that the contractors were not fully informed of the facts relating to the title of the land, did not acquiesce in or consent to the work so as to affect his rights.—Eardley Bros. v. Burt, 182 S. W. 721.

Under mechanics' lien statutes, such as that of Texas, the mere fact that the owner of property acquiesced in or even consented to the furnishing of material to be used on the premises, or the performance of labor, cannot fix liens on the property.—Id.

(E) Subcontractors and Contractors' Workmen and Materialmen.

⚡111 (Ky.) Though a city has paid part of the price of a filter plant to the original contractor, where the plant is wholly worthless because not according to specifications, it is in no way responsible to a subcontractor.—Monyahan v. City of Lancaster, 182 S. W. 862.

III. PROCEEDINGS TO PERFECT.

⚡132 (Mo.App.) A materialman, who after termination of the account for materials, furnished a building contractor supplied without charge a new door in place of one proved defective, does not thereby extend the time for filing a lien.—J. F. Meyer Mfg. Co. v. Sellers, 182 S. W. 789.

⚡134 (Mo.) A lien account must fairly apprise the owner and the public of the nature and amount of the demand, and must disclose that the demand is within the lien law.—State ex rel. O'Malley v. Reynolds, 182 S. W. 743.

⚡139 (Mo.) A lien account filed by a lumber company for lumber described in abbreviations and trade terms known and understood by business men in the trade, complies with Rev. St. 1909, § 8217.—State ex rel. O'Malley v. Reynolds, 182 S. W. 743.

⚡149 (Mo.) An owner against whom a lien for materials is claimed, may not complain because the lien account does not contain all the items for which a lien may have been maintained.—State ex rel. O'Malley v. Reynolds, 182 S. W. 743.

That a lien account for materials furnished a building contractor consolidated in one undated item a few charges for lienable materials, does not invalidate the whole lien account.—Id.

Where a lien account showed that the materials were furnished between given dates with in the beginning and close of the account, the absence of dates in connection with particular items in the account was immaterial.—Id.

That lien account consolidated in one item several charges, held not to invalidate the lien for the consolidated item.—Id.

IV. OPERATION AND EFFECT.

(C) Priority.

⚡199 (Tex.Civ.App.) A vendor's lien on land sold has priority over a mechanic's lien thereon based upon the drilling of an artesian well for the buyer.—Eardley Bros. v. Burt, 182 S. W. 721.

VII. ENFORCEMENT.

⚡263 (Ark.) Under Kirby's Dig. §§ 4978, 4986, 4988, complaint in suit against owner of building and land to enforce lien for material furnished the contractor held defective because not making the contractor a party defendant.—Cruce v. Mitchell, 182 S. W. 530.

⚡272 (Ark.) Complaint and answer in suit by materialman to enforce lien against owner's property *held* to raise the issue as to whether the indebtedness was past due and unpaid and whether it constituted a foundation for the enforcement of a lien on defendant's property.—Cruce v. Mitchell, 182 S. W. 530.

⚡280 (Mo.App.) In an action on a materialman's lien for materials furnished a building contractor, evidence that the owner had paid for the building was admissible to show that he regarded the building as finished and accepted.—J. F. Meyer Mfg. Co. v. Sellers, 182 S. W. 789.

⚡291 (Ark.) Where defendant's answer in suit to foreclose a mechanic's lien admitted amount due but claimed set-off, with offer to confess judgment for balance, but no proof of the answer was made, judgment for amount confessed instead of full amount *held* error.—E. O. Barnett Bros. v. Wright, 182 S. W. 511.

VIII. INDEMNITY AGAINST LIENS.

⚡315 (Tex.) Contractor's building bond providing that it was for benefit of all persons who might become entitled to liens, and conditioned that contract should be completed free of liens, read in connection with provision of contract for furnishing owners' release from liens by the bond *held* to secure claim of subcontractor failing to give statutory notice of lien to builder.—Bullard v. Norton, 182 S. W. 668.

MEDICINES.

See Hawkers and Peddlers, ⚡7; Physicians and Surgeons, ⚡18, 18.

MEMBERS.

See States, ⚡28.

MEMORANDA.

See Frauds, Statute of, ⚡118-118.

MENTAL CAPACITY.

See Criminal Law, ⚡50.

MENTAL SUFFERING.

See Damages, ⚡50.

MINES AND MINERALS.

See Master and Servant, ⚡211.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

⚡62 (Ky.) A mining lease entitling the lessors to timber rights as amended *held* to entitle the lessor to all timber of a girth greater than 60 inches with unlimited time for removal, subject to the restrictions that it should be used for the lessors own construction work and might be purchased by the lessee.—Blue Grass Coal Corp. v. Combs, 182 S. W. 207.

A mining lease which reserved to the owner that part of the surface not necessary for mining purposes *held* not to entitle the lessee to build houses for its employes on inclosed portions of the premises, where the houses could be placed on other portions.—Id.

Where a mining lease reserved to the lessors such portion of the surface as was unnecessary for mining operations so long as it did not work an interference therewith, the lessors are not entitled to pollute a stream from which the lessee drew water for its boilers used in operating the mine.—Id.

A mining lease which entitled the lessee to use surface timber *held* not to entitle it to use such timber in adjacent mining property.—Id.

A mining lease *held* to authorize the lessee to

erect houses on the surface to be used by its employes mining adjacent lands.—Id.

A mining lessee *held* entitled to a right of way through inclosed portions of the land to reach surface timber which it was entitled to use.—Id.

⚡64 (Ky.) Plaintiff, who acquired the rights of a mining lessee, *held* charged with notice of a change in the contract as it related to surface timber, as well as with facts sufficient to put it on inquiry.—Blue Grass Coal Corp. v. Combs, 182 S. W. 207.

Plaintiff, which acquired mining property with knowledge of an amended mining lease regulating timber rights, is, where it acted under the amended lease, charged with knowledge of an earlier lease to which the amended one referred.—Id.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

⚡118 (Ky.) Lessor of mine *held* not liable for injuries to lessee's employé, unless defective condition of stump supporting roof was known, but not disclosed, to lessee, and could not have been discovered by exercising ordinary care.—Imperial Jellico Coal Co. v. Bryant, 182 S. W. 205.

MINORS.

See Infants.

MISDEMEANOR.

See Witnesses, ⚡48.

MISREPRESENTATION.

See Chattel Mortgages, ⚡72; Fraud.

MISTAKE.

See Contracts, ⚡93; Judgment, ⚡435; Reformation of Instruments, ⚡18.

MODIFICATION.

See Appeal and Error, ⚡1151; Trial, ⚡267.

MONOPOLIES.

I. VALIDITY AND EFFECT OF GRANTS.

⚡4 (Tex.Civ.App.) Ordinance regulating jitneys or motor busses *held* not violative of Const. art. 1, § 26, as giving monopoly to street car company, taxicabs, and other rent vehicles.—Auto Transit Co. v. City of Ft. Worth, 182 S. W. 685.

MORTGAGES.

See Chattel Mortgages; Corporations, ⚡415; Fixtures, ⚡18; Homestead, ⚡115; Principal and Agent, ⚡111.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⚡25 (Mo.App.) Where plaintiff complied with his part of contract and broker failed to procure the loan, the note and deed of trust to broker for commission *held* without consideration.—Crews v. Lombard, 182 S. W. 825.

Notes and deed of trust without consideration never have any validity.—Id.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

⚡249 (Mo.App.) Where mortgage notes were assigned by the mortgagee, a subsequent release of the mortgage was ineffectual as to the assignee of the notes.—King v. King, 182 S. W. 1047.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

⚡287 (Tex.Civ.App.) Where part of mortgaged land is quitclaimed for a valuable consideration, and the mortgage debt is no part of such consideration, the presumed intention between the parties is that the grantor will pay his own debt, and that his land shall be first condemned for that purpose.—*Biswell v. Gladney*, 182 S. W. 1168.

X. FORECLOSURE BY ACTION.

(K) Deficiency and Personal Liability.

⚡560 (Tex.Civ.App.) Code Civ. Proc. Cal. § 726, is the law as to the right of action on a note of that state secured by mortgage on land therein, so that after foreclosure suit there, though personal judgment could not be had, action will not lie in Texas on the note.—*Lindsay v. Collings*, 182 S. W. 879.

MOTIONS.

See Appeal and Error, ⚡502, 520, 732; Continuance; Criminal Law, ⚡917-959; Indictment and Information, ⚡137; Trial, ⚡92, 96.

MOTIVE.

See Homicide, ⚡168.

MOVING PICTURES.

See Sunday, ⚡6.

MULTIFARIOUSNESS.

See Equity, ⚡147, 149.

MUNICIPAL CORPORATIONS.

See Constitutional Law, ⚡186; Counties; Dedication, ⚡35, 55, 57; Evidence, ⚡222, 387; Highways, ⚡130; Indemnity, ⚡13; Injunction, ⚡85; Schools and School Districts; Street Railroads; Telegraphs and Telephones, ⚡10.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

⚡59 (Ark.) Municipal corporations can exercise only those powers expressly granted by the Legislature and those necessarily implied and incident to those so granted.—*Willis v. City of Ft. Smith*, 182 S. W. 275.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(B) Municipal Departments and Officers Thereof.

⚡189 (Ky.) In an action on the bond of a police officer, who shot the plaintiff and defended on the ground that he did so in self-defense, where the testimony was conflicting, the issue of self-defense was for the jury.—*Forrestal v. National Surety Co.*, 182 S. W. 614.

Where plaintiff was shot by a police officer, who claimed self-defense, an instruction limiting the force which the officer might use in repelling the plaintiff's assault to what seemed to the officer to be necessary to repel it, was correct.—*Id.*

In action on bond of a police officer, who shot plaintiff and claimed self-defense, where plaintiff's evidence was that he did not attack the officer, and neither plaintiff nor defendant testified that plaintiff attacked the officer and then abandoned the attack before he was shot, it was not error to refuse a requested instruction—that although plaintiff assaulted the officer, if he had abandoned the assault when he was shot, the law was for him.—*Id.*

In an action on the bond of a police officer, who shot plaintiff, instruction predicating the

right to recover against the surety only on whether the officer was acting in his official capacity at the time, while technically error under the officer's testimony that he was acting as a policeman, was harmless, where the jury found for the officer, in which case the surety could not be liable, since its liability was conditional upon that of the officer.—*Id.*

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

⚡266 (Mo.App.) Rev. St. 1909, § 9280, authorizing the construction of sidewalks by a city of the third class at its own expense where no bids are received, is not impliedly repealed by section 9652, authorizing an entirely different method where no bids are received, as the latter act is of general operation as to all cities having less than 30,000 population, in view of Const. art. 9, § 7.—*City of Huntsville v. Eatherton*, 182 S. W. 767.

(B) Preliminary Proceedings and Ordinances or Resolutions.

⚡304 (Mo.App.) An ordinance for the construction of a sidewalk held not indefinite as to location, where it provided that it should be laid "along and in front of" described property.—*City of Huntsville v. Eatherton*, 182 S. W. 767.

An ordinance for the construction of a sidewalk held not indefinite, in saying the work of building was "left to the street and alley committee."—*Id.*

(E) Assessments for Benefits, and Special Taxes.

⚡450 (Ky.) Whether a street is a principal street, within the meaning of the statute providing that assessments for street improvements shall be levied on one-half in extent of the abutting squares surrounded by "principal streets," depends on dedication, and not on practical and convenient use of such streets.—*Koop v. Henry Bickel Co.*, 182 S. W. 617.

⚡450 (Mo.) Under St. Louis City Charter, art. 6, § 14, relating to establishment of benefit districts, avenue adjacent to a park conveyed to city as "carriage avenue" and accepted and used for general street purposes, held a "street" and hence properly designated as a boundary of a district for special taxation.—*Kennard v. Eyermann*, 182 S. W. 737.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

⚡648 (Ky.) A municipality or the public may acquire a right to the use of a street by adverse user.—*Home Laundry Co. v. City of Louisville*, 182 S. W. 645.

Municipality's adverse possession of land for statutory period, accompanied by public use of it in manner to create easement by prescription, held to vest in public title to its use as a street.—*Id.*

⚡658 (Ky.) A municipality in its governmental capacity holds streets as a trustee for the public.—*Home Laundry Co. v. City of Louisville*, 182 S. W. 645.

⚡665 (Ky.) A "street" held a public way, and, though ordinarily one used for vehicles as well as pedestrians, no less a street, though confined to travel by pedestrians.—*Home Laundry Co. v. City of Louisville*, 182 S. W. 645.

⚡669 (Ky.) Abutting property owner held to have peculiar rights to use of street, including that of ingress and egress over and from

the street.—*Home Laundry Co. v. City of Louisville*, 182 S. W. 645.

Abutting property owner *held* entitled to any reasonable use of the street not interfering with the enjoyment of its use by the public.—*Id.*

The right of an abutting property owner to use a street for ingress and egress is a private right, and may be lost by adverse user.—*Id.*

Assuming that narrow street in rear of courthouse was dedicated as ordinary street, abutting owners' rights of ingress and egress with vehicles *held* barred by use for 15 years as a way for pedestrians only.—*Id.*

Purchaser of property abutting on narrow street used only for pedestrians *held* estopped to complain that he was not permitted to use it for vehicles, where its physical characteristics, construction, and use charged him with notice.—*Id.*

—703 (Ark.) An ordinance requiring operators of jitney busses to file a bond conditioned that they will pay final judgments rendered against them is valid, since it does not create a new liability, but only secures the payment of a liability already existing.—*Willis v. City of Ft. Smith*, 182 S. W. 276.

—703 (Ky.) The governing bodies of cities and towns are generally invested with authority to regulate the use of streets, and may designate different portions thereof for the use of footmen and vehicles.—*Home Laundry Co. v. City of Louisville*, 182 S. W. 645.

A city, if beneficial to the public, may control by reasonable regulations the use which may be made of certain streets, as by limiting the weight of loads.—*Id.*

Where narrow street had been paved as a sidewalk, and for many years used only by pedestrians, occasional driving of vehicle along it by city employes *held* not to make it a carriageway.—*Id.*

City ordinances as to use of streets *held* not to authorize abutting owner to drive along narrow street paved as sidewalk, longitudinally, for purpose of delivering coal.—*Id.*

—703 (Tex.Civ.App.) Ordinance regulating jitneys or motor busses and their operation, and requiring a bond conditioned for payment of damages for injuries or death, etc., *held* authorized by the Ft. Worth charter.—*Auto Transit Co. v. City of Ft. Worth*, 182 S. W. 685.

Ordinance requiring surety bond from operators of jitneys or motor busses *held* not invalid, though there was no similar provision as to taxicabs, rent cars, or individuals operating their own cars not for hire.—*Id.*

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

—808 (Ky.) Where an abutting owner laid a metal drainpipe running in a groove in the sidewalk for the purpose of carrying away surface water, he is primarily liable to keep it in repair.—*City of Louisville v. Metropolitan Realty Co.*, 182 S. W. 172.

Where a landowner for many years used a drainpipe running through a groove in the sidewalk, *held* that it was primarily bound to repair the same, though it did not originally lay the pipe.—*Id.*

—821 (Tex.Civ.App.) Whether the foreman of a gas company negligently invited a pedestrian to cross its ditch in a street, and whether she was guilty of contributory negligence, *held* under the evidence questions for the jury.—*North Texas Gas Co. v. Meador*, 182 S. W. 708.

—822 (Ky.) A charge on contributory negligence of a pedestrian, suing a city for injuries on a defective street, may rest on circumstances shown by a reasonable inference to be drawn from the evidence.—*Watkins v. City of Henderson*, 182 S. W. 837.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(C) Bonds and Other Securities, and Sinking Funds.

—917 (Tex.Civ.App.) Under Denison City Charter, art. 4, § 4, prescribing resolution of city council for issuance of bonds, resolution to issue bonds, not reciting, "Be it resolved," or containing word "resolution," and not in express terms declaring that council deemed it advisable to issue bonds, *held* sufficient.—*McCarthy v. McElvaney*, 182 S. W. 1181.

Under Denison City Charter, art. 4, § 4, resolution of city council, not expressly stating the denomination of bonds to be issued, taken with mayor's proclamation for an election stating the denomination, *held* sufficient and not to invalidate the bonds.—*Id.*

Under Denison City Charter, art. 4, § 4, ordinance passed after election in favor of issuing bonds, dating such bonds prior to the time they were authorized to be issued, *held* not to invalidate them.—*Id.*

—921 (Tex.Civ.App.) Under the statute requiring municipal bonds to be sold for not less than par and accrued interest, an ordinance, providing for their sale at par, though not in the language, met the requirement, as the taxpayers would receive the principal and accrued interest and hence did not invalidate the bonds.—*McCarthy v. McElvaney*, 182 S. W. 1181.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, —687-756.

NAVIGABLE WATERS.

See Waters and Water Courses.

II. LANDS UNDER WATER.

—36 (Ark.) The state is the owner of lands under its navigable waters between high-water marks.—*C. M. Johnson Sand & Gravel Co. v. Quarles*, 182 S. W. 233.

—37 (Ark.) A state cannot delegate its trusteeship for the public in disposing of its navigable waters and the beds thereof.—*C. M. Johnson Sand & Gravel Co. v. Quarles*, 182 S. W. 283.

Where the state by statute granted to riparian owners on the Mississippi river the exclusive right to take and sell sand and gravel from the beds adjoining the shore lands, without granting any such right to riparian owners along other navigable streams, such grant was, at most, a privilege, subject to withdrawal at any time.—*Id.*

III. RIPARIAN AND LITTORAL RIGHTS.

—39 (Ark.) Acts 1907, p. 836, granting to riparian owners on the Mississippi river the exclusive right to remove sand and gravel for private use or sale from the beds, sand bars, and towheads in front of his lands to the thread of the stream, has been repealed, by complete inconsistency, by Acts 1913, p. 1083, and Acts 1915, p. 532.—*C. M. Johnson Sand & Gravel Co. v. Quarles*, 182 S. W. 283.

NECESSARIES.

See Husband and Wife, —19, 151; Parent and Child, —8. Digitized by Google

NEGLIGENCE.

See Carriers, ¶102-348; Explosives; Landlord and Tenant, ¶164-170; Master and Servant, ¶89-330; Physicians and Surgeons; Railroads, ¶222-446; Steam; Street Railroads; Waters and Water Courses, ¶171-179.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

¶2 (Ark.) Negligence and liability therefor cannot be predicated on a state of facts which imposes no legal duty.—*National Union Fire Ins. Co. v. School Dist. No. 55*, 182 S. W. 547.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

¶25 (Tex.Civ.App.) Where defendant was having plaintiff's barge pumped full of oil at 8 o'clock in the morning at a wharf from its pumping station through a pipe line, ordinary care on its part did not require that it keep some one constantly on the barge to guard against the approach of strangers near the flowing oil who might ignite it.—*Texas Co. v. Charles Clarke & Co.*, 182 S. W. 351.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

¶75 (Ky.) Where danger to plaintiff's mules and wagon when mules became frightened at train was not due to railroad company's negligence, *held*, that plaintiff could not recover for injuries sustained in attempting to avoid damage.—*Louisville & N. R. Co. v. Jenkins*, 182 S. W. 626.

¶80 (Mo.App.) Under the Kansas laws as those of the forum, contributory negligence, though ever so slight, will bar recovery.—*McNeil v. Missouri Pac. Ry. Co.*, 182 S. W. 762.

(D) Comparative Negligence.

¶101 (Tex.Civ.App.) A brakeman's action for injuries in coupling cars cannot be wholly defeated by a showing of his greater comparative negligence, unless his negligence alone caused the injury.—*San Antonio, U. & G. R. Co. v. Green*, 182 S. W. 392.

Contributory negligence of a brakeman does not defeat his action for injuries received in coupling cars, where the company was also negligent, but merely reduces the amount of his recovery.—*Id.*

IV. ACTIONS.

(B) Evidence.

¶121 (Tex.Civ.App.) In an action by the owner of an oil barge for its destruction by fire, where the court found that the fire was caused by the negligence of a specified person, and such finding was sustained by the evidence, the doctrine of *res ipsa loquitur* could not be applied to uphold the court's alternative finding of negligence generally on the part of defendant.—*Texas Co. v. Charles Clarke & Co.*, 182 S. W. 351.

¶121 (Tex.Civ.App.) The expression "*res ipsa loquitur*" is a shorthand method of showing that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster.—*Canode v. Sewell*, 182 S. W. 421.

(C) Trial, Judgment, and Review.

¶136 (Mo.App.) The court cannot say, as a matter of law, that plaintiff was negligent, unless the evidence most favorable to him and all reasonable inferences therefrom indisputably contradict the presumption that he exercised

reasonable care.—*Nufer v. Metropolitan St. Ry. Co.*, 182 S. W. 792.

¶142 (Tex.Civ.App.) When the evidence in a suit for negligence is sufficient to show that the injury was due to one or another act or omission of defendant, and that either was negligent, the trial court can properly find the injury was due to defendant's negligence in one or the other respects, and render judgment for plaintiff on such finding.—*Texas Co. v. Charles Clarke & Co.*, 182 S. W. 351.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

See Appeal and Error, ¶270, 293, 301, 502, 732; Criminal Law, ¶917-959, 1124.

II. GROUNDS.

(D) Disqualification or Misconduct of or Affecting Jury.

¶42 (Ky.) Casual remarks by a man as to what he thought should be done in a certain class of cases was not ground for new trial when at the time he made the remarks he did not have reference to the case on which he afterwards sat as juror.—*Nashville C. & St. L. Ry. Co. v. Henry*, 182 S. W. 651.

(F) Verdict or Findings Contrary to Law or Evidence.

¶77 (Mo.App.) The court *held* not authorized to set aside a verdict as the result of passion and prejudice because for a less amount than recoverable under the evidence.—*Kelley v. Peoples*, 182 S. W. 809.

A defendant against whom an inadequate verdict has been rendered because of passion or prejudice, or mistake or misapprehension of the jury, *held* entitled to have the verdict set aside, but not where the jury followed the instruction to which defendant did not object.—*Id.*

(G) Surprise, Accident, Inadvertence, or Mistake.

¶96 (Tex.Civ.App.) Defendant's motion for new trial on account of its inability to obtain the testimony of witnesses summoned by plaintiff, and excused in good faith by him, who remained within reach by automobile, but to secure whose attendance defendant asked no process or continuance or delay of trial, *held* properly denied.—*Texas City Terminal Co. v. Pettifils*, 182 S. W. 19.

(H) Newly Discovered Evidence.

¶103 (Tex.Civ.App.) In action for delay in delivering telegram, newly discovered evidence that time-table admitted in evidence was not in force was not ground for new trial, where plaintiff could have taken an earlier train, and did reach destination in time for funeral services shown to have taken place.—*Mansell v. Western Union Telegraph Co.*, 182 S. W. 1178.

NON OBSTANTE VEREDICTO.

See Judgment, ¶199.

NONRESIDENCE.

See Courts, ¶14.

NOTES.

See Bills and Notes.

NOTICE.

See Bills and Notes, ¶337-345; Carriers, ¶159; Chattel Mortgages, ¶150; Corporations, ¶423, 429; Execution, ¶191; Guardian and Ward, ¶87; Insurance, ¶

756; Judgment, ¶17; Principal and Agent, ¶148, 178; Sales, ¶285; Taxation, ¶658, 660; Vendor and Purchaser, ¶228, 231.

NOVATION.

¶9 (Mo.App.) Where plaintiff gave an order to defendants requiring them to pay her debt to a bank, which they accepted and agreed to pay, they could not, in her action for the moneys due her from them, have a credit for the amount of such order, unless they paid as agreed, since the transaction in the absence of acceptance as a discharge of plaintiff by the bank did not operate to release or extinguish plaintiff's debt.—Powers v. Conran, 182 S. W. 1012.

NUISANCE.

See Landlord and Tenant, ¶170.

I. PRIVATE NUISANCES.

(C) Abatement and Injunction.

¶26 (Ky.) Operators of a quarry and stone crusher constituting a nuisance could not defend the suit of injured property owners for an injunction on the ground that some of the plaintiffs moved to the nuisance.—Barrett v. Vreeland, 182 S. W. 606.

II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

¶72 (Ky.) Property owners, the physical structure of whose homes was injured by the shock from blasting in a quarry, which also threw stones upon the properties, and who were disturbed at night by the noise of machinery at the quarry, could enjoin operation in such manner.—Barrett v. Vreeland, 182 S. W. 606.

¶75 (Ky.) Under Civ. Code Prac. § 22, providing that persons interested in the subject of an action and in obtaining the demanded relief may be joined as plaintiffs, property owners whose houses were injured by the operation of a quarry and rock crusher could join as plaintiffs in suit to restrain.—Barrett v. Vreeland, 182 S. W. 606.

In suit to enjoin the operation of a quarry and rock crusher, evidence held to justify the chancellor's finding that the facts in regard to the disturbances produced in plaintiffs' properties were as testified to by them and their witnesses.—Id.

Equity will interfere more readily to enjoin a nuisance interfering with the enjoyment of property uninjured physically than it will to restrain physical injury to the property itself.—Id.

To enjoin a public nuisance causing them a particular individual injury, property owners did not need to first establish their right to injunctive relief by a proceeding at law.—Id.

Where injured property owners, within a few years of the beginning of the operation of a quarry and stone crusher with heavy blasts and at night, an unnecessary mode of operation, sued for injunction, they were not barred by their laches, although the quarry owners had installed \$2,500 worth of removable machinery.—Id.

In an injunction suit by property owners to restrain the operation of a quarry and rock crusher, evidence held insufficient to show injuries resulting from the operation of the rock crusher to justify injunctive relief as to it.—Id.

NUNC PRO TUNC.

See Indictment and Information, ¶43.

OBJECTIONS.

See Appeal and Error, ¶185-242, 293; Criminal Law, ¶695, 841, 1037, 1043; Pleading, ¶412, 428; Trial, ¶86.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ¶186, 187.

OCULISTS.

See Physicians and Surgeons, ¶18.

OFFICE BUILDINGS.

See Landlord and Tenant, ¶164, 167.

OFFICERS.

See Banks and Banking, ¶58; Corporations, ¶300, 399-429; Counties, ¶74-77; District and Prosecuting Attorneys; Embellishment; Judges; Justices of the Peace; Libel and Slander, ¶10; Municipal Corporations, ¶189; Receivers; Sheriffs and Constables; States, ¶28.

OPINION EVIDENCE.

See Criminal Law, ¶448-474; Evidence, ¶474-571.

OPTIONS.

See Records; Vendor and Purchaser, ¶3, 18.

ORAL INTERROGATORIES.

See Discovery.

ORDERS.

See Appeal and Error; Intoxicating Liquors, ¶32; Master and Servant, ¶148.

ORDINANCES.

See Municipal Corporations, ¶304.

OWNERSHIP.

See Navigable Waters, ¶36.

PARDON.

See Witnesses, ¶49.

PARENT AND CHILD.

See Adoption; Damages, ¶186; Guardian and Ward; Infants; Work and Labor, ¶7.

¶3 (Mo.App.) Evidence in an action on account against a father for clothing sold his children for his account held to sustain an order refusing defendant's requested peremptory instruction.—Gately Outfitting Co. v. Vinson, 182 S. W. 133.

"Necessaries" for the furnishing of which to his children the parent is liable, although furnished without his consent, include food, drink, clothing, washing, medicines, instruction, and suitable places of residence.—Id.

Where a tradesman furnishes goods to a minor as necessities, he must show in an action against the father that they were such as children in like condition in life are usually supplied with, and also that they were strict necessities furnished under such a state of circumstances as created an obligation on the parent to pay for them.—Id.

PAROL EVIDENCE.

See Evidence, ¶387-461.

PARTIES.

For parties on appeal and review of rulings, as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see the various specific topics.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶84 (Ark.) Under Kirby's Dig. §§ 6063, 6094, 6096, an answer, cross-complaint, demurrer, and

motion of owner in suit to enforce materialman's lien should have been treated as a specific demurrer on ground that plaintiff could not maintain a suit because of the defect of parties appearing on face of complaint.—Cruce v. Mitchell, 182 S. W. 530.

PARTITION.

See Judgment, [6747](#).

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

[114](#) (Mo.App.) While plaintiff's attorneys in a partition suit may ask court to tax their fee as costs against entire property partitioned, even where there was no contract for fee, yet their services valuable to those whose interests are being served should not be included in the allowance against all the interests in the suit.—Ernst v. Ernst, 182 S. W. 103.

In suit for partition, *held*, that attorneys for plaintiff were not entitled to fee as part of the costs as against the defendant whose claim they contested, though defendant, purchasing the property, took it subject to costs, and that they were not entitled to a fee for their services in enforcing the lien claim of the wife of one of such attorneys.—*Id.*

PARTNERSHIP.

I. THE RELATION.

(B) As to Third Persons.

[29](#) (Tex.Civ.App.) As regards liability of the others for the contract or representation of one, defendants agreeing to buy and conduct a business as partners, do not become partners till the purchase is made and the business delivered.—Eagle Drug Co. v. White, 182 S. W. 378.

[41](#) (Ark.) Signers of a subscription contract, for the establishment of a canning factory, which was not incorporated, but put into operation by a part of their number, who, though knowing it was in operation, supposed it had been organized as a corporation, and that the parties establishing it had done so on their own account, taking no part in the business, were not liable to its creditors as partners.—Rainwater v. Childress, 182 S. W. 280.

Signers of subscription contract for the establishment of a cannery, who, after establishing the business, knowing that no attempt had been made to incorporate, were active in operating it, were liable to its creditors as partners.—*Id.*

A signer of a subscription contract for the establishment of a cannery who, after incorporating, engaged with some of the signers in its establishment and operation, so that they all became liable as partners, but protested against the cannery's growing tomatoes for its own use, was not liable for the debt incurred in so doing.—*Id.*

(C) Evidence.

[48](#) (Tex.Civ.App.) Declarations in a contract of sale of a business, drawn up and signed by B., in the absence of W., that they were partners, is inadmissible against W.—Eagle Drug Co. v. White, 182 S. W. 378.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

[203](#) (Tex.Civ.App.) Where a sum of money was paid over by one member of a firm with the consent of the others an action to recover the same does not abate on the death of one of the partners, and judgment is valid, though nei-

ther his heirs nor legal representatives were made parties.—Broussard v. Le Blanc, 182 S. W. 78.

PASSENGERS.

See Carriers, [238-348](#).

PATENTS.

See Bills and Notes, [107](#).

PAYMENT.

See Banks and Banking, [138, 148](#); Bills and Notes, [430](#); Insurance, [598-602, 750](#); Limitation of Actions, [155](#); Subrogation; Tender; Vendor and Purchaser, [177](#).

II. APPLICATION.

[47](#) (Tex.Civ.App.) Defendants, purchasers of a stock of goods from B., were entitled to have part of the purchase price received by plaintiff applied, as he agreed with B. it should be, on a debt secured by mortgage on the goods, rather than on B.'s unsecured debt.—Eagle Drug Co. v. White, 182 S. W. 378.

PEDDLERS.

See Hawkers and Peddlers.

PENALTIES.

See Damages, [77, 79](#).

PERSONAL INJURIES.

See Carriers, [280-321](#); Damages, [130, 132, 166-180](#); Infants, [72](#); Master and Servant, [89-330](#); Mines and Minerals, [118](#); Negligence, [75-101](#); Railroads, [276-398](#); Steam; Street Railroads, [93, 99](#).

PERSONAL LIABILITY.

See Insurance, [179½](#).

PETITION.

See Intoxicating Liquors, [32](#); Pleading, [248](#).

PHOTOGRAPHS.

See Evidence, [380](#).

PHYSICIANS AND SURGEONS.

See Indictment and Information, [111](#).

[16](#) (Mo.App.) A physician, while not liable for errors of judgment, is liable for negligently administering medicines, or in performing an operation.—Coffey v. Tiffany, 182 S. W. 495.

[18](#) (Mo.App.) In an action for malpractice plaintiff has the burden of proving that a negligent error was made by the physician, which was the direct cause of the injury.—Coffey v. Tiffany, 182 S. W. 495.

That bad results follow treatment by a physician raises no presumption of negligence.—*Id.*

In an action against an oculist for negligently blinding plaintiff in one eye by administering improper medicines, evidence of negligence held sufficient to go to the jury.—*Id.*

Where plaintiff showed that medicines dropped in her eye by an oculist produced blindness, she is not bound to show the particular nature of the medicines.—*Id.*

PLEADING.

See Action, [64](#); Interpleader; Parties, [84](#).

For pleadings in particular actions or proceedings, see also the various specific topics. For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

⚡8 (Tex.Civ.App.) Answer to suit on note that defendants were accommodation makers signing for sole accommodation of payee held bad as pleading conclusion.—*Magill v. McCamley*, 182 S. W. 22.

⚡34 (Tex.Civ.App.) As against general demurrer, every intendment will be indulged in favor of the petitioner.—*Seaton v. Majors*, 182 S. W. 712.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

⚡176 (Tex.Civ.App.) Under Rev. St. art. 1829, as amended by Acts 33d Leg. c. 127, plaintiffs' reply to defendant's answer, that they had not sufficient information to form a belief, was tantamount to a denial to the extent of putting defendant upon proof of the fact alleged.—*Canode v. Sewell*, 182 S. W. 421.

V. DEMURRER OR EXCEPTION.

⚡205 (Ky.) General demurrer to the petition in an action to enjoin levy of an execution, which the trial court treated as though it were a special demurrer, raised the question of jurisdiction of the trial court.—*Kentucky River Hardwood Co. v. Noble*, 182 S. W. 941.

⚡214 (Mo.App.) The truth of facts alleged in a petition is admitted by a demurrer.—*Einstein v. Strother*, 182 S. W. 122.

⚡228 (Tex.Civ.App.) An exception, special or general, to the petition admits its allegations as true.—*Dublin Fruit Co. v. Neely*, 182 S. W. 406.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚡248 (Mo.App.) An amended petition in action for cutting and carrying away timber held not to change the cause of action alleged in original petition.—*Wright v. Nickey*, 182 S. W. 1085.

VII. SIGNATURE AND VERIFICATION.

⚡290 (Tex.Civ.App.) In an action against a railroad for injuries to a passenger on its car, where the defendant pleaded that plaintiff was guilty of contributory negligence in standing in the aisle, which plea was not denied under oath, the action of the court in refusing to instruct a verdict for defendant was proper.—*Texas City Terminal Co. v. Pettifils*, 182 S. W. 19.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

⚡317 (Ky.) In an action by a son against his father's administrator for reimbursement for expenses in procuring his brother's parole from prison, plaintiff might have been required to file a bill of particulars, showing his claim in detail.—*Gordon v. Gordon's Adm'r*, 182 S. W. 220.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡412 (Ark.) Defendant, who after decree for complainants dismissing the cross-complaint moved to have the decree reopened and obtained a trial on the merits as if the issues had been made up by the pleadings, held to have thereby waived plaintiff's failure to answer the counterclaim.—*Streudle v. Leroy*, 182 S. W. 898.

⚡412 (Tex.Civ.App.) Where the railway company went to trial without objecting to a shipper's failure to controvert the averments of defense in the answer, held, that its right to insist that the answer was confessed was waived.—*Southern Kansas Ry. Co. of Texas v. Hughey*, 182 S. W. 361.

⚡428 (Mo.App.) Where no demurrer was interposed to the petition, but objection was made to the introduction of evidence, on the ground

that it did not state a cause of action, every intendment must be made in favor of the petition.—*Wiley v. Wiley*, 182 S. W. 107.

PLEDGES.

See Corporations.

⚡16 (Mo.App.) In an action to recover on the bond given by the president of the plaintiff bank, evidence held to show that bank stock which he misappropriated had been pledged to the bank and delivered to the custody of the cashier.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

⚡55 (Mo.App.) Those personally obligated by a loan contract to repay are not relieved, on failure of title to collateral, because all believed no personal liability would be enforced, because of value of collateral.—*Equitable Life Assur. Society of United States v. De Lisle*, 182 S. W. 1026.

POISONS.

See Insurance, ⚡457, 528.

POLICE.

See Municipal Corporations, ⚡189.

POLICY.

See Insurance.

POSSESSION.

See Adverse Possession; Receivers, ⚡65; Trespass, ⚡20.

POST OFFICE.

See Fixtures, ⚡15.

POWERS.

See Wills, ⚡600, 616, 693.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREJUDICE.

See Criminal Law, ⚡126; Trial, ⚡125.

PREMIUMS.

See Insurance, ⚡349.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESIDENT.

See Corporations, ⚡300.

PRESUMPTIONS.

See Appeal and Error, ⚡907-934; Criminal Law, ⚡308, 1144; Evidence, ⚡58-87.

PRINCIPAL AND ACCESSORY.

See Criminal Law, ⚡59, 76, 792; Homicide, ⚡30.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, ⚡399-429; Factors; Frauds, Statute of, ⚡116; Insurance, ⚡93.

I. THE RELATION.

(A) Creation and Existence.

⚡3 (Mo.App.) A third party called in by the buyer and seller of a cigar stand merely to put their agreement in legal form for execution, was not liable to the seller as for a breach of

duty as agent after the buyer's failure to pay.—*McMurray v. Garnett*, 182 S. W. 123.

§22 (Mo.) An agency cannot be created by mere declaration of a person assuming to act as agent; and, to give a declaration of an agent probative force, there must be independent evidence of agency.—*Mechanics-American Nat. Bank of St. Louis v. Rowell*, 182 S. W. 989.

§22 (Tex.Civ.App.) An agency cannot be established by the statement of the agent.—*Eardley Bros. v. Burt*, 182 S. W. 721.

§23 (Tex.Civ.App.) In an action for the value of services in cleaning and drilling wells, evidence held insufficient to support a finding that the one who ordered the work done was the agent of the owner of the land to contract for the work, or for any other purpose, or that he purported to act as such.—*Eardley Bros. v. Burt*, 182 S. W. 721.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

§71 (Mo.App.) The seller of a cigar stand could maintain his action against his agent to sell for the latter's breach of duty in having aided the buyer to defraud the seller by inducing the latter to accept, in payment, a note secured by a mortgage on a worthless lot, although the agent made no active misrepresentations.—*McMurray v. Garnett*, 182 S. W. 123.

§79 (Mo.App.) In an action by the seller of a cigar stand against his agent in the transaction for breach of duty in having aided the buyer to defraud plaintiff, in view of the allegations of the petition, proof that one lot was substituted in the mortgage given to secure the purchase money note for those originally covered thereby, held not to constitute a variance.—*McMurray v. Garnett*, 182 S. W. 123.

Delay of a few months by the seller of a cigar stand in bringing suit against his agent in the transaction, who had aided the buyer to defraud the seller by inducing him to accept, as payment, a note secured by a mortgage on worthless land, did not release the agent.—*Id.*

In an action by the seller of a cigar stand against his agent for breach of duty in having aided the buyer to defraud the seller by inducing the latter to accept, in payment, a note secured by a mortgage on a worthless lot, instructions held to present the issues with sufficient clearness to the jury, and not erroneous as making the agent a guarantor.—*Id.*

(B) Compensation and Lien of Agent.

§81 (Mo.App.) Defendant, who authorized plaintiff to make sales on commission, having waived strict compliance with the contract in the first place, cannot make a new contract of sale with the purchaser produced by plaintiff avoiding plaintiff's commission.—*Vining v. Lippincott*, 182 S. W. 758.

§85 (Ark.) The owner of a business, who turned it over to a manager by contract providing the mode of repayment of his advances, but not binding the manager to such payment, upon resumption of the business, upon insolvency, was not entitled to judgment against the manager for the balance of amounts advanced him after payment to the owner by the receiver of the amount realized from the sale of assets.—*Myers v. Hines*, 182 S. W. 542.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§92 (Ark.) When an agent acts within the scope of his authority, the principal is bound.—*National Union Fire Ins. Co. v. School Dist. No. 55*, 182 S. W. 547.

§103 (Ky.) A traveling salesman, without express authority to make a contract of sale binding upon his principal, is authorized merely to solicit and transmit orders, not effective as sales until accepted by his principal and, until then, subject to countermand or withdrawal.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

§103 (Tex.Civ.App.) On an order for the sale of goods to be shipped at the seller's earliest convenience, the verbal agreement of the seller's salesman that the order should not be delivered to the seller within 30 days was binding upon the seller, and the contract was avoided by a violation of the agreement.—*National Novelty Import Co. v. Duncan*, 182 S. W. 888.

§105 (Mo.App.) Ordinarily the power to sell property includes the right to receive payments.—*Norrid v. Garner*, 182 S. W. 1025.

§111 (Mo.App.) That an agent had possession of a note and mortgage for collection does not show that he had authority to compromise the claim, and independent evidence of such authority is necessary to support a compromise.—*Olds v. Aven*, 182 S. W. 1010.

§129 (Mo.App.) The rights of an agent under contract of sale inure to the benefit of the principal.—*Dinnuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.*, 182 S. W. 1036.

§136 (Tex.Civ.App.) An agent, acting for a disclosed principal, may bind himself personally, either by adding his responsibility to that of the principal or by tendering his responsibility instead of that of the principal, either expressly by words or by implication from words or conduct.—*Dublin Fruit Co. v. Neely*, 182 S. W. 406.

Where the seller of apples, as agent, upon protest as to their quality by the buyer before acceptance agreed to save him harmless, or used such language that the buyer was justified in believing that such a promise had been made, the agent was personally responsible, though he did not intend to become so.—*Id.*

(B) Undisclosed Agency.

§145 (Tex.Civ.App.) The owner of cattle, whose brother rented grazing lands therefor, and who reaped all the benefits of the contract, ratifying it by repaying the brother the sum paid on the contract, was liable for the rent.—*Warburton v. Wilkinson*, 182 S. W. 711.

§146 (Tenn.) Agent innocently presenting a false bill of lading made by his principal and receiving goods from carrier, and remitting proceeds to his principal, without disclosing his agency to carrier, held personally liable for the goods.—*Louisville & N. R. Co. v. McKay & Morgan*, 182 S. W. 585.

(C) Unauthorized and Wrongful Acts.

§148 (Ky.) A principal is never bound where the person dealing with his agent knows, or has reason to know, that the agent is exceeding his authority.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

§150 (Ky.) A principal is bound by such acts of his agent as are performed within the apparent scope of the agent's authority, even though they may go beyond his real authority.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

§159 (Tex.Civ.App.) The owner of premises was not liable for exemplary damages on account of malice of her agent in wrongfully suing out a writ of sequestration against her tenant, unless the evidence showed she participated in the malice, or afterwards with knowledge of the facts ratified the act.—*Hamlett v. Coates*, 182 S. W. 1144.

(D) Ratification.

☞164 (Tex.Civ.App.) There can be no ratification of an unauthorized contract by a principal binding him, unless the ratified contract was made by one purporting to act as agent at the time.—*Eardley Bros. v. Burt*, 182 S. W. 721.

☞173 (Tex.Civ.App.) In an action for the value of services in cleaning and drilling wells, evidence held insufficient to show any ratification by the owner of the land of the contracts for the work made by another.—*Eardley Bros. v. Burt*, 182 S. W. 721.

(E) Notice to Agent.

☞178 (Mo.App.) A prospective purchaser delivering to a third person an abstract for examination and report held not chargeable with the knowledge acquired by the third person as to the quantity of the land from recitals in the abstract.—*Kelley v. Peeples*, 182 S. W. 809.

☞178 (Tex.Civ.App.) Where plaintiff's agent, in selling goods to a firm, was told that one member had left the firm, and that the goods were bought by the other member for himself, such notice was imputable to the plaintiff, and he could not recover from the retiring member.—*Evans v. San Antonio Machine & Supply Co.*, 182 S. W. 694.

(F) Actions.

☞193 (Tex.Civ.App.) Though the construction and effect of an agent's promise in writing to be personally responsible are ordinarily questions of law for the court, where the testimony conflicts as to the nature and extent of the words used or the conduct involved, the question is of fact for the jury.—*Dublin Fruit Co. v. Neely*, 182 S. W. 406.

PRINCIPAL AND SURETY.

See Bail; Bills and Notes, ☞121; Guaranty; Indemnity; Justices of the Peace, ☞191; Subrogation.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

☞59 (Mo.App.) The contract of a commercial surety, being prepared by it, is to be construed most strongly against it and in favor of the party to be indemnified.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

☞75 (Mo.App.) Unless ordinary business men would have deemed the act of the president of a bank in signing the cashier's name to a note to indicate the president was unworthy of confidence, the surety on the president's bond, which required notice of such acts, was not discharged, though not notified by the bank.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

Failure of a bank to notify its president's surety that the president had previously been convicted of larceny, where known when president's bond was written, held not to discharge the surety under provision requiring notice of any act subsequently coming to the notice of the employer indicating that the employé was unworthy of confidence.—*Id.*

☞79 (Mo.App.) The president of plaintiff bank, in securing a credit card showing a loan to a customer made by another bank, held to be acting in his official capacity, so that a surety on his bond was liable.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

That the president of a bank had in his youth been convicted of larceny, and the bank had heard rumors thereof, does not discharge a surety on his bond providing for its discharge in case the employé should have been a defaulter, and such fact was known to the employer.—*Id.*

III. DISCHARGE OF SURETY.

☞100 (Tex.Civ.App.) Bonding company executing school building contractor's bond with provision for notification of changes held not lia-

ble for contractor's default under subsequent new contract between contractor and school trustees involving changes of which bonding company was not advised.—*Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County*, 182 S. W. 386.

☞101 (Tex.) Sureties on contractor's bond held released through the alteration of the contract by the contractor and builder, from liability to subcontractor, who was a beneficiary under the bond.—*Bullard v. Norton*, 182 S. W. 668.

☞104 (Mo.App.) Where plaintiff, the holder of a note, by its conduct and representations and by extending the note without consent, prevented appellants, who were sureties, though they signed a note as makers, from proceeding against the maker, who was then solvent, it is estopped after his insolvency from asserting appellants' liability.—*Bank of Neelyville v. Lee*, 182 S. W. 1016.

☞104 (Tenn.) Sureties on the bond of a tire company, handling tires on consignment for a rubber company, held not released from liability because the rubber company accepted a note for a month's sales payable in 30 days, while the contract of consignment provided that monthly remittances should be made in cash.—*I. J. Cooper Rubber Co. v. Johnson*, 182 S. W. 593.

Where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety as to it.—*Id.*

☞118 (Tex.) Where a surety was a party to an arrangement for the settlement of the principal's debts, and participated in negotiations with the payee to accept the settlement proposed, held, that the release of the principal by payee's acceptance was with surety's consent, and did not discharge him from liability for the balance of the note.—*Peugh v. Moody*, 182 S. W. 892.

☞129 (Tex.) Sureties on contractor's bond discharged by change of contract by the parties, held not liable because failing to use diligence to see that original contract was carried out.—*Bullard v. Norton*, 182 S. W. 668.

IV. REMEDIES OF CREDITORS.

☞142 (Mo.App.) Claims against the president of defendant bank held not to be satisfied so as to prevent action on the president's bond because directors took them up, substituting cash, with the understanding that any sums recovered from the president's surety should be paid over to them as reimbursement.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

☞162 (Mo.App.) Whether the act of the president of a bank in indorsing the cashier's name to a note without authority, indicated him to be unworthy of confidence within the bond, requiring the surety to be notified of such facts under penalty of discharge, held for the jury.—*Farmers' Bank of Deepwater v. Ogden*, 182 S. W. 501.

V. RIGHTS AND REMEDIES OF SURETY.

(C) As to Cosurety.

☞192 (Mo.App.) Persons signing corporation's notes as joint makers for its accommodation held, as between themselves, coguarantors or cosureties, with liability secondary to that of the corporation.—*Broderick v. Lucas' Ex'r*, 182 S. W. 154.

☞193 (Mo.App.) A joint accommodation maker of secured note to whom the security was transferred held to hold it in trust to apply the proceeds on the note to the end that the other accommodation maker might be discharged.—*Broderick v. Lucas' Ex'r*, 182 S. W. 154.

Pretended sale of collateral security by holder of note to himself held a nullity, and the collateral remained security for payment of note

and subject to the trust in favor of person secondarily liable.—Id.

Where holder of note was also cosurety, provision authorizing him to sell collateral and purchase it himself held not to affect the relative rights of the cosureties, or authorize application of proceeds of sale free from claim of cosurety.—Id.

—194 (Mo.App.) Accommodation makers held cosureties as to each other, and, upon payment by each of the same amount on the notes, neither acquired any rights as against the other.—Broderick v. Lucas' Ex'r, 182 S. W. 154.

—200 (Mo.App.) In action for contribution between holders of notes secured by collateral on which they were cosureties for another party, exclusion of evidence as to what had become of defendant's collateral held not reversible error.—Broderick v. Lucas' Ex'r, 182 S. W. 154.

PRIORITIES.

See Chattel Mortgages, —138, 150; Mechanics' Liens, —199; United States, —76.

PRIVATE NUISANCE.

See Nuisance, —28.

PRIVATE ROADS.

See Easements.

PRIVILEGE.

See Constitutional Law, —205.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, —42; Witnesses, —188, 190.

PROBABLE CAUSE.

See Malicious Prosecution, —18-24.

PROBATE COURTS.

See Judgment, —475.

PROCESS.

See Appeal and Error, —677; Appearance; Attachment; Execution; Garnishment; Injunction; Judgment, —17; Mandamus; Sequestration.

PROHIBITION.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Insurance, —539-559.

PROPERTY.

See Fixtures.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROVOCATION.

See Assault and Battery, —66.

PUBLICATION.

See Taxation, —460.

PUBLIC LANDS.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(J) Patents.

—113 (Ky.) A patent to land in so far as it affected land previously patented by another patentee was void.—Gilbert v. Parrott, 182 S. W. 859.

PUBLIC NUISANCE.

See Nuisance, —72, 75.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication; Eminent Domain.

QUALIFICATIONS.

See Jury, —43.

QUANTITY.

See Vendor and Purchaser, —166.

QUESTIONS OF LAW AND FACT.

See Trial, —136-143, 191-219.

RAILROADS.

See Carriers, —306; Commerce, —27; Eminent Domain, —120; Master and Servant, —111, 112, 228; Receivers, —60, 65, 204; Street Railroads.

II. RAILROAD COMPANIES.

—22 (Tex.Civ.App.) Provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 26, that nonresident may sue railroad in any county where operating or having agent, refers to residence at time suit is commenced, allowing plaintiff, resident in Texas when injured but removing from state thereafter, to commence action in county other than that of injury or residence at time of injury.—Texas & P. Ry. Co. v. Conway, 182 S. W. 52.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

—138 (Ky.) Plaintiff coal company, which built a spur track to its mine, held entitled to recover from a railroad company the price of the steel, though the railroad company insisted on making the formal contract for reimbursement with its successor.—Cumberland R. Co. v. Gibson-Carr Coal Co., 182 S. W. 218.

IX. RECEIVERS.

—205 (Tex.Civ.App.) The appointment of a receiver for an insolvent railroad in a bondholder's suit, alleging waste and mismanagement, in which his petition expressly showed that a suit on the bonds and for foreclosure would be premature, was improper, the receivership not being sought as an ancillary remedy, despite Rev. St. 1911, art. 2128, authorizing appointment in cases of insolvency.—Houston & B. V. Ry. Co. v. Hughes, 182 S. W. 23.

—212 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2141, a shipper whose claim arose while the property of a railroad company was in the possession of a receiver appointed by a federal court, may, after termination of the receivership and return of property to the railroad company, sue the railroad

company.—*Kansas City, M. & O. Ry. Co. of Texas v. Latham*, 182 S. W. 717.

X. OPERATION.

(A) Duty to Operate.

☞222 (Mo.App.) The charge in plaintiffs' petition that defendant railroad's employees negligently backed a car off the end of a switch and into plaintiffs' building, to their damage, was a sufficiently specific charge of negligence.—*Compton v. Missouri Pac. Ry. Co.*, 182 S. W. 1055.

Where a railroad's servants, operating a train, backed a car off the end of a switch and into plaintiffs' building, the facts raised a presumption of negligence for plaintiffs under the *res ipsa loquitur* doctrine.—*Id.*

(C) Companies and Persons Liable for Injuries.

☞265 (Tex.Civ.App.) Under an application for and an order for the return of the property of a railroad company which had been in the hands of a receiver, *held*, that the company assumed claims against the receiver arising out of negligence in the operation of the road.—*Kansas City, M. & O. Ry. Co. of Texas v. Latham*, 182 S. W. 717.

After return to a railroad company of property which had been in the custody of a federal receiver, *held*, that, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2141, the railroad company was liable for claims based on negligence in operating the road, though the federal court reserved jurisdiction as to matters not determined.—*Id.*

Where receivers were not personally liable, and had been discharged, they are not necessary parties to an action against a railroad company for damages for negligent injury to a shipment during the receivership.—*Id.*

(D) Injuries to Licensees or Trespassers in General.

☞276 (Ark.) Where deceased was a trespasser on a logging train, defendant was not liable for negligence, not having wantonly injured him.—*Prescott & N. W. Ry. Co. v. Hopkins*, 182 S. W. 551.

(F) Accidents at Crossings.

☞312 (Mo.App.) Though the Kansas statute required locomotives to be equipped with headlights, removal of a headlight from a locomotive propelling a snowplow will not, where the snow would have demolished it, render the railroad company liable for a crossing accident in that state.—*McNeil v. Missouri Pac. Ry. Co.*, 182 S. W. 762.

☞327 (Mo.App.) A railroad crossing of itself is a danger signal warning travelers to look and listen for trains.—*McNeil v. Missouri Pac. Ry. Co.*, 182 S. W. 762.

☞333 (Mo.App.) Plaintiff, who, knowing that a train was approaching, and that a passenger train was due, attempted by a wild drive to beat it to the crossing, and was hurt in a collision, with an engine propelling a snowplow, which was preceding the train, *held* guilty of contributory negligence.—*McNeil v. Missouri Pac. Ry. Co.*, 182 S. W. 762.

☞334 (Mo.App.) A driver of a team in his excitement of sudden danger caused by defendant's negligence to sound warning as required by *Rev. St. 1909*, § 3140, in approaching a railroad crossing is not held to the same accountability to look and listen as is a person afforded time to deliberate.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

☞337 (Mo.App.) Where the proximate cause of a crossing accident is defendant's failure to sound warning, as required by *Rev. St. 1909*, § 3140, the right to recover cannot be defeated because plaintiff's team contributed to the accident by becoming excited at the sudden ap-

proach of the train.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

Failure to give warning signals as required by *Rev. St. 1909*, § 3140, *held* the proximate cause of a crossing accident.—*Id.*

☞348 (Mo.App.) In an action for injuries at a railroad crossing, the existence of evidence that the warning signals were not given as required by *Rev. St. 1909*, § 3140, establishes a *prima facie* case, unless it appears that the injury was not due to the failure to give the signals.—*Carter v. Wabash R. Co.*, 182 S. W. 1061.

☞350 (Ark.) Evidence *held* to warrant submission to the jury of the issues of negligence of the railroad and contributory negligence of the plaintiff in going on a railroad track at a public crossing, where the view was obstructed but no warning was given.—*E. Smith & W. R. Co. v. Pence*, 182 S. W. 568.

(G) Injuries to Persons on or near Tracks.

☞358 (Ky.) That a railroad did not prevent persons from walking across its bridge did not make them invitees so as to make the railroad liable for failure to exercise ordinary care, where it maintained warning signs prohibiting trespassing and there was no walk or other facility to aid in crossing the bridge.—*Chesapeake & O. Ry. Co. v. Stephen's Adm'r*, 182 S. W. 938.

☞360 (Ky.) Railway company *held* not liable for injuries from mules becoming frightened at noise of passing train or escaping steam, unless it was unusual and greater than that ordinarily made.—*Louisville & N. R. Co. v. Jenkins*, 182 S. W. 626.

That train which frightened mules was extra train not running on regular schedule *held* to impose on company no duty of advising driver of mules of the time of its coming.—*Id.*

☞369 (Ky.) Railway company *held* to owe no duty to give signals of train's approach or slacken speed at place where mining company had coal tippie, to avoid frightening mules.—*Louisville & N. R. Co. v. Jenkins*, 182 S. W. 626.

Trainmen *held* not required to maintain lookout for mules near track, or to use ordinary care to discover their presence, or their driver's peril, due to their becoming frightened.—*Id.*

☞369 (Ky.) No duty to keep warning lights and a lookout exists as to trespassers on the track, and no liability for injury to them can exist until they are discovered in a place of peril.—*Chesapeake & O. Ry. Co. v. Stephen's Adm'r*, 182 S. W. 938.

☞395 (Ky.) Recovery cannot be had, under a petition alleging negligence of a railroad company, upon proof of injury only, but the burden is on the plaintiff to show the negligence.—*Chesapeake & O. Ry. Co. v. Stephen's Adm'r*, 182 S. W. 938.

☞398 (Ky.) Evidence showing that mules did not become frightened at passing train until engine was passing them *held* not to show that trainmen discovered their fright or their driver's peril in time to prevent his injuries.—*Louisville & N. R. Co. v. Jenkins*, 182 S. W. 626.

Evidence *held* to show that driver of mules injured when they became frightened at passing train was guilty of culpable negligence in leaving them unattended and unhitched near the track.—*Id.*

☞398 (Ky.) Evidence *held* insufficient to show that a railway company was negligent in causing the death of plaintiff's intestate, who was run over on a bridge by one of its trains.—*Chesapeake & O. Ry. Co. v. Stephen's Adm'r*, 182 S. W. 938.

(H) Injuries to Animals on or near Tracks.

☞411 (Mo.App.) The remedies prescribed by *Rev. St. 1909*, §§ 3145, 3146, 5428, for the killing of animals by trains, *held* cumulative on-

ly so far as they relate to compensatory damages.—*Dubray v. Chicago & A. Ry. Co.*, 182 S. W. 1092.

A railroad company, inclosing its right of way within the limits of a municipal corporation, must exercise due care with respect to maintaining the inclosure.—*Id.*

⚡413 (Mo.App.) Under Rev. St. 1909, § 3145, a railroad company *held* liable for double damages for injuries to animals entering on the track through an open gate left open through the negligence of the company.—*Jeffries v. Chicago & A. R. Co.*, 182 S. W. 1082.

A railroad company, installing a gate in a railroad right of way for the benefit of an adjoining owner and communicating with a public highway, must exercise ordinary care to keep the gate closed.—*Id.*

⚡415 (Tex.Civ.App.) Where stock were accustomed to graze where grass was growing in and about the defendant's tracks, as known to its employes, the engineer was bound to keep a lookout and exercise greater care to discover stock and avoid injury thereto.—*Houston & T. C. Ry. Co. v. Holbert*, 182 S. W. 1180.

⚡425 (Mo.App.) A railroad company, injuring cattle at a public road crossing, *held* liable, where the cattle first entered on the right of way through a gate in the right of way fence, negligently left open by the company.—*Jeffries v. Chicago & A. R. Co.*, 182 S. W. 1082.

⚡441 (Tex.Civ.App.) In an action for damages for a horse killed by defendant's engine, the burden was on defendant to show that it could not fence its track at the point where the injury occurred, even though within the switch limits.—*Houston & T. C. Ry. Co. v. Holbert*, 182 S. W. 1180.

Where there was nothing to show that defendant railroad could not have fenced its tracks at point where plaintiff's horse was killed, though within its switch limits, without inconveniencing the public, it was unnecessary for plaintiff to show negligence to recover; the mere killing being enough.—*Id.*

⚡443 (Mo.App.) Evidence *held* to justify a finding that a railroad company failed to exercise proper care in keeping a gate in its right of way fence closed.—*Jeffries v. Chicago & A. R. Co.*, 182 S. W. 1082.

⚡443 (Mo.App.) In action against a railroad for killing of animals struck by a train, evidence *held* to show prima facie negligence in performance of statutory duty to maintain fences and cattle guards.—*Dubray v. Chicago & A. Ry. Co.*, 182 S. W. 1092.

In action against a railroad for killing animals struck by a train, evidence *held* not to show negligent failure of the engineer to take steps to avoid the accident.—*Id.*

⚡443 (Tex.Civ.App.) Plaintiff, in a suit against a railroad for the killing of mules, was required to show, by a preponderance of the testimony, that he owned them when they were killed.—*Texas & N. O. R. Co. v. Turner*, 182 S. W. 357.

⚡443 (Tex.Civ.App.) Evidence in an action against a railroad for damages for killing a horse, alleging negligence in operating the train at a dangerous speed and in failing to ring the bell and blow the whistle, *held* to sustain a verdict for plaintiff.—*Houston & T. C. Ry. Co. v. Holbert*, 182 S. W. 1180.

⚡446 (Mo.App.) In action against a railroad for injury to cattle on the track, the testimony of the engineer and fireman *held* not to authorize a directed verdict for the railroad company in view of other evidence.—*Jeffries v. Chicago & A. R. Co.*, 182 S. W. 1082.

⚡446 (Tex.Civ.App.) In a suit against a railroad for killing and injuring mules, evidence *held* to make the plaintiff's ownership when

they were killed or injured a question for the jury.—*Texas & N. O. R. Co. v. Turner*, 182 S. W. 357.

RATE.

See Interest, ⚡34-36.

RATIFICATION.

See Corporations, ⚡426; Counties, ⚡124; Principal and Agent, ⚡164, 178.

READING.

See Trial, ⚡118.

REAL ACTIONS.

See Partition; Trespass to Try Title.

RECEIVERS.

See Appeal and Error, ⚡920; Banks and Banking, ⚡77; Courts, ⚡493, 500, 501; Railroads, ⚡205, 212, 265.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡60 (Tex.Civ.App.) That the federal court, which appointed a receiver of the property of a railroad company, reserved jurisdiction over claims presented, on discharge of the receiver does not give it jurisdiction over claims not presented.—*Kansas City, M. & O. Ry. Co. of Texas v. Latham*, 182 S. W. 717.

III. TITLE TO AND POSSESSION OF PROPERTY.

⚡65 (Tex.Civ.App.) The appointment of a receiver and his administration of the affairs of a railroad company impounds the property of the company, so that while it remains in the custody of the court, the receiver's possession cannot be disturbed by any other court.—*Kansas City, M. & O. Ry. Co. of Texas v. Latham*, 182 S. W. 717.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

⚡154 (Ark.) Where the appointment of a receiver for a business was improperly asked by one employed by its owner to manage it, and whose compensation was dependent upon there being net profits, the business being insolvent when the solvent owner resumed possession, the cost of master and receiver was assessable against the manager in his suit to wind up the business.—*Myers v. Hines*, 182 S. W. 542.

VII. ACCOUNTING AND COMPENSATION.

⚡204 (Tex.Civ.App.) Where the federal court appoints a receiver for a railroad company, such court acquires jurisdiction of all claims presented by petition or intervention, and the discharge of the receiver does not itself release such jurisdiction.—*Kansas City, M. & O. Ry. Co. of Texas v. Latham*, 182 S. W. 717.

RECOGNIZANCES.

See Bail.

RECORDS.

See Adverse Possession, ⚡82; Appeal and Error, ⚡501-713, 907; Costs, ⚡255; Criminal Law, ⚡1086-1124; Deeds, ⚡59; Evidence, ⚡352; Railroads, ⚡276; Vendor and Purchaser, ⚡231, 261.

⚡6 (Ky.) An option contract for the purchase of land is a contract for an interest in land, and, when properly acknowledged, is recordable.—*Fields & Combs v. Vizard Inv. Co.*, 182 S. W. 934.

REDIRECT EXAMINATION.

See Witnesses, ¶287.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

¶16 (Ky.) Only where it is apparent on the face of a will, and the intent can be ascertained by due construction of the instrument, will a court of equity correct a mistake in a will.—*Lewis v. Reed's Ex'r*, 182 S. W. 638.

¶18 (Mo.) A mistake of law will not afford an adequate ground for relief by reformation of an instrument, but the rule that ignorance of the law excuses no one has no application to mistakes of persons as to their own private rights and interests.—*McIntyre v. Casey*, 182 S. W. 966.

II. PROCEEDINGS AND RELIEF.

¶45 (Ky.) Evidence, in a suit for reformation of a deed, *held* not to show omission by mistake of a reservation of a life estate of the grantor.—*Combs v. Ison*, 182 S. W. 953.

¶45 (Mo.) On evidence in ejectment, *held*, that defendant was entitled on his cross-bill to relief in equity on the ground of mistake by a reformation of the deeds in conformity with the intention of the parties.—*McIntyre v. Casey*, 182 S. W. 966.

REGISTRATION.

See Records.

REHEARING.

See Appeal and Error, ¶833; New Trial.

RELEASE.

See Assignments for Benefit of Creditors, ¶39; Chattel Mortgages, ¶243; Mortgages, ¶249; Payment; Principal and Surety, ¶118.

RELEVANCY.

See Criminal Law, ¶349-359.

RELIGIOUS SOCIETIES.

¶12 (Ark.) In church having congregational form of government decision of council called to determine dispute resulting in a division *held* not controlling upon the congregation.—*Monk v. Little*, 182 S. W. 511.

Recognition of one faction of church society having congregational form of government by association of such churches *held* not binding upon civil courts.—*Id.*

¶23 (Ark.) In church whose rule was that congregation was governing body, and in which division had occurred, followers of pastor elected at regular church meeting *held* entitled to control of the church property.—*Monk v. Little*, 182 S. W. 511.

Faction of church *held* not in rebellion to constituted authorities or subject to expulsion, but entitled to church property, though they did not vote to grant letter to former member in accordance with decision of council.—*Id.*

¶24 (Ark.) Court *held* to have properly assumed jurisdiction of suit by members of church to obtain custody of church building and restrain its use by defendants; the suit involving property rights.—*Monk v. Little*, 182 S. W. 511.

REMAINDERS.

See Life Estates.

REMAND.

See Removal of Causes, ¶107.

REMISSION.

See Damages, ¶228.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

¶3 (Ky.) Under the federal Employers' Liability Act (Act April 22, 1908, § 6, as amended by Act April 5, 1910, § 1), prohibiting removal of causes under the act, where defendant railroad's petition for removal alleged that the allegation in its employe's petition of his engagement in interstate commerce when injured was fraudulently made, the case did not stand removed to the federal court, and the state court could try the question of fraudulent allegation of jurisdictional facts.—*Chesapeake & O. Ry. Co. v. Shaw*, 182 S. W. 653.

VII. REMAND OR DISMISSAL OF CAUSE.

¶107 (Tex. Civ. App.) Action of federal court in remanding cause to state court cannot be reviewed by state courts.—*Texas & P. Ry. Co. v. Conway*, 182 S. W. 52.

RENT.

See Descent and Distribution, ¶95; Landlord and Tenant, ¶254, 262.

REPAIRS.

See Landlord and Tenant, ¶152, 154.

REPEAL.

See Statutes, ¶161.

REPLEVIN.

See Sales, ¶481.

I. RIGHT OF ACTION AND DEFENSES.

¶8 (Tenn.) A mere equitable title will not support replevin.—*Richmond Type & Electrotype Foundry v. Carter*, 182 S. W. 240.

A transfer of notes secured by a chattel mortgage without assignment of the mortgage *held* merely to carry with it the equitable title to the mortgage, and not to entitle the holder to maintain replevin in his own name.—*Id.*

REPLY.

See Pleading, ¶176.

REPUGNANCY.

See Wills, ¶471; Witnesses, ¶380-393.

RESCISSION.

See Cancellation of Instruments; Sales, ¶116.

RES GESTÆ.

See Criminal Law, ¶364, 368; Evidence, ¶121, 123.

RES IPSA LOQUITUR.

See Carriers, ¶316; Master and Servant, ¶265; Negligence, ¶121; Railroads, ¶222.

REVENUE.

See Taxation.

REVERSIONS.

See Dedication, ¶65.

REVIEW.

See Appeal and Error; Certiorari; Judgment, ¶335; Limitation of Actions, ¶72.

REVOCATION.

See Brokers, ¶10; Guaranty, ¶24.

RIGHT OF WAY.

See Easements; Eminent Domain, ¶120.

RIPARIAN RIGHTS.

See Navigable Waters, ¶39.

RISKS.

See Insurance, ¶455-466.

ROADS.

See Highways.

ROBBERY.

¶17 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 458, 468, an indictment for robbery, describing the property as \$11 in money of the United States, of the value of \$11, sufficiently described the property.—*Noe v. State*, 182 S. W. 1122.

RULE IN SHELLEY'S CASE.

See Wills, ¶608.

SAFE PLACE TO WORK.

See Master and Servant, ¶101-125, 203-226, 235.

SAFETY APPLIANCES.

See Master and Servant, ¶111, 228.

SALES.

See Accession, ¶1; Commerce, ¶40; Customs and Usages, ¶19; Evidence, ¶420, 441; Execution, ¶268; Guardian and Ward, ¶87, 107; Intoxicating Liquors; Principal and Agent, ¶103; Taxation, ¶658, 660; Vendor and Purchaser; Waters and Water Courses, ¶254.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶17 (Mo.App.) The seller of goods is not estopped to pursue individually the person who negotiated the sale when the credit therefor was extended to him individually, and not to the corporation of which he was a member, by having entered the sale in his books in the name of the corporation on the buyer's statement that he was himself the corporation.—*F. Hattersley Brokerage & Commission Co. v. Humes*, 182 S. W. 93.

¶22 (Ky.) In an action for damages for defendant's breach of contract to sell and deliver flour held that the writing given and signed by defendant's salesman was only an offer to purchase, subject to defendant's acceptance, and that where defendant declined the offer there could be no recovery.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

¶52 (Mo.App.) In an action for price of potatoes, evidence held to authorize finding of unqualified acceptance of offer of sale.—*Asbury v. Evans*, 182 S. W. 785.

¶53 (Mo.App.) On an issue in action for price whether transaction was sale or consignment for sale, payment by check indorsed, "Advance on Potatoes," held not to determine the case as a matter of law.—*Asbury v. Evans*, 182 S. W. 785.

II. CONSTRUCTION OF CONTRACT.

¶59 (Tex.Civ.App.) Though in negotiations nothing was said of rules of an association, the parties receiving and retaining the broker's memorandum of sale, stating contract was made

subject thereto, they are bound thereby, there being no fraud or misrepresentation.—*People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.*, 182 S. W. 1163.

¶85 (Tex.Civ.App.) On an order for the sale of goods to be shipped at the seller's earliest convenience, the verbal agreement of the seller's salesman that the order should not be delivered to the seller within 30 days was binding upon the seller, and the contract was avoided by a violation of the agreement.—*National Novelty Import Co. v. Duncan*, 182 S. W. 888.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(C) Rescission by Buyer.**

¶116 (Tenn.) Upon sale of goods with representation that buyer might handle them exclusively in his city, subsequent sale of goods to another in that city held a breach of a material part of the contract entitling the first buyer to rescind.—*German-American Monogram Mfrs. v. Johnson*, 182 S. W. 595.

A buyer may be discharged if there is a breach of the contract by the seller in some substantial particular which goes to the essence of the contract and renders the seller incapable of performance, or of performance as intended.—*Id.*

IV. PERFORMANCE OF CONTRACT.**(B) Bills of Sale.**

¶149 (Ark.) Defendants' bill of sale to 175 head of horses, described as being from three to eight years old, weighing 900 pounds and up, sound and free from blemishes and diseases of all kinds, was not merely a sale to plaintiffs or defendants' claim to horses running wild on the range, but purported to be a sale of the horses themselves.—*Lindsey v. Ritchey*, 182 S. W. 901.

(C) Delivery and Acceptance of Goods.

¶168½ (Ky.) Where plaintiff contracted to manufacture and deliver railroad ties, and that, if they were not satisfactory to the buyer, the contract should be void, the buyer was the sole arbiter as to his satisfaction, so long as he acted in good faith.—*Humble & McLendon v. Wyatt*, 182 S. W. 610.

¶181 (Ark.) In an action for the price of one hog, defended on the ground that one of those delivered was a boar unfit for sale for meat, evidence held to support a verdict for plaintiff.—*City Meat Market v. Bolen*, 182 S. W. 277.

VI. WARRANTIES.

¶285 (Tex.Civ.App.) The failure of the buyer of an engine to give notice to the seller by registered letter within the specified time of any defect, as required by the seller's written warranty of the engine as a condition to recovery, prevented the buyer's recovery for breach of the warranty.—*Wilson v. Avery Co. of Texas*, 182 S. W. 884.

VII. REMEDIES OF SELLER.**(B) Actions for Price or Value.**

¶358 (Tex.Civ.App.) Where a seller agreed to deliver to the buyer in a certain county oil of a certain grade, which it failed to do, it is immaterial what grade it delivered to the carrier in another county.—*People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.*, 182 S. W. 1163.

¶365 (Tenn.) In action for price of goods, where the verdict for defendant on the ground of his right to rescind was correct, whether the jury attributed that right to the ground of fraud or to the defense that there was a breach of a material part of the engagement was immaterial.—*German-American Monogram Mfrs. v. Johnson*, 182 S. W. 595.

(F) Actions for Damages.

⚡377 (Ky.) A petition in action by manufacturer and seller of railroad ties under contract declaring the contract void if they were not satisfactory to the buyer on inspection, to recover damages for breach, not alleging buyer's bad faith in rejecting the ties, *held* bad on demurrer.—*Humble & McLendon v. Wyatt*, 182 S. W. 610.

⚡387 (Tex.Civ.App.) In an action for goods sold and delivered, buyer's letter to seller, omitting the terms of the contract, *held* for the jury on the question of his credibility as to making a contract upon a precedent condition of delivery.—*National Novelty Import Co. v. Duncan*, 182 S. W. 888.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

⚡392 (Ky.) Unless an article sold is absolutely worthless for every purpose, though it is useless to the buyer, he must return, or offer to return, it before he can recover the price.—*Hauss v. Surran*, 182 S. W. 927.

⚡397 (Tex.Civ.App.) In an action to recover money paid for an alleged defective engine, where plaintiff's evidence tended to show that the engine was constructed on a wrong mechanical principle, so that it was worthless, defendant's evidence that other buyers of like engines found them satisfactory was admissible.—*Wilson v. Avery Co. of Texas*, 182 S. W. 884.

(D) Actions and Counterclaims for Breach of Warranty.

⚡429 (Ky.) Where the contract of sale merely permits, and does not require, return of the article if not as warranted, the buyer may retain it, and recoup for damages for breach of warranty.—*Hauss v. Surran*, 182 S. W. 927.

⚡436 (Mo.App.) Waiver of a breach of warranty of rope sold is not in the case unless pleaded.—*Metropolitan St. Ry. Co. v. Broderick Rope Co.*, 182 S. W. 765.

⚡442 (Ky.) The measure of damages for breach of warranty of power of machinery sold and installed is the difference between its value as installed and its value as warranted.—*Hauss v. Surran*, 182 S. W. 927.

⚡446 (Mo.App.) In action for breach of warranty of rope, instruction excusing use of rope by plaintiff, if it had gotten into condition making its use impossible if proper care was exercised toward passengers, is properly refused if not conditioned on plaintiff having used the rope with care.—*Metropolitan St. Ry. Co. v. Broderick Rope Co.*, 182 S. W. 765.

IX. CONDITIONAL SALES.

⚡481 (Ark.) The buyer of machinery by conditional sale, the seller reserving title until payment, could not maintain replevin for the machinery after permitting the seller to retake the property before payment or tender of the purchase price.—*Geiser Mfg. Co. v. Davis*, 182 S. W. 557.

SALESMEN.

See Principal and Agent, ⚡103.

SATISFACTION.

See Payment.

SCHOOLS AND SCHOOL DISTRICTS.

See Contracts, ⚡303; Statutes, ⚡122; Taxation, ⚡28.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

⚡26 (Ark.) A rural special school district can be established only out of territory not already incorporated in such a district.—*Special*

School Dist. No. 79 v. Special School Dist. No. 2, 182 S. W. 288.

⚡27 (Ark.) After ordering an election on a petition to establish a rural special school district, the county judge cannot before such election, order an election on a petition to establish another such district, including some of the same territory.—*Special School Dist. No. 79 v. Special School Dist. No. 2*, 182 S. W. 288.

(D) District Property, Contracts, and Liabilities.

⚡81 (Mo.App.) Under Kirby's Dig. Ark. § 4981, and Sess. Laws 1911, p. 462, amending Kirby's Dig. c. 101, one furnishing materials for school building *held* not required to file account in order to hold contractor's surety liable.—*C. A. Burton Machinery Co. v. National Surety Co.*, 182 S. W. 801.

Materialman by taking notes from contractor for schoolhouse *held* not to discharge contractor's surety from liability on bond securing payment for labor and materials.—*Id.*

Surety on contractor's bond securing payment for labor and materials for schoolhouse *held* not discharged by slight extension of time involved in taking of notes by materialman resulting in no damage to it.—*Id.*

In materialman's action on bond of contractor for schoolhouse, if damage resulted to surety from extension of time involved in taking of contractor's notes, *held*, that this was an affirmative defense to be pleaded and proved.—*Id.*

In materialman's action against surety on bond of contractor for schoolhouse, fact that contractor, granted extension of time by materialman, was declared a bankrupt, *held* not to show that it could have been made to pay prior to bankruptcy.—*Id.*

Items for materials furnished contractor for use on schoolhouse *held* not so commingled with other sales to the contractor as to prevent a recovery against the contractor's surety.—*Id.*

In materialman's action against surety on bond of contractor for schoolhouse, failure to offer the contractor's overdue notes for cancellation *held* not to defeat a recovery.—*Id.*

In materialman's action against surety on bond of contractor for schoolhouse, whether contractor's notes were taken as payment *held* a question for the jury; there being no presumption that they were.—*Id.*

⚡86 (Tex.Civ.App.) Petition in contractor's suit for price of school building *held* bad for failure to allege levy of tax to raise contract price.—*Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County*, 182 S. W. 386.

(E) District Debt, Securities, and Taxation.

⚡93 (Ky.) Under Const. § 184, and Ky. St. §§ 4370, 4371, 4385, 4535f, state superintendent of public instruction *held* not authorized to exceed appropriations contained in sections 4385 and 4535f in employing clerical assistance.—*Greene v. Gilbert*, 182 S. W. 262.

⚡101 (Ky.) Ky. St. § 4482, as amended by Acts 1914, c. 64, providing for an increase of the tax for operating expenses of common schools, *held* valid.—*Larue v. Redmon*, 182 S. W. 622.

SCINTILLA OF EVIDENCE.

See Evidence, ⚡588, 597.

SECONDARY EVIDENCE.

See Criminal Law, ⚡400; Evidence, ⚡178.

SECURITY.

See Attachment, ⚡134, 138.

SEDUCTION.**II. CRIMINAL RESPONSIBILITY.**

⚡40 (Tex.Cr.App.) Testimony of witness' conversation with one accused of seduction held admissible in view of circumstantial evidence in corroboration thereof.—Wood v. State, 182 S. W. 1122.

⚡46 (Tex.Cr.App.) The testimony of the prosecuting witness need not be directly corroborated in every element of the offense, and circumstantial evidence is sufficient in corroboration if it connects the accused with the commission of the offense beyond a reasonable doubt, on the questions of intercourse and promise of marriage.—Wood v. State, 182 S. W. 1122.

Where prosecutrix testified, that accused had exhibited a protector to her, testimony of other witnesses that they had seen such appliances in his possession prior to the alleged seduction is admissible in corroboration.—Id.

SELF-DEFENSE.

See Homicide, ⚡109-112, 187, 191, 300; Municipal Corporations, ⚡189.

SELF-SERVING DECLARATIONS.

See Evidence, ⚡271.

SEPARATE ESTATE.

See Husband and Wife, ⚡119-202.

SEPARATION.

See Husband and Wife, ⚡285½-299.

SEQUESTRATION.

See Damages, ⚡62; Principal and Agent, ⚡159.

⚡16 (Tex.Civ.App.) In suit to recover hides, where plaintiff issued writ of sequestration and defendants replevied, a verdict for plaintiff should have disposed of the issue of title, and, if that issue was resolved in his favor, should have found the value of each of the replevied hides.—Herrera v. Marquez, 182 S. W. 1143.

A verdict for plaintiff on the issue of title should have found the value of each of the replevied hides, in view of defendant's right under Rev. St. 1911, art. 7107, to return them in satisfaction of judgment.—Id.

The damages should be determined by their market value at the time of trial when the question arises in the original suit and under Rev. St. 1911, art. 7106.—Id.

Where there was no evidence before the jury by which they could correctly measure damages, a peremptory instruction that the undisputed evidence showed the hides to be of a certain value was error.—Id.

⚡21 (Tex.Civ.App.) Where the business of a boarding house keeper was destroyed by a wrongful sequestration, she could recover for loss of profits.—Hamlett v. Coates, 182 S. W. 1144.

When a want of probable cause for the suing out of a writ of sequestration is shown, malice may be inferred therefrom.—Id.

In suit for a wrongful sequestration, if the evidence shows honesty of purpose and not intention on the part of the suitor for the writ to injure or recklessly disregard the rights of the person against whom it is issued, the conclusion, from the absence of probable cause, that the writ was sued out maliciously, is unwarranted.—Id.

In a suit for a wrongful sequestration, the award, as actual damages, of \$500 for humiliation and grief, could not stand.—Id.

SERVANTS.

See Master and Servant.

SERVICES.

See Work and Labor.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Judgment, ⚡883.

SETTLEMENT.

See Account Stated; Executors and Administrators, ⚡488-516; Payment.

SHERIFFS AND CONSTABLES.**IV. LIABILITIES ON OFFICIAL BONDS.**

⚡157 (Tex.Civ.App.) Where a constable took into his actual possession part of the cotton upon which he had levied execution and sold, after he had made due return to his writ, the seizure was not in his official capacity and his sureties were not liable.—Kimbrough v. Bevering, 182 S. W. 403.

Under Rev. St. 1911, art. 5475, giving a preference lien to a landlord for advances, where cotton was levied upon by a constable and sold under execution against a tenant farmer to whom his landlord had made advances, and the buyer at the sale or his agent seized part of the crop sold, there was a conversion for which the constable and his sureties were liable.—Id.

SIGNALS.

See Railroads, ⚡327, 369.

SIGNATURES.

See Contracts, ⚡35; Frauds, Statute of, ⚡115.

SILENCE.

See Evidence, ⚡220.

SIMPLE APPLIANCES.

See Master and Servant, ⚡153.

SLANDER.

See Libel and Slander.

STATEMENT.

See Submission of Controversy.

STATES.**I. POLITICAL STATUS AND RELATIONS.**

⚡13 (Tenn.) The Supreme Court of the United States has, under Const. U. S. art. 3, § 2, original and exclusive jurisdiction to establish boundaries between states, which must be established either by its decree or by agreement of states, so that state courts in a suit between citizens can determine only where the boundary is, and not what it should be.—McCarty v. Carolina Lumber Co., 182 S. W. 909.

The determination of the United States Geological Survey as to the boundary between states is not conclusive, since the survey was without authority to establish a line, and attempted only to represent the line as it was then thought to be located.—Id.

North Carolina commissioners of 1799 correctly interpreted the call of the Cession Act, which read, "running from the end of Iron Mountain where the Nolachucky river runs through it, to the top of Bald Mountain," as requiring departure from the Iron Mountain at a point where both Little and Big Bald Mountains were

visible, and running from there to Little Bald, and thence to and along the top of the range to Big Bald.—Id.

Although commissioners in running a boundary between states should have run it in a certain way, other than that adopted, that question is immaterial in determining what the boundary is, since that is shown by their act, and not what their acts should have been.—Id.

Although the boundary as run by a boundary commission was not clearly marked by artificial marks, if the natural marks were clear the line was sufficiently established and would override the incorrectness of a line marked by trees or other artificial lines.—Id.

The fact that inhabitants along the boundary between states sent their children to schools of one state and paid taxes to it, is not conclusive of the proper location of the boundary, especially where the region was wild and inaccessible and they could only have employed the schools which they did employ.—Id.

Where North Carolina by its boundary commission of 1799 established the boundary between it and Tennessee, and Tennessee thereafter made but spasmodic attempts to have the line changed, each of which contemplated further action by North Carolina, which was not taken, the boundary originally established was the legal boundary.—Id.

II. GOVERNMENT AND OFFICERS.

§28 (Ark.) Acts 1915, p. 402, changing the existing statute only by postponing date of biennial election for 1916 and thereafter, *held* not to require election in 1916 of successors of senators whose terms would expire in 1918, but to merely incidentally postpone commencement of term of office. Const. art. 5, §§ 3, 15; article 19, § 5; Kirby's Dig. §§ 647, 2850.—Hendricks v. Hodges, 182 S. W. 538.

§59 (Ky.) Where the salary of a clerical position in the service of the state is definitely fixed by law, that is conclusive of the salary to be paid.—Greene v. Gilbert, 182 S. W. 202.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§119 (Mo.) Rev. St. 1909, §§ 10482, 10591, 10594, as amended by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, are not invalid as an appropriation of money for private purposes prohibited by Const. art. 10, § 3.—State ex rel. Moberly Special Road Dist. v. Burton, 182 S. W. 746; State ex rel. Columbia Special Road Dist. v. Johnson, Id. 750.

Such statutes do not grant public moneys to municipalities or other corporations within the prohibition of Const. art. 4, § 48, or lend its credit in aid of any individual or corporation in violation of section 47.—Id.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§30 (Tenn.) Under Const. art. 3, § 18, providing that a bill unreturned to the Legislature by the Governor within 5 days, Sundays excepted, shall become a law without his signature,

unless return is prevented by adjournment, a bill held by the Governor for 33 days, for 30 of which the General Assembly was temporarily adjourned, became a law, though vetoed when returned.—Johnson City v. Tennessee Eastern Electric Co., 182 S. W. 587.

Shannon's Code, §§ 227-230, touching the procedure in regard to bills after enrollment, does not amount to a construction of Const. art. 3, § 18, providing that failure of the Governor to return a bill within 5 days after presentment shall cause it to become a law without his signature, unless return is prevented by adjournment, in conflict with the construction in the section of adjournment as meaning final adjournment.—Id.

§32 (Tenn.) A return of a bill by the Governor, with his objections thereto in writing, made to the committee on enrolled bills of the house of origin, or to any member thereof, is a good return of the bill and objections within Const. art. 3, § 18, regulating the return of vetoed bills by the Governor.—Johnson City v. Tennessee Eastern Electric Co., 182 S. W. 587.

§64 (Tex. Cr. App.) Under Acts 34th Leg. c. 28, regulating loan brokers, *held*, that invalidity of section 9, making the broker's bond liable to any judgment obtained against him, would not make the whole act invalid, where the bond prescribed by section 2 would meet such liability.—Ex parte Huttsell, 182 S. W. 458.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§77 (Mo.) A statute is not special or class legislation if it applies to all alike of a given class, provided the classification is not arbitrary.—State ex rel. Moberly Special Road Dist. v. Burton, 182 S. W. 746; State ex rel. Columbia Special Road Dist. v. Johnson, Id. 750.

§95 (Mo.) Rev. St. 1909, §§ 10482, 10591, 10594, as amended and re-enacted by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, are not invalid under Const. art. 4, § 53, as special or class legislation.—State ex rel. Moberly Special Road Dist. v. Burton, 182 S. W. 746; State ex rel. Columbia Special Road Dist. v. Johnson, Id. 750.

III. SUBJECTS AND TITLES OF ACTS.

§122 (Ky.) Ky. St. § 4482, relating to schools as amended by Acts 1914, c. 64, *held* valid under Const. § 51, requiring that an act relate to but one subject, which shall be stated in the title; all its subject-matter being germane to the title.—Larue v. Redmon, 182 S. W. 622.

§123 (Tenn.) Pub. Acts 1913, c. 28, §§ 3, 6, 12, and Pub. Acts 1915, c. 23, do not violate Const. art. 2, § 17, requiring that no bill shall embrace more than one subject, since all the provisions of such act are germane to the general subject of the act, that of improvement of county roads.—Walmsley v. Franklin County, 182 S. W. 599.

Pub. Acts 1913, c. 28, §§ 3, 6, 12, and Pub. Acts 1915, c. 23, providing for improvement of county roads, do not violate Const. art. 2, § 17, requiring the subject of an act to be expressed in the title.—Id.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§161 (Mo. App.) For a later enactment to repeal a former by implication the two must be irreconcilably inconsistent, or it must clearly appear that the Legislature intended by the later act to prescribe the only rule that should govern in the case provided for.—City of Huntsville v. Eatherton, 182 S. W. 767.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⇒219 (Ky.) Doctrine of contemporaneous construction of statutes by executive officials held resorted to only where statute is uncertain, ambiguous, and difficult of understanding.—*Greene v. Gilbert*, 182 S. W. 202.

⇒220 (Mo.App.) Where it is contended that an act is repealed by one of later date relating to the same subject-matter, it is persuasive that no repeal was intended if the Legislature amends other acts inseparably connected with the act claimed to have been repealed without

indicating anything to the contrary.—*City of Huntsville v. Eatherton*, 182 S. W. 767.

⇒225 (Ark.) Statutes relating to the same subject must be construed together.—*Lonoke County v. Reed*, 182 S. W. 563.

VII. PLEADING AND EVIDENCE.

⇒279 (Mo.App.) A servant suing for injuries need not refer in his petition to the federal Employers' Liability Act, if the facts alleged bring the action within it, since state as well as federal courts are presumed to be cognizant of its enactment, and to know that it supersedes the state law upon that subject.—*Hartman v. Chicago, B. & Q. R. Co.*, 182 S. W. 148.

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STEALING.

See Larceny.

STEAM.

⚡6 (Tex.Civ.App.) In an action for injuries due to explosion of a locomotive, *held* that proof that the explosion was caused by excessive steam pressure did not demand a verdict for plaintiff, in the absence of proof that such pressure was chargeable to defendant's negligence.—*McGraw v. Galveston, H. & S. A. Ry. Co.*, 182 S. W. 417.

Evidence, in an action for injuries from explosion of a locomotive, *held* not to show that the explosion was due to excessive steam pressure.—*Id.*

Where plaintiff alleged that the explosion causing her injury was due to excessive steam pressure of the locomotive which exploded, and that such pressure was created by defendant's negligence, the burden was on her to prove this allegation by facts rather than by mere speculation.—*Id.*

Where the petition alleged that the explosion of the locomotive causing plaintiff's injury was due to excessive steam pressure and it did not appear that nothing but such pressure could have caused the explosion, plaintiff could not recover except on proof that the explosion was caused as alleged.—*Id.*

Proof of the explosion of a locomotive which caused plaintiff's injury *held* not to authorize the presumption that the explosion occurred on account of excessive steam pressure.—*Id.*

⚡6 (Tex.Civ.App.) Explosion of a locomotive boiler in charge of defendant's servants *held* to have presumably been due to defendant's negligence, though there was no direct proof thereof.—*Galveston, H. & S. A. Ry. Co. v. Perez*, 182 S. W. 419.

Where the petition, in an action for injury from a boiler explosion, alleged merely that the explosion was caused by defendant's negligence, without specifying any negligent acts, it was not essential that plaintiff prove any particular negligent acts.—*Id.*

STIPULATIONS.

See Damages, ⚡77, 79.

⚡14 (Tenn.) Where, in condemnation proceedings, by agreement the right was reserved to a co-owner to claim in a future suit incidental damages to another tract of land, her case in such subsequent suit must be viewed as if her claim to damages were being urged in the condemnation proceeding.—*Tillman v. Lewisburg & N. R. Co.*, 182 S. W. 597.

STREET RAILROADS.

See Carriers, ⚡292.

II. REGULATION AND OPERATION.

⚡81 (Ky.) A motorman operating a car on a principal street of a city must exercise ordinary care to discover the proximity of travelers on the street to the track, and exercise ordinary care to prevent injuring them.—*Kentucky Traction & Terminal Co. v. Humphrey*, 182 S. W. 854.

⚡84 (Mo.App.) To run a street car in excess of the maximum speed allowed by ordinance is negligence per se.—*Nufer v. Metropolitan St. Ry. Co.*, 182 S. W. 792.

⚡90 (Ky.) The duty to keep a lookout is imposed on the motorman operating a car, and he cannot be relieved of that duty by having it imposed on others.—*Ohio Valley Mills v. Louisville Ry. Co.*, 182 S. W. 955.

⚡93 (Ky.) A motorman, on discovering the apparent danger of a traveler on the street, caused by his horse becoming frightened, must exercise ordinary care consistent with the safety

of the car and his duties to the passengers.—*Kentucky Traction & Terminal Co. v. Humphrey*, 182 S. W. 854.

⚡99 (Mo.App.) Where a driver seeing a car approaching proceeded to cross the street car track without giving it further attention, and its speed was usual, as known to him, he was negligent.—*Nufer v. Metropolitan St. Ry. Co.*, 182 S. W. 792.

⚡110 (Ky.) Petition in action against street railway company for damages to automobile in collision, which alleges that street railway company improperly and unskillfully handled car, raises question of failure to keep lookout.—*Ohio Valley Mills v. Louisville Ry. Co.*, 182 S. W. 955.

⚡112 (Ky.) Killing of stock by electric railway car *held* prima facie negligent so that company had burden of showing that accident could not have been avoided by the exercise of ordinary care.—*Kentucky Traction & Terminal Co. v. Wright*, 182 S. W. 604.

⚡114 (Ark.) Evidence in action for negligent killing of plaintiff's horse in the nighttime by defendant's street car *held* sufficient to sustain a judgment for plaintiff.—*Little Rock Ry. & Electric Co. v. Baxley*, 182 S. W. 528.

⚡117 (Ky.) Where statutory presumption of negligence respecting killing of stock is overcome by uncontradicted and unimpeached testimony, case *held* properly taken from the jury, but not if witnesses are impeached or contradicted.—*Kentucky Traction & Terminal Co. v. Wright*, 182 S. W. 604.

Evidence *held* to make question for jury as to whether killing of stock by electric railway car could have been avoided by exercise of ordinary care.—*Id.*

⚡117 (Mo.App.) Where a motorman admitted that he saw that plaintiff was proceeding negligently towards the street car crossing, and his testimony as to efforts to stop the car was contradicted, refusal to submit the issue of negligence under the last chance rule was error.—*Nufer v. Metropolitan St. Ry. Co.*, 182 S. W. 792.

⚡118 (Ky.) In action for value of stock killed by electric car, instruction *held* erroneous as imposing absolute duty on defendant's employes to use means at their command to avoid the injury, without prescribing any degree of care.—*Kentucky Traction & Terminal Co. v. Wright*, 182 S. W. 604.

In action for killing stock *held*, that instruction as to duty of using ordinary care to avoid injury should have been confined to the motorman.—*Id.*

STREETS.

See Boundaries, ⚡20; Municipal Corporations, ⚡648-703.

STRIKING OUT.

See Trial, ⚡92, 96.

SUBMISSION OF CONTROVERSY.

See Appeal and Error, ⚡845.

⚡17 (Tex.Civ.App.) The court may examine the pleadings in determining a case on an agreed statement of facts.—*El Fresno Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701.

SUBROGATION.

⚡7 (Tenn.) Equity of a government contractor's surety who completed the work to subrogation to the rights of government *held* superior to that of one who advanced contractor moneys to pay materialmen and laborers, though bond was conditioned for payment of such persons.—*People's Nat. Bank v. Corse*, 182 S. W. 917.

⚡28 (Tenn.) Where payment of a bond to secure a city in deposit of moneys with a bank

did not discharge the total obligation, and the bank would be indebted after payment of all dividends, the surety who paid the bond is not subrogated so as to share pro rata in the dividends.—*Knaffl v. Knoxville Banking & Trust Co.*, 182 S. W. 232.

A provision in a bond given to secure a city in deposit of moneys in a bank held not to entitle the surety to subrogation, where his payment of the bond, together with the dividends from the insolvent bank, would not discharge its obligation.—*Id.*

SUBSCRIPTIONS.

See Banks and Banking, ¶39; Corporations, ¶77, 90.

¶15 (Mo.App.) Where contract with fruit growers' association was to be binding when there were 1,000 cars subscribed, and signers subscribed 945 cars, and other parties, subscribing 200 cars, signed an identical contract, but there was no evidence of community of interest, the first contract never became binding.—*Ozark Fruit Growers' Ass'n v. Erb*, 182 S. W. 1048.

SUIT.

See Action.

SUNDAY.

¶6 (Tex.Cr.App.) Defendant, who gave his moving picture show on a Sunday without charging admission, but invited patrons to pay what they wished, and who deducted his day's expenses from the receipts and turned over the balance to charity as advertised, held to violate the Sunday statute.—*Spooner v. State*, 182 S. W. 1121.

SUNSTROKE.

See Insurance, ¶455.

SUPPORT.

See Parent and Child.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Evidence, ¶83.

SUSPENDED SENTENCES.

See Criminal Law, ¶1023.

TAXATION.

See Constitutional Law, ¶92, 137; Commerce, ¶63; Counties, ¶190, 196; Drains, ¶66; Highways, ¶122, 130; Licenses; Municipal Corporations, ¶450; Schools and School Districts, ¶101; Statutes, ¶95.

I. NATURE AND EXTENT OF POWER IN GENERAL.

¶26 (Ky.) Under Const. § 184, providing that no sum shall be raised by taxation for education other than in graded schools, except on submission to the voters, taxes for common schools may be imposed by the Legislature without submission of the question to the legal voters.—*Larue v. Redmon*, 182 S. W. 622.

That the Legislature in one instance delegated the determination of the amount of a school tax to the voters did not affect its power subsequently to vary that tax.—*Id.*

¶28 (Ky.) It is the exclusive power of the Legislature to provide for taxation, and such power cannot be delegated in the absence of express constitutional authority for the delegation.—*Larue v. Redmon*, 182 S. W. 622.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

¶37 (Ky.) Ky. St. § 4482, as amended by Acts 1914, c. 64, is not a violation of Const. § 2, as an exercise of absolute and arbitrary power over the lives, liberty, and property of citizens.—*Larue v. Redmon*, 182 S. W. 622.

¶44 (Mo.) Rev. St. 1909, §§ 10482, 10591, 10594, as amended and re-enacted by Laws 1913, pp. 669, 674, 675, relating to organization of special road districts in counties and the apportionment with and disbursement by the district for road and bridge purposes of taxes collected by the county court, do not violate the constitutional requirement as to uniformity of taxation.—*State ex rel. Moberly Special Road Dist. v. Burton*, 182 S. W. 746; *State ex rel. Columbia Special Road Dist. v. Johnson*, *Id.* 750.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

¶658 (Ark.) Certificate of clerk as to notice of sale of land for taxes held invalid for failure to comply with Kirby's Dig. § 7086; such certificate showing on its face that it was made subsequent to the sale.—*Earl v. Harris*, 182 S. W. 273.

¶660 (Ark.) Under Kirby's Dig. § 7085, requiring notice of sale of land for taxes to be published "weekly for two weeks between the second Monday in May and the second Monday in June," a certificate showing publication on "May —, 1902, and May —, 1902," is insufficient, as it fails to show compliance with the statute.—*Earl v. Harris*, 182 S. W. 273.

TELEGRAPHS AND TELEPHONES.

See Eminent Domain, ¶47, 71, 120.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

¶7 (Tenn.) Under New York act of April 12, 1848 (Laws 1848, c. 265) amended by Act of April 8, 1851 (Laws 1851, c. 98) and Act of June 29, 1853 (Laws 1853, c. 471), a telegraph company organized under the original act need not obtain the written consent of holders of two-thirds of its capital stock to extend its lines without the state.—*Western Union Telegraph Co. v. Nashville, C. & St. L. Ry. Co.*, 182 S. W. 254.

¶10 (Tex.Civ.App.) Subject to regulation restriction of Rev. St. 1911, art. 1235, telegraph and telephone companies have absolute right to use ways of municipalities for transmitting telegrams and long-distance telephone messages, as provided by article 1231.—*Athens Telephone Co. v. City of Athens*, 182 S. W. 42.

¶17 (Ky.) Under Civ. Code Prac. § 29, appellant presenting its claim as a prior lien upon proceeds of sale of defendant's property by plaintiff trustee, should have been permitted to file its petition and litigate its claim against the proceeds.—*Central Home Telephone & Telegraph Co. v. Fidelity & Columbia Trust Co.*, 182 S. W. 618.

II. REGULATION AND OPERATION.

¶33 (Tex.Civ.App.) Telephone company, agreeing to maximum rate to secure franchise from town incorporated under general laws, held bound by provision therefor in franchise.—*Athens Telephone Co. v. City of Athens*, 182 S. W. 42.

Telephone rate fixed in franchise to local telephone company held not inoperative, because not evidenced by separate contract therefor signed by company.—*Id.*

Where owners of telephone system, legally obligated to maximum rate in franchise from town incorporated under general laws, sold system to company incorporated to own and operate it, which took system over in payment for four-

fifths of capital stock; corporation could not increase such maximum rate.—Id.

⚡66 (Ky.) Evidence *held* insufficient to show liability of a telephone company on the ground of negligent delay in the transmission of a phone message informing the plaintiff of the death of his mother.—Buckner v. Gainesboro Telephone Co., 182 S. W. 848.

TENANCY IN COMMON.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡15 (Ky.) Possession of land by one tenant in common will not, as against cotenants, if there is nothing to show that the holding was adverse, ripen into title.—Johnson v. Myer, 182 S. W. 190.

⚡33 (Tex.Civ.App.) Where an agreement of tenants in common was that in case of default by either in payments for the common property the one paying should take the whole title, the forfeiture could not be effected unless one party defaulted in all payments due by him, since any other construction would be inequitable.—Hardee v. Alexander, 182 S. W. 57.

Where a tenant in common refused to permit a sale of the property to which he had agreed, thereby preventing his cotenant from making payments, he could not have the equitable relief of forfeiture of his cotenant's interest to him under their contract providing for forfeiture of the rights of either to the other in case of default in payments, under the maxim that he who comes into equity must come with clean hands.—Id.

⚡38 (Tex.Civ.App.) Pleading *held* insufficient to remove a transaction by one of two tenants in common from the rule that a tenant in common who discharges an incumbrance against the common property acquires only an equitable lien, and not the whole title.—Hardee v. Alexander, 182 S. W. 57.

TENDER.

⚡14 (Ark.) An offer by the buyer of machinery to pay to the agent who sold it two notes of the purchase money if the agent would surrender the buyer's old notes under the original contract of purchase, as to which he had defaulted, was not a tender relieving him from payment of the notes or divesting the seller's title, being conditional.—Geiser Mfg. Co. v. Davis, 182 S. W. 557.

THEATERS AND SHOWS.

See Sunday, ⚡6.

THEFT.

See Larceny.

TIMBER.

See Logs and Logging; Mines and Minerals, ⚡62.

TIME.

See Contracts, ⚡329; Criminal Law, ⚡841, 1092; Executors and Administrators, ⚡296; Indictment and Information, ⚡43; Insurance, ⚡539; Interest, ⚡51; Judgment, ⚡153; Limitation of Actions, ⚡138; Mechanics' Liens, ⚡182; Trial, ⚡92.

TITLE.

See Adverse Possession; Courts, ⚡231; Replevin; Trespass, ⚡19; Trespass to Try Title; Vendor and Purchaser, ⚡54, 239.

TORTS.

See Fraud; Libel and Slander; Municipal Corporations, ⚡808-822; Negligence; Nuisance; Trespass.

TOWNS.

See Municipal Corporations.

TRADE FIXTURES.

See Fixtures, ⚡15.

TRAVELING SALESMEN.

See Principal and Agent, ⚡108.

TREES.

See Logs and Logging.

TRESPASS.

See False Imprisonment; Master and Servant, ⚡89, 306.

II. ACTIONS.

(A) Right of Action and Defenses.

⚡19 (Ky.) In action for trespass plaintiffs *held* bound to succeed on the strength of their own title, and not on defects in defendant's title.—Gilbert v. Parrott, 182 S. W. 859.

⚡20 (Mo.App.) Possession of unfenced and unoccupied land is constructively in the owner, who has such possession as supports an action for cutting and removing timber thereon.—Wright v. Nickey, 182 S. W. 1085.

TRESPASS TO TRY TITLE.

See Costs, ⚡82.

II. PROCEEDINGS.

⚡35 (Tex.Civ.App.) If either party in trespass to try title pleads specially his title, he must recover, if at all, on the title pleaded.—Hamlett v. Coates, 182 S. W. 1144.

⚡38 (Tex.Civ.App.) The burden *held* to be on plaintiffs to prove an alleged equitable title from one of defendants, and that the defendant grantees had notice or did not pay value.—Deweese v. Nicholson, 182 S. W. 396.

⚡41 (Tex.Civ.App.) In trespass to try title, evidence *held* sufficient to warrant a finding that defendant and plaintiffs never intended that the 217-acre tract involved, part of a larger one conveyed to defendant, be turned over to a land corporation in which he and plaintiffs owned stock.—Deweese v. Nicholson, 182 S. W. 396.

⚡44 (Tex.Civ.App.) In trespass to try title, where there was evidence supporting plaintiff's claim that the renting to defendant was by the month, and defendant's that it was by the year, and that she paid rent after its expiration, the court properly declined to direct verdict for plaintiff, though defendant's plea in reconvention relied on a rental contract for a year which had expired before suit.—Hamlett v. Coates, 182 S. W. 1144.

TRIAL.

See Continuance; Costs; Criminal Law, ⚡633-889; Jury; New Trial; Stipulations; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

⚡29 (Tex.Civ.App.) Action of the court in deciding that certain of the grounds of negligence charged are so supported by evidence as

to authorize their submission *held* not objectionable as an intimation of opinion on the weight to be given to the grounds submitted.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

IV. RECEPTION OF EVIDENCE.

(C) Objections, Motions to Strike Out, and Exceptions.

¶86 (Tex.Civ.App.) Testimony tending to establish one of two issues on trial incompetent or irrelevant as to the other issue is not inadmissible for such reason; as the duty is on the party against whom it is offered to request its limitation to the issue on which it is admissible.—*Wilson v. Avery Co. of Texas*, 182 S. W. 884.

¶92 (Mo.App.) A motion to exclude testimony adduced is properly overruled where the first and only objection was made when the witness was testifying to transactions about which he was unquestionably a competent witness.—*Coombes v. Knowlson*, 182 S. W. 1040.

¶96 (Mo.App.) A motion to exclude the testimony of the husband, testifying as to his own acts as agent of his wife, *held* properly denied, where the principal part of his testimony was competent.—*Coombes v. Knowlson*, 182 S. W. 1040.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

¶114 (Mo.App.) In suit on a life policy, argument of plaintiff's counsel having no tendency to rouse the passions or prejudices of the jury, and merely referring to things which were before the jury and apparent to them, was not improper.—*Warren v. New York Life Ins. Co.*, 182 S. W. 96.

¶114 (Mo.App.) Argument of counsel for plaintiff in an action to recover for damages due to delay in shipping poultry to the effect that in a similar case a carrier was held liable, and that a named person knew that plaintiff told the truth, *held* erroneously admitted over defendant's objection.—*Whittom v. Adams Express Co.*, 182 S. W. 137.

¶118 (Tex.Civ.App.) So far as argument of counsel, in a case submitted to the jury on special issues, explains to the jury the legal effect of their answers, it is improper.—*Galveston, H. & H. R. Co. v. Hodnett*, 182 S. W. 7.

¶120 (Tex.Civ.App.) Statement of counsel in argument, without evidence to support, in effect, that witness had testified contrary to his prior statement to counsel, was improper.—*Galveston, H. & H. R. Co. v. Hodnett*, 182 S. W. 7.

¶120 (Tex.Civ.App.) Argument of plaintiff's counsel, claimed to have intimated that attorney requesting plaintiff to submit to physical examination represented an insurance company, *held* not improper in view of the testimony as to whom he represented.—*Decatur Cotton Seed Oil Co. v. Taylor*, 182 S. W. 401.

¶125 (Tex.Civ.App.) Remark in argument of plaintiff's counsel concerning defendant's request for physical examination that this was a scheme resorted to by "corporations" or by "this corporation" *held* not reversible error.—*Decatur Cotton Seed Oil Co. v. Taylor*, 182 S. W. 401.

Remark of plaintiff's counsel that defendant should apply money it was paying stenographer for taking down argument on plaintiff's doctor bill *held* not improper.—*Id.*

¶133 (Ky.) Argument of counsel of successful party *held* not ground for reversal, where the court directed the jury to try the case on the evidence heard in court.—*South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850.

¶133 (Tex.Civ.App.) In a personal injury case against a railroad, improper, but not inflammatory, remarks of plaintiff's counsel to the jury, withdrawn upon objection, and as to which the court instructed they should be disregarded, *held* not prejudicially erroneous, in ab-

sence of anything in verdict or record indicating they affected the jury.—*Texas City Terminal Co. v. Pettifils*, 182 S. W. 19.

¶133 (Tex.Civ.App.) Statements of counsel that a general charge given would be a safer guide than a special charge *held* not to require a reversal, where part of such statements were withdrawn and the court instructed that the jury was bound by the special charge, the same as by the general charge, and no further instructions were requested by defendant.—*Galveston, H. & S. A. Ry. Co. v. Watts*, 182 S. W. 412.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

¶136 (Ky.) Ordinarily the construction of a writing is for the court.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

¶139 (Mo.App.) Where the proof offered in support of an affirmative defense, as to which defendant had the burden of proof, consisted of oral testimony, and there was no admission of its truth by plaintiff, the denial of a peremptory instruction for the insurer at the close of the case was proper.—*Warren v. New York Life Ins. Co.*, 182 S. W. 96.

¶139 (Mo.App.) Negative testimony that plaintiff and others riding in a bus did not hear crossing signals given by an engine carrying a snowplow is, as against positive evidence that the signals were given, insufficient to carry that issue to the jury.—*McNeil v. Missouri Pac. Ry. Co.*, 182 S. W. 762.

¶139 (Tex.Civ.App.) To authorize directing verdict, the evidence must be undisputed and so conclusive as not to authorize the drawing of different conclusions.—*Texas & P. Ry. Co. v. Frazer*, 182 S. W. 1161.

¶140 (Ky.) Where the testimony is conflicting, the jury may believe the testimony of one witness, and disregard that of the other witness.—*South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850.

¶140 (Mo.App.) The question which party's witnesses are entitled to believe, is for the jury.—*Greenlee v. Kansas City Casualty Co.*, 182 S. W. 138.

¶143 (Tex.Civ.App.) Where the evidence is conflicting, the court should not direct a verdict for either party.—*Shipp v. Cartwright*, 182 S. W. 70.

(B) Demurrer to Evidence.

¶156 (Mo.App.) In considering demurrer to evidence, the court is not bound to accept testimony opposed to plain physical facts and laws.—*Nufer v. Metropolitan St. Ry. Co.*, 182 S. W. 792.

¶156 (Mo.App.) On demurrer, evidence *held* to be viewed in light most favorable to plaintiff, giving plaintiff the benefit of every fair and legitimate inference.—*Perlin v. Waters-Pierce Oil Co.*, 182 S. W. 1013.

(D) Direction of Verdict.

¶178 (Mo.App.) On motion for a peremptory instruction by defendant, the evidence must be considered in the light most favorable to the plaintiff.—*Gately Outfitting Co. v. Vinson*, 182 S. W. 133.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

¶191 (Ark.) In an action on account for meat sold defendant, an instruction that if the jury should find plaintiff sold and delivered meat to defendant, they should find for plaintiff for the value thereof, deducting any payments made, was not erroneous as assuming that the sale was made.—*Olson v. Swift & Co.*, 182 S. W. 903.

¶191 (Ky.) In action for damages to shipment of tobacco, *held* on the facts shown that the court did not err in assuming that the delay between an intermediate point where the shipment was damaged by flood, and destination, was unreasonable.—*Louisville & N. R. Co. v. E. J. O'Brien & Co.*, 182 S. W. 227.

In action for damages to shipment of tobacco, *held* on the evidence that the court did not err in assuming that the shipment was further damaged by delay after a flood, and in leaving the extent of the damages to the jury.—*Id.*

¶194 (Mo.App.) In an action for delay in shipment of cattle, instructions that, if the jury found for plaintiff on the different counts, to find for stated amounts, are erroneous, as invading the jury's province.—*Stockwell Co. v. Union Pac. Ry. Co.*, 182 S. W. 829.

¶194 (Tex.Civ.App.) In an action for libel, defendant's requested charge on its liability in the absence of express malice *held* properly refused, as being on the weight of the evidence.—*Houston Chronicle Pub. Co. v. Bowen*, 182 S. W. 61.

¶194 (Tex.Civ.App.) A requested instruction which was on the weight of the evidence was properly refused.—*Turner v. McKinney*, 182 S. W. 431.

(B) Necessity and Subject-Matter.

¶203 (Ark.) The refusal of an instruction correctly applying the law to the facts of the case in a concrete way where it was not covered by any other instruction, is error.—*Western Coal & Mining Co. v. Harrison*, 182 S. W. 525.

¶203 (Ky.) Where several grounds of defense are sustained by evidence and contradicted by plaintiff's evidence, the court must, in its instructions, state the law applicable to the several grounds of defense.—*Stevens & Elkins v. Lewis-Wilson-Hicks Co.*, 182 S. W. 840.

¶214 (Mo.App.) Where plaintiff's instruction did not tell the jury in direct and positive terms under what circumstances defendant would be entitled to interest, the refusal of defendant's proper instruction thereon was error.—*Coombes v. Knowlson*, 182 S. W. 1040.

¶219 (Mo.App.) In an action for negligently allowing the gate of an elevator to fall on plaintiff, the use of the word "negligence" in an instruction merely to characterize the act is not improper, though it was not defined.—*Anderson v. American Sash & Door Co.*, 182 S. W. 819.

(C) Form, Requisites, and Sufficiency.

¶229 (Tex.Civ.App.) Undue emphasis of the cause of one party by reiteration of charges as to damages is improper.—*Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County*, 182 S. W. 886.

¶232 (Tex.Civ.App.) Where a servant's action for personal injury was submitted to the jury on special issues, instructions informing the jury of the facts required to be found to entitle plaintiff to recover, were not erroneous.—*J. M. Guffey Petroleum Co. v. Dinwiddie*, 182 S. W. 444.

¶234 (Mo.App.) An instruction which does not require the jury to find the facts predicated, but which merely recites the facts, is erroneous.—*J. F. Meyer Mfg. Co. v. Sellers*, 182 S. W. 789.

¶234 (Tex.Civ.App.) Charge requiring facts relied upon as grounds for recovery to be established by clear preponderance of evidence, *held* to impose too great a burden.—*Wyatt v. Chambers*, 182 S. W. 16.

¶243 (Tex.Civ.App.) In a street car passenger's action for injuries from falling from the running board of a car, *held*, that instructions

given relative to negligence and contributory negligence were not conflicting.—*Tennegkeit v. Galveston Electric Co.*, 182 S. W. 72.

¶244 (Mo.App.) In action for breach of warranty of rope, instruction singling out circumstance that, though the rope may have deteriorated because of delay in putting it into service, that was not controlling, *held* properly refused.—*Metropolitan St. Ry. Co. v. Broderick Rope Co.*, 182 S. W. 765.

(D) Applicability to Pleadings and Evidence.

¶250 (Mo.App.) Instruction authorizing consideration of plaintiff's condition in life in estimating damages for personal injury *held* erroneous in absence of allegation or proof of loss of time or service.—*Abernathy v. Lusk*, 182 S. W. 1049.

Instruction authorizing consideration of loss of time, if any, in assessing damages for personal injury, *held* erroneous in absence of allegation or evidence of loss of time.—*Id.*

¶251 (Ky.) Where plaintiff suing for a personal injury was entitled to recover, if the injury was caused by ordinary negligence of defendant, the word "gross" as applied to negligence should be omitted from the instructions.—*Taylor Coal Co. v. Miller*, 182 S. W. 920.

¶251 (Mo.App.) In wife's action for alienation of affections, instructions as to plaintiff leaving her husband, claimed by plaintiff to have been compelled by defendant's acts, *held* not to have injected extrinsic and prejudicial issues into the case.—*McKay v. McKay*, 182 S. W. 124.

¶251 (Mo.App.) No instruction should be given based upon a hypothesis outside the scope of the issues made by the pleadings and the evidence.—*Gately Outfitting Co. v. Vinson*, 182 S. W. 133.

¶251 (Tex.Civ.App.) Defendant, having specifically pleaded certain acts as contributory negligence, was not entitled to have other acts submitted to the jury as a basis for finding contributory negligence.—*North Texas Gas Co. v. Meador*, 182 S. W. 708.

¶252 (Ark.) In action for the price of hog, defendant's instructions as to its liability *held* properly refused, as inapplicable to the facts.—*City Meat Market v. Bolen*, 182 S. W. 277.

¶252 (Ark.) An abstract instruction that drafts given for a wager are void, where liability of defendant, which collected and paid out the proceeds of drafts obtained from plaintiff by larceny, depended on its notice of the larceny, *held* error.—*Arkansas Nat. Bank v. Johnson*, 182 S. W. 523.

¶252 (Mo.App.) An instruction which predicates the facts in direct contradiction to all the evidence is erroneous.—*J. F. Meyer Mfg. Co. v. Sellers*, 182 S. W. 789.

¶252 (Tex.Civ.App.) There being no evidence that plaintiff's injury was caused by a weakened condition of her arm, though it had previously been broken, a requested instruction predicated on a finding of such fact was properly refused.—*North Texas Gas Co. v. Meador*, 182 S. W. 708.

¶253 (Mo.App.) In an action for services rendered as a domestic, an instruction that food and shelter were incidental to such service, but clothes were not, *held* erroneous in taking from the jury the defense that plaintiff was merely to receive board and support for her services.—*Collins v. Smith*, 182 S. W. 1087.

¶253 (Tex.Civ.App.) An instruction that plaintiff could not recover unless he was thrown from the car by the act of the conductor in pushing between him and the car *held* not erroneous, as ignoring other negligent acts charged, where there was no evidence as to such other negligent acts.—*Tennegkeit v. Galveston Electric Co.*, 182 S. W. 72.

§253 (Tex.Civ.App.) In a brakeman's action for injuries in coupling cars, a requested instruction denying his right to recover if he was contributorily negligent, whether the defendant was negligent or not, was properly refused, since it ignored the state and federal statutes on comparative negligence.—San Antonio, U. & G. R. Co. v. Green, 182 S. W. 392.

(E) Requests or Prayers.

§255 (Mo.App.) Failure to give an instruction on reduction of damages because of plaintiff's failure to properly care for himself is not erroneous unless requested.—Delano v. Roberts, 182 S. W. 771.

§256 (Ky.) An instruction that plaintiff might recover for lost time and impairment of earning power was not objectionable in failing to limit recovery for loss of earning power to the time following the period for which loss of time was allowed, in absence of a request for a more specific instruction.—Nashville O. & St. L. Ry. Co. v. Henry, 182 S. W. 651.

§256 (Ky.) In a personal injury case, where defendant did not request direction that the allowance for impairment of plaintiff's earning power should begin where that for loss of time ended, an instruction as to allowance for impairment of earning power, without the qualification, was not prejudicial.—Nashville, O. & St. L. Ry. Co. v. Banks, 182 S. W. 660.

§260 (Ark.) The refusal of instructions substantially covered by those given is not error.—Shearer v. Farmers' & Merchants' Bank, 182 S. W. 262.

§260 (Mo.App.) The refusal of instructions fully covered by those given the party was not erroneous.—Warren v. New York Life Ins. Co., 182 S. W. 96.

§260 (Mo.App.) The refusal of an instruction which, in substance, was covered by one given, and was merely repetitive, was not error.—McKay v. McKay, 182 S. W. 124.

§260 (Mo.App.) The refusal of an instruction, the substance of which is sufficiently included in other instructions, is not error.—Hoelscher v. Missouri, K. & T. Ry. Co., 182 S. W. 1078.

§260 (Tex.Civ.App.) In an action for libel, defendant's requested charge on the issue of exemplary damages was properly refused, where the court's main charge thereon was sufficiently full and fair to protect the defendant in all its rights.—Houston Chronicle Pub. Co. v. Bowen, 182 S. W. 61.

§260 (Tex.Civ.App.) It is not error to refuse a requested instruction already substantially covered by the charge given.—Chicago, R. I. & G. Ry. Co. v. Cosio, 182 S. W. 83.

§260 (Tex.Civ.App.) In railroad servant's action for injuries, refusal of requested instruction on assumption of risk held not error, in view of the court's charge thereon.—Turner v. McKinney, 182 S. W. 431.

Refusal of a requested instruction held not error, where the law involved therein was sufficiently given in the court's main charge.—Id.

§260 (Tex.Civ.App.) Requested instruction for defendant in action for death of railway engineer, killed when his engine left the track, held properly refused, where it could have added nothing to the charge given and which covered the issue proper to be submitted.—St. Louis, B. & M. Ry. Co. v. Jenkins, 182 S. W. 1159.

A special charge was properly refused when it was covered by the other charges given.—Id.

§267 (Mo.App.) In wife's action for alienation of affections, modification of instruction as to wife leaving her husband held to have made no substantial change therein.—McKay v. McKay, 182 S. W. 124.

(G) Construction and Operation.

§295 (Mo.App.) Instructions will be construed together, and error will not be predicated

on any isolated part thereof.—Wiley v. Wiley, 182 S. W. 107.

§296 (Mo.App.) Where defendant's instructions omitted no feature essential to its case, and plaintiff's instructions presented plaintiff's defense, held, that there was no error of which plaintiff could complain.—Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co., 182 S. W. 759.

§296 (Mo.App.) In action against a carrier for injuries to live stock during transportation, error in a charge on the burden of proof held not prejudicial, in view of other instructions.—Kolkmeier v. Chicago & A. R. Co., 182 S. W. 794.

§296 (Mo.App.) In an action for injuries received by plaintiff in entering defendant's elevator, error in instructions which omitted a consideration of plaintiff's contributory negligence is cured by defendant's instructions presenting that issue.—Anderson v. American Sash & Door Co., 182 S. W. 819.

§296 (Mo.App.) Where defendant's own instructions presented a defensive theory improperly omitted from plaintiff's instructions, the error is cured.—Davis v. Chicago, R. I. & P. Ry. Co., 182 S. W. 826.

§296 (Tex.Civ.App.) Failure of paragraph of charge to state that plaintiff could not recover for injuries due to her negligence subsequent to the injury, if error, held harmless, where this matter was clearly stated in another paragraph.—Galveston, H. & S. A. Ry. Co. v. Watts, 182 S. W. 412.

VIII. CUSTODY, CONDUCT, AND DE-LIBERATIONS OF JURY.

§307 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1957, refusal of court, in an action for the killing of mules, where plaintiff's ownership was in issue, to allow the jury to take to the jury room plaintiff's statement, conflicting with his oral testimony as to ownership, was error.—Texas & N. O. R. Co. v. Turner, 182 S. W. 357.

IX. VERDICT.

(A) General Verdict.

§327 (Tex.Civ.App.) A verdict against a defendant, silent as to the other defendant, was sufficient to sustain judgment for both defendants.—White v. Barrow, 182 S. W. 1154.

(B) Special Interrogatories and Findings.

§347 (Ky.) Since the repeal of Civ. Code Prac. § 327, subsec. 2, by the amendment of May 15, 1886, special verdicts are not authorized by law.—Bishop v. Newman's Ex'r, 182 S. W. 165.

§350 (Tex.Civ.App.) Submitting numerous issues on evidentiary facts merely going to prove a real issue is improper practice.—Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County, 182 S. W. 386.

§350 (Tex.Civ.App.) In action for railway engineer's death, submission of issue as to whether the unsafe track, if it was unsafe, or the unsafe locomotive, if it was unsafe, or both, were the proximate cause of the accident, held not injurious to defendant, as no intelligent jury could have been misled thereby.—St. Louis, B. & M. Ry. Co. v. Jenkins, 182 S. W. 1159.

In action for death of railway engineer, refusal of defendant's requested issue as to whether deceased was exercising ordinary care to run his engine at a safe rate of speed, held properly refused in view of the other issues submitted.—Id.

§350 (Tex.Civ.App.) Defendant may not have submitted to the jury the question of the oil sold by him being according to sample in broker's possession, where sale is proved to have been of a certain grade, and not according to sample.—People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co., 182 S. W. 1163.

—351 (Tex.Civ.App.) In servant's action for injury from falling from a ladder on an oil derrick, defendant's requested submission of its negligence in the construction and maintenance of the steps was an invitation to submit issues as to its negligence in fastening a step and in allowing it to become loose and unsafe.—*J. M. Guffey Petroleum Co. v. Dinwiddie*, 182 S. W. 444.

In a servant's action for personal injury, the refusal of special issues requested by defendant was not error, where the special issues submitted by the court sufficiently comprehended all the material issues in the case.—*Id.*

—352 (Tex.Civ.App.) In suit against railroad for killing mules, defendant's requested issue as to ownership *held* properly refused, as assuming a sale by plaintiff.—*Texas & N. O. R. Co. v. Turner*, 182 S. W. 357.

—352 (Tex.Civ.App.) In a servant's action for injury, the submission of two special issues as to defendant's negligence sufficiently presented the question suggested by a special charge, and in a form more in accordance with *Vernon's Sayles' Ann. Civ. St. 1914, art. 1984a*, relating to the form of special interrogatories.—*J. M. Guffey Petroleum Co. v. Dinwiddie*, 182 S. W. 444.

X. TRIAL BY COURT.

(A) *Hearing and Determination of Cause.*

—386 (Mo.App.) Where defendant did not ask or present any specific declarations for the court to pass upon, a general declaration of law drawn by the court from the facts was sufficient.—*C. A. Burton Machinery Co. v. National Surety Co.*, 182 S. W. 801.

(B) *Findings of Fact and Conclusions of Law.*

—395 (Tex.Civ.App.) A conclusion of law on the merits must be supported by a finding of facts.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

In an action on a note and to foreclose a deed of trust, where defendants claimed a home-*stead*, the trial court's failure to make finding of fact upon which its conclusion of defendant's abandonment could have been based, made a judgment in accordance with such conclusion erroneous, and it required reversal.—*Id.*

—397 (Tex.Civ.App.) The refusal to make a requested finding was not error where the trial court in another finding fully stated the matter requested to be found.—*Bogart v. Cowboy State Bank & Trust Co.*, 182 S. W. 678.

—404 (Mo.App.) A memorandum by the trial court not made at the request of either party, does not fall within *Rev. St. 1909, § 1972*, and so does not have the effect of a special verdict, but is to be treated as a general verdict.—*Joblin v. Illinois Surety Co.*, 182 S. W. 143.

—404 (Mo.App.) Trial court's finding on request under *Rev. St. 1909, § 1972*, *held* to have the effect of a special verdict; the facts found being established by affirmative evidence or inferable from the testimony.—*Broderick v. Lucas' Ex'r*, 182 S. W. 154.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

—412 (Tex.Civ.App.) Any error in admitting evidence that board was replaced and fastened after accident *held* waived, where photograph made after the accident was introduced, and witness testified with reference thereto.—*Decatur Cotton Seed Oil Co. v. Taylor*, 182 S. W. 401.

TRIAL DE NOVO.

See *Justices of the Peace*, —174.

TRUST DEEDS.

See *Mortgages*.

TRUSTEE PROCESS.

See *Garnishment*.

TRUSTS.

See *Assignments for Benefit of Creditors*; *Monopolies*; *Wills*, —682.

II. CONSTRUCTION AND OPERATION.

(A) *In General.*

—114 (Tex.Civ.App.) Where a will devised property in trust for the benefit of all children lawfully born to testator's son, the trust was not executed; no time being stated for the ascertainment of the children of the class.—*Reeves v. Simpson*, 182 S. W. 68.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) *Actions.*

—365 (Ky.) Equity will not enforce a trust where by lapse of time the acts of the parties authorize a presumption unfavorable to the continuance of the trust.—*Newberry v. Winlock's Ex'r*, 182 S. W. 949.

A trust alleged to have been created 18 or 19 years before suit for its enforcement will not be enforced where the trustee has died and the facts raise a presumption either that the trust never existed or was settled by trustee.—*Id.*

UNDISCLOSED AGENCY.

See *Principal and Agent*, —145, 146.

UNIFORMITY.

See *Taxation*, —44.

UNITED STATES.

See *Public Lands*; *Removal of Causes*; *Subrogation*, —7.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

—67 (Tenn.) Advances of money to a government contractor to pay for labor and materials *held* not to fall within federal contractor's bond requiring payment to all persons supplying labor or materials.—*People's Nat. Bank v. Corse*, 182 S. W. 917.

—76 (Tenn.) The United States' right of priority in payment of debts due it is not an attribute of sovereignty, but depends on the acts of Congress.—*People's Nat. Bank v. Corse*, 182 S. W. 917.

Under *Rev. St. § 3466 (U. S. Comp. St. 1913, § 6372)*, providing that, where a debtor is insolvent or the property of an absconding debtor is attached, claims due the United States shall first be satisfied, the federal government has no lien on the property of its debtors as such.—*Id.*

A surety on a nonresident government contractor's bond who completed the work after attachment of the contractor's property, *held* not to have priority over the attachment by subrogation under *Rev. St. §§ 3466, 3468 (U. S. Comp. St. 1913, §§ 6372, 6374)*, the government having no priority, as the attachment was not a sequestration of the contractor's property for distribution.—*Id.*

USAGES.

See *Customs and Usages*.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

⚡5 (Tex.Cr.App.) Acts 34th Leg. c. 28, regulating loan brokers, and by section 18 making compromises for usury void, *held* not unconstitutional.—*Ex parte Hutsell*, 182 S. W. 458.

⚡37 (Tex.Civ.App.) An agreement to pay plaintiff 200 per cent. on an investment as profits *held* not an agreement for the payment of usury, the payment not being for that of interest under Vernon's Sayles' Ann. Civ. St. 1914, art. 4973, but for payment of profits.—*Burton v. Stayner*, 182 S. W. 394.

⚡75 (Tex.Civ.App.) Where the original transaction was usurious, that vice will follow a debt based on such usury in whatever form it may assume.—*Burton v. Stayner*, 182 S. W. 394.

VACATION.

See Judgment, ⚡138-153, 342.

VALUE.

See Courts, ⚡247; Evidence, ⚡543.

VARIANCE.

See Indictment and Information, ⚡180.

VENDOR AND PURCHASER.

See Criminal Law, ⚡126; Exchange of Property, ⚡7; Mechanics' Liens, ⚡59, 199; Records, ⚡6; Sales.

I. REQUISITES AND VALIDITY OF CONTRACT.

⚡3 (Ky.) A contract, binding an owner to convey land to a purchaser on demand and payment of the price within a specified time, *held* only an option to purchase at a fixed price within the time.—*Fields & Combs v. Vizard Inv. Co.*, 182 S. W. 934.

⚡18 (Ky.) A contract, granting a party the right to purchase the land of the adverse party at a fixed price per acre on the party making a survey and exercising the option within a specified time, is enforceable on the party exercising his option within the time.—*Fields & Combs v. Vizard Inv. Co.*, 182 S. W. 934.

One having an option to purchase land *held* to forfeit his rights, under the contract and an oral extension of time, by failing for a month to complete the purchase after the time as extended.—*Id.*

II. CONSTRUCTION AND OPERATION OF CONTRACT.

⚡54 (Tex.Civ.App.) Where land is conveyed by deed retaining an express lien to secure part of the purchase money, legal title to the land remains in the vendor until the purchase money is paid.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

IV. PERFORMANCE OF CONTRACT.

(C) Quantity of Land and Appurtenances.

⚡166 (Ky.) That plaintiff was impelled to accept deed to specific property with knowledge that tract contained less than he had supposed, by necessity of using it to store supplies bought after defendant's acceptance of his purchase offer, *held* not to entitle plaintiff to pro rata price reduction on deferred payments provided for in deed.—*Louisville Soap Co. v. Louisville Cotton Oil Co.*, 182 S. W. 181.

(D) Payment of Purchase Money.

⚡177 (Ky.) Where plaintiff accepted deed to defendant's tract indicating on its face an acreage of 2½ acres, and, when accepting deed,

plaintiff knew that such was the acreage, instead of 6, as he had believed, plaintiff *held* not entitled to abatement on balance of purchase price to meet shortage.—*Louisville Soap Co. v. Louisville Cotton Oil Co.*, 182 S. W. 181.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⚡228 (Tex.Civ.App.) A purchaser of land, with notice that his vendor's lessee put improvements thereon under oral agreement that he might remove them, preventing him from doing so, is liable to him for their value.—*Bean v. Cook*, 182 S. W. 1166.

⚡231 (Ky.) An option contract, when recorded, gives notice to a subsequent purchaser of the vendor.—*Fields & Combs v. Vizard Inv. Co.*, 182 S. W. 934.

⚡231 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 6831, 6842, record of an assigned land certificate, being a copy of recorded certificate, with proper acknowledgment of one of the assignors, *held* constructive notice to subsequent purchasers of divestiture of such assignor's interest.—*Delay v. Truitt*, 182 S. W. 732.

Where a deed was written on the back of the original patent to the land, and its record immediately followed a registration of the patent, the registration of the deed could not be excluded on account of its alleged insufficiency of description.—*Id.*

A purchaser is required only to look for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derived his title.—*Id.*

⚡231 (Tex.Civ.App.) A subsequent deed of record does not afford constructive notice to an anterior holder of an interest in the land.—*Biswell v. Gladney*, 182 S. W. 1168.

A subsequent purchaser of part of land subject to a common charge has constructive notice of the equities of a prior grantee of another part of the same land, whose deed is on record.—*Id.*

⚡238 (Tex.Civ.App.) Where an innocent purchaser places his deed on record first, a purchaser from him would acquire title, though he was not an innocent purchaser.—*Delay v. Truitt*, 182 S. W. 732.

⚡239 (Ky.) A deed, to be effectual against a subsequent purchaser for a valuable consideration, must have been delivered to and accepted by the grantee.—*Justice v. Peters*, 182 S. W. 611.

⚡239 (Tex.Civ.App.) Purchasers of land from the record owner without notice of the claim of a corporation or stockholders, paying full value, could hold against the stockholders, claiming equitably in their own right under contract with a defendant, another stockholder, or as successors to the assets of the corporation, to which defendant had agreed to convey.—*Dewees v. Nicholson*, 182 S. W. 396.

Where corporate stockholders assumed payment of the price of land bought for the corporation, such assumption inured to the benefit of purchasers of a part of the land, which, by agreement with the corporation and stockholders, the selling stockholder, in whose name title to the land had been taken for the benefit of the corporation, was to own individually.—*Id.*

Where, with the assent of stockholders in a land company, title to land purchased for it was taken in the name of one, the other stockholders assuming payment of the price, such others could not recover the price per acre, the payment of which they had assumed, from innocent purchasers for value from the stockholder holding the legal title.—*Id.*

⚡242 (Tex.Civ.App.) The holder of an equitable title has the burden of showing that a subsequent purchaser invested with the legal title

is not an innocent purchaser.—*Delay v. Truitt*, 182 S. W. 732.

Parties claiming under a subsequent deed, as against a prior deed of their grantor, have the burden of showing that they are innocent purchasers.—*Id.*

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

—261 (Tex.Civ.App.) The assignment of a vendor's lien is within the registration statutes.—*Biswell v. Gladney*, 182 S. W. 1168.

—265 (Tex.Civ.App.) The purchaser of vendor's lien notes without actual notice of a conveyance by the purchaser was not charged with any fact upon which, on the doctrine of inquiry, notice of such deed could be imputed to him.—*Biswell v. Gladney*, 182 S. W. 1168.

The record of a quitclaim deed, not on its face showing that the grantor and grantee contracted in regard to the grantor's debt for purchase money of a larger tract, as a part of the real consideration, affords notice of the equities to a subsequent assignee of the vendor's lien notes.—*Id.*

A subsequent purchaser of land subject to a vendor's lien is not required to go further than the record in searching the vendor's lien note, if he does not know it has been assigned.—*Id.*

Where owner of land subject to a vendor's lien conveys a part of the land by quitclaim deed, agreeing that the land conveyed shall be discharged from the vendor's lien, and the original vendor releases another part of the land, of greater value than the amount due on the lien notes, the land so conveyed is discharged as against a subsequent purchaser of the lien notes, with notice of the record of the quitclaim deed.—*Id.*

—281 (Tex.Civ.App.) In a suit by the assignee of a vendor's lien note against the purchaser and a purchaser from him, evidence held not to establish the defense of payment as against the assignee's position of bona fide purchaser.—*Biswell v. Gladney*, 182 S. W. 1168.

The possession of a vendor's lien note, together with its indorsement by the vendor "without recourse," put the burden of proof upon the purchaser and his grantees to show that the assignee was not an innocent transferee of the note.—*Id.*

—295 (Tex.Civ.App.) Where the vendor of realty by deed reserving a vendor's lien foreclosed, he could not thereafter claim that he continued to hold the superior title to make out his right to the insurance money payable on the burning of the house.—*Stratton v. Westchester Fire Ins. Co. of New York*, 182 S. W. 4.

VENUE.

See Corporations, —666.

I. NATURE OR SUBJECT OF ACTION.

—7 (Ky.) Under the express provision of Civ. Code Prac. § 72, the circuit court of a county had jurisdiction of an action for damages for breach of a contract of sale to be performed in that county.—*Nolin Milling Co. v. White Grocery Co.*, 182 S. W. 191.

—7 (Tex.Civ.App.) A contract of sale held in writing within Rev. St. 1911, art. 1830, subd. 5, as to venue, where the broker made written memorandum thereof, and sent copies to the parties, which they retained.—*People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.*, 182 S. W. 1163.

There is a contract in writing to perform an obligation in G. county, within Rev. St. 1911, art. 1830, subd. 5, where a seller ships with draft attached to bill of lading obligating delivery of possession there.—*Id.*

VERDICT.

See Appeal and Error, —994-1004; Criminal Law, —889, 1159; Indictment and Information, —202; New Trial, —77; Trial, —852.

VERIFICATION.

See Bills and Notes, —485; Pleading, —290.

VESTED RIGHTS.

See Constitutional Law, —92.

VETO.

See Statutes, —30, 32.

WAIVER.

See Appeal and Error, —1078; Appearance; Attachment, —138; Criminal Law, —1026; Estoppel; Executors and Administrators, —245; Indictment and Information, —5; Insurance, —555, 559, 755; Pleading, —412; Principal and Surety, —129; Trial, —412; Vendor and Purchaser, —168, 177.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

See Courts, —140.

WARRANTY.

See Sales, —285, 429-446.

WATERS AND WATER COURSES.

See Drains; Navigable Waters.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

—171 (Mo.App.) Though waters overflowing the bank of a stream are to be considered as surface waters, yet if such overflow is caused by one who negligently obstructs the natural course of the stream he is liable for any loss that ensues.—*Hoelscher v. Missouri, K. & T. Ry. Co.*, 182 S. W. 1078.

—172 (Tex.Civ.App.) Defendant to be liable for damages from the breaking of a dam, by which it impounded waters which it diverted, need not have been negligent.—*Texas & P. Ry. Co. v. Frazer*, 182 S. W. 1161.

The unprecedented character of the rainfall will not relieve defendant from liability, where it diverted waters from their natural channel and impounded them, and then permitted them to escape on plaintiff's land.—*Id.*

Plaintiff, not having joined or acquiesced in the request of other citizens that defendant build a dam to impound water which it had diverted, is not estopped, because thereof, to claim damages to his land from the escape of water therefrom.—*Id.*

—179 (Mo.App.) In an action for the overflowing of land by the damming of a creek due to the faulty construction of a railroad bridge, held, that the question of proximate cause was for the jury.—*Hoelscher v. Missouri, K. & T. Ry. Co.*, 182 S. W. 1078.

—179 (Tex.Civ.App.) The action being only for damages to land from the breaking of a dam allowing escape of diverted and impounded water, with no claim, as an element of damages, of the dam being a menace, defendant's testimony of it being a benefit and not a menace is inadmissible.—*Texas & P. Ry. Co. v. Frazer*, 182 S. W. 1161.

IX. PUBLIC WATER SUPPLY.**(B) Irrigation and Other Agricultural Purposes.**

§254 (Tex. Civ. App.) Where defendant contracted to pay a certain sum for irrigation water rights, he could not escape liability for failure to pay by selling his land, or a part thereof, so that, in an action to recover the sum due, his contract with the buyer of his land was inadmissible.—*Bennett v. Rio Grande Canal Co.*, 182 S. W. 713.

Contract to furnish water for irrigation, exempting company from liability during reasonable time for repair and construction, held not an attempt to contract against its own negligence, but a valid condition, so that testimony of the cause of a delay was admissible in an action for the contract price of water furnished.—*Id.*

WAYS.

See Easements; Highways.

WEAPONS.

§17 (Tex. Cr. App.) Evidence of a noise from defendant's direction held insufficient for a conviction of carrying a pistol.—*Daugherty v. State*, 182 S. W. 306.

WIDOWS.

See Dower.

WILLS.

See Descent and Distribution; Executors and Administrators; Trusts.

VI. CONSTRUCTION.**(A) General Rules.**

§439 (Ky.) In construing a will, the court should aim to give effect to the testator's intent, upholding, if possible, each item of the instrument.—*Lewis v. Reed's Ex'r*, 182 S. W. 638.

§471 (Ky.) The courts will, if possible, harmonize provisions of a will, and only if inconsistent will the latter prevail over former provisions.—*Lewis v. Reed's Ex'r*, 182 S. W. 638.

§486 (Mo. App.) Payment, which will of plaintiff's mother directed to be made to plaintiff for board, held not presumed to also cover nursing and services.—*Le Count v. Fountain's Estate*, 182 S. W. 102.

§487 (Tex. Civ. App.) Clause, of testator's will making absolute devise to his wife, providing that on her death whatever might be left should be divided among their relatives, giving her full power of disposition, was not such a legal limitation upon the estate previously granted the wife as to create an ambiguity in the will to admit evidence of the maker's intention.—*Feebles v. Slaughter*, 182 S. W. 10.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

§531 (Ky.) Under a devise to a brother of executrix of the use of property for a number of years, and then share and share alike to two brothers named and three nephews named, the nephews take per capita.—*White v. White's Guardian*, 182 S. W. 942.

§535 (Ky.) An heir will not be excluded or disinherited, except by express words or necessary implication; and if the will is doubtful, that construction favorable to the heir will be adopted.—*Lewis v. Reed's Ex'r*, 182 S. W. 638.

Though testator's will declared that he left the residue of his property to all of his nieces and nephews as enumerated, plaintiff, whose mother was a niece, but was not enumerated, having died before the testator, cannot take on the ground that the name of her mother was omitted through mistake.—*Id.*

(C) Survivorship, Representation, and Substitution.

§545 (Ky.) "Issue" in Ky. St. § 4841, providing for surviving issue of a deceased devisee taking, does not have the meaning of "heirs," so as to include ancestors.—*Slone v. Mason Coal & Coke Co.*, 182 S. W. 929.

§545 (Ky.) Where property is devised to one for life with remainder to another, and, if the remainderman die without issue, then to a third person, the limitation as to dying without issue is restricted to the death of the remainderman before termination of life estate.—*White v. White's Guardian*, 182 S. W. 942.

(E) Nature of Estates and Interests Created.

§600 (Tex. Civ. App.) A will giving testator's entire property to his wife in the first clause, and thereafter providing that whatever might be left at her death should be equally divided between testator's and her relatives, but that she should have free power of disposition, did not limit her rights in the property to a life estate.—*Feebles v. Slaughter*, 182 S. W. 10.

Where testator's will gave his property to his wife with power of control and disposition, whatever should be left on her death to go to their relatives, such relatives could not pursue the proceeds of the property sold by the wife.—*Id.*

§608 (Tex. Civ. App.) Where the testator devises a life estate in lands to his son and the remainder to his heirs, and his heirs predecease the devisee, the life tenant takes the fee under the rule in *Shelley's Case*.—*Reeves v. Simpson*, 182 S. W. 68.

§616 (Ky.) Under a devise to testatrix's brother for a number of years, and then to be divided between the brother and others, with right of survivorship, and a codicil by which the brother was given a life estate only, with power to sell and divide, the brother having predeceased the others named his estate terminated.—*White v. White's Guardian*, 182 S. W. 942.

(H) Estates in Trust and Powers.

§682 (Tex. Civ. App.) A will devising lands to trustees to control and manage the property and to pay the income for the support of a son and his family, the remainder on his death to the son's heirs, does not create a life estate in the son, but he is only a beneficiary of the trust.—*Reeves v. Simpson*, 182 S. W. 68.

§693 (Tex. Civ. App.) Where testator's will gave his wife a life estate, with remainder to their relatives, and full power to control and dispose of the property, the wife's acts of disposition during her life cut off the remaindermen's contingent right.—*Feebles v. Slaughter*, 182 S. W. 10.

Where testator's will gave his wife absolute power to control and dispose of the property left her, whatever might be left on her death to go to their relatives, a disposition by the wife by gift was effectual to bar the relatives' right.—*Id.*

WITNESSES.

See Appeal and Error, §206, 904, 1048; Criminal Law, §543, 594, 721½; Depositions; Evidence; Trial, §86-96, 140.

II. COMPETENCY.**(A) Capacity and Qualifications in General.**

§48 (Tex. Cr. App.) A conviction for a misdemeanor did not render the convict incompetent as witness for state in a criminal case.—*Solan v. State*, 182 S. W. 317.

§49 (Tex. Cr. App.) Granting of pardon to ex-convict who had served his term for felony on request of state and to enable him to testify for the state, held a matter for the Governor, so that the Court of Criminal Appeals could not

hold, on objection, that such witness was incompetent.—*Solan v. State*, 182 S. W. 317.

—52 (Ky.) In action against his father-in-law for alienation of his wife's affections, plaintiff's divorced wife was competent, under Civ. Code Prac. § 606, to testify as to what she told her father in justification of leaving plaintiff, etc., but incompetent to testify as to plaintiff's accusations, etc.—*Willey v. Howell*, 182 S. W. 619.

In action against plaintiff's father-in-law for alienation of wife's affections, the plaintiff's divorced wife was competent, under Civ. Code Prac. § 606, to testify as to conversations between plaintiff and a third person and between defendant and such third person in plaintiff's presence.—*Id.*

In action against father-in-law for alienation of wife's affections, testimony of plaintiff's divorced wife that she wrote letter to her mother and when she wrote it did not violate Civ. Code Prac. § 606.—*Id.*

—58 (Ky.) In an action against plaintiff's father-in-law for alienation of wife's affections, plaintiff's testimony as to statements to him by his former wife while the marriage existed held expressly prohibited by Civ. Code Prac. § 606.—*Willey v. Howell*, 182 S. W. 619.

—58 (Mo.App.) In wife's action for alienation of affections, husband held incompetent as a witness, notwithstanding Rev. St. 1909, §§ 6354, 6359.—*McKay v. McKay*, 182 S. W. 124.

—78 (Ky.) In action against plaintiff's father-in-law for alienation of wife's affections, where defendant, to make plaintiff's former wife competent, had to show her divorce, refusal to permit him to read the judgment of her divorce held erroneous.—*Willey v. Howell*, 182 S. W. 619.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

—138 (Mo.App.) Testimony of plaintiff's stenographer as to conversations of deceased defendant with president of plaintiff company held admissible, since she was not an interested party to the transaction.—*F. Hattersley Brokerage & Commission Co. v. Humes*, 182 S. W. 93.

—144 (Ky.) A surviving wife is not a competent witness in a proceeding to charge the estate of her deceased husband with claims for payment of taxes on her separate property, which she asserted it was agreed the husband should pay.—*Rau v. Rowe's Adm'r*, 182 S. W. 846.

—178 (Mo.App.) Where an officer of plaintiff company was incompetent to testify to personal transactions with deceased, but in probate proceedings the executrix called him for the purpose of identifying an account, he was thereafter competent for all purposes in the plaintiff's action on the account.—*F. Hattersley Brokerage & Commission Co. v. Humes*, 182 S. W. 93.

Where a party to a suit is disqualified by statute to testify because of the death of the other party, the taking of his deposition by the adverse party is a waiver of such incompetency, though the deposition so taken may be filed and not read or even not filed at all.—*Id.*

Evidence, in an action by the seller of goods for purchase price against the estate of deceased buyer, held to show such examination of plaintiff's agent by executrix of deceased as to waive his disability to testify as to personal transactions with the deceased.—*Id.*

—178 (Tex.Civ.App.) Heir of plaintiff's intestate incompetent as witness against defendant administratrix, unless called by her, held not so called where plaintiff prepared and filed interrogatories, though defendant propounded

cross-interrogatories and procured issuance of commission.—*Wyatt v. Chambers*, 182 S. W. 16.

(D) Confidential Relations and Privileged Communications.

—188 (Tex.Cr.App.) Where defendant's wife testified that she stole her husband buy peas identified as those stolen, permitting the sheriff to testify that she told him all she knew about the peas was that her husband told her he had bought them was not error, as permitting her to be contradicted by a confidential communication made to her by her husband.—*Williams v. State*, 182 S. W. 335.

—190 (Mo.App.) In an action on an accident policy, statement by insured as to cause of his fall made to his wife, held not inadmissible as a confidential communication.—*Greenlee v. Kansas City Casualty Co.*, 182 S. W. 138.

III. EXAMINATION.

(A) Taking Testimony in General.

—244 (Tex.Cr.App.) It is not error to allow the state to lead an unwilling witness.—*Atkinson v. State*, 182 S. W. 1099.

(B) Cross-Examination and Re-Examination.

—269 (Tex.Cr.App.) In a trial for murder, where defendant, on his direct examination, testified that he was an Odd Fellow, it was permissible for the state to ask him if he said he was an Odd Fellow and to elicit a reply that he had been, but improper to ask him when he had been expelled from the Odd Fellows.—*Ingram v. State*, 182 S. W. 290.

—269 (Tex.Civ.App.) Admission of testimony on cross-examination held not erroneous where material and it followed the direct examination.—*Chicago, R. I. & G. Ry. Co. v. Cosio*, 182 S. W. 83.

Where a railroad servant was injured in starting a motor car by pushing it until the engine started, and defendant railroad introduced evidence on direct examination of a witness on the issue of its due care in providing a reasonably safe car, it was not error to admit on cross-examination testimony that the motor could have been equipped with a self-starter, although no pleading authorized the testimony.—*Id.*

—287 (Tex.Cr.App.) In a prosecution for manslaughter, where defendant, cross-examining deceased's widow, proved by her that she ran a hotel after her husband's death, and sought to leave the impression on the jury that her character was not good, the widow's testimony on redirect, that her husband left her no property and she ran the hotel to make a living, was admissible.—*Mansell v. State*, 182 S. W. 1137.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

—318 (Tex.Cr.App.) In trial for murder, where testimony of defendant's impeaching witness was shaken on cross-examination, although not impeached, the defendant could not introduce testimony in corroboration of such witness.—*Ingram v. State*, 182 S. W. 290.

—321 (Tex.Cr.App.) Defendant, in the absence of surprise, could not call his own witness to lay a predicate for impeaching him, and so secure the admission of testimony otherwise inadmissible.—*Ingram v. State*, 182 S. W. 290.

—323 (Tex.Cr.App.) Where witness for state failed to testify to facts material to state's case as he had testified before the grand jury, and when recalled by defendant gave testimony detrimental to the state's case, there was no error in admitting his testimony before the grand jury.—*Ingram v. State*, 182 S. W. 290.

(B) Character and Conduct of Witness.

⇒337 (Tex.Cr.App.) Where accused testified, *held*, that it was permissible to elicit from him that he was under indictment for horse theft.—Villareal v. State, 182 S. W. 322.

⇒344 (Tex.Civ.App.) A witness in a civil action cannot be impeached by requiring him to testify to discreditable acts on his part having no material bearing on the issues involved in the case.—Turner v. McKinney, 182 S. W. 431.

In railroad servant's action for injuries, where plaintiff testified that he had left another state looking for work and not because he had been indicted, etc., exclusion of testimony of detective who would have said that plaintiff left pending a charge, and escaped from the officers, *held* proper.—Id.

(D) Inconsistent Statements by Witness.

⇒380 (Tex.Cr.App.) In an incest case, where the female testified that accused had never had intercourse with her, *held*, the state, having knowledge she would, so testify, could not impeach her by a letter charging accused with being the father of her child.—Hollingsworth v. State, 182 S. W. 465.

⇒387 (Tex.Cr.App.) Where defendant's wife testified that she saw him buy the peas identified as those stolen, the state was properly permitted to ask her, on cross-examination, whether she did not tell the sheriff that all she knew about the peas was that her husband told her he bought them.—Williams v. State, 182 S. W. 335.

⇒391 (Tex.Cr.App.) Where defendant's wife testified that she saw her husband buy peas identified as those stolen, it was competent to impeach her by testimony of the sheriff that she told him that all she knew about the peas was that her husband told her he bought them.—Williams v. State, 182 S. W. 335.

⇒393 (Ky.) Under Civ. Code Prac. §§ 597, 598, a witness may be impeached by the testimony of the stenographer taking his deposition, not filed as required by section 585.—Ohio Valley Mills v. Louisville Ry. Co., 182 S. W. 955.

Practice of impeaching a witness by proof of contradictory statements by the testimony of the stenographer taking the deposition of the witness does not violate Civ. Code Prac. § 554.—Id.

⇒393 (Tex.Cr.App.) Defendant, surprised by injurious testimony of a witness, might show witness' prior statements before the grand jury different from his testimony at the trial.—Ingram v. State, 182 S. W. 290.

(E) Contradiction and Corroboration of Witness.

⇒400 (Ky.) Evidence *held* insufficient to show contradiction by one party of his own witness, so that its admission was erroneous.—Forestal v. National Surety Co., 182 S. W. 614.

⇒414 (Tex.Cr.App.) Admission of testimony of foreman of the grand jury which indicted accused relative to the giving of testimony before the grand jury by the state's purchasing witness *held* error; it not being permissible to corroborate the purchasing witness in this manner.—Venn v. State, 182 S. W. 315.

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⚡7 (Ky.) Compensation for care and nursing rendered by daughter to mother residing with her can be recovered only on proof of a contract to pay therefor, such services being presumed gratuitous, and proof of the mother's statement of a desire to compensate is not sufficient.—Bishop v. Newman's Ex'r, 182 S. W. 165.

⚡7 (Ky.) In the absence of express contract by a father to pay for board and care furnished by his son, the law presumes such expenditures and care to be gratuitous.—Norman v. Norman, 182 S. W. 224.

⚡7 (Mo. App.) There is a presumption that the services of a child at home as a member of the family were rendered without creating a liability against the parent to pay for them.—Wiley v. Wiley, 182 S. W. 107.

Where defendant promised to pay his daughter for her household services some months before she reached her majority, but she continued to render such services through the following years, she was entitled to recover on the implied contract to pay arising from acceptance of the services under the circumstances.—Id.

⚡29 (Mo. App.) Agreement fixing contract price for work held not to prevent party from placing its case upon a quantum meruit basis, but only to prevent recovery beyond the agreed price.—Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co., 182 S. W. 759.

⚡30 (Mo. App.) In an action by a daughter to recover for services rendered her father in doing household work, questions of fact, such as whether, when she was leaving home, defendant offered her \$200 as payment for her services, not as a gift, were for the jury, and not reviewable on appeal.—Wiley v. Wiley, 182 S. W. 107.

⚡30 (Mo. App.) In action in which recovery was sought on quantum meruit for constructing automobile body verdict held responsive to issues, though for less than lowest estimate placed by the evidence on value of work.—Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co., 182 S. W. 759.

Reasonable price for work performed held a question for jury notwithstanding agreement as to price where recovery was sought on quantum meruit.—Id.

⚡30 (Mo. App.) In an action for services in baling hay, refusal of an instruction authorizing recovery in quantum meruit, if defendant requested plaintiff not to bale all the hay agreed to be baled, was not error, where the reasonable value was the same as the contract price.—Swift v. Johnson, 182 S. W. 1072.

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